Society of American Law Teachers SALT
Public Advocacy Center, Room 223
Touro Law Center
225 Eastview Drive, Central Islip NY 11722
631 650 2310
www.saltlaw.org

Statement on Tenure/Security of Position

Submitted by Society of American Law Teachers
For the April 2, 2011 meeting of the Standards Review Committee

SALT thanks the Standards Review Committee, once again, for soliciting comments on the evolving proposed accreditation standards and for arranging an open session to hear oral presentations from some of the individuals and groups who have been following the process with interest. Although public hearings will be held later on proposals authorized by the Council for that purpose, SALT has suggested in earlier statements that the SRC will benefit from engaging in discussions before the proposals have been finalized for submission to the Council, so we appreciate the opportunity to offer direct commentary at this stage.

We note at the outset that the current standards on security of position have consistently been understood to require systems of tenure for the protection of academic freedom of doctrinal faculty and comparable security of position for clinical faculty, despite recent suggestions to the contrary. The draft proposal would replace those provisions with ones that express more clearly the necessity for protecting academic freedom but would at the same time remove the expectation that faculty must have the opportunity to earn tenure or comparable security of position. As more fully articulated and illustrated below through the personal stories of current faculty members, that change would weaken vital protections that protect all faculty from retaliation for taking controversial positions in their scholarship, for representing unpopular clients in their clinical work, for challenging their students with innovative teaching and provocative material, and for speaking their minds to authority, whether inside or outside the law school. The removal of that protection would create a chilling effect on faculty, particularly problematic in the current volatile and intensely partisan political climate. The cost of such changes would be enormous—not for most current faculty, who would retain the protections they already have earned, but for future faculty, who could be hired without them and ultimately for legal education, which would cease to be led by individuals who can afford to speak truth to power, and for students, who would no longer benefit from such leadership.

The arguments in favor of the change—that the standards never meant tenure systems are the norm, that accreditation standards for law schools should mirror standards for other disciplines in this respect, that tenure and security of position are "mere" terms and conditions of employment, that schools must be freed from the obligations of tenure and security of position for financial reasons and to permit innovation, and that academic freedom can be protected adequately without the existence of tenure—are both wrong and short-sighted. We understand that the accreditation standards in other disciplines do not require tenure or security of position, but that does not mean the law school standards should not continue to do so. While tenure is important to ensure academic freedom in all of the academy, there are special concerns and pressures that warrant special protections for legal academics, many more of whom act in the public arena in ways that challenge the status quo and invite external pressures on law school and university administrators and faculty. Tenure and security of position are the bulwarks of academic freedom, not simply terms of employment for faculty. And, as noted in SALT's July 2010 Statement on Tenure and Security of Position, no evidence has been provided that changing the tenure requirements will produce any cost savings. Indeed, schools may need to offer higher salaries to induce highly qualified individuals to accept faculty positions without tenure.[1]

The risks and costs of making this enormous change in the accreditation standards are far too high and the benefits, if any, far too meager to warrant adopting it. In the remainder of this statement, we discuss the nature of the current standards on tenure and security of position and why it is critical to retain or strengthen, not weaken, them to support academic freedom. We urge the SRC to reject the proposed draft and instead to strengthen the commitment to academic freedom in the standards, to clarify the standards to accord with the consistent understanding that tenure systems for faculty are the norm, and to press schools towards equal status for all faculty who meet the requirements of tenure. At the very least, the SRC should consider the current proposals only after an open and full discussion in the academy to inform the SRC decision, the process contemplated when the Council referred this issue to the SRC for consideration.

The Process of Deliberation Regarding Tenure and Security of Position

It is worth remembering that the current SRC consideration of the standards on tenure and security of position began as the result of a report to the Council from the Special Committee on Security of Position. That Special Committee was created by the Council to consider two issues: (1) whether an alternative approach to security of position—one which bears a strong similarity to the version currently proposed—would sufficiently protect the core interests of academic freedom, attraction and retention of well-qualified faculty, and participation by all relevant constituents in law school governance affecting curriculum, and (2) whether the alternative approach would serve the interests underlying the existing security of position provisions as effectively, more effectively, or less effectively than the existing provisions.

[1] As noted in the report to the Council of the Special Committee on Security of Position, "[a]cademic economists who have carefully studied the economics of college labor . . . have written that the tenure system is a logical and efficient outgrowth of the way that academic employment is structured in the United States work place." Report at p. 10.

