

ROBERT A. GORMAN
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July 5, 2010

American Bar Association Standards Review Committee
c/o Ms. Becky Stretch, Assistant Consultant
321 North Clark Street
Chicago, IL 06054

Dear Ms. Stretch:

I write to the Standards Review Committee in connection with the ongoing review of the criteria utilized by the American Bar Association for the accreditation of law schools. I would greatly appreciate it if you would provide copies of this letter to Committee Chair Donald J. Polden, to all other Committee members, and to the Consultant on Legal Education Hewlett H. Askew.

I am presently the Kenneth W. Gemmill Professor Emeritus of Law at the University of Pennsylvania, where I served as an active member of the faculty from 1965 through 2000. I served as Associate Dean under three deans (Louis Pollak in the 1970s, James Freedman in the 1970s and 1980s, and Colin Diver in the 1990s), and throughout that period I was generally the chair of the faculty curriculum committee; I also led the faculty in two major reexaminations and reforms of our curriculum. In 1980-81, I was President of the American Association of University Professors (AAUP); and in 1991, I was President of the Association of American Law Schools (AALS). For nearly thirty years (with only a few interruptions), I have been the chair or a member of, or a consultant to, the AAUP Committee on Academic Freedom and Tenure.

I.

In this letter, I would like to focus my remarks on ABA Standard 405(b), which has for many years required that “an established and announced policy with respect to academic freedom and tenure” be a condition of accreditation. The related Standard 405(c), which speaks to clinical law teachers, requires “a form of security of position reasonably similar to tenure.” These Standards, and others related thereto, have been subjected to special scrutiny by various subcommittees of the Standards Review Committee. Comments about Chapter 4 have been sent to the ABA by organizations such as the AAUP and AALS, which have emphasized the importance of academic freedom and tenure in assessing the quality of law schools, and from the Board of Directors of the American Law Deans Association (ALDA), which has urged the ABA to dilute or abandon in its Standards the requirement of tenure, at least for clinicians and apparently for law faculty more generally.

I wish to place myself firmly in the former camp, and to urge that the Standards Review Committee and the Council on Legal Education and Admissions to the Bar

preserve the requirement of academic freedom and tenure now in Standard 405(b), and indeed to enlarge the application of that requirement so as to extend it beyond the ranks of “traditional” full-time law faculty so as to include full-time clinicians. I believe that the most effective way to assure academic freedom – an accreditation element which appears to be endorsed by all of the interested parties – is through a system of tenure; and that the reasons proffered for diluting or abandoning tenure are altogether unconvincing.

II.

Without belaboring the issue, academic freedom assumes that there is a public value in insulating faculty members against discipline or other reprisals because of their articulated positions, no matter how controversial, unorthodox, or unwelcome. This protection embraces research and scholarly writing, classroom teaching, the shaping of institutional policies at faculty meetings or through intramural memoranda, and so-called extramural utterances beyond the walls of the university. By so promoting faculty expressive freedom and thus the generation of new ideas in scholarship, teaching and the like, academic freedom has a public value that is at least as important as the value to the individual or to the institution.

The prevailing means for protecting such freedom in U.S. institutions of higher learning is academic tenure. Tenure is typically preceded by a demanding probationary period of several years, after which a determination is made by the probationer’s peers whether his or her work is of a sufficiently high quality as to warrant an indefinite appointment. If granted, this appointment comes with a presumption of continuing fitness, so that the institution may terminate the appointment only “for cause” and only when such determination is made through what practicing lawyers comfortably understand as due process (e.g., specified charges of unfitness, a hearing before an advisory faculty body, representation in an adversary process, a written record, statement of findings and conclusions, etc.). These protections are neither complicated nor strange in our society. They are available to the millions of Americans who are covered by collectively bargained labor agreements; and tenure is of course a hallmark of our federal judicial system, with the same purpose as in the academy of fostering sometimes controversial and indeed even courageous court decisions.

As is set forth in the seminal *1940 Statement of Principles on Academic Freedom and Tenure* – endorsed by the AAUP, the Association of American Colleges and Universities, and more than 200 additional learned societies and educational associations (including the AALS, the fourth endorser, in 1946) – “Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.”

I also note that the AALS has officially and long ago taken this view: Section 6-6(d) of its membership requirements states that the law school “shall have academic freedom and tenure in accordance with the principles of the American Association of

University Professors.” And, in his letter to the ABA Consultant dated June 1, 2010, AALS President Reese Hansen stated: “Measures that would weaken or abolish the tenure and security of position requirements in the ABA standards are central to our concerns It is . . . unlikely that any substitute for tenure designed to protect academic freedom and faculty teaching programs will be as effective as tenure in protecting the internal balance of institutional governance or responding to external pressures law schools will certainly face.”

III.

