

Society of American Law Teachers (SALT) Comments on  
the Report of the ABA Council on Legal Education and Admissions to the Bar  
Special Committee on Security of Position  
July 21, 2008

Since 1973, SALT has been an independent organization of law teachers, deans, law librarians, and legal education professionals working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to under-served individuals and communities. SALT challenges faculty, staff, and students to develop legal institutions with greater equality, justice, and excellence; to promote core values of equality and justice; and to resist inequitable social policies. The SALT Board of Governors submits these comments on the Report of the Special Committee on Security of Position (“Report”) to the Council on behalf of the SALT membership after carefully considering the Report.

SALT urges the Council not to refer the Security of Position Report to the Standards Review Committee at this time. Although the Committee drafted specific language, the Alternative Approach, that could replace the existing Standards dealing with security of position, it wisely does not recommend this Alternative Approach to the Council or to the Standards Review Committee for adoption. The fact that there was no consensus on the need for a revision of the security of position Standards, either on the Task Force on Clinicians in the Academy, AALS Section of Clinical Legal Education, or on the part of this Committee, cautions against precipitous action. Sending the Report, and the Alternative Approach, to the Standards Review Committee is, therefore, premature.

SALT agrees with the Committee that, although the Alternative Approach addresses some persistent and troubling issues created by the current Standards, the Alternative Approach does not eliminate those problems, but simply compounds them. We, like members of the Special Committee, are concerned that the Alternative Approach would not sufficiently protect or advance the policies served by the current requirement of security of position for law school faculty, however they are classified. History demonstrates that only a meaningful system of security of position can secure these underlying goals of the Standards, and any change should be undertaken only after more thorough and widespread discussion.

The Committee itself notes both the “limited time frame” that constrained its ability to draft the Alternative Approach and the lack of consensus on the Committee on the “potential downsides and risks” involved in adopting the Alternative Approach. The Committee reports that it did no more than record the “ideas and thoughts” discussed by members, which it thought would be helpful to “surface” in advance of further deliberations on a possible revision of the security of position Standards. Under these circumstances, SALT believes that, although the current Standards are perhaps imperfect, retaining them is best, at least until there has been a more thorough consideration of proposed changes.

We all agree that it remains critical that faculty have academic freedom in their teaching, research, governance responsibilities, and public comments; that law schools are able to attract and retain a competent full-time faculty; and that faculty retain their primary responsibility to determine educational policy through participation in faculty governance. The question is whether the suggested Alternative Approach sufficiently furthers those goals. The Committee itself could not say that it would, and gave persuasive arguments for why it might not. Under those circumstances, it would be unwise to move forward on such a significant change at this time.

The Report warns the Council to consider the possible unintended consequences should the Standards be changed to the Alternative Approach contained in the Report. One such consequence might be a substantial change in the security of all or many faculty at some schools. As the Alternative Approach is drafted, one such consequence could be the development of “at will” employment arrangements for all faculty, also known as “contingent faculty.” An “at will” faculty may be one of the unintended consequences of making Standard #2 “faculty retention and success at attracting new competent faculty over a seven year period” one of the methods by which security of position can be demonstrated. As long as a school can demonstrate it has a competent faculty, it may not be required to ensure longevity of service of the faculty it hires. By suggesting that a tenure system is one, but not the only, way to demonstrate that academic freedom, faculty quality, and governance roles are protected, the Alternative Approach invites schools to move away from a tenure-based system.

Academic freedom for all teachers and researchers often depends upon the willingness of tenured faculty to speak out when someone is threatened with actions or processes that undercut that freedom. Inviting schools to move away from a tenure system means there may not be a “representative group of faculty” sufficiently secure in their jobs to provide the procedural protections for academic freedom proposed in Standard #1. Under such circumstances, faculty oversight of the termination or non-renewal of a contract that might be motivated by a desire to chill or silence the speech of faculty members will be illusory. Under Interpretation 1-3, a law school meets its burden of proving sufficient protection for academic freedom by showing explicit acceptance of the AAUP principles on academic freedom and tenure, and an established procedure involving a representative group of faculty to consider appointment, renewal, and termination decisions. But explicit acceptance of the AAUP principles is meaningless without an effective system of faculty oversight, and that effectiveness will be undermined by potential changes in the status of all faculty.

