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## SOCIETY OF AMERICAN LAW TEACHERS STATEMENT ON TENURE AND SECURITY OF POSITION

July 19, 2010

SALT joins the AALS, AAUP, CLEA, and others who have submitted comments, to stress the critical importance of tenure to maintaining high-quality legal education and protecting the academic freedom of all law teachers, including clinical faculty. We submit these comments now, in advance of the circulation of a specific proposal regarding Standard 405, to inform the Standards Review Committee (SRC) members as they begin discussion of these issues, originally raised by the Report of the Special Committee on Security of Position.

Tenure has long been understood as providing the necessary underpinning for the absolutely essential guarantee of academic freedom to those who shape and deliver legal education. Requiring only that a school have a policy regarding academic freedom is insufficient. The security that comes with tenure is the only way to ensure that faculty will remain free to teach, research, participate in governance decisions, and speak on matters of public concern without fear of reprisal. Changing the accreditation standards to weaken the requirements regarding tenure would have enormous and unfortunate implications for the quality of legal education.

Tenure is not simply a term and condition of employment, as some have argued. It is, rather, the bedrock on which academic freedom and therefore the integrity and quality of the educational process rest.

SALT urges the SRC to reject any weakening of expectations regarding tenure for law faculty. Indeed, we urge SRC to strengthen the standards by making the expectation of tenure security more clear by encompassing within its protections clinical faculty, often most vulnerable to the kind of political pressures that make academic freedom so critical in the legal academy.

We describe below some of the consequences of removing the expectations that most faculty will be hired and promoted on a tenure track.

**Impact on Faculty Governance.** As part of an effort to “de-regulate” law school accreditation standards, some deans have argued that the Standards should not require a tenure system because decisions about what they call “terms and conditions of employment” are best left to individual schools.<sup>1</sup> This characterization ignores the fact that tenure exists, in part, to protect the role of law faculty in institutional governance. The faculty’s shared role in institutional governance has been recognized since the establishment of the AAUP’s Declaration of Principles on Academic Freedom and Academic Tenure in 1915.<sup>2</sup> The shared governance role has been acknowledged as critical because “it is the best way for a university to promote ‘[g]enuine boldness and thoroughness of inquiry.’ ”<sup>3</sup> Both the ABA Standards and AALS Rules and By-laws recognize the vital role law faculty play in the development and delivery of the program of legal education.<sup>4</sup> Whether on curriculum or hiring matters, faculties have a critical role in governing their institutions in accord with its academic values. Faculty members who are at-will employees are much less likely to raise concerns about proposals that may threaten academic values.<sup>5</sup> The protections of tenure ensure that faculty can exercise independent judgment and that the power over institutional goals and mission, curriculum design, and hiring is exercised by faculty with long-term commitments to the institution. It would be problematic if decision-making was situated with faculty who are subject to nonrenewal or termination without cause and those on short-term contracts, all of whom will have reason to follow the administration’s viewpoint rather than their own.

Tenure ensures law faculty a meaningful voice in the development and implementation of a school’s program of legal education. Alternative models for employing law school faculty—long-term contracts, short-term contracts, or quasi-tenure employment structures (such as clinical tenure)—have invariably diminished their voice on important issues affecting the mission, function, and direction of their law schools compared to tenured and tenure-track faculty. Faculty members employed under those models have lesser voting rights over hiring, retention, and curriculum design, and less input over the direction of the shared institutional

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<sup>1</sup> ALDA Board Statement, Hearing of Accreditation Task Force, January 3 2007 at 5; statement available at: [http://www.americanlawdeans.org/images/ALDA\\_Board\\_Statement\\_1-5-07\\_.pdf](http://www.americanlawdeans.org/images/ALDA_Board_Statement_1-5-07_.pdf). ALDA is a national association of law school deans. Dean David Van Zandt made clear that the January, 2007 statement was not endorsed by all ALDA member deans, and, in fact there were member deans who disagreed with all or parts of that statement. See Memo to ALDA Deans from David Van Zandt, available at: [http://www.americanlawdeans.org/images/Summary\\_of\\_ABA\\_Task\\_Force\\_Hear.pdf](http://www.americanlawdeans.org/images/Summary_of_ABA_Task_Force_Hear.pdf)

<sup>2</sup> Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J., 945, 953-62 (2009).

