December 4, 2013,

The Hon. Solomon Oliver, Jr., Council Chairperson,
Barry A. Currier, Managing Director of Accreditation and Legal Education,
Section on Legal Education and Admissions to the Bar
321 N. Clark Street, 21st Floor
Chicago, IL 60654-7958

via email to JR Clark, jr.clark@americanbar.org

RE: COMMENTS OF PROFESSORS ROBERT GORMAN AND ELLIOTT MILSTEIN REGARDING PROPOSED REVISIONS TO STANDARD 405

Dear Judge Oliver, Mr. Currier and Members of the Council of the ABA Section of Legal Education:

We write to you with respect to the possible revision of Standard 405 of the accreditation standards of the American Bar Association. As background, we both had the honor of serving as presidents of the Association of American Law Schools.

Robert A. Gorman actively served on the faculty of the University of Pennsylvania Law School from 1965 to 2000, and is the Kenneth W. Gemmill Professor Emeritus there. In 1980-81, he was President of the American Association of University Professors (AAUP); and in 1991, was President of the Association of American Law Schools (AALS). Across some thirty years, he served as the chair or a member of, or a consultant to, the AAUP Committee on Academic Freedom and Tenure.

Elliott S. Milstein has served on the faculty of American University Washington College of Law since 1972 and was director of its clinical program from then until 1988 when he became dean of the law school. He was interim president of American University in 1993 for more than a year and stepped down from the deanship in 1995 to return to clinical teaching. He was president of the AALS in 2000 and served for six years on its Executive Committee. He is a past recipient of the William Pincus Award for Outstanding Contributions to Clinical Legal Education. He has served on many ABA Site Teams, including serving as chair.

I.

As currently written, Standard 405(b) requires, as it has for decades, "an established and announced policy with respect to academic freedom and tenure" as a condition of accreditation. Section 405(c), which speaks to clinical law teachers, requires "a form of security of position reasonably similar to tenure." The Council is considering whether to replace those sections with one of two alternatives, both of which would eliminate in the Standards the express requirement of tenure as the method to ensure academic freedom and protected participation in law school governance. Both would delete "tenure," a legal concept with decades of jurisprudence and practice that give it definition, and substitute other, more limited protection. The proposals to substitute "security of position" under Alternative 1, and altogether to eliminate "security of position" as a central feature of Alternative 2, share the same vice. Either would permit universities, law schools or other faculty to inhibit or chill faculty members from expressing or advocating for controversial positions, both externally and internally.

A comparable eradication of a tenure Standard was proffered four years ago by the Standards Review Committee of the Council. That was met with a truly extraordinary outpouring of opposition from a full range of voices within the legal academy (and beyond): the AALS, the AAUP, the Society of American Law Teachers, the Clinical Legal Education Association, a wide group of Deans of Color, a dozen former Presidents of the AALS and major experts on academic freedom and tenure within the AAUP, federal judges (particularly Hon. Guido Calabresi and the late Hon. Louis H. Pollak, both former Deans of the Yale Law School and Judge Pollak at Pennsylvania as well), some eighty law faculties throughout the United States, and other organizations and individuals. (These comments are all accessible on the website of the Standards Review Committee, in the period 2010-11.) We think it deserves forceful emphasis that these comments, in the aggregate, reflect the deepest understanding of the objectives and operations of law schools, of the importance of academic freedom and of a faculty voice in law school governance, of the factors that induce individuals to enter and remain within the professoriate, and of the value and impact of accreditation.

II.

We wish by this letter to concur strongly with this group in opposing the departure from the requirement of a "tenure system," as currently provided in the ABA Standards. The complete elimination of any explicit reference to "security of position" in Alternative 2 is in our judgment untenable and dangerous, Alternative 1 undermines the central ways that the requirement of a tenure system has ensured that law professors can continue in their historic role in our democracy

as critics of our system of justice, and proponents of change. Their independence enables them to be effective teachers of lawyers who can themselves play critical roles in government and society. We therefore urge the members of the Council not to support either Alternative but rather to leave things as they presently are in Standard 405(b).

Our disagreement with both Alternatives should not obscure the fact that there is a wide commonality of objectives among all parties – including the SRC and the Council – as to the accreditation process and Standards: these are the attraction and maintenance of a competent full-time faculty; protection for the academic freedom of faculty members in their teaching, research, governance responsibilities and law school related public service activities; and the "meaningful participation" of full-time faculty members in the governance of their law school. But how can any (let alone all) of these objectives be accomplished if the hold of law faculty members upon their respective positions is known to be altogether tenuous and determinable by and at the will of the administration (or sometimes possibly by hostile senior colleagues)? That is particularly the case when what is at issue is internal, i.e., what should be taught in the curriculum, who should teach in the law school, what methods should be used to prepare students for their many roles as lawyers, what values should be transmitted, and even who should be admitted to the institution. American legal education has established itself as the model across the world primarily because of the role of the legal professoriate in maintaining an outstanding, dynamic, and creative system for educating the legal profession. We threaten the continuation of this role for legal education when we abandon the most fundamental protection for the faculty.

III.

Much of the hesitancy to embrace tenure stems from an uncertain or erroneous understanding of what it means. It is not a guarantee of lifetime employment that will interfere with reasonable educational initiatives of one's institution. For incoming faculty, a tenure system typically embraces a probationary period, in which the faculty member is expected to perform in research and teaching at a level that demonstrates mastery, thoughtfulness, skill, dedication and promise of continued accomplishment. (Surely that is the "competent" law faculty that the ABA seeks.) After that demanding process, in which faculty colleagues participate in decision-making, tenure also is understood to guarantee certain safeguards in the event of termination of appointment: "good cause" for termination or lesser discipline (which can include consistently poor teaching or scholarship), to be demonstrated by the law school; and a hearing at which there is faculty participation and the basics of fair process, such as the right to be heard, legal or professional representation, examination of witnesses, a written transcript, and reasoned conclusions. It

should be noted that the faculty role is generally understood to be advisory only, rather than dispositive.