Similarly, the Alternative Approach fails to ensure that all faculty – but particularly clinical faculty and legal research and writing faculty – will have an effective opportunity to participate in the development of curriculum that improves the quality of legal education. The current Standards suffer from a similar problem, but the Alternative Approach will not solve that problem. Especially in view of movement in the academy towards incorporating and assessing a wide range of skills in legal education, it is especially important that clinical and legal writing and research faculties be in a position

to contribute the wealth of knowledge about learning theory and innovative pedagogies they typically have because of the nature of their teaching responsibilities and research.<sup>1</sup> Yet they are the least likely to have either the status within their institutions needed to participate in discussions of curriculum reform or the security of position necessary to risk participating fully in these kinds of discussions. Any proposed change in the Standards related to security of position should more effectively address this issue.

The Alternative Approach threatens to lead to further stratification within faculty ranks of the legal academy. The Alternative Approach retains tenure as the presumptive method of showing that the three principles necessary to a quality education have been met, and then, for faculty whose “positions do not include the possibility of tenure,” places the burden on the law school to demonstrate compliance with the overarching principles of academic freedom, attraction of competent faculty, and participation in governance. While the appearance of inequity might be eliminated, because the law school must show it satisfies the standards with respect to all faculty, the possibility of unequal treatment would be increased. The generality of provisions for demonstrating compliance fails to provide sufficient protections. Moreover, the removal of the current requirement in Standard 405(c) that at least clinical faculty are to be treated “reasonably similar[ly]” to other full-time faculty and Standard 405(d) as it applies to legal writing faculty would further exacerbate the problem.

Similar treatment is vital to ensure that clinical and research and writing courses are fully integrated into the law school curriculum, a necessary step to further the objectives of the recent report of the Carnegie Foundation for the Advancement of Teaching. There is already considerable resistance to implementing Standards 405(c) and 405(d), and the failure to incorporate clinical and legal writing and research faculty and courses fully into the law school sends a message to law students that such courses are not valued, as noted in the Carnegie Foundation report: “In many of the schools we visited, students commented that faculty view courses directly oriented toward practice as of secondary intellectual value and importance.”<sup>2</sup> SALT believes that the elimination of security of position from the Standards would initially have its greatest negative effect on faculty teaching clinical and legal writing and research courses. An elimination of security of position would, therefore, be counterproductive to efforts to value lawyering skills and professional values taught by clinical and legal process and writing courses.

Moreover, the elimination of security of position will disproportionately affect women in legal education, who are disproportionately represented in non-tenured positions. At the 2008 AALS Workshop for New Law School Clinical Teachers, forty of the fifty-two new clinical law teachers (76%) registered were women.<sup>3</sup> Nationally, a recent study indicates that 50.4% of clinical faculty are women, and 31% of all clinical faculty are on a tenure-

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<sup>1</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 91-110 (2007). For scholarship about legal writing, the Journal of the Legal Writing Institute, established in 1988, has published eleven volumes.

<sup>2</sup> *Id.* at 88.

<sup>3</sup> AALS Registration List for the 2008 Workshop for New Law School Clinical Teachers (on file with SALT).

track.<sup>4</sup> AALS data indicate that 33.7% of all faculty, clinical and non-clinical combined, are women.<sup>5</sup> The AALS survey also indicates that of faculty on contracts, renewable and short-term contracts combined, 59.5% are women.<sup>6</sup>

The impact of the Alternative Approach would be even more dramatic for legal research and writing faculty since there are far more women than men engaged in this area of teaching. According to the 2008 ALWD/LWI Survey<sup>7</sup>, of the 672 full time legal research and writing faculty, excluding directors and associate directors, 465 or 69% are females, and 207 or 31% are males.<sup>8</sup> Over 75% of those responsible for supervising legal research and writing faculty are female.<sup>9</sup> Under the existing Standard 405 (d), teachers within the legal research and writing programs have little position security. Tenure is even rarer. According to the 2008 ALWD/LWI Survey, there are 33 tenured directors of legal research and writing programs.<sup>10</sup> Only 64 directors are either tenured or tenure-track eligible faculty. Under the Alternative Approach, their condition would not improve.

