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# THE LEGAL MEANING OF ACADEMIC TENURE IN TENNESSEE PUBLIC HIGHER EDUCATION AS INFLUENCED BY STATE AND FEDERAL COURT DECISIONS

A Dissertation

Presented for the

Doctor of Education

Degree

The University of Tennessee, Knoxville

Delano R. Phelps

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ABSTRACT

The purpose of the study was to determine the legal meaning and ramifications of academic tenure in Tennessee public higher education. The study was viewed primarily from the administrator's concern with the objective of preventing litigation or being able to successfully defend litigation should it develop. The study was also intended to inform faculty members of their rights, responsibilities, and restrictions surrounding tenured versus nontenured status.

Academic tenure in Tennessee public higher education, as in most states, is authorized through powers delegated to the governing boards by the Legislature. Tenure is embodied in governing board and institutional policies, constitutional provisions, and precedent established through custom. The ultimate interpretation of these provisions in conjunction with legitimate state interests rests upon the courts.

The legal meaning of academic tenure was sought through appellate court opinions from throughout the country. The topical method of legal research was used to compile a bibliography of cases concerning tenure. The search emphasized court decisions postdating June 29, 1972, when the United States Supreme Court rendered two opinions concerning faculty rights in institutions of public higher education.

All cases were Shepardized to determine their status as relevant case law. Issues of relevant cases were grouped by subject and presented in narrative form.

The results of the study indicated that most tenure disputes from higher education are heard in federal courts and are based upon the First or Fourteenth Amendment of the United States Constitution. The judiciary was supportive of the concept and general practices of academic tenure and justified the support primarily through the preservation of academic freedom, a special concern of the First Amendment. The judiciary viewed academic freedom as being absolutely essential for the continuity of our free society. The tenure status of a professor is irrelevant in a First Amendment litigous proceeding. The study recognized some problems inherent in tenure systems, but no effective substitute which would ensure academic freedom was found.

A pervasive concern of the courts in a proceeding contesting a termination by either a tenured or nontenured faculty member is the due process requirement and/or the due process hearing. The Fourteenth Amendment requires that the property attribute of academic tenure be recognized and that an adequate hearing precede any deprivation of that property right. The liberty provision of the Fourteenth Amendment applies equally to tenured and nontenured faculty members and that protective mechanism is activated when the administration or governance restricts a faculty member's social or

professional mobility through, for example, releasing disparaging information about the professor to the public. The basis feature of academic tenure is the property attribute recognized by the United States Constitution.

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# CHAPTER I

## FORMULATION AND DEFINITION OF THE PROBLEM

### Introduction

Tenure systems in the public sector of education are usually authorized by statute, while tenure in the private sector is created by the individual institution. A court finding that a discharge was contrary to the tenure plan of a public institution is generally followed by a court order to reinstate those involved; such a discharge is beyond the governing board's authority and contrary to state law. Remedial claims are often based on the deprivation of property rights clause of the Fourteenth Amendment.[1] In a private institution, however, any right to tenure is at most contractual. The principle that courts will not order specific performance of personal service contracts is likely to prevail even when monetary damages do not provide an adequate remedy. Thus tenure systems are more binding upon public institutions than on private institutions.[2] Since tenure is a provision arising from state statutes or from policies of

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[1]Kern Alexander and Erwin S. Solomon, College and University Law (Charlottesville, VA: The Michie Company Law Publishers, 1972), p. 356.

[2]Commission on Academic Tenure in Higher Education, Faculty Tenure (San Francisco: Jossey-Bass Publishers, 1973), p. 161.

private institutions, its definition varies between states and between private institutions.[3]

Kenneth E. Eble offered two arguments supporting the claim that tenure affects teaching adversely. First, he maintained that security generates incompetence or facilitates decay; secondly, teaching suffers when an institution is hindered from dismissing its incompetents.[4] Opponents of tenure cite instances of professors past their prime riding the system to retirement while eager, competent young people are denied employment. For example, less than half of the 5,094 persons earning Ph.D.'s in English and foreign languages in 1977 were able to obtain full-time teaching positions. Each of the 375 job openings listed by the Modern Language Association in October, 1977, generated responses from 100 to 500 applicants.[5]

The 1977 amendments to the Age Discrimination in Employment Act of 1967 prolonged retirement to age 70. Commending July 1, 1982, this Act will include tenured

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[3]Clark Byse and Louis Joughin, Tenure in American Higher Education (Ithaca, NY: Cornell University Press, 1959), p. 133.

