

# AAUP

American Association of University Professors

---

*Academic Freedom for a Free Society*

July 1, 2010

Donald J. Polden, Dean  
School of Law  
Santa Clara University  
500 El Camino Real  
Santa Clara, CA 95053

Margaret Martin Barry, Professor  
Columbus School of Law  
The Catholic University of America  
3600 John McCormack Road, NE  
Washington, DC 20064

Re: ABA Standards Review Committee's Consideration of  
Chapter 4 Accreditation Standards

Dear Dean Polden & Professor Barry:

I write on behalf of the American Association of University Professors (AAUP) seeking to submit the enclosed statement to the Standards Review Committee as it begins its review of Chapter 4 of the ABA's Standards for Approval of Law Schools. As I am sure that you are aware, the AAUP has long been an advocate for tenure in higher education and views tenure as an essential means for protecting academic freedom. We hope the enclosed statement from the AAUP's Committee on Academic Freedom and Tenure adequately describes our thoughts on the importance of tenure in relation to academic freedom and conveys our concerns with the alternative approach to tenure that has been proposed in the Report of the Special Committee on Security of Position.

Thank you for your consideration of our enclosed statement. Please distribute a copy of it to other members of the Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Nelson". The signature is fluid and cursive, with a prominent initial "C" and a long, sweeping underline.

Cary Nelson, President

Enclosure

cc: Becky Stretch,  
ABA Section of Legal Education and Admissions to the Bar

# AAUP

American Association of University Professors

---

*Academic Freedom for a Free Society*

## Statement to the American Bar Association's Section on Legal Education and Admission to the Bar

In a report of March 10, 2009, the Standards Review Committee of the ABA's Section on Legal Education and Admissions to the Bar proposed a Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education. The Statement endorses two fundamental goals among others: the protection of academic freedom and the attainment of faculty of high quality; and it welcomes further comment. Part of the background for the Statement is the Report of the Special Committee on Security of Position issued in May 2008. We understand that report is before the Section as it considers the proposed Statement. Accordingly, the American Association of University Professors (AAUP) welcomes the invitation to comment on it and will refer to it below as the report addressed.

The AAUP was founded in 1915 to advance the standards, ideals, and welfare of teachers and researchers at accredited colleges and universities and professional schools of similar grade, including schools of law.<sup>1</sup> Beginning with the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, on to the joint 1940 *Statement of Principles on Academic Freedom and Tenure*—which the Association of American Law Schools endorsed in 1946 and which is currently endorsed by more than 210 learned societies and educational organizations—

---

<sup>1</sup> The founders of the AAUP included Roscoe Pound and John Wigmore, the Association's second president. Law faculty have long played a prominent role in the Association's leadership, as chair of its Committee A on Academic Freedom and Tenure, or as president, in recent decades including Clark Byse, Sanford Kadish, William Van Alstyne, Ralph S. Brown, Jr., Robert M. O'Neil, Matthew W. Finkin, Robert A. Gorman, and David M. Rabban in one or both of those positions.

and in the work of Committee A on Academic Freedom and Tenure in refining the standards of the 1940 *Statement* and applying them through a process of case investigation, the AAUP has been both a clearinghouse for emerging issues of academic freedom, tenure, and due process, and the primary forum for bringing the academic profession's considered judgment to their resolution. Consequently, the AAUP believes it is especially well situated to bring its many decades of deliberation and experience to bear on the alternative the Committee on Security of Position has suggested.

The report presents, but does not endorse, an alternative to the Section's current standards for the accreditation of law schools as those standards relate to academic tenure. We understand the concern of the Committee on Security of Position to derive from the situation of clinical faculty and instructors in legal writing. However, the alternative the report discusses does not address those categories as necessitating distinctive treatment. Instead, it rests upon a tacit rejection of such segregated treatment by suggesting an alternative that would encompass an entire faculty of law.

That alternative appears to be driven by two stated concerns. One is the desire to "allow more freedom, within certain boundaries, for schools to experiment with different models designed to achieve the same objectives" as does the tenure system. The second is concerned with "ossification," the fear of becoming tenured-in by operation of the current tenure system. Each concern will be addressed in turn.