<sup>3</sup> *Id.*, at 958.

<sup>4</sup> See ABA Standards 403(a), 404(a)(3), 205 and 207 and AALS Section 6-5(a).

<sup>5</sup> Areen, *supra* note 2 at 959.

enterprise.<sup>6</sup> Equalizing the roles of all faculty, and protecting them all with a tenure system, is particularly important as the legal academy moves towards incorporating learning outcome measures and assessment of a broad range of skills and knowledge as promoted in the Carnegie and Best Practices reports.

**Impact on Faculty Diversity.** Because those who already have tenure will likely retain it, the impact of removing a presumption of tenure-track hiring will fall primarily on new faculty. Because the legal academy remains insufficiently diverse,<sup>7</sup> a change now will risk creating a two-tier system in which people of color may be disproportionately relegated to untenured positions, while the still predominantly white and male tenured professoriate will retain privileged positions.

**Impact on Academic Freedom.** Recent attacks on law clinics<sup>8</sup> and political attacks on the content of classroom teaching<sup>9</sup> illustrate the need for tenure to protect those who challenge the status quo. Effectively training students to join the legal profession can only be accomplished if law students are educated to understand the ways in which justice must be implemented through law. The legal academy needs to protect professors—including clinical faculty—who are willing to challenge students to consider alternative perspectives and challenge those with power and money.

Non-tenure track employment models have demonstrably resulted in lesser autonomy for faculty over their research and classroom teaching. Faculty employed under alternative schemes have reported internal and external restrictions on academic freedom in course design and, for clinical faculty, choice of client representation. Faculty employed under non-tenure-track models are also chilled in their choice of scholarly inquiry to avoid running afoul of those with decisional power over their promotion and retention.<sup>10</sup> In light of the documented attacks on academic freedom, if changes are made to the Standards with regard to security of position,

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6 Cf. Report and Recommendations on the Status of Clinical Faculty in the Legal Academy, prepared by THE ASSOCIATION OF AMERICAN LAW SCHOOLS SECTION ON CLINICAL LEGAL EDUCATION'S TASK FORCE ON THE STATUS OF CLINICIANS AND THE LEGAL ACADEMY, Bryan L. Adamson ( Co-Chair), Calvin Pang ( Co-Chair), Bradford Colbert, Kathy Hessler, Katherine Kruse, Robert Kuehn, Mary Helen McNeal, David Santacrose (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1628117](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628117).

<sup>7</sup> For a breakdown of statistics on tenure, see [http://www.aals.org/resources\\_statistical.php](http://www.aals.org/resources_statistical.php) (tracking "job security" by minority/non-minority).

<sup>8</sup> In the last year, clinics at numerous schools have come under attack for filing lawsuits that were contrary to the state's business interests. See Ian Urbina, *School Law Clinics Face Backlash*, N.Y. Times, Apr. 3, 2010. For a comprehensive study of more recent attacks on law clinics, see Robert R. Kuehn and Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 J. LEGAL EDUC. 97, 98 (2009).

<sup>9</sup> See e.g., David Horowitz's book, 101 MOST DANGEROUS ACADEMICS [2006], a book that singled out "liberal" faculty for statements supposedly made in classes or the content of their syllabi. The book was widely applauded by right-wing talk radio hosts and commentators.

<sup>10</sup> Cf. Report and Recommendations on the Status of Clinical Faculty in the Legal Academy, *supra* note 6.

those changes should strengthen job security for clinical faculty, not weaken it for all faculty members.