The Special Committee's report, including its discussion of the nature and history of tenure and its relationship to academic freedom and shared governance, should be read by each member of the SRC to inform its discussion of this critical issue. Although the Special Committee did not reach agreement whether to recommend for or against the alternative approach, the report outlined many of the concerns that underlay the Committee's divided opinions. It explained that tenure was created not for the benefit of individual faculty, but for the good of the academic enterprise; that "[j]ust as tenure for judges is designed to enable them to provide justice, even when a decision is unpopular, so, too, academic tenure is to enable faculty to discover and transmit new knowledge, even when their views challenge powerful interests." It identified and discussed at some length the "positive features" of the alternative approach and the "potential downsides or risks that might come from abandoning the current Standards and Interpretations." And it noted that the determination of which approach was preferable "should be lodged in the Standards Review Committee as that Committee will have the opportunity to gather more information and public comment on the issues raised below before reaching its conclusion."

Despite the clear differences of opinion among Special Committee members about the wisdom of adopting the alternative approach, and the richness of the debate reflected in the report, the SRC subcommittee on tenure and security of position almost immediately adopted the alternative approach in its proposed drafts and there has not yet been a robust discussion at the SRC of the competing concerns. We hope that the public hearing on April 2 will be the start, not the end, of information-gathering by the SRC, and the invitation for more thorough discussion of the pros and cons of maintaining the current scheme or moving to a non-tenure-based system of faculty status.

The Nature of the Current Standards

We will not repeat here the evidence presented in earlier filings with the SRC that the current accreditation standards, while lacking some clarity, have always been understood as requiring schools to maintain tenure systems[2] for faculty (*see* the October 2010 memo from Professor Richard Neumann, "Standard 405(b) and its Interpretations" and the June 2010 comment from the Clinical Legal Education Association, "Historical Background on Clinical Faculty Accreditation Standards"). But we feel compelled to emphasize that evidence, and the fact that this radical change in standards has been presented repeatedly as a "clarification" of the current rules when it is nothing of the kind. In 1999 and 2004, the SRC debated and ultimately proposed the removal of the tenure requirement, articulated then, more honestly, as a significant change—and, we note, the Council rejected the proposal on both occasions. In its public meetings, the SRC has yet to even acknowledge that the proposed standard is a major change, not a clarification, and has had only minimal discussion of the merits of making this radical change. We urge all SRC members to read the comments noted above to understand more fully both the meaning of the current standards and the history of the long battle to accord clinicians equivalent status, premised

[2] By "tenure," the accreditation standards contemplate a system in which faculty are hired on a probationary status and then evaluated by their tenured colleagues, after a specified period (usually five to seven years), to determine whether they have demonstrated the abilities and accomplishments to satisfy the rigorous standard specified in the institution's tenure standards. If granted tenure on this basis, the faculty member is protected against dismissal except for adequate cause or under extraordinary circumstances because of financial exigencies.

on the maintenance of the tenure system as the foundation for security of position. And we urge the SRC members to openly discuss and consider the arguments presented on this point.

Why Tenure is Important

As explained in the report of the Special Committee on Tenure and Security of Position, the institution of tenure—the promise that tenured faculty will not be disciplined or dismissed except for cause, as established by the faculty or a representative group of faculty—has been foundational for assuring academic freedom and the ability to attract highly-qualified faculty members. As noted in SALT's July 2010 Statement on Tenure and Security of Position, we believe that removing the expectation that most faculty will be hired and promoted on a tenure track would threaten academic freedom and thus have severe consequences for the quality of legal education.

To understand why tenure is so critical for academic freedom, and why threatening academic freedom would have such a problematic effect on legal education, it is important to articulate the nature of academic freedom itself. Faculty must have the freedom, without fear of reprisal, to choose what to research, and to communicate their conclusions, no matter what they are. They must have the freedom to choose how to teach their courses, to shape the classroom experience for their students through selection of material, choice of pedagogy, and expression of viewpoint. They must have the freedom to advocate, whether on legal issues or on behalf of clients, no matter whose interests they may cross. And they must have the freedom to fulfill their roles in the shared governance of their schools: to set academic standards for students, to evaluate the performance of their colleagues, to shape the law school through hiring, to establish and review the curriculum, and to speak their minds about the implementation of law school policies and the work of the law school administration.