#### *More Freedom*

The Committee on Security of Position supplies a thorough account of the history and purpose of the tenure system: to protect academic freedom and to secure the most competent to the profession. The two are closely intertwined in two key regards: First, the most academically

promising are often the most intellectually independent. They will not be attracted to an institution where conditions are inimical to that independence. Second, because the long-term implications of a tenure decision for the institution are so significant, the process of evaluation and review is especially exacting. More relaxed review consequent upon a shorter term of institutional obligation is unlikely, in the longer run, to conduce toward a faculty of high achievement.<sup>2</sup>

The Committee on Security of Position proposes—but does not endorse—this alternative: (1) that academic freedom be given greater specificity and be assured expressly to all officers of instruction; (2) that a procedure be made available to any instructor who believes his or her academic freedom has been infringed—by an adverse decision on reappointment, for example—in which the affected faculty member may present his or her claim; and (3) that a representative group of faculty periodically review the performance of the members of the faculty. For instance, a system of periodic appointment—on an annual or, perhaps, multi-year basis, perhaps subject to a presumption of renewal—could be put in place of tenure, but subject to a complaint by a nonreappointed faculty member of a violation of academic freedom. In the name of

---

<sup>2</sup> Henry M. Wriston, president of Brown University and leader of the presidential group negotiating the 1940 *Statement* with the AAUP, was persuaded to endorse tenure in good measure because it would deal with what he saw happening in his own institution, which relied on periodic renewals:

Heretofore our excuse for indecision has been that the teacher was not yet satisfactory but that, given time, he might improve. If we are not to have an indefinite number of years to appraise him, clearly the benefit of the doubt must go to the institution.

Henry M. Wriston, *Academic Freedom and Tenure: Report by the Chairman of the Commission on Academic Freedom and Academic Tenure of the Association of American Colleges*, 25 BULL. ASSOC. OF AM. COLLEGES 110, 120 (1939).

Kingman Brewster, president of Yale and professor of law, echoed this sentiment in his 1971-72 report, noting: [T]he very fact that the professorial promotion is a lifetime commitment of university resources makes the departmental and committee process of promotion to tenure much more rigorous and hard-headed than it otherwise would be. If there were a confident feeling that mistakes in judgment could be rectified by some later process we would all go soft and give colleagues of whom we are personally fond an excessive benefit of all doubt. Realization that the commitment is for keeps helps to hold the standards high. . . . In short, we would not have as good a senior faculty as we now do, if tenure were not the consequence of promotion to senior rank.

Kingman Brewster, *On Tenure*, 58 AAUP BULL. 383 (Winter 1972).

institutional freedom and flexibility it would substitute perpetual probation for tenure—that is, perpetual probation instead of a system where, after the affected faculty member has passed an exacting evaluation, the administration would be required thereafter to demonstrate cause for dismissal in a hearing before a faculty hearing committee.

The AAUP has long had experience with such systems and in its experience such a system cannot protect academic freedom, as much in a school of law as in a college of arts and sciences.<sup>3</sup> The infirmity in the proposal is the assumption that academic freedom can be protected by segregating out for separate appeal any claim of violation even as the faculty is held in the status of perpetual probation. The distinction fails to recognize that, as Arthur Lovejoy observed nearly a century ago in response to just such a proposal, “The motive for a dismissal, and the reason officially given for it, are frequently two very different things.”<sup>4</sup> Or, as the chair of Committee A put it nearly three decades later, “Departure from consecrated conformity is a

---

<sup>3</sup> While the 1940 *Statement* was being negotiated, the AAUP, with the participation of representatives of the Association of American Law Schools, conducted an investigation of the dismissal of three faculty members at the College of Law of the John B. Stetson University, two of them after thirteen years of service. *Academic Freedom and Tenure: John B. Stetson University*, 28 AAUP BULL. 377 (1938). (The investigating committee consisted of Professor James A. McLaughlin [Harvard Law School], William M. Hepburn [University of Alabama Law School], and Lon L. Fuller [Duke Law School].) No cause was asserted other than the vague references to teaching competence, later withdrawn; no hearing was held. The College of Law had no tenure system. The joint AAUP-AALS committee of investigation stressed the importance of tenure as:

an integral part of our academic system . . . [that] forms one of the main inducements to the pursuit of an academic career. . . . This tradition embodies the conviction commonly held in higher education circles that scholarship and a high grade of instruction which can only be nurtured by scholarship can best thrive in an atmosphere free from those fears and pressures used to promote production in the business world. This tradition embodies a faith that love of learning and love of teaching thrive under these conditions to such an extent that pressures commonly used in the commercial world are unnecessary as well as harmful. The appreciation of this tradition is so widespread that it affords one of the elementary considerations that justify an academic life.

