several topics which were covered in it.[1]

We also wish to point out, as indicated in the prior Memorandum, that we believe the Complaint and Decree are a step toward eliminating serious anticompetitive practices that have injured hundreds of schools and hundreds of thousands of students. With changes to cure weaknesses that might otherwise undermine the effectiveness of the Decree, it could become not a mere step toward eliminating injurious anticompetitive practices, but almost certainly a highly effective step toward doing so. The needed changes, moreover, while curative, are relatively small in the total scheme of things. Yet, unless the changes are made, the Decree could fail to remedy the anticompetitive practices charged in the Complaint. We therefore urge the Government to make the necessary changes, so that the Complaint and Consent Decree will not risk ineffectiveness, but will instead fulfill their capability of being a major accomplishment which rectifies long-standing secretive practices that wreaked extensive anticompetitive and, indeed, antisocial injury.

2. The Consent Decree Does Not Contain Provisions Needed To Insure Against Continued or Renewed Capture of the Regulatory Process by Directly Interested Persons Who Hold Economically Self Interested, Anticompetitive Views

The Complaint and the Competitive Impact Statement accurately say that the ABA's ''accreditation process has been captured by legal educators who have a direct interest in the outcome of the process.'' (CIS, p. 10; Complaint, pp. 12–13; *see also* CIS, p. 1.) Thus ''the ABA at times acted as a guild that protected the interests of professional law school personnel.'' (CIS, p. 2.) So strong was the evidence of guild capture that the Division eventually concluded ''that mere amendment of the ABA's Standards and practices would not provide adequate or permanent relief and that reform of the entire accreditation process was needed. * * * [T]he larger and more fundamental problem of regulatory capture also had to be addressed.'' (CIS, p. 16.)

One of the most important steps taken in the Consent Decree to address the problem of regulatory capture is to limit the percentage of law school deans or faculty who can comprise the membership of key committees. (CIS, pp. 11–12.) Their membership on the Accreditation Committee, the Council and the Standards Review Committee cannot be greater than 50 percent (Consent Decree, pp. 5–6; CIS, pp. 11–12); their membership on the Nominating Committee (which nominates Section officers) cannot be greater than 40 percent. (Consent Decree, p. 6, CIS, p. 11.) (These four committees are hereinafter referred to collectively as ''committees.'')

In addition, for five years appointments to the Council, the Accreditation Committee and the Standards Review Committee—but *not* the Nominating Committee—will be subject to approval by the Board of Governors.

Limiting the membership of academics on the foregoing committees to ''only'' 50 percent or ''only'' 40 percent is not likely, however, to cure the problem of capture of the process. Not only will the ostensible limitations make little difference to the existing percentage memberships on the Council and the Accreditation Committee,[2] but, far more importantly, the capture of the process has not been primarily a question of numbers or percentages. It has been, instead, a matter of who has been interested in and willing to devote the most time to the work of the Section—to the work of establishing and implementing Section policies. As the DOJ recognized, accreditation is of direct concern to the professional well-being of the existing academic participants—it has deeply affected their academic salaries and working conditions and, because a leading position as an accreditor regularly enables them to obtain (lucrative) deanships, it has even been the determinant of their professional positions. Because of its effect on their academic salaries and working conditions, it has been of preeminent interest to academics who hold the anticompetitive view that the accreditation process should be used to force increases in salaries, enhanced fringe benefits, decreases in hours of teaching, and increases in perquisites. Members of the aforementioned committees who are judges or practicing lawyers, on the other hand, are usually far too busy on the bench or in practice to give accreditation the intense attention given it by the academics. And even when they do give it comparable attention, it almost invariably is the case that they are in agreement with the academics who captured and control accreditation, often because the lawyers and judges are themselves former academics (e.g., the most recent past Chairman of the Council, Joseph Bellacosa), or because, as events and testimony make plain, they defer to the views of the academics and support the academics' agenda.

As stated buy a leading academic at Northwestern University Law School who from time to time has been active in the Section:

> * * * the most powerful force in the Section is made up of law school deans, who by and large defend the regulatory status quo. It could hardly be otherwise. The other predominant occupational groups represented in the Section—practitioners, judges and bar admissions officials—more often than not defer to the deans on most questions involving legal education. Such deference is natural both because the deans necessarily have superior knowledge of the internal workings of legal education and because they are willing to spend the substantial time necessary to maintain direction of the Section. To the practitioners, judges and bar admissions officials, service in the Section is a voluntary diversion from their real work; to the deans, it is part of their real work of effectively governing legal education.[3]

The academics' capture and use of the accreditation process has also been augmented by additional factors. One is that, as said in the CIS, most of the accreditation process as it applies to particular schools ''was carried out by the Accreditation Committee and the Consultant's office. * * *'' (CIS, p. 10.) The Consultant ''direct[s]'' ''[t]he day-to-day operation of the ABA's accreditation process.'' (CIS, p. 4.) However, as the Division recognized, ''the individuals who served on the Accreditation Committee and in the Consultant's office had been in these positions for many years.''(CIS. p. 10.) indeed, the Consultant, James White,

[1] Among the topics covered here but not in the Memorandum are the composition of site inspection teams, the practice of writing one-sided and even untrue site reports in order to force compliance with anticompetitive rules, appeals from the Accreditation Committee to the Council of the Section of Legal Education, term limits on membership on committees, the identity of an antitrust compliance officer, validation of ABA accreditation requirements in accordance with Department of Education rules, requiring first year courses to be taught by full-time faculty as defined by the ABA, barring full-time students from working more than 20 hours per week, and requiring expensive library facilities and very large and expensive hard cover collections of books.

[2] At a meeting of the American Association of Law Libraries, accreditation leader Roger Jacobs, a member of the Council, recently indicated correctly that the percentage limitations on the Accreditation Committee and Council will have little effect because the limitations ''only requires the shift in one member or so in each of those bodies.'' (Exhibit 1.)

[3] John S. Elson, *The Regulation Of Legal Education; The Potential For Implementing The MacCrate Report's Recommendations For Curricular Reform*, 1 Clinical L. Rev. 363, 372–3 (1994) (footnotes omitted).