

# SALT EQUALIZER

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## Judicial Nominations: The White House Proposes, the Senate Opposes

*Bob Dinerstein, American University, Washington College of Law*

As I sit down to write this column, the Democratic Convention is about to start, launched by another knockdown-drag out fight between two longtime rivals – no, not the Democrats and Republicans, but the Yankees and the Red Sox! But as important as baseball may be, the consequence for the Republic of the different visions of the federal judiciary that animate the two parties is of incomparably greater moment. Once again, those differences have come into sharp relief in recent weeks, and SALT has been an active participant in the ongoing debate.

After a somewhat long hiatus, the Senate Judiciary Committee and the full Senate recently have been very active on the judicial nominations front. Last week, the Senate failed to vote for cloture on several problematic Court of Appeals nominees: Henry Saad, David McKeague, and Richard Griffin (Sixth Circuit) and William Myers II (Ninth Circuit). Saad's and Myers's nominations had been pending for awhile, while McKeague and Griffin only received Judiciary Committee approval on straight-line party votes of 10-9 on July 20. The cloture vote for Myers was also on July 20, with the votes for the other nominees on July 22,

*Nominations continued on page 2*

## Co-Presidents' Column

*Holly Maguigan, New York University School of Law  
Beto Juárez, St. Mary's University School of Law*



Greetings!

The fall semester begins with all of the promises of a new academic year. We write this in late July, all too aware of the quick passage of the last few days of the summer. We hope that each of you has had a productive summer, with generous provision for recreation as well!

SALT has been extraordinarily active over the summer months. Twenty-nine members of the Board of Directors met in retreat at Northern Illinois University College of Law in May 2004. The retreat provided the Board with an opportunity to consider infrastructure issues first discussed at a retreat of SALT former presidents and co-presidents in October 2003. Dean LeRoy Pernel, the faculty, and the staff of NIU warmly welcomed the SALT Board and allowed us to work productively throughout the retreat. SALT Board member Elvia Arriola and NIU Public Events Coordinator Melody Mitchell went above and beyond the call of duty in handling the logistics of the retreat. We thank NIU for its hospitality.

*Co-Presidents continued on page 2*

## SALT EQUALIZER

The *SALT Equalizer* is a publication of the Society of American Law Teachers and is published quarterly.

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## Co-Presidents:

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In June, SALT, together with the Mexican American Legal Defense & Educational Fund (MALDEF), the Equal Justice Society, and Americans for a Fair Chance issued a study of affirmative action in Texas entitled "Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After *Grutter* and *Gratz*." The report examines minority enrollment at institutions of higher education in the state of Texas and urges Texas to reinstate race-based affirmative action programs in admissions while retaining its program providing for automatic admission to students graduating in the top 10% of their high school class. SALT will continue to monitor affirmative action developments in Texas and in other states, and will soon be releasing a brochure providing guidance to admissions offices seeking to retain or institute affirmative action plans.

The Supreme Court's decisions in *Rasul v. Bush* (permitting detainees at Guantánamo Bay to challenge their imprisonment) and in *Hamdi v. Rumsfeld* (permitting a U.S. citizen captured in Afghanistan to challenge his detention) were welcome affirmations of basic due process rights. Disclosures of the abuses in Iraqi prisons, however, and of the assertions by the executive branch of authority to torture persons in the custody of our government, remind us that vigilance in the defense of basic human rights is always necessary. Raquel Aldana-Pindell (UNLV) and Ronald Slye (Seattle) authored a report for SALT which conclusively rebuts the Department of Justice's assertions of authority to torture and details the dangers such assertions of authority present for members of the U.S. military in the future.

The Third Circuit held oral arguments in July in SALT's lawsuit challenging the

Solomon Amendment. We are grateful for the superb representation provided to SALT in this lawsuit by Heller Ehrman, Jenner & Block, and O'Melveny & Myers.

The other major area of activity this summer has been the preparatory work for SALT's Teaching Conference, to be held at the University of Nevada-Las Vegas on October 15 and 16, 2004. The theme of the conference is "Class in the Classroom." As with prior teaching conferences, the organizing committee has lined up a stellar roster of presenters. Bargain hotel rates are available, and low air fares are available. We hope you will join us for what promises to be an exciting conference that will give you lots of ideas for your teaching.

SALT's Webmaster, Richard Chused (Georgetown), responds immediately to our requests for posting materials on the SALT web site ([www.saltlaw.org](http://www.saltlaw.org)), no matter how unreasonable those requests are. You will find more information regarding all of these SALT activities on the web site, including copies of the reports on torture and on affirmative action in Texas. We encourage you to bookmark the site and to visit it often. Richard will be a Fulbright Scholar in Israel this fall; Nancy Ota (Albany) has agreed to take over Richard's webmaster duties. Thank you, Richard and Nancy!

