To: The University of Arkansas Board of Trustees and President Donald R. Bobbitt
From: Professors Joshua M. Silverstein and Robert E. Steinbuch
Cc: The University of Arkansas Office of General Counsel
The University of Arkansas Faculty
Re: Response to the Office of General Counsel's FAQ Concerning the Proposed Revisions to Board Policy 405.1

Introduction.

In November of 2017, the University of Arkansas Office of General Counsel ("Counsel's Office") posted an FAQ concerning the proposed changes to Board Policy 405.1. The FAQ contains numerous false or misleading claims. This memorandum corrects the record.

Before we turn to substance, we offer three preliminary notes. First, this memo focuses solely on responding to various problematic claims in the FAQ. It is not intended to constitute a comprehensive case against the proposed revisions to 405.1. Second, for reasons of length and time, we have not addressed every problematic statement in the FAQ. Third, given the exceptional time pressure that we have been forced to work under, we alert you to the possibility that we might amend this document in the future.

FAQ § I, p. 1. Counsel's Office claims: "Some faculty members and administrators have expressed support for the proposed change while some faculty have shared concerns."

Response: This language suggests that there is a division among the faculty on the proposal. That is false. Faculty are almost universally opposed to the suggested amendments. For example, the faculty governing bodies of virtually every UA System campus have formally expressly their opposition to the proposed changes—on both substantive and procedural grounds. In addition, the feedback email address—feedback@uasys.edu—had received only ***one*** comment in favor of the revisions as of December 9, 2017. *Faculties' outcries slow UA System's tenure-policy redo*, Ark. Dem. Gaz., Dec. 10, 2017 ("Of the comments the system received through feedback@uasys.edu, only one was in support of the changes.").

FAQ § I, p. 1. Counsel's Office claims: "[S]ince the last update of these policies, the University of Arkansas System and our campuses have changed significantly. . . . In addition to the changes with our campuses, there have been legal developments impacting these policies. Further, experience in applying the existing policies over time has revealed areas where clarification or revision would benefit meeting the underlying purposes of the policies."

Response: The Counsel's Office has not identified ***any*** legal developments that require changing the standard for dismissal for cause. And, as law professors, we know of no such developments. Likewise, the Counsel's Office has not identified how "experience in applying the existing policies" reveals "areas where clarification or revisions" would be helpful.

The Counsel's Office serves in an advocacy capacity representing the University against faculty during termination proceedings. They are far from an unbiased party in this debate. We would, nonetheless, welcome their full explanation of the alleged basis for the claims here. Again, the

University attorneys have offered no explanation at all to date.

FAQ § II, pp. 2-3 & Page 6. The Counsel's Office asserts on pages 2-3 that the proposed changes to 405.1 are designed "to add precision and specificity, thereby providing more explicit guidance to faculty and removing ambiguity as to the requirements of the policy." Then, on page 6, they contend that the "proposed amendment ***merely*** provides greater clarity on what constitutes 'cause' rather than leaving the matter to inference." (Emphasis added.) In other words, the Counsel's Office maintains that the proposal does not actually expand the grounds for termination. The primary basis for this assertion is presented on page 2 of the FAQ: "It is important to note that under the current policy only a few examples of conduct constituting 'cause' are provided, ***but the policy very specifically states that the conduct is not limited to those specific examples***." (Emphasis added.)

Response: The Counsel's Office's analysis here reflects a critical misunderstanding of how statutory rules and contractual language are interpreted in the American legal system.

Both the current and proposed versions of 405.1 set forth the same general standard for cause. The current policy states that cause is "conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University." The proposal states that cause is "conduct that demonstrates the faculty member lacks the willingness or ability to perform duties or responsibilities to the university." Those are identical in every substantive respect. The current policy then offers a non-exclusive list of four examples. The proposal, by contrast, offers a non-exclusive list of at least ***sixteen*** examples. Moreover, the four examples in the current policy all reflect extreme problems—e.g., "incompetence" and "moral turpitude." By contrast, several of the examples in the proposed version fall well short of constituting extreme problems—e.g., "unsatisfactory performance" and "unwillingness to work productively with colleagues."

It is a fundamental principle of interpretation that when a general term is coupled with specific examples, the specific examples play a central role in defining the scope of the general term. This principle is so well-established that it is often referred to by its Latin description: *Ejusdem generis*. *See Edwards v. Campbell*, 2010 Ark. 398, *5, 370 S.W.3d 250, 253 (Ark. 2010) ("[W]e recognized in *Oldner* the doctrine of *ejusdem generis*, which provides that when general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.) (internal quotation marks omitted). This means that a general word or phrase ***changes meaning*** depending on the specific examples included with the general word or phrase.