[4]Kenneth E. Eble, "Tenure and Teaching," The Tenure Debate, ed. Bardwell L. Smith (San Francisco: Jossey-Bass Publishers, 1973), p. 99.

[5]"Those Doctoral Dilemmas," Time, CXI (January 9, 1978), 57.

college professors. This retirement age extension may cause some legislatures, governing boards, and administrators to rethink their tenure policies.[6]

Collective bargaining could produce further stagnation in the professoriate. Since the property attribute of tenure provides some protection to previously tenured professors, collective bargaining could result in the establishment of policies which exclude probationary faculty from achieving tenure. Such probationary faculty would have no legal recourse since they have no property right in their employment.[7]

Tenure may not be as problematic as it appears nor as meaningful as it once was. The source of possible stagnation in the professorial ranks may have been caused by weak administration rather than by instructional personnel. Administrators are slow to dismiss troublesome or incompetent faculty members, and the tenure aspect is used as an excuse. Administrators can assign incompetents to undesirable positions or withhold salary increases. In the inflationary economy of the 1970's, the faculty member who does not

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[6]Thomas J. Flygare, "Mandatory Retirement Is Fading Fast; Will Tenure Be Next?" Phi Delta Kappan, LIX (June, 1978), 711.

[7]Arthur P. Menard, "May Tenure Rights of Faculty Be Bargained Away?" The Journal of College and University Law, II (Spring, 1975), 257.

receive periodic salary increases is economically forced to leave the institution.[8]

The justification for tenure has long been debated within and without the academic community. Arguments for perpetration of the tenure system have included the unique nature of academics, preservation of academic freedom, and compensation for low-paying positions. These arguments are being rebutted based on the changing nature of higher education. The increasing degree of mobility and cooperative efforts between the university and other institutions of business, education, and government have lowered the walls between the academic community and the outside world. Secondly, it is generally accepted that academic freedom applies to all faculty, not just to tenured faculty. Lastly, the level of remuneration for faculty has greatly increased. Added to academic annual salary are summer vacation for leisure, additional income, or professional advancement, consultant fees, and funded opportunities for travel.[9]

What purpose does tenure serve for the institution? Tenure provides the institution with an increased expectation

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[8]Barry M. Richman and Richard N. Farmer, Leadership, Goals, and Power in Higher Education (San Francisco: Jossey-Bass Publishers, 1976), p. 146.

[9]Robert Nisbet, "The Future of Tenure," Change, V (April, 1973), 28-29.

that faculty necessary for the continuance of existing programs will be available year after year. A tenured faculty member is less likely to enter the job market seeking a new position than is one who is nontenured.[10] Through judicious use of the tenure policy and realistic long-range planning, an instution of higher education could create a stable nucleus of competent tenured faculty in each department. Appointment and/or termination of probationary faculty could adjust to enrollment fluctuations and provide a pool of experienced individuals from which tenured positions could be filled.[11] Unfortunately, many universities have been neither judicious in their use of tenure nor realistic in their planning.[12]

A related question is the extent to which tenure may restrict an educational institution in its restructuring or discontinuing of academic programs which cause the displacement of tenured faculty. It is well established that tenure does not provide a guarantee against institutional change. Typical tenure procedures provide that tenured faculty may

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[10]Iona L. Perry, "Suppose We Lost Tenure?" Educational Leadership, XXXV (December, 1977), 184.

[11]Kent G. Alm, et al., "Managing Faculty Reductions," The Journal of Higher Education, XLVIII (March/April, 1977), 154-57.