In our last column, we asked you to contact us if there is an issue you'd like to work on, or an issue you think SALT should be working on. We are delighted that some of you have done so; we will be reporting on some of these initiatives in future issues of the *Equalizer*. We are always eager to hear from you. You can e-mail Holly at [holly.maguigan@nyu.edu](mailto:holly.maguigan@nyu.edu) and Beto at [bjuarez@stmarytx.edu](mailto:bjuarez@stmarytx.edu). We look forward to hearing from you!

Warmest wishes,  
Holly and Beto

## Nominations:

▼ continued from page 1

2004. The close timing of the McKeague and Griffin committee and floor votes strongly supports the view that the Republicans were looking more for a campaign issue (at least with their political base) than presenting nominees whom they thought had a reasonable chance of being confirmed.

Through the tireless efforts of SALT Judicial Nominations Committee Co-Chair Florence Roisman (Indiana University School of Law—Indianapolis), SALT wrote letters opposing Myers and McKeague. We characterized Myers as extremely hostile to, *inter alia*, environmental protection, workers' safety, and Native American rights. As Solicitor of the Department of the Interior under President George W. Bush, Myers has taken extreme positions in favor of development of wetlands and ranch lands, and is a firm supporter of the anti-governmental "Sagebrush Revolution." We opposed Judge McKeague because of his insensitivity to prisoners' rights issues (including the right of female prisoners not to be sexually assaulted by prison guards), and claims of religious indoctrination, and because of his "irascible" judicial temperament.

In addition to the above nominees, the nominations of such troubling judicial candidates as William Haynes (Fourth Circuit), Brett Kavanaugh (D.C. Circuit), and Thomas Griffith (D.C. Circuit) are technically not dead yet. (Haynes was voted out of committee on March 11, 2004; Kavanaugh had a committee hearing on April 27, 2004, but there has been no committee vote; and Griffith has not yet had a hearing.) Haynes, Department of Defense General Counsel, has come under fire for his role in promulgating the Government's policies on the limited rights of enemy



combatants, policies that the Supreme Court rejected as violating due process in *Hamdi v. Rumsfeld*. Kavanagh was President Bush's principal "vetter" of the many right-wing judicial nominations he has presented, and was associate counsel to Ken Starr. Griffith, general counsel of Brigham Young University, practiced law in Washington, D.C., and then in Utah without being a member of the bar in those jurisdictions (he had let his D.C. Bar membership lapse). For the reasons given below, these nominations may effectively be DOA, but past experience suggests that one should be careful not to assume too much about the nominations process.

SALT also has opposed, again through Florence Roisman's efforts, the nomination of Claude Allen, Deputy Secretary of the Department of Health and Human Services, to the U.S. Court of Appeals for the Fourth Circuit. Among other things, Allen has made anti-gay comments and has taken curious positions on the role of litigation in dispute resolution. While it appeared that the Senate Judiciary Committee would vote on Allen's nomination in July, Chairman Orrin Hatch has not yet brought up the matter for a committee vote, in large part because Maryland Senators Sarbanes and Mikulski have complained that Allen, a Virginian, would be taking a seat traditionally filled by a judge from Maryland.

SALT's letters opposing the nominations of Myers, McKeague, and Allen, as well as previous letters of opposition, can be reviewed on the SALT Web site, judicial nominations bar, at [www.saltlaw.org/judicial.htm](http://www.saltlaw.org/judicial.htm).

With the effective end of this congressional session, it may be worthwhile to place the recent nominations battles in context. While Democratic opposition to such high-profile nominees as Miguel Estrada (who later withdrew), Priscilla Owen, Carolyn Kuhl, Janice Rogers Brown, Charles Pickering, Sr., and William Pryor (the last two appointed as recess appointees

by President Bush) has dominated the headlines, the reality is that, unsurprisingly, the Senate has confirmed the vast majority of the Bush nominees, including some very conservative and problematic judges (the most recent of whom was J. Leon Holmes for the U.S.