What are the hesitations put forward by those who would eliminate tenure from the ABA accreditation standards? Why is tenure thought to be inapplicable or unwise? Perhaps the most persistent and vocal opponents through the past several years have been a group of law school deans who constitute the Board of Directors of the American Law Deans Association. ALDA was created some 20 years ago by a handful of deans who were discomforted by the accreditation standards and visitation process of the ABA and the AALS. The ALDA letter of July 21, 2008, which appears to be the principal document reflecting the ALDA contentions and particularly the challenge to tenure, purports to speak for no more than the twelve deans then serving on the Board: “These comments . . . have not been reviewed or agreed to by the entire membership of ALDA.” (I have no personal knowledge about whether the remaining hundred or so law deans were consulted or even directly informed about the letter, but it appears not. One can safely assume that the faculty members at the dozen schools led by the ALDA deans were neither consulted nor informed of the deans’ strong comments – which is precisely the unfortunate state of mind that infuses the ALDA deans’ arguments.)

The ALDA Board letter argues that academic tenure is merely one of the “terms and conditions of employment” for law faculty, and that the ABA should not concern itself with such matters. This contention is unsound on many levels. The “condition of employment” language is, I submit, no more than a slogan, without reliable explanatory power. As a professor of labor law, I know what that phrase from the National Labor Relations Act means: any term that deals with the employer-employee relationship. So, under the ALDA framework, academic freedom itself -- the right to write and teach without fear of job-related reprisals -- would also be a “term or condition of employment,” and so beyond the proper sphere of ABA concern. But the ALDA Board has acknowledged that academic freedom *is* a proper matter for the Standards, thus proving that their linguistic game is just that.

The deans also contend that tenure increases institutional costs and inhibits flexibility in staffing and program design. Operating law schools more cheaply and maximizing unilateral decanal/administrative control are familiar managerial objectives. Once again, the ALDA Board has the industrial model in mind, and not the academic model, in which academic excellence is the key and faculty participation in governance is a central element. I would echo the words of AALS President Reese Hansen in his June 1, 2010 letter to ABA Consultant Askew: “[W]e urge the ABA not to let the rhetoric of industrial production control the conversation about the minimal standards of a quality

legal education. It is appropriate to ask whether legal education is worth its cost and whether law students are getting what they have been promised. But legal education is not primarily achieved by better managers.”

I fear that all too many of the ALDA Board members have as their objective a law school staffed largely by low-paid part-time and untenured faculty, who work on one-year or very short-term contracts. The ALDA letter admits that the stronger law schools will no doubt continue to grant tenure (presumably because that will be necessary to attract strong faculty members, which is of course the whole point of the ABA accreditation exercise!); but it contends that the scrapping of tenure will allow for “experimentation” and “innovation” (presumably amongst more mediocre faculty members). The ALDA logic is self-defeating, and points out precisely why tenure is essential to the development of a quality faculty. Moreover, it suggests that tenured faculty have been adversaries of innovation and change in legal education, but few if any supportive facts are proffered; and little to prove that eliminating or diluting tenure will foster innovation (unless that is defined as “what the dean wants”).¹

Another argument made by the ALDA Board against referring to tenure in the Standards is that such reference would make the ABA and the law schools “outliers” in higher education, as no other division of the university world has such an accreditation requirement. I cannot confidently say that the latter is or is not so. But even if it were, the special nature of law schools and of the legal profession in my opinion would justify any differential treatment. The research, scholarship and teaching of the law professoriate commonly deal with matters of public moment and controversy, moreso than is the case in most other parts of the university; and the style of teaching is typically more challenging, argumentative and indeed on occasion confrontational. Reliance on tenure as a buttress for academic freedom is thus particularly justified for law faculty.

IV.

In conclusion, I find it puzzling that the assailants of tenure find it a less rather than more appropriate standard for clinical law faculty as compared with “traditional” faculty. It is not necessary, I hope, to rehearse the contributions made by clinical faculty throughout the U.S. in the education of our students, in the imparting of essential professional skills and values, in the design of innovative curricular programs, and in thoughtful scholarship on matters relating to the worlds of practice and teaching. Nor should it be necessary to explain that of all faculty categories, it has been the clinicians whose teaching – most especially, in the form of live-client litigation clinics – has placed them in the position that is most vulnerable to criticism and pressure (often of the most coarse and intolerable nature) from persons, corporations and legislators who are

¹ If the deans are concerned that “tenured-in” faculty will prevent ending certain programs and embarking on new ones, such concern is unwarranted. The AAUP has stated the better practice: “Termination of an appointment with continuous tenure . . . may occur as a result of bona fide formal discontinuance of a program or department of instruction,” provided an effort is made to find another “suitable position” for the displaced faculty, and they are afforded a right to appeal to a faculty committee; this is straightforward and fair.

discomforted by the work of the clinic. Only within the last year, litigative or legislative pressures have been placed upon at least three law schools – Rutgers, Maryland, and Tulane – designed to force alterations or termination of certain clinical exercises that have outraged local corporations or legislators. It is precisely the clinical faculty member for whom academic freedom is a vital concern and not merely an abstract slogan, and for whom tenure provides a crucial guarantee that instruction can be carried out in the best interests of our students, and of the public. The “security of position” language set forth for clinical law faculty in Standard 405(c) is, I would urge, the least acceptable fall-back in the event that full-fledged tenure is not accorded them; but to dilute or weaken that Standard in any material way would reflect a flawed understanding of legal education and law schools today, and would fail to assure protections for academic freedom for those who need them the most.

I thank you for your attention, and I would be pleased to discuss these matters further in the event you might find that useful.

Sincerely,

Robert A. Gorman
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