The proposal makes quantitative changes to the definition of cause by dramatically expanding the list of examples that justify termination. It also makes qualitative changes by including new types of examples that constitute less serious grounds for dismissal. Accordingly, the general cause standard—"lacks the willingness or ability to perform duties or responsibilities"—plainly has a much broader meaning under the proposal than under the current rule. This analysis demonstrates that even if the proposal adds clarity—which is dubious—it unquestionably expands greatly the grounds over which a tenured member of the faculty can be fired. This helps to explain why faculty within the UA System are all but unanimous in their opposition to the

Counsel's Office's recommended changes to 405.1.

Further, the proposed revisions do not in fact increase clarity. The Counsel's Office's principle example of ambiguity in the current policy is the phrase "moral turpitude," which it asserts is "amorphous." But there is a long tradition in American law of judging conduct via that standard. *See, e.g., Henry v. Goodwin*, 266 Ark. 95, 99, 583 S.W.2d 29, 31 (Ark. 1979); *Supreme Court Committee on Professional Conduct v. Jones*, 256 Ark. 1106, 1107, 509 S.W.2d 294, 295 (Ark. 1974); 21 Am. Jur. 2d *Criminal Law* § 22 ("Crimes involving moral turpitude"). Indeed, numerous Arkansas statutes use the locution. *See, e.g.*, A.C.A. § 6-51-606(h)(3)(B) (governing school licenses); A.C.A. § 16-10-409(a)(1)(A) (governing the suspension of judges). And the same is true at the federal level. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (articulating the standard for deporting aliens). The United States Supreme Court even ruled that the phrase "moral turpitude" is not unconstitutionally vague in *Jordan v. De George*, 341 U.S. 223 (1951).

There are authorities contending that the locution "moral turpitude" is problematic. And we have ***some*** sympathy for this position. But given the Counsel's Office's alleged concern with ambiguity, it is more than a little ironic that they have included collegiality as a ground for termination ("unwillingness to work productively with colleagues"). Collegiality is one of the most ambiguous concepts in all of higher education, and its use in evaluating faculty is expressly disapproved of by the AAUP, as we have explained in other submissions. In short, whatever vagueness problems there might be with "moral turpitude," they pale in comparison to the vagueness problems with the language added in proposed 405.1.

FAQ § II, p. 3. This page contains an example of a cause policy from the **University of Florida** (UF), with the implication that UF's policy was employed in the drafting of proposed 405.1.

Response: Counsel's Office's reliance on UF's cause policy in the FAQ is highly misleading.

First, the policy does ***not*** apply to numerous tenured faculty at UF. Florida has a statewide faculty union called United Faculty of Florida, which represents over 20,000 faculty members at various universities and colleges across the state, including UF. See here (setting forth basic information about the union).

Critically, when there is a conflict between a UF board of trustees policy and the collective bargaining agreement between UF and the union, the collective bargaining agreement controls. *See* UF Collective Bargaining Agreement § 8.3 ("No existing, new or amended University regulation, policy, or resolution shall apply to bargaining unit faculty members if it conflicts with an express term of the Agreement."), available here (this link contains the entire agreement). The definition of cause in the collective bargaining agreement is different from that contained in the University rules. The agreement thus governs the termination of any union member, not the board rule cited by the Counsel's Office. And the agreement provides as follows: "Just cause shall be defined as ***misconduct or incompetency***." UF Collective Bargaining Agreement § 27.1(a) (emphasis added). The policy then elaborates: "A faculty member's activities that fall outside the scope of employment shall constitute misconduct only if such activities adversely affect the legitimate and compelling interests of the University." *Id.* § 27.1(b). The cause standard in the UF collective bargaining agreement is considerably ***more*** stringent than either the

UF board of trustee's policy definition of cause quoted in the FAQ or the definition set out in the proposed revision to 405.1.[1]

Second, UF is just one college out of thousands in the United States. We pulled the definitions of cause from selected other universities. Both UF's board rule and the proposed revision to 405.1 are considerably more punitive than the policies in force at the other schools we analyzed.

Consider the **University of Texas**. Rule 31008, Part. 2, § 2 of the Board of Regents' Rules and Regulations, available here, provides that termination of tenured faculty "will be only for good cause shown." Rule 31102, Part 2, § 5.3, available here, elaborates that the permissible grounds for termination are "incompetence, neglect of duty, or other good cause." This definition of cause is actually required by a statute in the Texas Education Code.[2] And the code also defines "neglect of duty" to mean "continuing or repeated substantial neglect of professional responsibilities." Tex. Education Code Ann. § 51.942(a)(3), available here. As these rules and laws demonstrate, Texas does not use an expansive list like the one proposed by the Counsel's Office. Moreover, the Texas provisions employ precisely the type of stringent language that is essential to the protection of academic freedom and the promotion of institutional excellence.[3]

Next consider the **University of Oklahoma**. The governing rules for that school are set out in the Regent's Policy Manual, available here. In § 2.1.2, the Regents' Policy Manual cites to the 1940 AAUP Statement of Principles on Academic Freedom and Tenure, noting that the statement "has long been recognized as providing valuable and authoritative guidance for policy and practice in American colleges and universities." It then provides that "[t]he section on academic freedom below is essentially a restatement of these principles, with some modification and extension consistent with their intent and with later declarations by the Association."