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*"[M]any conservative judges with strong connections to the Federalist Society and deep skepticism about civil rights . . . , reproductive rights, labor and employment rights, and environmental protection now have lifetime appointments to the federal bench, and will be influencing the development of our federal law for years to come."*

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District Court for the Eastern District of Arkansas). According to statistics furnished by the Alliance for Justice in late July, the 108th Congress has confirmed 98 judges (18 for the Courts of Appeals, 79 for the District Courts, and one for the Court of International Trade), and the 107th and 108th Congresses combined have confirmed 198 judges. Only two judges have been rejected (Pickering and Owen by the 107th Congress), but both were re-nominated in the 108th Congress, and Pickering is on the Court of Appeals as a

recess appointment. Only two nominees, including Miguel Estrada, have withdrawn. All but 11 nominees have had committee hearings, in marked contrast to the Republican practice of denying hearings to a number of President Clinton's judicial nominees. The Democrats have defeated cloture votes on Kuhl, Owen, Brown, Estrada (prior to his withdrawal), and Pryor (later appointed as a recess appointee), in addition to the flurry of failed cloture votes in late July described above. But many conservative judges with strong connections to the Federalist Society and deep skepticism about civil rights (for people of color, women, gays and lesbians, and people with disabilities, among others), reproductive rights, labor and employment rights, and environmental protection now have lifetime appointments to the federal bench, and will be influencing the development of our federal law for years to come.

The Senate is now in recess, and will not be back in session until after Labor Day, when it will meet until October 1. In an election year, and with pressing business regarding the 9/11 Commission Report (as well as needed action on the various appropriation bills that are pending), it is questionable whether there will be any further confirmations of controversial nominees such as those discussed above. But the politics of judicial nominations may lead to additional cloture votes (which the Republicans are likely to lose) to keep the political fires burning. Obviously, the results of the presidential and Senate elections will have a major effect on the nature of SALT's judicial nomination activities next year, as will the likelihood of multiple Supreme Court vacancies during the next presidential term. As always, we welcome the contributions of SALT members to our efforts to convey SALT's and its members' views on judicial nominees.



## Excerpts from July 7, 2004 Letter on Solomon Amendment Litigation

To SALT members from Kent Greenfield, Boston College Law School, and Sylvia Law, New York University School of Law

[Editor's Note: In September 2003, SALT and a coalition of two dozen law schools called the Forum for Academic and Institutional Rights ("FAIR") filed suit against the Defense Department seeking to enjoin the Solomon Amendment, the common name for the statute that requires law schools and other academic institutions to allow military recruiters on campus notwithstanding the military's discrimination against gays and lesbians. If law schools are found out of compliance, the entire parent university can lose all defense department funding. SALT and FAIR, along with plaintiffs representing student groups and a few individually named law professors and students, alleged in their complaint that the Solomon Amendment violates the First Amendment rights of law schools by forcing them to use their resources to further speech that they abhor.]

We wanted to give a report on the Third Circuit oral argument in *FAIR v. Rumsfeld*, which was held Wednesday, June 30, in Philadelphia. The panel consisted of Judge Ambro and Senior Judges Stapleton and Aldisert, the latter appearing by way of video conferencing from Santa Barbara. Josh Rosenkranz [of Heller Ehrman White & McAuliffe] argued on our behalf, and Paul Smith and Walter Dellinger argued on behalf of plaintiffs' amici. Arguing on behalf of the government was Greg Katsas, a Deputy Assistant Attorney General who heads the Appellate Branch of the Civil Division in the Justice Department. Arguing for the government's amici was private attorney Howard

Bashman. Present in the courtroom were Kent Greenfield (FAIR President), Sylvia Law (FAIR Vice President and past SALT President), Nicholas Georgakopoulos (FAIR Treasurer), and Paula Johnson (past SALT Co-President), along with approximately 25 students and summer associates.

In summary, it is impossible to predict how the court will rule based on the judges' questions. It seems clear that Judge



Tim Wei and Josh Rosenkranz of Heller Ehrman at the FAIR v. Rumsfeld argument before the Third Circuit.

Aldisert was hostile to our claims. He appeared unwilling to apply strict scrutiny, asking only whether we would win under *O'Brien* [*United States v. O'Brien*, 391 U.S. 367 (1968)] if the court applied intermediate scrutiny. He also evidenced a significant amount of respect for the military's prerogative, and doubted that the "average" person would attribute the views of the military on "sexual preference" to the schools that were forced to allow recruiters on campus. Judge Ambro, who presided, asked tough questions of both Josh and the government, focusing especially on whether the government had met its evidentiary obligation to show that, even under intermediate scrutiny, the statute's infringement on speech rights was no more than necessary. Although Judge Ambro clearly understood our comparison of the First Amendment infringements in this case to those in *Dale* [*Boy Scouts of*

*America v. Dale*, 530 U.S. 640 (2000)] and *Hurley* [*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)], he did not appear willing to extend the holdings in those cases to our claim. Although Judge Stapleton asked questions of the attorneys in the two prior cases, he was completely quiet throughout our argument.