Comparable safeguards are commonly available in other fields of employment. Most obviously, federal judges have lifetime tenure in order to ensure that they are able to render controversial or unpopular court decisions without fear of reprisal. Tenure is also available to civil servants and to the millions of Americans who are covered by collectively bargained labor agreements. Is seems clear that law professors, hired, retained and promoted based upon meeting exacting standards, should be able to take it for granted that due process safeguards will be afforded before their employment is terminated. Apart from these procedures assuring fair treatment, tenure is a safeguard against adverse administration decisions that derive from prejudice, from personal animosity, or from opposition to the views of the targeted faculty member – whether expressed in articles or books, or in the classroom, or in the faculty-meeting room, or in the school, local or national newspaper. Tenure also makes clear that all faculty, particularly those promoting change or innovation in the established content, teaching methods, or goals of the law school's curriculum, are able to propose and advocate their ideas without fear of reprisal.

That is why the promise of tenure, as an accreditation requirement, helps to attract an able and dedicated faculty, and to guarantee the academic freedom that the ABA and all of the academic world extols. In contrast, "security of employment" is a vague term, without the decades of history behind it – and without the well-understood procedures and safeguards -- that "tenure" carries. Nor will even repeated reappointments for five years accomplish the ABA's objectives, as exposure to recurrent administrative assessments, in which subjectivity with substantial opportunities for invisible reprisals, creates pressures and sometimes fears that are inimical to the exercise of academic freedom.

IV.

It is said that no other academic discipline requires tenure or its equivalent as a condition of accreditation, so why should law schools? However, no other segment of the professoriate comparably and consistently finds the faculty taking positions against powerful political and economic forces on matters of public import, or championing or challenging controversial legislative, executive or judicial actions. Often their opponents are in a position adversely to affect the well-being of the institution that employs them, or of the individual herself or himself. Indeed, legal education in the U.S. is admired around the world for its training of professionals to uphold the rule of law, no matter how controversial the message or the manner of teaching. The style of teaching in law schools is typically more challenging, argumentative and indeed on occasion confrontational than elsewhere in the university. In sum, reliance on tenure as a buttress for academic freedom is particularly justified for law faculty. Perhaps no

group of law teachers knows this better than the clinical faculty, whose law schools have been the subject of chilling donor or political reprisals on account of the teachers' (and their students') involvement in controversial litigation or legislative projects.

By formulating its Alternatives 1 and 2 as they have, the Council (and the Standards Review Committee before it) must have at least tentatively concluded that the basic goals of accreditation – a competent faculty, academic freedom, shared governance, and economic security – can be achieved without a system of tenure. Yet the draft Interpretations create presumptions and burdens that appear designed to mirror and overlap with tenure. As with the phrase "security of position," these presumptions and burdens are cumbersome and vague, with all participants in the process – the deans, the faculties, and especially the accrediting committees with separate representation from the ABA and the AALS – being left to assess whether, for example, academic freedom is *really* and *satisfactorily* assured on this or that law campus. Why ought not the well-understood and readily administrable term "tenure" be retained as the accreditation norm?

Nor is there evidence, as is also sometimes asserted, that tenure inevitably discourages experimentation in law schools. The growth over the past decades of clinical legal education, other experiential education, cross-subject matter and team teaching, and courses based upon such perspectives as law and economics, critical theory and the like has occurred in large part because of the ideas, the energy and always the acceptance of tenure-track faculty. And, this innovation is proceeding rapidly at most law schools right now in response to the ongoing changes in the legal profession. It is also not convincing, at least to us, that tenure will unreasonably drive up the costs of legal education. (Indeed, economists would probably tell us the contrary: that eliminating tenure or comparable job security will induce prospective faculty to seek higher compensation, to make it worthwhile to accept the post.) Driving down costs should not be a central element for determining accreditation or measuring quality. It is more likely to be an excuse for underpaying faculty, for running a school principally with part-time faculty, and for rotating out limited-term faculty as their compensation expectations naturally rise. That is not the way to secure a faculty of quality and dedication.

V.

Sister organizations agree upon the importance of tenure as a safeguard for academic freedom and academic quality. As is set forth in the seminal *1940 Statement of Principles on Academic Freedom and Tenure* – jointly formulated by the AAUP and the Association of American Colleges and Universities, and endorsed by 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."

We 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, then 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." It seems to us that should the ABA be inclined to reject these views of its partner in the accreditation enterprise, it ought respectfully and fully explicate the reasons for the risky path it is pursuing.

VI.

For the reasons we have attempted to put before you, we most strongly urge that the Council firmly reject Alternative 2, which eliminates all reference in the text of the Standards to tenure or even security of position, and substitutes open-ended and difficult-to-administer criteria such as "competent" faculty, "protection" for academic freedom, and "meaningful participation" in governance. We also object to Alternative 1. Even though it purports to require "a form of security of position sufficient to ensure academic freedom and attraction and retention of a competent full-time faculty,". it however leaves open the question of why "tenure," which is designed to achieve exactly that, should be abandoned in favor of a new, untested and weaker standard. The proposed alternative to tenure does not explain why this new standard would be preferable or what consequences the proponents expect from this change. Preservation of a Standard requiring a "system of tenure" would be much the preferred outcome, in that the language would be well-understood, unequivocal and best tailored to accomplish efficaciously the ultimate goals of the ABA's system of accreditation.

Thank you for your attention. We would be pleased to discuss these matters further in the event you might find that useful.

Sincerely,

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