---

[1] Note that the UF collective bargaining agreement also contains a robust academic freedom article that is far more protective of academic freedom than the language contained in the 405.1 proposal. *See* UF Collective Bargaining Agreement, Art. 10. For example, § 10.1 provides that "The University and UFF shall maintain, encourage, protect, and promote the faculty's full academic freedom in teaching, research/creative activities, ***and professional, university, and employment-related public service***." (Emphasis added.) The highlighted language demonstrates that Florida extends academic freedom to service, something the Counsel's Office has proposed we abandon in Arkansas. *See also id.* § 10.2 (". . . a faculty member shall be free to discuss all relevant matters in the classroom, to explore all avenues of scholarship . . . ***to speak freely on all matters of university governance*** . . .) (emphasis added).

[2] *See* Tex. Education Code Ann. § 51.942(c)(5), available here (providing that the rules governing the performance evaluation of faculty at a state university "shall include provisions providing that: . . . a faculty member be subject to revocation of tenure . . . if incompetency, neglect of duty, or other good cause is determined to be present.").

[3] The Texas Board of Regents's Rules and Regulations also contain a particularly robust endorsement of tenure: "The Importance of Tenure. The Board of Regents recognizes the time-honored practice of tenure for university faculty as an important protection of free inquiry, open intellectual and scientific debate, and unfettered criticism of the accepted body of knowledge. Academic institutions have a special need for practices that protect freedom of expression, since the core of the academic enterprise involves a continual reexamination of ideas. Academic disciplines thrive and grow through critical analysis of conventions and theories. Throughout history, the process of exploring and expanding the frontiers of learning has necessarily challenged the established order. That is why tenure is so valuable, not merely for the protection of individual faculty members but also as an assurance to society that the pursuit of truth and knowledge commands our first priority. Without freedom to question, there can be no freedom to learn." Board of Regents Rules and Regulations, Rule 31002, § 2, available here.

Section 2.3.5 of the Regents' Policy Manual contains the rules governing abrogation of tenure and termination at the University of Oklahoma (OU). The section begins by noting that "severe sanctions such as a dismissal proceeding involving a tenured faculty member . . . should be an exceptional event." It then contains a sub-section entitled "Grounds for Abrogation of Tenure, Dismissal, and Other Severe Sanctions" which contains OU's cause standard. The sub-section provides as follows:

> A faculty member against whom the imposition of a severe sanction is to be brought or whose dismissal is to be required must have given such cause for the action as related directly and substantially to his or her professional capabilities or performance. It is not possible to specify all proper grounds for these drastic measures. Proper reasons for dismissal of a faculty member who has tenure or whose tenure-track or renewable terms/consecutive term appointment has not expired include the following:
>
> (a) Professional incompetence or dishonesty;
> (b) Substantial, manifest, or repeated failure to fulfill professional duties or responsibilities;
> (c) Personal behavior preventing the faculty member from satisfactory fulfillment of professional duties or responsibilities;
> (d) Substantial, manifest, or repeated failure to adhere to University policies; including, for example, the University's Compliance Program;
> (e) Serious violations of law that are admitted or proved before a court of competent jurisdiction or the administrative hearing body established to hear such matters, preventing the faculty member from satisfactory fulfillment of professional duties or responsibilities, or violations of a court order, when such order relates to the faculty member's proper performance of professional responsibilities;[4]
> (f) [Provision that applies only to the school's Health Sciences Center.]
> (g) [Elimination of academic units.]
> (h) [Financial emergencies.]

This too is precisely the type of strong language that appropriately protects academic freedom at an institution.[5] And we welcome the adoption of such a rule at the University of Arkansas.

Florida's collective bargaining agreement, Texas's combination of statutes and Board of Regent rules, and Oklahoma's Regents' Policy Manual all provide ***far greater*** protection than the Counsel's Office's recommended version of 405.1. Among other differences, notice that Florida, Texas, and Oklahoma do not contain ***any*** language comparable to the provisions in the proposal that establish the following standalone bases for termination: (1) unsatisfactory performance, (2) pattern of disruptive conduct, or (3) unwillingness to work productively with colleagues.

---

[4] Notice with (e) that Oklahoma requires that an independent, neutral, non-university judge or government agency determine that a law has been violated before a faculty member may be terminated under this provision. That contrasts with proposed 405.1, which has no such mandate.