In more detail: After Josh's excellent opening, in which he argued that this case is about whether law schools are free to shape their pedagogical environments, Judge Ambro asked whether this case was about compelled speech or freedom of association. Josh answered that these issues overlapped here, and started to explain the First Amendment interests involved. Judge Aldisert interrupted, saying that this was "not a First Amendment case" at all but a case about Congress's spending power, the Necessary and Proper Clause, and the

power to raise armies. Josh of course explained that this was an unconstitutional conditions case rather than a spending power case, but Judge Aldisert did not look convinced.

Josh pointed out that the key conflict here was whether the exclusion of recruiters was speech or conduct. Judge Ambro fixated on this conflict by querying Josh about why this was speech, citing *Spence v. Washington*, 418 U.S. 405 (1974). Was the exclusion intended to convey a message and was it understood as such by the relevant audience? Judge Aldisert was troubled by this as well, asking Josh whether the average person on the street would look at military recruiters as embodying a message of discrimination on the basis of "sexual preference." How many people think of the military that way, asked Judge Aldisert, perhaps "1 in 1000"? Josh answered that the question is



not what the average person believes but what the law schools and the students and faculty believe. Josh argued that this case is like *Hurley* and *Dale*, in that the law schools have a right to exclude speech that muddles their message and a right to exclude someone who conveys a message they abhor.

Judge Ambro seemed to be wrestling with the *Hurley* and *Dale* analogies throughout all the arguments. He asked Josh whether the First Amendment rights were as directly implicated in this case as in *Hurley* and *Dale*. Later, in questioning the government's lawyer, he suggested a "rule of reason" or "common sense" exception to *Hurley* or *Dale* that would allow courts to not apply strict scrutiny when the effect on speech is less severe than in those cases. These questions and others asked by Judge Ambro made it appear that he was not convinced that this case deserved strict scrutiny.

Nevertheless, Judge Ambro did seem to believe that the government might not win even under the intermediate scrutiny test of *O'Brien*. Judge Ambro asked both Josh and the government attorney to go through the *O'Brien* factors. Josh pushed the court to recognize that *O'Brien* should not apply since the statute is not unrelated to expression, as is required by *O'Brien*. Also, when Judge Ambro asked about the evidentiary point, Josh emphasized that there is no evidence that there is a compelling interest in recruiting on campus.

Paul Smith used his ten minutes of allotted time to add to the constitutional arguments. He answered Judge Aldisert's concerns by saying that the fact that this is a funding condition case should not have any impact on the analysis, since the funding coercion is so severe that the analysis should be the same as if the statute was a blanket requirement that military recruiters be allowed on campus.

Paul also made the point that this case is about compelled speech – the Solomon Amendment forces law schools to encourage students to consider the military as a career. When pressed by Judges Aldisert and Ambro about the *O'Brien* analysis, Paul argued that even under *O'Brien* the government has the burden of presenting evidence that the restriction on speech advances a government interest. Here, Paul made clear, the government failed to

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*"This case is about  
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[T]he Solomon  
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everything the First  
Amendment stands  
for."*

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present any such evidence. Walter Dellinger spent his five minutes of allotted time to argue that the Solomon Amendment is either satisfied with the law schools' equal application of neutral policies, or that the law requires law schools to treat the military specially. If the latter, the

constitutional arguments are made stronger.

During the government's argument, Judge Ambro asked the government to describe why strict scrutiny was not appropriate. The government answered that the Solomon Amendment was about conduct rather than speech, and that the statute was not viewpoint-based. If the government is targeting conduct rather than speech, *O'Brien* should apply. Ambro pushed the government to explain why *Hurley* and *Dale* did not apply. Katsas responded that here, unlike in *Hurley*, the law schools are conduits for speech rather than speakers themselves. "No one" would attribute to law schools the message of those who come onto campus once or twice a year. And unlike in *Dale*, the presence of the recruiters does not go to the heart of what the law schools do.

In applying *O'Brien*, Ambro pushed both attorneys for the government side to point to any evidence in the record that the statute advanced an important government interest. The government attorneys replied in two ways. First, they suggested that "common sense" was enough to satisfy their evidentiary burden. They argued that, based on AALS policy, every law school in the country would exclude military recruiters if the Solomon Amendment were enjoined and that that would have a negative effect on recruiting. (Josh, in his rebuttal, strongly contested the government's assertion that most or all law schools would completely exclude recruiters.) The government's second attempt to show evidence of a government interest was to point to one of the letters sent to Yale by a senior DOD official, explaining why it was necessary for military recruiters to have access to the campus and to the services of the career offices of the law schools. Judge Ambro seemed particularly troubled with the government's putative evidence.