[12]George W. Bonham, "The Carbondate Disease," Change, VI (May, 1974), 11.

be terminated for justifiable reasons which include the American Association of University Professors' recommended bases of financial exigency, discontinuance of a program or department, or for medical reasons.[13]

The one advantage of tenure which most justifies the system is academic freedom. If courses and methods are not viewed critically, they can quickly become obsolete in our rapidly changing society. In many institutions this freedom can only be guarded with a tenure system. The various disadvantages, serious as they may be, are the costs which society must incur in order to secure the great benefits of academic freedom.[14] However, the concept of academic freedom has complicated the procedure to be used in terminating nontenured faculty.[15] Shulman stated that "critics of the tenure system do not dispute the need for academic freedom,

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[13]Ronald C. Brown, "Tenure Rights in Contractual and Constitutional Context," Journal of Law and Education, VI (July, 1977), 286.

[14]Fritz Machlup, "In Defense of Academic Tenure," Academic Freedom and Tenure: A Handbook of the American Association of University Professors, ed. Louis Joughin (Madison: The University of Wisconsin Press, 1967), p. 326.

[15]W. O. Schultz, II, "Nontenured Faculty: Current Legal and Practical Problems in Connection with Nonrenewal of Such Appointments," The Journal of College and University Law, I (Fall, 1973), 80.

but they contend that the two can be separated and that academic freedom can be protected by other means."[16]

It is generally thought that the idea of academic freedom as we now view it originated in Germany during the nineteenth century. Academic freedom allows the professor to do independent research and convey his findings to his students without fear of retribution from higher authority. The greatest difference between academic freedom in the United States and its forerunner in Germany arises from the fundamental differences in individual rights. In Germany the freedom to do uninhibited research and to teach accordingly was extended only to faculty in the university. In the United States the individual freedoms granted by the Constitution guarantee all persons similar freedoms. Thus constitutionally the professoriate has the same freedom of speech as any other citizen.[17] In recent years the courts have granted all instructional personnel in education the full protection of the First Amendment, thus removing one of the major reasons for the existence of tenure.[18]

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[16]Carol H. Shulman, "The Tenure Debate," Research Currents (Washington, D.C.: ERIC Clearing House on Higher Education, 1971), ERIC Document ED 054 391.

[17]Alexander and Solomon, op. cit., p. 342-43.

[18]Flygare, loc. cit.

A basic goal of tenure is to ensure that faculty members will not be dismissed without adequate cause and without due process. The due process provision guarantees some protection to a tenured faculty member regardless of the reason for termination.[19] Procedural due process requires that standards define some specific professorial behaviors and a procedure to determine whether the standards have been met. However, specific behavioral standards do not easily translate into overall competency. The standards and rules under which a professor is judged are vague or imprecise; therefore, administrators often have difficulty showing that adequate due process was rendered.[20] The administrator can create a situation wherein virtually the same due process is required for nontenured as for tenured faculty.[21]

The controversies surrounding tenure have generated concern and study throughout the country. In a 1973 study on tenure, Freeman and Rossmeier reported:

> In recent months almost every periodical on higher education has devoted at least one article to the

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[19]B. N. Shaw, Academic Tenure in American Higher Education (Chicago: Adams Press, 1971), p. 69.

[20]James B. Wilson, "Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty," The Journal of College and University Law, IV (Spring, 1977), 196-97.

[21]Harold J. Rood, "Legal Issues in Faculty Termination," The Journal of Higher Education, XLVIII (March/April, 1977), 138.

> subject of tenure. The New York Times, the Wall Street Journal, and countless lesser known newspapers are also carrying articles about the debate.[22]

The tenure debate is expected to continue because of declining college enrollments and the surplus of qualified instructors.[23]

Prior to the early 1970's the courts were rarely occupied with tenure disputes. Since that time the courts have become extensively involved in all areas of educational disputes, and the faculty issues have largely involved the area of tenure and employment contracts.[24] During the academic year 1977-78, the National Education Association participated in the funding of 573 cases involving higher education faculty. The denial of due process rights to nontenured faculty was the issue in 120 of the cases; 62 of the cases involved denial of due process to tenured faculty.[25] A 1978 issue of The School Law Newsletter was devoted to tenure. The extent of tenure litigation was described as

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[22]Thomas M. Freeman and Joseph G. Rossmeier. A New Look at Tenure: A Management Imperative (East Lansing, MI: Michigan State University, 1973), ERIC Document ED 080 097.

[23]Gene A. Budig, "What's Ahead for Higher Education?" Phi Delta Kappan, LIX (September, 1977), 13.