[5] Note further that OU also follows the AAUP on the issue of post-tenure review. *See* Regents' Policy Manual, § 2.3.4 ("Bearing in mind the value and importance of academic freedom and procedural due process to the well being and success of the academic community, the University acknowledges and supports in principle the policies and procedures set forth in the AAUP' Standards for Good Practice in Post-Tenure Review.").

Before changing Board Policy 405.1, we believe that a comprehensive review of the approaches in use at other schools is one of several necessary steps. But if the University is to rely on a more limited assessment of national practices, such a review establishes that ***current*** 405.1 is the version in alignment with the approach of peer schools, not proposed 405.1.[6] Indeed, this point is recognized by a leading American legal encyclopedia: "'Tenure' in the academic community is defined as a faculty appointment for an indefinite period of time . . . which protects a teacher from dismissal except for serious misconduct, incompetence, financial exigency, or a change in institutional programs." 14A C.J.S. *Colleges and Universities* § 20. And the AAUP is in agreement. *See* Report, Academic Freedom and Tenure: Greenville College (Illinois) at page 86, available here (explaining that the most common grounds for cause are "'incompetence,' 'professional misconduct,' 'gross neglect,' and the like"); *see also* Assoc. of Am. Colleges & Universities and AAUP Joint Commission on Academic Tenure (1973) (recommending that adequate cause for dismissal be confined to "demonstrated incompetence or dishonesty in teaching or research, to substantial and manifest neglect of duty, and to personal conduct which substantially impairs the individual's fulfillment of institutional responsibilities.").

FAQ § II, p. 4. The Counsel's Office list various factors that the Board of Trustees considered when it heard two dismissals over the last five years. The FAQ explains that "the stated grounds for dismissal were not limited to the general examples set out in the current Board Policy 405.1."

Response: This aspect of the FAQ is highly misleading. ***No one*** has suggested that the specific examples in current 405.1 are exclusive. Moreover, the fact that the University relied upon a particular ground or set of grounds in upholding a termination does not mean that the University's actions were in compliance with the law. Indeed, some termination matters, where the University cited to grounds for cause beyond those specifically listed in 405.1, resulted in litigation in which the school settled, and for a significant dollar figure. In any such case where there was no final, definitive court ruling, there is no basis for concluding that the termination grounds were legally permissible.

FAQ § II, p. 4. Counsel's Office claims: "While the University has never expressly included 'collegiality' among the factors that can constitute cause for dismissal, the University has always considered 'a ***pattern*** of disruptive conduct or unwillingness to work productively with colleagues" as conduct that may give rise to the termination of a tenured faculty member." (Emphasis in original.)

Response: What the Counsel's Office ***believes*** is justified by the current rules, and what Board Policy 405.1 ***legally permits***, are two different things. And the Counsel's Office's legal analysis here is simply incorrect.

---

[6] We also briefly looked at the policies of private institutions. Princeton University's, available here, is representative of what we found: "A member of the Faculty may be suspended, dismissed, or be subjected to reduction of salary or other workplace restrictions for cause only on the basis of (a) ***substantial and manifest*** incompetence, (b) ***substantial and manifest*** neglect of duty, or (c) substantial and material misrepresentations in dealings with University officials, including during the appointment process, (d) conduct which is shown to violate the University rules and procedures applicable to a member of the Faculty, or (e) conduct which is shown to substantially impair the individual's performance of the full range of his or her responsibilities as a member of the Faculty." (Emphasis added.) As with the Florida, Texas, and Oklahoma, this is far more protective than proposed 405.1.

FAQ § II, pp. 4-5. Counsel's Office claims: "Further, campuses have already incorporated aspects of collegiality, as germane to professional responsibilities, into their policies." The FAQ continues by offering examples from Fayetteville, and Fulbright College specifically, which "recognizes that a faculty member's annual performance rating may appropriately take into account 'an individual's demonstrated ability to work productively with colleagues in carrying out the research/creative, teaching and service missions of the department and the College.'"

Response: This is strikingly misleading. Annual review and termination are separate and dramatically different proceedings. Taking collegiality into account as ***one factor among many*** in ***annual reviews***, as is done at UAF, is a far cry from identifying collegiality as a ***standalone basis*** for ***termination***, as the Counsel's Office is proposing with 405.1. Thus, the Counsel's Office's reliance here on the UAF rules is highly deceptive.

FAQ § II, p. 5. Counsel's Office claims: "The AAUP opposes the use of 'collegiality' as a stand-alone factor for annual evaluations. The proposed amendment does not do this. Rather, the proposed amendment clarifies the Board's standard on dismissals to reflect its existing practice, as discussed above."