*Solomon continued on page 10*



## Lawsuit Against UND Law Clinic and Professor Dismissed with Prejudice

Laura Rovner, University of Denver College of Law

I am very happy to report that Judge Ralph Erickson of the U.S. District Court for the District of North Dakota has dismissed with prejudice the lawsuit filed by Martin Wishnatsky against the University of North Dakota's Clinical Education Program and me personally.

As some of you may recall, Wishnatsky sued the clinic and me after we refused to represent him in an action he wished to bring challenging the constitutionality of the placement of a statue of Themis, the Greek goddess of justice, on top of the Grand Forks County Courthouse. Wishnatsky claimed that the statue's placement on the court building constituted an "establishment of the pagan religion." Prior to his request to us for representation, Wishnatsky had repeatedly and publicly criticized both the program and me for representing five clients who were (and still are) challenging the constitutionality of the placement of a Ten Commandments monument on city government property. Much of his criticism appeared in a local newspaper.

We declined Wishnatsky's request for representation on two grounds. First, at the time of his request, the clinic was not taking on new cases. Second, in any event, our ethical obligations required that we turn down his request, as his persistent, antagonistic criticisms of the clinic and me had created a conflict of interest that would make it impossible to establish an effective attorney-client relationship. Wishnatsky then filed suit, claiming that our refusal to represent him violated his First Amendment rights. He alleged that we had unconstitutionally denied him a "valuable government benefit" — pro bono representation by a governmental entity — on the basis of his engaging in constitutionally protected public speech.

The North Dakota Attorney General's office represented the clinic and me (I was sued in both my official and personal capacities), and late last spring, filed a Motion for Judgment on the Pleadings pursuant to F.R.C.P. 12(c). SALT and CLEA (the Clinical Legal Education Association) filed an amicus brief in our support. The brief was drafted by Claudia Angelos and her students at NYU's Civil Rights Clinic. The AALS filed an amicus brief supporting us as well.

Echoes of arguments made in both of the amicus briefs appear in the court's five-page opinion dismissing the suit. The opinion expressly states that "an attorney should not be compelled to represent a client when the attorney believes [such representation] would violate the attorney's ethical obligations."

Many thanks to the entire SALT community for your support, along with special appreciation to Claudia Angelos, the Political Interference Committee (Bob Kuehn, Peter Joy and Bridget McCormack), Larry Spain, CLEA, and the AALS Section on Clinical Education.

## SALT Members Encouraged to Attend October Bar Exam Conference

Eileen Kaufman, Touro Law School

SALT members are encouraged to attend a conference entitled "Examining the Landscape of Legal Education and Bar Admissions," to be held on October 1-2, 2004, at the Inter-Continental Hotel in Chicago. This conference was planned by the "Joint Working Group," whose members were designated by the AALS, the ABA Section on Legal Education and Admissions to the Bar, the Conference of Chief Justices, and the National Conference of Bar Examiners.

**Examining the Landscape of Legal Education and Bar Admissions**  
October 1-2, 2004  
Inter-Continental Hotel, Chicago

Among the many subjects to be examined at this conference are two that are of particular concern to SALT. One panel will explore licensing alternatives to the bar exam, a subject explored in some detail at SALT's October 11, 2003 workshop. (See November 2003 *Equalizer*). The panel is scheduled for Saturday, October 2, 2004, at 1:45 p.m. Scheduled speakers include Larry Grosberg, John Law, Sophie Sparrow, and Thomas Zlaket. Mary Kay Kane will moderate the panel. Immediately following the discussion of licensing alternatives will be a panel designed to evaluate the alternatives presented. Members of that panel are Marva Brooks, Bucky Askew, Elliott Milstein, Dick Morgan, and Jerry VandeWalle, with Randy Shepard moderating. It is particularly important for SALT members to be present to participate in

*Bar Exam Conference continued on page 10*



## "Class in the Classroom": SALT's Teaching Conference to be Held in Las Vegas on October 15-16

Tayyab Mahmud,  
John Marshall Law School

On October 15-16, 2004, SALT will sponsor a teaching conference to address legal issues relating to social class and political economy. The conference, entitled "Class in the Classroom," will be held at the William S. Boyd School of Law, University of Nevada, Las Vegas.

SALT teaching conferences, held about once every two years, are much-awaited events for members and friends of SALT. These conferences eloquently reaffirm that SALT, before anything, is a community of teachers, and that excellence in legal education remains a primary focus of this community. SALT teaching conferences bring into sharp relief timely issues of justice, diversity, peace and academic excellence. Through the prism of the selected themes, conference participants explore pedagogical techniques, curricular designs, and teaching materials that may help to bring law teaching more in tune with the values and priorities of SALT and its members.