**Impact on Quality of Legal Education.** The grant of tenure involves a multi-year rigorous evaluation of teaching and scholarship, which is designed to ensure that those who earn tenure are highly qualified legal educators. Any proposal to weaken security of position in the Standards will inevitably lead to increased reliance on contract and adjunct faculty. Indeed, the arguments for removing security of position are based explicitly on a desire by some deans to expand decanal prerogatives in general and the use of such contingent faculty in particular. As has been true at the undergraduate level,<sup>11</sup> such a change is likely to impair the quality of legal education. While contract faculty and practitioner-adjuncts are a valuable asset and enrich the curriculum, relying more heavily on them to teach—and shape—the core curriculum is misguided and troubling. Schools already struggle with adequate training and supervision of adjuncts, some of whom are lacking in teaching experience and skills, even though they may be experts in their fields of practice. Adjuncts usually have full-time jobs. Unlike full-time faculty, they are unable to put in the time and effort required to fully prepare for class, delve deeply into complex doctrinal issues, think about the impact of doctrinal changes on the legal system, develop students' jurisprudential perspectives, or explore innovative pedagogies or assessments. Neither contract nor adjunct faculty are positioned to engage in the long term curricular and assessment planning anticipated by the proposed Outcome Measures and Assessment Standards. Simply put, you cannot replace full time tenure-track and tenured educators with full time lawyers and judges or contract employees and expect the same quality of legal education.

**Impact on Cost of Legal Education.** Proponents of the proposed changes argue that reducing the number of tenured faculty will make law school more affordable. No hard evidence supports this claim. On the contrary, at the undergraduate level, replacement of tenured faculty has not resulted in less expensive tuition.<sup>12</sup> There is no reason to believe the result would be different for law schools.

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<sup>11</sup> In undergraduate education, the research on the use of contingent faculty and its consequences has documented the adverse impact on learning. Audrey J. Jaegar and M. Kevin Eagan, *Examining Retention and Contingent Faculty Use in a State System of Public Higher Education*, *Educational Policy*, Sage Journals Online, available at: <http://epx.sagepub.com/content/early/2010/06/07/0895904810361723.short?rss=1&source=mfc>. (high levels of exposure to part time faculty in the first year of college are consistently found to negatively affect student retention to the second year).

<sup>12</sup> College Board reports that average tuition at 4 year private not for profit colleges increased 6.5% in one year, from 2008-2009. Faculty salaries at these institutions increased 11% over a period of 16 years. *Published Tuition and Fee and Room and Board Charges*, COLLEGE BOARD, [http://www.trends-collegeboard.com/college\\_pricing/highlights.html](http://www.trends-collegeboard.com/college_pricing/highlights.html) See also, Sam Dillon, *Share of College Spending for Recreation is Rising*, NYTimes, July 10, 2010 (reporting on the Delta Project conclusion that money spent on amenities and on administration were greater than money spent on

**Conclusion.** The change from the status quo to a system that likely would result in more contract hires who can be more easily fired in response to budget constraints or programmatic changes is largely irrevocable.<sup>13</sup> Thus, any decision to change accreditation requirements must be made with an eye toward the impact that decision has on the future of the profession. For the reasons noted above, we urge the members of the Standards Review Committee to ensure that changes to Chapter 4 clarify the expectation that most faculty members will be given the opportunity to be considered for tenure and revise the security of position standards to encompass clinical legal faculty.

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instruction.) A sampling of the cost of construction at existing law schools is also revealing: While deans hope to raise much of the money used for such construction, the financial burden is shared by students whose tuition or fees are increased as a consequence.

<sup>13</sup> Carole J. Bland, et al, *The Impact of Appointment Type on the Productivity and Commitment of Full-Time Faculty in Research and Doctoral Institutions*, 77 THE JOURNAL OF HIGHER EDUCATION 89, 90 (2006), (quoting John G. Cross and Edie N. Goldberg, *How Does University Decision Making Shape the Faculty*, 123 New Directions for Higher Education 49, 57 (2003)).