Response: This is material is critically misleading. The AAUP opposes the use of collegiality as a standalone factor for both (1) annual reviews, ***and (2) for termination***. The Counsel's Office deceptively focuses on prong 1 (annual reviews) when their proposal actually violates prong 2 (termination), a considerably more serious problem. Thus, the proposal is in gross violation of AAUP standards.

Confirming this analysis, the Arkansas state chapter of the AAUP, which has representatives from virtually every college in this state, sent a letter to the Board of Trustees explaining that proposed 405.1 ***improperly*** employs collegiality as a basis for faculty evaluation. The state chapter further warned that this change "seeks to eliminate faculty's freedom to express opinions while performing their jobs."

Note also that this language in the FAQ is internally inconsistent. Counsel's Office's claims that revised 405.1 "clarifies" the board's standards. If all the revisions are doing is clarifying, then they are not making any substantive change. But Counsel's Office also asserts here that the language is being altered "to reflect existing practice." This necessarily indicates that a substantive change to 405.1 is needed because existing practice does not comport with the current rule. The Counsel's Office cannot have it both ways. Either the amendments are merely clarifying or the amendments are necessary to bring existing practice into compliance with the rules.

As we demonstrated above, the language of the proposal does indeed work a major substantive change. Therefore, counsel's admission that existing practice is more in alignment with the ***proposal*** establishes that the Counsel's Office has been acting in violation of both the dictates of existing 405.1 and AAUP standards for some time.

FAQ § II, p. 5. Counsel's Office writes: "Q: Are the interests of the University of Arkansas and the citizens of Arkansas best served by allowing faculty members to stay in their positions if they

(1) have a pattern of engaging in disruptive conduct or (2) demonstrate an unwillingness to work productively with colleagues? A: No."

Response: This is a red herring. History has shown that employing collegiality or the like as a standalone factor in annual reviews, tenure, and other proceedings is prone to considerable abuse, undermining academic freedom and other university interests. In particular, collegiality assessments preclude legitimate dissent, which is essential in academia.

Put another way, the FAQ is misleadingly asking the wrong question. The appropriate question is this: "Are the interests of the University of Arkansas served by a ***rule*** that permits termination of tenured faculty if, ***in the sole judgment of administrators***, a faculty member engages in disruptive conduct or demonstrates an unwillingness to work productively with colleagues, when that determination ***may serve as a pretext for improper or discriminatory motives?***" The lessons of history are clear: The answer is no.

FAQ § II, p. 6. Counsel's Office claims: "There are multiple protections against arbitrary and capricious dismissal decisions. . . . First, respectful disagreements do not come within the scope of the proposed amendment's definition of 'cause.' Second, conduct that is disruptive or uncooperative will typically not be a ground for dismissal unless a *pattern* emerges over a period of time. Third, the Board policy on dismissal, in addition to existing University practice, requires a robust consensus that a faculty member's actions should give rise to a dismissal. The campus's Chancellor, the President, and the Board of Trustees must approve of a disputed for-cause dismissal of a tenured faculty member before the dismissal becomes effective, and the department chair, dean, and provost have opportunities to voice their views along the way. Fourth, there are extensive procedural protections, including the opportunity for a formal hearing before a committee of faculty peers prior to action by the President and the Board."

Response: Each one of these points is either misleading or untrue.

Regarding the first point, there is frequently a considerable difference of opinion over what distinguishes "respectful disagreement" from "disruptive conduct." This creates a grave danger of abuse. Debates in academia can be fierce, as they should be given the importance of the work we do, whether it be teaching, research, or service. Permitting administrators to judge what constitutes "respectful disagreement" is a recipe for undermining academic freedom.

Regarding the second point, the fact that a pattern is required over a period of time provides little consolation when the underlying standard is so prone to abuse.

Regarding the third point, when was the last time a chancellor's decision to terminate a faculty member was overridden by the President? Indeed, we know of no such examples, even when a faculty committee recommended that a chancellor's decision be reversed. Absent demonstrated examples, the "robust consensus" is ***de facto*** a consensus of one.

Regarding the fourth point, revised 405.1 waters down the procedural protections of existing 405.1, as we have pointed out in our other submissions and as is addressed below.

In short, these alleged "protections" are not meaningful in force.

FAQ § II, p. 6. Counsel's Office writes: "Q: Does this policy require a faculty member to be terminated after receiving one unsatisfactory evaluation? A: No."

Response: This statement is a highly misleading strawman argument. ***No one*** is arguing that the proposed revision ***mandates*** termination after a single unsatisfactory rating in an annual review. However, the proposed revision indisputably ***permits*** termination after a single unsatisfactory rating when combined with a judgment that the faculty member is not being sufficiently "cooperative" in trying to remedy his or her allegedly deficient performance.