The "Class in the Classroom" theme of the 2004 conference will offer participants a unique opportunity to explore the need for and modes of integrating questions of class and political economy in legal education. The response of the members and friends of SALT to the proposed theme has been very enthusiastic. Scores of people have come forward and offered to spearhead discussions of specific questions within the scope of the general theme of the conference.

As of the end of July, topics for plenaries, panels and workshops include:

- "What is Class? Intersections of Class, Race and Gender"
- "Class and Post-*Grutter* Affirmative Action"
- "Class and the Legal Academy"
- "Class and Las Vegas"
- "Class and American Legal History"
- "Class and Constitutional Law"
- "Class and the Continuing Assault on Civil Rights"
- "Globalization and International Business Transactions"
- "Class and Contracts"
- "Corporate Responsibility"
- "Labor and Employment"
- "Poverty and Criminal Justice"
- "Housing and Land Use"
- "Class and Clinical Legal Education"
- "Elections and Voting Rights" and
- "Technology and Justice Pedagogy."

If you would like to participate in any of the panels/workshops listed, or would like to propose one, please contact any of the members of the Teaching Conference Committee listed at the end of this article.

For conference attendees' accommodations, special rates have been arranged at

two hotels: the LUXOR, a union-approved hotel on the Vegas Strip, and AMERISUITES, a non-gaming hotel within walking distance of the law school. The Luxor rates are \$69.00 for Thursday, October 14th, and \$119.00 for Friday, October 15th, and Saturday, October 16th. To reserve accommodations at the Luxor, call 1-800-288-1000 and refer to the group name ("SALT Teaching Conference") or group code ("TSALT4").

**Class in the Classroom**  
October 15-16, 2004  
William S. Boyd  
School of Law,  
University of Nevada,  
Las Vegas

Luxor reservations must be received by September 14th to secure these rates.

AMERISUITES rates are \$109 for a king or two doubles in one room, and a pull-out sleeper couch in the living area. To reserve accommodations at Amerisuites, call 1-702-369-3366 and refer to the SALT group rate. Amerisuites reservations must be received by August 30th to secure this rate.

The SALT Teaching Conference is open to all legal educators. The conference registration deadline is September 15, 2004. Registration materials are being mailed and are also accessible at SALT's Web site, [www.saltlaw.org](http://www.saltlaw.org).

Please mark your calendars now and plan to attend this informative and important conference. We are very excited about the conference and hope to see many of you there. Members of the SALT Teaching Conference Committee, who deserve our thanks and appreciation for putting together such an exciting conference, are: Patricia Falk, Emily Houh, Joan Howarth, Tayyab Mahmud (Chair), Nancy Ota, Alfreda Robinson and Bob Seibel. For further information, check the SALT Web site, or e-mail Tayyab Mahmud: [7mahmud@jmls.edu](mailto:7mahmud@jmls.edu).



## Retreat and Advance: A Report on the 2004 SALT Board Retreat

*Joan Howarth, Boyd School of Law, University of Nevada-Las Vegas*

Most SALT Board meetings seem to be conducted in stolen time, perhaps in the wee morning hours at an AALS meeting, or piggybacked onto some other intense and engaging event. The overnight board retreat in DeKalb, Illinois in late May offered a rare opportunity to slow down, discuss fundamental principles, recount important SALT history, and socialize, although again too much work was squeezed into too little time.

The retreat was a direct outgrowth of the SALT former presidents' retreat that was held in Minnesota in October 2003. The retreat committee — David Brennen, Elvia Arriola, and Joan Howarth — worked with SALT Co-Presidents Beto Juárez and Holly Maguigan on how best to use our precious time together to advance several key goals.

One of the primary goals was to re-visit and perhaps refine the SALT mission. SALT has been stretched thin. Pursuing an ambitious range of significant projects and maintaining a vibrant national organization while relying on volunteer efforts is a continuing challenge, and the retreat was a time to assess our direction and our ambitions. The Board met in small groups and as a whole, considering the extent to which various possible SALT projects fit within or outside our mission. We finally reached surprising and satisfying consensus about SALT's mission as an organization of progressive law professors working for justice in a wide array of arenas.

Another primary goal was to chart out the work that SALT will do in the next year. We took time at the retreat to meet with our committees, and then report to the Board as to what would be done by each committee, and when, in the next year. By the end of the retreat, the walls were covered with a messy timeline of all the work to be done.