The picture that emerges from these data is that an increasing number of women are entering law teaching as clinical and legal research and writing teachers. Their entry into teaching increases the overall number of law teachers who are women, but women are less likely to have security of position and the status that is afforded to their male colleagues. If the ABA abandons its commitment to treating law faculty teaching in clinical courses reasonably similarly to other full-time law faculty, the ABA will facilitate the disparate treatment of these faculty and discourage those law schools that have chosen to include legal research and writing faculty within Standard 405(c) from continuing this practice. If the ABA abandons a commitment to security of position, the current divide between clinical and legal research and writing faculty and other full-time faculty will widen rather than narrow, and women more than men will be adversely affected.

Finally, historically, clinical legal faculty members have often been in the midst of political controversies because many law school clinic cases involve public interest litigation that is at odds with the interests of significant donors or is politically unpopular. These faculty members are directly involved in teaching future lawyers about professionalism and social justice issues. It is critical that clinical faculty members who courageously tackle major social issues do so with at least some degree of job security –

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<sup>4</sup> Task Force on Clinicians in the Academy, AALS Section of Clinical Legal Education, Preview of the CSALE 2008 Survey of Applied Legal Education (stating preliminary results of survey to all ABA-accredited law schools with a 78% response rate) (on file with SALT).

<sup>5</sup> Association of American Law School, Statistical Report on Law Faculty 2007-2008, at 2, available at [www.aals.org/statistics](http://www.aals.org/statistics).

<sup>6</sup> *Id.* at 24.

<sup>7</sup> Association of Legal Writing Directors and Legal Writing Institute 2008 Survey Results, available at <http://www.lwionline.org/surveys.html>. The ALWD/LWI annual survey includes information on salary ranges, benefits, scholarship, committee responsibilities, voting privileges, and other indicators of status within law schools.

<sup>8</sup> *Id.* at 45, Question 57.

<sup>9</sup> *Id.* at 3, Question 2.

<sup>10</sup> *Id.* at 65-66, Question 45.

both for the sake of the faculty members and for the message that is sent to law students. Although the current Standards do not provide as much security as SALT thinks is necessary, they are still better than the proposed changes.

SALT does not agree that adhering to the current Standards or more stringent ones related to security of position will stifle innovation or require law schools to abandon their missions. Nor are we convinced that the ABA should alter its accrediting standards to avoid being an “outlier” with respect to what other accrediting bodies may do. We share the view of the American Association of University Professors, which observes with alarm the rapid growth of contingent faculty at many universities. Between 1998 and 2001, full time non-tenure track faculty grew by 35.5 percent. Forty-eight per cent of all faculties in universities and colleges are now contingent, a development that the AAUP believes “hurts students,” “hurts faculty,” and diminishes overall a university’s commitment to academic freedom.<sup>11</sup>

As the Report’s historical summary of tenure, academic freedom, and shared governance demonstrates, without security of position, there is no meaningful protection for academic freedom. SALT submits that, if the Council believes that tenure is too constraining, then only a protection such as a requirement of “just cause” or “good cause” for termination or non-renewal of a contract will provide faculty with some measure of academic freedom protection. As the history of tenure demonstrates, tenure in academia serves the same function as a life appointment on the federal bench: tenure ensures that law faculty will have protection to pursue their research and teaching without fear of loss of employment. It is SALT’s position that only tenure or some requirement of cause for termination of employment actually protects academic freedom and the ability of faculty members to participate effectively in governance, including fulfilling faculty responsibility to control and innovate in educational policy and pedagogy.

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<sup>11</sup> American Association of University Professors, Background Facts on Contingent Faculty, <http://www.aaup.org/AAUP/issues/contingent/contingentfacts.htm>.