FAQ § II, p. 7 Counsel's Office claims: "It is also important to note that campus annual review policies and procedures generally involve peer review at the departmental level, meaning that a faculty member's colleagues have significant involvement in evaluating performance. 'Unsatisfactory performance' evaluations are not given lightly under these policies."

Response: This critically overstates. In many departments and colleges, annual reviews fall solely within the jurisdiction of administrators. For example, at our law school, the Dean conducts the annual review of tenured faculty without any formal input from other faculty members. Unfortunately, in our experience, unsatisfactory performance evaluations have not only been given lightly, but have been given in circumstances where there was actually no legitimate basis for the finding. For example, as we explained in a prior submission, faculty at our school have improperly been found unsatisfactory in their teaching because of assessment practices—such as the spread of their final grades—that are clearly permissible under our institutional rules.

FAQ § II, p. 7. Counsel's Office claims: "The current version of 405.1 does not include a comparable provision, but some of our campuses do have provisions that address the period of time that a faculty member will be provided to remediate unsatisfactory performance."

Response: This is strikingly misleading. The UA-Little Rock policy quoted by the FAQ and the similar UA-Fayetteville policy provide far more protection than revised 405.1. These policies require a minimum of either ***four or five*** unsatisfactory findings (depending on which prong of the rule is implicated) before a faculty member may be terminated. One could plausibly believe such unsatisfactory performance rises to the level of incompetence, the generally accepted standard for cause termination, as recognized by the AAUP. (Note however that the AAUP opposes the use of "unsatisfactory performance" as a standard for abrogating tenure, as we have explained in prior submissions.)

Let us add that some have expressed concern that faculty are permitted to keep their jobs when performing in a purportedly "unsatisfactory" manner. We are not wholly unsympathetic to this concern, but the concern reflects confusion regarding the essential roles of academic freedom and tenure in public and not-for-profit institutions of higher education. Without robust protection for freedom of thought in the university setting, findings of "unsatisfactory" work can, and frequently have been, employed as a pretext to silence faculty who speak out on controversial matters of public concern, including matters involving university governance. The

reason the faculties at UA-Fayetteville and UA-Little Rock consented to the employment of "unsatisfactory performance" as a basis for the termination of tenured faculty is that it is very difficult to make four or five such findings on pretextual grounds, weakening the standard's propensity for abuse. Under revised 405.1, a ***single*** finding of unsatisfactory performance is sufficient grounds for termination. The likelihood of abuse if the proposal passes should be clear to any fair observer.

FAQ § II, p. 7. Counsel's Office claims: "Faculty members will have a full year to remediate performance deficiencies."

Response: This is false. If the supervising administrators unilaterally believe that the faculty member is not being sufficiently cooperative, then the faculty member does not have even the limited one-year period, as the FAQ expressly admits: "The language does include a provision that if a faculty member simply chooses not to actively engage with improvement efforts following the unsatisfactory rating, then a termination notice could be issued more quickly, but those instances should be unusual and rare."

As we noted above, faculty at our school have improperly been found unsatisfactory in their teaching because of assessment practices—such as the spread of their final grades—that are clearly permissible under our institutional rules. Suppose a professor found unsatisfactory simply refuses to change these assessment practices because the professor believes—correctly, and with considerably evidentiary support—that the practices employed are permissible under the rules and are consistent with best practices in teaching in the professor's field. Under proposed 405.1, the Dean of our law school could request that termination proceedings be started ***immediately***. At that point, the procedural protections in revised 405.1 will be no comfort to the faculty member, particularly given how rarely departmental decisions are reversed by higher-ranking administrators. It takes little imagination to perceive how proposed 405.1's dramatic reduction in protections will be used to suppress dissent and unpopular opinions within the UA System.

FAQ § II, p. 8. Counsel's Office writes: "Q: Will the proposed amendment undermine academic freedom? A: No. The existing Board policy prevents dismissal proceedings from being instituted against a faculty member in violation of sound principles of academic freedom, encompassing protections in research, classroom discussion, and speech as a citizen. The concept of 'academic Freedom' at the University of Arkansas has never encompassed a right to be repeatedly disruptive or demonstrate an unwillingness to work with colleagues."

Response: This is false. For all of the reasons explained above and in the other faculty submissions to the Board of Trustees, the proposed amendments will very much undermine academic freedom. In fact, as a document Professor Josh Silverstein obtained via the Freedom of Information Act demonstrates, members of the Counsel's Office ***admit*** this: the document expressly acknowledged that proposed 405.1 is "limiting" in reference to revisions that ***remove service work*** from the protective umbrella of academic freedom.

FAQ § III, p. 8. Counsel's Office writes: "Q: Does the amendment remove significant procedural protections that previously existed in the dismissal process? A: No. There are some

minor changes to reflect the fact that the University's representative always has the right to have counsel present at the dismissal proceedings and that the Board will not subpoena witnesses."