[24]Brown, op. cit., p. 279.

[25]"NEA Defends Legal Rights of College Faculty," NEA Advocate, October, 1978, 7.

follows: "The story is getting repetitive: Another faculty member has sued another college because tenure was not granted."[26]

Some legal authors feel that tenure may violate Title VII of the Civil Rights Act of 1964 or the more general affirmative action concepts. They argue that the practice of tenure has handicapped women and minorities in gaining access to the better positions in higher education. In response to evidence that discrimination against women was prevalent in institutions of higher education, the Equal Employment Opportunity Act of 1972 amended Title VII to include employees of educational institutions.[27]

## The Problem

Most of the literature on tenure is general in nature and is, in essence, an emotional defense or condemnation of tenure. Because of statutory differences between states, the literature has limited application to specific situations in Tennessee. If administrators in the institutions of public higher education in Tennessee are to develop and administer tenure policies which will protect both faculty and university, these administrators must be knowledgeable

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[26]"College of William and Mary Sued When Faculty Member Is Denied Tenure," The School Law Newsletter, VII, 1978, 1.

[27]George R. LaNoue, "Tenure and Title VII," The Journal of College and University Law, I (Spring, 1974), 207.

of Tennessee statutes, of current policies, of case law in the jurisdiction of which Tennessee is a part, and of other federal case law having probable impact on future tenure decisions in Tennessee. At present, no concise body of such information is available for administrators. They are dependent upon memory, hearsay, and bits and pieces of information.

## Purpose of the Study

The objective of the study was to locate and analyze applicable state and federal court cases for probably impact on future tenure decisions in Tennessee public higher education.

## Importance of the Study

The ramifications of statutes and constitutional provisions rest ultimately upon the court's interpretation of them. The results of this study were intended to clarify the legal position of the faculty and the responsibility of administrators in Tennessee public higher education.

Administrators should expect that faculty terminations will lead to litigation unless all the legal requirements have been met by the institution. Termination in the academic market place of the 1970's could be equivalent to a removal from the profession, not just a position. Openings are few, and budget reductions tend to restrict appointments at any salary level. With this limited reemployment

possibility, faculty members facing termination are more inclined to protest the termination through litigation.[28] Faced with such probable litigation, the administrator needs a concise source of legal information on tenure.

## Assumptions

The assumptions made for this study were as follows:

(1) Variations between actual decisions and probable decisions of state courts would result only from variations in state statutes.

(2) Court decisions from legal jurisdictions which do not have binding effect on Tennessee will have persuasive effect upon similar questions which could originate in Tennessee.

## Delimitations

The delimitating aspects of this study were as follows:

(1) Court opinions rendered since and including the two 1972 United States Supreme Court landmark decisions concerning faculty rights in public higher education comprised the primary data source.

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[28] Rood, op. cit., p. 123-24.

(2) Although the state technical institutes at Memphis, Nashville, and Knoxville were part of Tennessee's public higher education, they were not included in the definition of Tennessee public higher education.

(3) The study did not purport to take a position in defense of nor condemnation of tenure. The concern was restricted to the legal meaning of academic tenure in Tennessee public higher education.

## Definition of Terms

AAUP. American Association of University Professors.

Administrator. A manager or one serving in a management position at an institution of higher education.

De facto. Being in actual possession of a right through custom or practice without having lawful title.

Dicta. The statements of judges or court opinions on subjects other than the principle issues at bar.

EEOC. Equal Employment Opportunity Commission.

Faculty. Persons holding professorial rank in an instructional department who have or may acquire tenure.

Grandfather clause. A stipulation or provision of a statute or policy whereby certain parties who have obtained specific rights prior to the current statute or policy retain those rights.

Procedural due process. Administrative safeguards whereby a faculty will not be deprived of property or liberty rights without an adequate hearing.

Substantive due process. Administrative policies to preclude sanctions against a faculty except in reasonable situations having valid objectives.

TCA. Tennessee Code Annotated.

Tennessee public higher education. The two systems of public higher education in Tennessee known as The University of Tennessee and the State Board of Regents.

Tenure. Continuous faculty membership subject to dismissal only under statutory provisions or statutorily authorized governing board policies.