We also evaluated whether certain SALT projects should be dropped or maintained. A wide consensus supported maintaining SALT's teaching conferences. We generated a number of ways to collaborate more effectively with sister organizations that did not exist during SALT's early years, including CLEA and Lat-Crit. We re-affirmed our commitment to the SALT salary survey, and discussed ways to make it even better. We also re-affirmed our commitment to speaking out on judicial nominations, and discussed ways to expand our influence. We considered various ways to improve our infrastructure, such as electronic voting and a change in the timing of the elections. We planned for a memorable SALT dinner in January in San Francisco.

We were inspired by reports of SALT's projects, including the litigation challenging the Solomon Amendment, the "Class in the Classroom" Teaching Conference to be held in Las Vegas in October, and SALT's post-*Grutter* efforts to support affirmative action. We voted to co-sponsor a report on the Texas Ten Percent Plan with MALDEF, the Equal Justice Society, and Americans for a Fair Chance. (The full report can be found on the SALT Web site.)

We also watched the Lakers beat the Timberwolves, marveled at the corn fields, celebrated Beto's birthday, and enjoyed the wonderful hospitality of the law school at Northern Illinois University. Perhaps the real report on the retreat is not these few paragraphs, but is instead the articles in this and future issues of the *Equalizer*, and all the information at [www.saltlaw.org](http://www.saltlaw.org) describing SALT's advances in the coming months.



*Joan Howarth and Michael Rooke-Ley*



*Elvia Arriola and Tayyab Mahmud wish Beto Juárez a happy birthday*



*Margaret Martin Barry and Paula Johnson*



*Nancy Ota, Eileen Kaufman, and Deborah Post*



## Reflections on the SALT Board Retreat

Carol Chomsky, University of Minnesota Law School

Almost ten years ago, when I joined the Board of SALT, my first Board meeting was a two-day retreat held at a Zen retreat facility outside San Francisco. I earned my way onto the Board by helping to plan and lead the 1994 SALT teaching conference in Minneapolis, but I knew few of the people on the Board when I arrived for the meeting. At our first session, the walls were covered with butcher block paper with markings representing a time-line starting in 1972, when the idea for SALT was born. Each of us was asked to take a marker and write on the time-line the date we first became involved with SALT and to talk a bit about how and why. Many of the Board members had long histories with SALT, but there were at least a few of us who entered the picture only at the very end of the line then written. But it didn't really matter how new or "old" we were; the stories of how and why each one of us connected with SALT drew us together and helped make us into a community.

And so it was in 2004 when we gathered for a two-day retreat in DeKalb. No walks on the scrubby beach this time, but there we were, sitting in a circle, creating a time-line of our association with SALT, laughing over stories, sharing our anxieties and uncertainties as well as our hopes and dreams. This time my spot on the timeline was further back, of course — *much* further back. So many new faces in what seems like such a short time! But the spirit of SALT was in the room, as it was a decade ago. What draws all of us, relative newcomers and hangers-on alike, is the sense of community, the commitment to causes, and the passion of our involvement.

Sometimes, I admit, I wondered whether time really *had* moved. As we talked in DeKalb about SALT's mission (What is it? How should we articulate it? Is it changing? Is it too broad? Can we do all these things?), I had a feeling of "deja vu all over again." Didn't we have this conversation four years ago at the retreat in Santa Fe? And a year before that when the Board created a list of "Explore" topics and "Goals"? And a few years before that, at the San Francisco retreat? Well, yes and no. As the conversation progressed, I realized that we were not having the same conversation; we were having a different conversation about the same issues. Different not because we were suggesting fundamental shifts in SALT's mission and agenda, but because *this* Board needed to have the mission and goals conversation to re-commit together to who we are, what we stand for, and where we want to go. To become more than a set of individuals elected to a Board. To become a community.

Does that mean that we always agree, that our Board meetings run smoothly, that we have no controversies? Hardly! My own involvement with SALT was born in the midst of a stressful dialogue on SALT's agenda and the meaning of its commitment to diversity that erupted at the 1994 teaching conference. The retreat in DeKalb, like all other SALT meetings, produced its share of debate about hard issues. But as Margaret Montoya reminded us on our final day together, at just the moment when the level of disagreement began to seem uncomfortable, it is our ability to listen to each other and talk through those moments that is SALT's greatest strength. It is, indeed, among the things we do best. It's certainly part of what keeps me, and others, active and engaged.



Paula Johnson, Elvia Arriola, and Carol Chomsky



Board members at work



SALT Co-Presidents Beto Juárez and Holly Maguigan



Nancy Ehrenreich and Jane Dolkart



Margaret Montoya and Natsu Saito



Board members discuss SALT's mission



## Bar Exam Conference:

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this discussion in order to ensure that the full range of competing ideas is identified and explored.