Response: This claim is false. Section IV.C. of 405.1 concerns the procedures for dismissing a tenured or tenure-track faculty member. Part of the termination process is a hearing before an impartial committee. The proposal revises section IV.C.5. to strip away the committee's ability to grant procedural protections equivalent to those afforded in a court of law. That is a critical reduction in protection, specifically designed to weaken the burden that the Counsel's Office must meet during hearings before the faculty committee. That alone is sufficient to establish that significant procedural protections are removed in proposed 405.1.

FAQ § IV, p. 9. Counsel's Office writes: "Q: If the Board of Trustees adopts the various amendments, will they apply to faculty members who have already received tenure? A: Yes. Tenure provides a property interest, which is protected by the Constitution and state law. The revisions in the policy do not change the fundamental interest created by tenure, which is the right not be fired except for cause. The revisions simply clarify the interest provided to faculty who are awarded tenure by better defining possible 'cause' for dismissing tenured faculty. The Board of Trustees is responsible for governing the university for the benefit of all its stakeholders and always reserves the right to amend its policies."

Response: The Counsel's Office's legal analysis here is both wrong and likely to lead to litigation.

First, as we demonstrated above, revised 405.1 changes the substantive standard governing termination for cause. The proposal is not simply clarifying in effect.

Second, the property interest protected under constitutional and state law is not merely the generic right to termination only for cause. It is the right to termination only for cause ***as set forth in the tenure contract between the university and the faculty***. If that were not the case, then colleges could change the definition of cause at their discretion to eviscerate tenure protections for existing faculty.

Third, the UA System is barred from exercising its right to amend school policies when doing so would interfere with the vested contract rights of the faculty.

To elaborate, suppose a consumer enters into an automobile purchase agreement with an auto dealer. The contract states that the dealer will provide the consumer with a car, and further specifies that the car is a Honda Accord. The consumer's rights under this contract are not merely the right to receive a car from the dealer. The consumer is entitled to the precise type of car bargained for—a Honda Accord. And no provision in this contract may be altered by the dealer without the consent of the consumer. Accordingly, if the dealer supplies a Honda Civic or Toyota Prius, it will be in breach of the contract. The dealer must provide the exact type of car specified in the contract. Any argument that the dealer is in compliance with the agreement because it provided "a car" when it turned over a Civic or a Prius will fail.

Likewise, when a professor is hired and then tenured by the UA System, the professor's tenure

contract, which includes existing Board of Trustees rules, does not merely encompass the right to termination for cause. It includes the right to termination for cause as specified in the parties' agreement. Contending that a university can change the definition of cause at its discretion is the equivalent to contending that the car dealers in the above hypothetical can change the definition of "car" in a purchase contract from one type of car to another.

The general principle underlying the reasoning in these two examples is this: Contracts may not be unilaterally modified by one party. Instead, both parties must consent to any change. Bancorpsouth Bank v. Shields, 2011 Ark. 503, *8, 385 S.W.3d 805, 809 (Ark. 2011) ("Fundamental principles of contract law require that the parties to a contract agree to any modification of that contract. Those parties must manifest assent to the modification of a contract and to the particular terms of such modification."); 17A Am. Jur. 2d *Contracts* § 496 ("A modification of a contract requires the mutual assent of both, or all, parties to the contract. Hence, one party to a contract may unilaterally alter its terms without the assent of the other party. Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract.").

In fact, states and their instrumentalities are generally barred from undermining both contracts to which they are a party ***and*** contracts between private parties. *See Ark. Dept. of Human Services v. Walters*, 315 Ark. 204, 210, 866 S.W.2d 823, 825 (Ark. 1993) ("We have said that statutes can be construed to operate retroactively so long as they ***do not disturb contractual or vested rights***, or create new obligations. We have indicated that it would violate due process to disturb vested rights or contractual rights." (citations omitted; emphasis added)); *Talkington v. Turnbow*, 190 Ark. 1138, 83 S.W.2d 71, 73 (Ark. 1935) ("The Constitution inhibits the enactment of ex post facto laws, but does not prohibit the passage of retroactive laws which ***do not impair the obligation of contracts or vested rights accruing there under***." (emphasis added)); 16B Am. Jur. 2d *Constitutional Law* § 763 ("However, a proper retroactive application of a statute requires a determination that the legislature clearly intended the statute to apply retroactively and that retroactive application ***does not impair vested contract rights*** in violation of the Contracts Clause." (emphasis added).

These legal rules are so well established that it is rare for universities to attempt to breach them. But when colleges do violate the law by unilaterally imposing substantive changes to tenure contracts or other vested rights, the courts are swift to reverse the action after a lawsuit is filed.