## Source of Data and Procedures

The search was first for mandatory primary sources. Those sources were the Federal and State of Tennessee Constitutions, Federal and State of Tennessee legislation, and decisions from those courts having binding legal impact upon Tennessee. The search also included locating persuasive primary authority; that is, court decisions from other common law jurisdictions.

Tennessee statute books were searched to establish the evolution of higher education tenure laws of the state to the present. The chief guide to current statutes is the three-volume general index at the end of Tennessee Code

Annotated. This annotation describes and analyzes the judicial interpretations of a statute by the Tennessee courts. A parallel reference table is included in TCA to acts in earlier codes.

The case law was located using the topical method of legal research to compile a bibliography of cases from the American Digest System. Digests, master subject outlines, are indexes to court cases from the entire field of law arranged under major headings. Under each alphabetically arranged topical heading, such as "College and University," the subject is divided into the different questions which have been litigated with respect to that topic. Digests were used to locate citations, that is, the name and volume number of the book and the page number of the cases in the National Reporter System.[29] Each case was examined to determine its relation to research questions implicit within the purpose of the study.

All cases were traced through a citor. A citor is a device that enables the legal researcher to determine whether a case was cited in a following case or in a later statutory enactment. It enables one to determine whether a ruling was followed, modified, or overruled in a later decision and

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[29]J. Myron Jacobstein and Roy M. Mersky, Ervin H. Pollack's Fundamentals of Legal Research (Mineola, NY: The Foundation Press, Inc., 1973), p. 75-76.

whether it is still applicable case law. A court decision can be rendered irrelevant by the enactment of a statute at a later time or by an overruling court decision. Since Shepard's Citations are the most commonly used citors, this process is known as "Shepardizing" a case.

The major research emphasis pertaining to case law was placed on cases by which Tennessee is directly bound. This consisted of the Supreme Court of Tennessee, the Sixth Circuit United States Court of Appeals, its district courts, and the United States Supreme Court. State court appellate cases for all 50 states, cases from the eleven federal judicial circuits, and cases from all federal district courts throughout the United States were researched.

Opinions of the Attorney General of Tennessee issued since the enactment of the original bill and the other provisions which established tenure in Tennessee public higher education were reviewed. The exact legal status of the Attorney General's opinions is unclear, but by long-standing custom such opinions are presumed binding as to the actions of agencies and/or officials of the state. Regarding the impact of such opinions on an individual's rights, a prime consideration in tenure litigation, opinions of the

Attorney General may be persuasive but are not binding and do not have the effect of court decisions.[30]

Research bias was minimized by including all applicable cases within the specified time frame. Interpretation of the law was that of the courts, not that of the researcher. The research purported to render neither consent nor adverse judgment of the practice of tenure. The objective was restricted to determining how the courts were interpreting tenure laws and governing board policies and to answering questions which administrators and faculty might raise regarding those provisions.

## Organization of the Study

This study was presented in four chapters. Chapter I stated the problem and the research techniques used. Chapter II was a review of the literature related to tenure in public higher education. Chapter III presented the statutory and case law with its application to Tennessee. Chapter IV was a summary of the study with conclusions and recommendations.

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[30]Lewis L. Laska, Tennessee Legal Research Handbook (Buffalo, NY: William S. Hein & Co., Inc., 1977), p. 132.

# CHAPTER II

# REVIEW OF RELATED LITERATURE

## Introduction

Comprehending academic tenure in Tennessee public higher education requires an understanding of how academic tenure is viewed by the academic and legal communities throughout the country. State legislators and educational administrators who influence legislation are mindful of legislative events in other states, and, as a result, there tends to be substantial similarity among states concerning educational laws and practices. Opinions expressed in the literature influence the decision makers who deal with tenure statutes and regulations. Courts are in no way bound by their constituents' views of academic tenure in public higher education; however, it has been said that even the justices of the United States Supreme Court read newspapers and are thereby influenced in their private and professional activities.