We know the members of the SRC agree that academic freedom is vital but contemplate protecting that freedom, not through providing tenure or comparable security of position, but instead through requiring that each law school simply have a policy that provides protection for academic freedom. The proposed interpretations would require that the law school show "it has established sufficient conditions to attract and retain competent faculty," that "it provides sufficient protection for academic freedom," and that it have procedures "to ensure that its policy [with respect to the protection of academic freedom] is followed . . . ." But having a policy declaring academic freedom is not enough. Simply put, there is a difference between saying it and making it so. To remove a faculty member who has tenure or security of position, the burden is on a school to demonstrate that the individual was not competent, was engaging in professional misconduct, was not fulfilling his or her responsibilities, or was falling significantly short of meeting established expectations in research, teaching, and service, and the burden is, by design, a heavy one. But to remove a faculty member who does not have tenure or security of position, a school could simply fail to renew the contract when the opportunity arose or specify other plausible reasons, and the burden would be on the faculty member to show that the removal or non-renewal was in fact being done in violation of academic freedom. Nor is it enough, as draft Interpretation 405-3 proposes, to have rules that "prohibit the non-renewal, denial of promotion, or loss of a faculty position unless a representative group of faculty agrees that the determination is not

a violation of academic freedom." Demonstrating that the reason for non-renewal is tied to a faculty member's public positions, innovative teaching, controversial litigation, or opposition to a dean's initiative will be extraordinarily difficult, while the fear of such retaliation and the knowledge of the height of that evidentiary hurdle will be enough to chill the faculty member's actions long before the time for contract renewal.

As noted by Matthew Finkin, a labor and education scholar, in his 1996 book *The Case for Tenure*, it would be possible to have academic freedom without a tenure system under two conditions:

> First, that all governing boards and administrators of institutions of higher education believe so strongly in academic freedom that every charge of abuse, and every suspicion of abuse, would inspire them with such a zeal to protect the offender that they would rather see the institution which they govern or administer impoverished or destroyed than allow the defender to be removed from his post. Second, that it is always possible to distinguish offenses that come under the heading of abuse of freedom from all other reasons for dispensing with the services of a teacher or scholar. . . . Neither of the two conditions is satisfied.[3]

We applaud the proposed standard's articulation of the need for law schools to have clear policies that protect academic freedom, but that should be added to, not substituted for, the protections that tenure or comparable security of position provide.

When Tenure/Security of Position Has Mattered

Perhaps the best way to understand the importance of tenure is to consider real-life examples of when faculty members have felt pressured by the kinds of attacks that threaten academic freedom and have felt able to do "the right thing" because of the protections of tenure, or unable to do so because of their absence. Some of the most visible examples come from recent and historical attacks on law clinics, which are often most at risk of criticism by legislators, law school alumni, major donors, and the public because they frequently represent the powerless against the powerful and sometimes take controversial and unpopular cases and often do not have the protections of tenured positions. Professors Robert Kuehn and Bridget McCormack have detailed a host of such examples in their article, Lessons From Forty Years of Interference in Law School Clinics, 24 Georgetown Journal of Legal Ethics 59 (2011). They found attempted interference not only from external sources but also from university and law school officials: a 2005 survey showed that the faculty or administration had interfered in the casework of a significant number of clinic attorneys and a 2008 survey showed that the deans of 9% of respondents had "suggested" that the clinic attorney avoid a particular case. It's not clear how many of such actions were motivated by political concerns and how many instead by educational or cost considerations. But well over half of the faculty members responding said their deans were concerned about how the clinic's cases would be viewed by alumni or potential donors, and more than a quarter

[3] Matthew Finkin, The Case for Tenure 24 (1996), quoted in the Report of Special Committee on Security of Position at p. 10.

said their deans cared at least somewhat about how clinic cases are perceived by politicians, state courts, their state's bar association, and groups representing businesses or other interests. Not surprisingly, Kuehn and McCormack found self-censorship by clinic attorneys in response to such interference or its threat. They conclude that "[t]he lesser security of position and status of law clinic attorneys within the legal academy compound these concerns, both making clinic attorneys more vulnerable to employment-related sanctions and less able to speak out internally on law school matters."

It is true that there are courageous and tenacious deans who defend and protect their faculty members under assaults by those outside the law school. But the public defense by deans of their faculty members' academic freedom occurred while the accreditation standards continue to guarantee to full-time clinicians a security of position reasonably similar to tenure—that is, the ability to earn a status that protects them from dismissal except for adequate cause, for financial exigency, or because their programs have been discontinued. That security is part of what allows—even compels—the deans to defend their colleagues so resolutely. Clinic faculty choose cases based on their worth in teaching students the skills and values of the profession. Without security of position, clinicians would also have to be concerned not only about the impact on the law school of taking on unpopular causes or of litigating against the wealthy or powerful, but about the impact on their own jobs, especially if their dean or central administrators cautioned against doing so. All faculty might face similar concerns in their scholarship.

And, indeed, faculty members do have concerns about their ability to teach, research, and advocate according to their principles and beliefs if not protected by tenure. This is demonstrated first, in the resolutions passed by the faculties of Georgetown, Golden Gate, Touro, Duquesne, Baltimore, Hawai'i, Loyola-New Orleans, Cleveland Marshall, Suffolk, Oregon, and University of Nevada Las Vegas that oppose the proposed accreditation standard changes on the grounds that they would damage the quality of legal education, academic freedom, and faculty governance, and undermine the movement to bring clinical law professors, legal writing professors, and library directors into full membership in the academy. Copies of most of those resolutions have been filed with the SRC and are posted on the Committee's website.