*Id.* at 383–84. The AALS suspended Stetson College of Law on July 15, 1939. *Id.* at 399.

The AAUP has entertained cases of violations of academic freedom in legal education since 1940 and wishes to note that several of these stemmed from the professionally well-grounded activities of legal clinics that incurred the ire of the politically influential. See, e.g., *Academic Freedom and Tenure: University of Mississippi*, 28 AAUP BULL. 75–86 (1970) (joint investigation with AALS).

<sup>4</sup> A.O. Lovejoy, *Letter to the Editor*, THE NATION, Dec. 14, 1916, at 56.

common prelude to the discovery that an intellectual non-conformant is in fact non-cooperative in other matters as well.”<sup>5</sup> The tenureless approach trusts an adjudicative body to sort it all out, later on. But the prospect of that occurring, perhaps long after termination, is scarcely equivalent to a hearing on the *bona fides* of the termination before it takes place. And lacking *that* protection, we can justifiably be skeptical that faculty would not tend to steer clear of any zone of speech or activity that would enmesh them in that very process. The drafters of the AAUP’s 1915 *Declaration* were well aware of this when they declared the need for tenure:

To safeguard freedom of inquiry and of teaching against both covert and overt attacks, by providing suitable judicial bodies, composed of members of the academic profession, which may be called into action before university teachers are dismissed or disciplined, and may determine in what cases the question of academic freedom is actually involved.

We need look no further than the events of the last year to see the necessity of protecting academic freedom in law school clinical programs across the country. Indeed, clinical legal programs are receiving increased pressure from political opponents and corporate adversaries in multiple states. In the last twelve months alone, the AAUP has jointly filed an amicus brief in support of the Rutgers environmental law clinic and has sent letters of concern to state legislators in Maryland and Louisiana commenting on legislation intended to curtail the work of legal clinics in those states, if not close their doors completely. The AAUP has consistently recognized the role of clinical faculty not just in educating students but also in contributing greatly to society at large. In the joint amicus brief filed in support of the Rutgers environmental law clinic the AAUP observed that the “[f]reedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community.”<sup>6</sup>

---

<sup>5</sup> *Report of Committee A*, 30 AAUP BULL. 13, 27 (1944).

<sup>6</sup> The 1967 *Joint Statement on Rights and Freedoms of Students*, of which the AAUP was a co-author.

These examples of external threats to clinical programs and their faculty underscore the necessity for a heightened sensitivity to academic freedom protections. To be sure, the proposal of the Committee on Security of Position would require faculty review of renewal of appointment in contrast to unilateral administrative action of the sort taken, for example, in the Stetson University case.<sup>7</sup> But none of the faculty engaged in the review process would have tenure. Professor Peter Byrne of the Georgetown law faculty was asked by the American Association for Higher Education to devise a tenureless system that would protect academic freedom. He proposed a structure that strongly resembles what the Committee on Security of Position has described but with one insightful caveat:

The effects of tenure on academic freedom are pervasive. A simple example is the status of any professors who serve on the appeals panel discussed above. In our hypothetical tenureless college, these professors would themselves not be tenured. Their continued employment would rest to some extent on some of the very institutional decision makers whose actions they are reviewing. They simply cannot enjoy the independence of decision making that tenured professors would be able to enjoy. This might make them unwilling to question the memory or veracity of an official in one case, or to stake out a broad reading of faculty prerogatives in another. Thus might academic freedom shrink over time both in practice and in theory. At a minimum, professors serving on such a committee must explicitly be protected against retaliation by the institution; perhaps longer term contracts or even tenure would be desirable, to give them adequate independence.<sup>8</sup>

We have dwelt upon the foundational documents of 1915 and the run-up to the 1940 *Statement* because the alternative the Committee presents would allow the legal academy to return to the very condition the profession found wanting and that summoned those efforts. We need not cite the hundred or so case investigations since 1940 evidencing the deleterious consequences of a tenureless professoriate to the atmosphere of robust debate and wide-ranging independence of mind, wholly apart from the ethical and moral problems posed by a system that,

---

<sup>7</sup> *Supra* note 2.