Consider the case of *Saxe v. Board of Trustees of Metropolitan State College of Denver*, 179 P.3d 67 (Col. Ct. App. 2007). There, the Board of Trustees attempted to amend the college handbook, which was incorporated into faculty tenure contracts. The old handbook provided that when the school implemented a reduction in workforce, nontenured faculty must be laid off before tenured faculty. The revised handbook eliminated this priority for tenured faculty. *Id.* at 71. The old handbook also obligated the college to make every reasonable effort to relocate tenured faculty within the institution rather than terminate them. The revised handbook eliminated the relocation right as well. *Id.* These changes were applied retroactively to faculty already protected by tenure. *Id.* at 74.

Five professors at the school preemptively filed a lawsuit seeking to nullify these changes (and

some others). The school argued in court that it had statutory and contractual authority to make the changes to the handbook and the professors' tenure contracts. *Id.* at 71. The Colorado courts ultimately ruled to the contrary.

The Colorado Appellate Court found that if the priority and relocation rights in the old handbook granted vested rights to the professors, then the college "did ***not*** have statutory or contractual authority to unilaterally modify those provisions." *Id.* at 74 (emphasis added). And that is so even though the handbook expressly provided that the board of trustees reserved the right to amend the handbook. *Id.* As the court explained, decisions from across the United States all support the conclusion that "an employer may not abrogate an employee's vested benefits." *Id.*

To fall under the vested rights doctrine, a contractual or property right must be substantive (rather than procedural) and must have in fact vested. The court concluded that both the priority right and the relocation right were substantive in nature. *Id.* at 75-77. Indeed, the court noted that both rights "lie at the heart of the concept of tenure because tenure provides job security and, thereby encourages academic freedom." *Id.* at 76.

The Colorado court then explained that determining whether a substantive right has vested requires the consideration of three factors: (1) whether the public interest is advanced or harmed; (2) whether the new rule "gives effect to or defeats the bona fide intentions or reasonable expectations of the affected individuals"; and (3) whether the new rule "surprises individuals who have relied on a contrary" rule. *Id.* at 77-78 (internal quotation marks omitted). The trial court mistakenly did not address these factors when it initially heard the case. And thus the appellate court sent the lawsuit back to the lower court for a proper assessment of the factors. *Id.* at 72, 78.

On remand, the trial court ruled that all three factors supported a finding that the professors' priority and relocation rights had vested. *Saxe v. Board of Trustees of Metropolitan State College of Denver*, 2009 WL 3485976, *1-*3 (Col. Dist. Ct. Jun. 1, 2009). Thus, the retroactive changes to those rights in the revised version of the college's handbook violated the Colorado Constitution. *Id.* at *4.

Another illuminating example is the case of *Zuelsdorf v. Univ. of Alaska, Fairbanks*, 794 P.2d 932 (Alaska 1990), which demonstrates that the vested rights doctrine applies to ***untenured*** faculty too. There, a university policy manual, which was incorporated into faculty employment contracts, set a deadline for the school to provide untenured faculty with notice that their next year of employment would be their final year. After the deadline had passed in 1985-1986, the university altered the deadline to a later point in the calendar and attempted to apply the new deadline retroactively so it could remove untenured faculty a year early. *Id.* at 935. The Alaska Supreme Court held that this violated the vested rights of a nontenured, assistant professor. *Id.* Critically, the court found that the university's express reservation of the right to unilaterally amend the policy manual could not override the nontenured professor's vested rights. *Id.* The court's language in the opinions is instructive: "When one party acquires vested rights under a contract, the other party may not amend the terms of the contract so as to unilaterally deprive the first of its rights; such a change constitutes a modification of the agreement requiring mutual consent and consideration." *Id.*

Returning to 405.1, the standards governing dismissal for cause are even more central to the substantive right to tenure than the standards governing financial exigency or departmental changes that were at issue in *Saxe*. In addition, the three factors identified by the *Saxe* appellate court are more easily met here than in the Colorado decision, once again because termination for cause is at the core of tenure protection. Finally, both the Colorado Court of Appeals and the Alaska Supreme Court emphasized that a university's reservation of the right to unilaterally amend its rules may not be exercised to undermine vested rights, consistent with long-established principles of contract law and constitutional law recognized in this state and nationally. Accordingly, any attempt to apply the modifications in revised 405.1 concerning termination for cause to existing tenured faculty would violate the Arkansas Constitution and the United States Constitution.

Conclusion.

The points we have set forth in this memorandum demonstrate that the FAQ drafted by the Office of General Counsel is fatally deficient.

There are only two ways to salvage this process. One, it can be ended. There is simply no need to alter Board Policy 405.1. Alternatively, an all-university committee, with faculty representatives from every campus within the UA System, should be organized to undertake the task of analyzing 405.1, following the procedures outlined in our prior submissions to the Board of Trustees.