A second subject of special concern to SALT is one exploring the “cut score” debate, which will be held on Saturday, October 2, 2004, at 9:30 a.m. Panelists who will be commenting on the efficacy, wisdom, and effect of increasing the passing score on the bar exam are Michael Kane, Marcia Mengel and Carol Chomsky. John Sebert will serve as moderator. SALT has played a leading role in critiquing the alleged need for increasing the passing score, as well as in critiquing the methodology developed by Stephen Klein, who has offered support in many states regarding efforts to increase their passing score.

Among the other subjects to be explored at the October conference are the role of law schools and boards of law examiners in assessing minimal competency, the purposes of legal education and the bar exam, examination design for law schools and bar boards, grading in law schools and on the bar exam, and law school assessments. SALT members clearly have much to contribute and we therefore urge you to attend the conference and participate actively. Members in the Chicago area are particularly encouraged to attend.

The National Conference of Bar Examiners (“NCBE”) is serving as “secretariat” for the conference. Questions about registration should be directed to Debra Martin (dmartin@ncbex.org) or Myra Hajny (mhajny@ncbex.org) at the NCBE. Alternatively, questions can be directed to SALT member Roberto Corrada (rcorrada@law.du.edu), who served as a member of the Joint Working Group.

## Solomon:

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In Josh’s rebuttal, he emphasized that the purpose of the statute was indeed about speech and viewpoint. The legislative history of the amendment was to send a message to “certain law schools.” Judge Ambro pointed out that the DOD had initially opposed the bill (evidently, Judge Ambro thought this fact made the government’s evidentiary arguments less persuasive).

Josh also again answered Judge Aldisert’s question about how few people would attribute the views of the military recruiters to the law schools themselves. Josh cited *Wooley v. Maynard* [430 U.S. 705 (1977)], reminding the court that a person is entitled to block out the state motto on a license plate, even if few would attribute the motto’s views to the typical driver. Josh summed up by saying that the Solomon Amendment “flies in the face of everything the First Amendment stands for.”

*[Editor’s Note: Past SALT Co-President Paula Johnson, who was present at the argument, encouraged SALT members to feel optimistic about the outcome, and proud of the effort put into the case, saying, “The judges are inscrutable. We don’t know what they’ll do, but if they do rule against us, it’s not because our cause is not right and just – it is – but because they did the wrong thing. We have fought hard, and we’ll continue to fight the good fight.”]*

## SAVE THE DATE!

**SALT Mentoring Program  
at the AALS Annual Meeting  
San Francisco, California  
January 5, 2005**

For the fourth year in a row, SALT will be hosting an event of special interest to new law teachers at the AALS Annual Meeting. This year’s program will be held on Wednesday, January 5, and is being co-sponsored by the Equal Justice Society.

The focus of the event is progressive scholarship and its intersections with activist lawyering. The Equal Justice Society will be presenting ideas on the development of a web-based resource for progressive scholars, and SALT representatives will address methods for achieving success.

Among the topics to be discussed are how to find and utilize mentors and how to collaborate or connect with attorneys engaged in activism.



## About SALT

The Society of American Law Teachers (SALT) is a community of progressive and caring law teachers dedicated to justice, diversity, equality and academic excellence. Since SALT was first conceived in 1972, our membership base has grown to include several hundred law professors and administrators. We aim to make the legal profession more inclusive, enhance the quality of legal education, and extend the power of law to underserved individuals and communities. We envision a future in which law schools embrace students and faculty from diverse backgrounds who work together to develop a more just conception of law, and in which the legal profession extends meaningful

access to justice to all sectors of our society and serves as a clarion voice for justice and equality.

SALT is committed to efforts to achieve affirmative action in higher education. In addition to maintaining a high level of involvement in impact litigation meant to further that goal, SALT has been very active in examining and decrying the impact of bar examinations, the LSAT, and magazine rankings on legal education and the composition of both our student bodies and the bar itself.

SALT's enormously popular teaching conferences are exciting, engaging, irreverent and very practical. The conferences provide opportunities to learn and exchange ideas about teaching techniques and methods in settings that are designed

by and for law professors who are committed to making a difference in their students' lives. Our Pre-Tenure Mentoring Committee, which presents the New Teachers' Workshop during the AALS annual meeting, offers pre-tenured professors ongoing support for their scholarship and classroom teaching, and insight into workplace politics. SALT's annual Public Interest Retreats provide students, teachers and practitioners with the opportunity to educate one another on public interest law issues and to forge new communities of progressive lawyers and legal academics. Our gatherings create an often much-needed sense of belonging and community.

You can find out more about SALT at [www.saltlaw.org](http://www.saltlaw.org).

Please join us!

## Society of American Law Teachers

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