<sup>8</sup> Peter Byrne, *Academic Freedom Without Tenure?* 10 (AAHE New Pathways Working Paper No. 5, undated).

as at Stetson in the 1930s, would allow a professor of a decade or more of service to be dismissed without a hearing on the merits. Simply put, a university, and a school dedicated to the academic study of law, can thrive only in an atmosphere of academic freedom; and, as the historical record amply evidences, academic freedom rarely thrives without tenure.

### *Ossification*

The assertion of the need for greater flexibility in the face of “ossification” is not new. A concern for “tenuring-in” was expressed when the last major financial crisis befell the academic community, in the early to mid-1970s, and institutions experimented with the imposition of tenure quotas. Committee A addressed those experiments. It acknowledged the legitimacy of the concern. It noted that “[a] sound academic program needs elements not only of continuity but also of flexibility, which is served by the continuing opportunity to recruit new persons and to pursue new academic emphases. It is desirable for a faculty to include those recently arrived from the seminars of our graduate schools as well as those who are well established as scholars and teachers.”<sup>9</sup> But it saw that need as far better addressed in the longer run than by engaging in short-term expedience.<sup>10</sup>

---

<sup>9</sup> *Id. On the Imposition of Tenure Quotas*, AAUP POLICY DOCUMENTS AND REPORTS 57, 58 (10th ed. 2006).

<sup>10</sup> Among the points listed for institutional consideration and planning were that:

1. The desired distribution of tenured and nontenured faculty should be viewed as a long-term goal rather than a short-term solution. The ratio of tenured to nontenured faculty is itself the dynamic consequence of a complex of academic decisions and developments, each of which can be reconsidered. These include: (a) the rate of growth of the institution and its faculty; (b) the fraction of those appointed initially to tenured or probationary positions; (c) the use of visiting faculty members; (d) the use of graduate assistants; (e) the average length of the probationary period of nontenured faculty members who ultimately achieve tenure; (f) the fraction of nontenured faculty members who ultimately achieve tenure; (g) the institutional policy on retirement; and (h) the age distribution of the total faculty.
2. A satisfactory long-range plan may well imply that, along the way, the proportion of the faculty on tenure will at first increase and then, as the force of the plan takes effect, decrease. Just as the end of growth in the size of the faculty leads to a gradual increase in the proportion of those tenured, so the gradual aging of the present faculty will ultimately lead to a tendency for the proportion to decline. Most changes in academic personnel policies require some lag in time before full implementation and impact, and there is nothing disastrous in temporary bulges in the percentage of faculty members on tenure.

Tenure quotas did not become a fixture of the academic scene at the time even as the complement of full-time faculty remained more or less in a steady state. The fact is that even in that state faculty members resign or retire;<sup>11</sup> for the reasons Committee A set forth, institutions learned that they were not well served by short-term expedients.

Yet what the alternative proposes would address a short-term concern by changing an accreditation standard that is intended—and should be expected—to have its impact in the long run. Nor would a shift to term appointments be likely to address the prospect of “ossification” given the unlikelihood of nonrenewals of long-serving faculty.<sup>12</sup> In the AAUP’s experience, going back to the 1940 *Statement of Principles*, a product of the Great Depression whose fundamental tenets have survived and have, indeed, achieved increasing endorsement through several economic recessions—the alternative put forth for discussion would be a setback for academic freedom and institutional quality with no offsetting benefit.

---

On the other hand, long-range injury to an institution may result from rigid and hasty application of any single presumed remedy such as the imposition of a fixed quota.

<sup>11</sup> For that reason the prospect of ossification is not rendered insurmountable as a consequence of the abolition of mandatory age-based retirement. See ALBERT REES & SHARON SMITH, *FACULTY RETIREMENT IN ARTS & SCIENCES* (1991).

<sup>12</sup> This is a serious question, not addressed by the Committee on Security of Position, whether the loss of so critical a means of quality control—see *supra* note 1—is worth the potential benefit of greater flexibility, which, in practice, may not really be the result. Even if an entire faculty were at-will employees and the institution faced the immediate prospect of no growth in the authorized number of faculty positions, it is scarcely conceivable that the institution would terminate the appointments of many of the incumbent faculty (putting the Age Discrimination in Employment Act aside) merely in order to make room for new appointments, or that it would find applicants of high quality and ethical earnestness eager to accept appointment at an institution that had behaved in that fashion.