End the ABA's Accreditation Power

aier.org/article/end-the-abas-accreditation-power/

December 15, 2020

Allen Mendenhall

– December 15, 2020 Reading Time: 4 minutes

President-elect Joe Biden has pledged to "unify." In a divided America, how is that possible? Where is room for agreement in our increasingly polarized politics? What can bring together Biden and Trump voters?

One possibility, on a small scale: stripping the American Bar Association (ABA) of its accreditation authority over American law schools. The ABA's Section of Legal Education and Admissions, which operates independent of the ABA while nominally part of it, exercises the accrediting function, regulating law schools with standards and rules of procedure.

The ABA is a voluntary membership association of lawyers that has accredited law schools since 1952, having developed the first standards for American legal education in 1921.

A decade ago, Democratic and Republican senators joined forces to scrutinize law schools' exploitative tuition- and enrollment-related practices, a problem the ABA largely neglected. Calling for greater transparency and oversight, these senators effectively pressured the ABA into changing reporting practices for law schools so that students were not borrowing federal financial aid money that they could not repay with their modest salaries (due to lawyer glut).

The problem, however, remains. A recent report by the Texas Public Policy Foundation suggests that attending law school is among the riskiest educational investments in light of high student debt rates relative to post-graduation earnings.

Law school is, for many students, a bad investment. It is expensive in no small part because ABA standards drive up the costs of legal education, causing administrators to spend on expensive compliance rather than teaching or student services. For example, ABA standards limit online instruction and mandate the number of credit hours required for graduation. President Barack Obama correctly believed the third year of law school was unnecessary, but the ABA will have none of it.

The coronavirus has proven that certain ABA standards are outdated. The pandemic forced the ABA—under directive from the Department of Education (DOE)—to fold Standard 306 (which addressed distance education) into a different standard to provide more flexibility and to adopt emergency policies involving online and remote instruction.

Yet outmoded ABA standards remain in place even though they escalate the price of legal education with little if any measurable benefit to the profession and the public that the ABA purports to serve. The ABA makes law school prohibitively expensive for low-income communities and first-generation college students who might wish to pursue the law as a profession.

Why else would the left want to target the ABA?

The answer is simple: If ever there were an example of systemic or structural racism in this country, the ABA, formed in 1878, is it. The ABA was designed, in part, to restrict ethnic minorities and the poor from entering the legal profession. Its rise coincided with the rise of state bar associations, which are separate from the ABA but likewise culpable for erecting barriers to entry. For 66 years, in fact, the ABA excluded blacks from membership.

In 1912, when the ABA discovered that three African-Americans had been admitted into its ranks, it ousted them. It issued a resolution claiming that "it has never been contemplated that members of the colored race should become members of this Association."

Despite concerted efforts to liberalize—employing minorities, promoting equity and

inclusion, establishing the Coalition on Racial and Ethnic Justice, among other things—the ABA cannot undo the long-term effects of its practices and policies that, for over a century and two-score decades, disproportionately impacted people of color.

The ABA professes equity and inclusion, but its accrediting practices cause *inequality* and *exclusion*. Of course, the ABA does not intend to restrict ethnic minorities from entering law, not in today's age at least, but its standards and policies do just that.

According to the ABA's own findings, "85% of lawyers are white, compared to 77% of the U.S. population. Only 5% of lawyers are African-American, 5% are Hispanic, and 3% are Asian." The ABA bears significant responsibility for the fact that the legal profession remains mostly white. Progressive lawyers have never been able to overhaul or repurpose this organization that was created, in part, to institutionalize racism.

Conservatives, for their part, fear that the ABA, in its current form, embraces progressivism that may filter into law schools. The right would welcome the opportunity to disempower the ABA by altering the accrediting function from which, chiefly, the ABA derives its power.

Why do conservatives portray the ABA as progressive? For starters, there's the ABA's apparent bias against conservative nominees to the federal bench. Both President George W. Bush and President Donald J. Trump rejected the formal, historical role of the ABA in vetting federal judges.

Conservatives also vigorously opposed the adoption of ABA Model Rule 8.4(g), which includes in its definition of professional misconduct "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."

Conservatives consider this provision to be a vague, overbroad speech code that could penalize lawyers for voicing opinions about, say, same-sex marriage or transgender bathrooms.

If the ABA no longer accredited law schools, then state legislators and supreme courts would decide which law schools in their states to accredit. Policy wonks and lawmakers on both sides of the aisle would determine how best to disburse federal student aid under this decentralized scheme, admittedly an arduous task.

Stripping the ABA of its accreditation authority would help the ABA itself by freeing it to refocus on policies consistent with its desired brand and identity. Rather than contributing to the lack of diversity in the legal profession, the ABA could concentrate, with renewed credibility, on its other advocacy initiatives involving immigration, domestic violence, poverty, and more.

During this time of intense partisan rancor, one can nevertheless imagine Senator Ted Cruz and Senator Elizabeth Warren—both lawyers—finding mutually agreeable terms upon which to divest the ABA of its control over legal education. Removing the ABA's accreditation authority would begin reducing the high costs of legal education that correlate with the artificially high costs of legal services.

Society writ large would therefore benefit if the ABA lost the authority to accredit law schools. If only there were a politician willing to take the lead on this issue.

READ MORE

Allen Mendenhall

Allen Mendenhall is an associate dean at Faulkner University Thomas Goode Jones School of Law and executive director of the Blackstone & Burke Center for Law & Liberty.

He holds a B.A. in English from Furman University, M.A. in English from West Virginia University, J.D. from West Virginia University College of Law, LL.M. in transnational law from Temple University Beasley School of Law, and Ph.D. in English from Auburn University.

Get notified of new articles from Allen Mendenhall and AIER.
SUBSCRIBE

Related Articles – Free Enterprise, Higher Education, Policy