The concerns are also demonstrated in stories told by individual faculty members and shared with Professors Carol Chomsky and Andi Curcio, members of the executive committee of SALT's Committee on Issues in Legal Education, in response to their request to hear from faculty about how security of position has mattered to them. The stories demonstrate how tenure or security of position lets law faculty do their jobs effectively, how it lets faculty members stand up for what they think is important in their scholarship, their teaching, their advocacy, and their institutions. Only a few examples are included here, to provide a more specific sense of the concerns expressed elsewhere more generally.

One faculty member described a dean who was interfering with admissions decisions, vetoing the faculty committee's judgment to admit certain minority students. An untenured faculty member on the committee was not comfortable challenging the dean, so "the tenured faculty had to tell the dean" he

was acting inappropriately. "I wouldn't have done it if I was on only a long-term contract," she said. Another faculty member described numerous circumstances where it was made clear to faculty that speaking out—especially speaking out in criticism of or opposition to the dean, or complaining of discriminatory conduct—would result in retaliation. Even tenured faculty at her institution have been afraid to speak out because of possible retaliation against their untenured colleagues with whom they are closely associated. Several faculty members talked about adverse employment decisions made by the dean with respect to retention or renewal of contract faculty even in the face of strongly positive or even unanimous support from faculty colleagues. And one talked about being marginalized—but not fired, because she has tenure—for repeatedly raising issues of race, gender, and diversity on admissions, faculty recruitment, and academic affairs committees.

A Latina faculty member noted that student hostility about her ethnicity, including comments about her accent and the fact that in her course (a required one) she challenged students to consider "racial disparity in the criminal justice system" rather than just "teach the black letter law" led to mixed student teaching evaluations. She notes that "as an untenured professor, I was lucky that my previous institution had a better—not perfect—sense of this and I was considered a good teacher. I am grateful I have tenure at my current school because otherwise I think I would have to conform my teaching style, to teach more to the bar, to receive better student evaluations. I have seen many of my younger colleagues have to do this."

Another faculty member described what happened when she was sued for defamation because of an article she had written. Although the university counsel thought the suit was meritless, the university refused to defend her. The Vice Provost conveyed the clear message "that academic freedom and defending against meritless suits 'are just not that high on my list of priorities.'" Another administrator told her that publishing law review articles was a personal, rather than a professional, pursuit. She fought internally to change the university's decision, without success, and then publicly told her story about the university "reneging" on its obligation to her under her contract, state law, and AAUP guidelines. "I could do this because I had tenure," she said.

A faculty member teaching in a family law clinic took on a divorce and custody case involving serious domestic violence perpetrated by a law school alumnus. Her untenured colleague was not comfortable taking on the case, fearing that the alumnus would complain and her career would be jeopardized. "We decided it was best for me to take the case instead, since I already had tenure. Had neither of us been tenured at that time, our client, who was severely abused by her husband, might have gone unrepresented." Another faculty member who received a negative tenure vote a number of years ago is certain that it was because he had taken on a series of high-profile politically charged environmental cases, which did not sit well with "the old guard." "If there were no tenure and if you were on renewable contracts, you would know that at the time of contract renewal, both legislators that didn't like positions one had taken and development contributors, local or regional contributors to the law school fund, would know that was the pressure point. If there were no tenure, faculty members would not be willing to take on the difficult cases against corporations or big money because they would not want to risk that when time comes for contract renewal there would be voices that you may not even

hear—pressures on the dean and the university to not renew the professor's contract." This reluctance to challenge injustice would have a negative impact on students, the faculty member noted. "It's really important that our students recognize that the American legal system is a system where individuals can make a difference. I was trying to show them in a variety of different cases, that even if one side has power and money, as a lawyer, you can stop that force if you have facts/law on your side and you carefully put your case together." That often won't happen if the faculty members are concerned about the impact bringing such law suits will have on their own careers.

These stories are just the tip of the iceberg of all the stories that can be told. Many faculty know of times when they acted or spoke out about important matters because they had tenure or security of position, or did not act or speak because they had no such protection. Or times when they spoke for those without tenure who did not feel comfortable speaking themselves. Or heard colleagues advised to play it safe and postpone a controversial research agenda until after tenure. Or gave that advice themselves. It is easy to simply assert that academic freedom will survive intact even if tenure or comparable security of position is not mandated. But years of experience demonstrate the risks to legal education of moving in that direction.