Due to the rapidly changing environs of higher educational institutions, the literature search was confined to the 1970's with rare exception. During the 1970's, higher educational institutions became overextended as student enrollment stabilized or declined. Administrators found it necessary to operate with leaner budgets while inflation worsened the situation. The faculty shortage of the 1960's

was transformed into a faculty surplus as new graduates from the increased capacity of higher education created during the 1960's reached the job market. Administrators who made employment decisions found themselves in a buyer's market where it was possible to upgrade faculty, providing that openings could be created through terminations. Job openings occurred less frequently, interest in job security increased, and an unprecedented interest in tenure and other mechanisms of job security developed.

On June 29, 1972, the United States Supreme Court rendered two landmark decisions, Board of Regents v. Roth and Perry v. Sindermann, concerning faculty rights and security in institutions of public higher education. These decisions became the precedent cases controlling most of the litigation to follow which questioned job security in institutions of public higher education.

During the 1970's the trend toward an increasing percentage of post-secondary students receiving their education in public rather than private institutions continued. As educational costs soared and graduates from prestigeous institutions of higher education became unable to find employment for which they had been trained, public confidence in higher education diminished, and the sources of funds began to demand accountability of the higher educational establishment. All of these changes rendered literature on academic tenure predating the 1970's substantially irrelevant.

The search sought to equally include literature which supported tenure and which oposed it. One could claim that most articles in educational periodicals are written by academicians who have a subjective interest in tenure and who would therefore tend to be supportive. To offset this possible biasness and to provide a legal foundation for the chapters to follow, all relevant articles from legal periodicals within the designated time frame were included. Regardless of an author's view, an effort was made to find another author who rebutted or viewed differently the point in question.

## Scope and Definition

Tenure is not unique to education. Federal judges have tenure for life; federal and state employees generally are protected by some type of tenure system after serving designated probationary periods.[1] However, the probationary period in academia is far longer than either that served by industrial workers under collective-bargaining contracts or by professional employees in state and federal service.[2] Tenure systems in higher education are essentially employment

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[1]Kern Alexander and Erwin S. Solomon, College and University Law (Charlottesville, VA: The Michie Company Law Publishers, 1972), p. 355.

[2]William W. Van Alstyne, "Tenure: A Conscientious Objective," Change, X (October, 1978), 45.

security provisions under which professors attain permanent status protecting them against dismissal except for stated cause and through prescribed procedures.[3]

An extensive study of tenure, sponsored by the American Association of University Professors (AAUP) and the Association of American Colleges, was conducted by the Commission on Academic Tenure in Higher Education. The Commission defined tenure as:

> an arrangement under which faculty appointments in an institution of higher education are continued until retirement for age or physical disability, subject to dismissal for adequate cause or unavoidable termination on account of financial exigency or change of institutional program.[4]

Although subject to varied definitions, eligibility, and legal basis, the concept of tenure in educational employment has as a basic element an indication of employment security. This means that the employing institution has surrendered powers which it otherwise would possess to terminate the professor's services.[5]

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[3]Alexander and Solomon, loc. cit.

[4]Commission on Academic Tenure in Higher Education, Faculty Tenure (San Francisco: Jossey-Bass Publishers, 1973), p. 256.

[5]Alan A. Matheson, "Judicial Enforcement of Academic Tenure: An Examination," Washington Law Review, L (June, 1975), 597.

Other than the element of employment security, few generalizations can be made about tenure systems. Byse and Joughin summarized the variations in tenure systems as follows:

> Tenure is embodied in a bewildering variety of policies, plans and practices; the range reveals extraordinary differences in generosity, explicitness, and intelligibility. Large or small, public or private, nonsectarian or religiously affiliated, there is no consensus concerning either the criteria or the procedures for acquiring and terminating tenure.[6]

While most public institutions of higher education have tenure systems, only one state, Wisconsin, has statutorily provided tenure for its statewide university system. In most public institutions, governing boards may establish tenure plans which have the force of statutory law because of the quasi-legislative character of these boards.[7]

## Administrative Advantages of Tenure

A properly administered tenure system would be an advantage to an institution and would not serve to protect nonproductive faculty members.[8] The adoption of tenure is

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[6]Clark Byse and Louis Joughin, Tenure in American Higher Education (Ithaca, NY: Cornell University Press, 1959), p. 133.

[7]James L. Petersen, "The Dismissal of Tenured Faculty for Reasons of Financial Exigency," Indiana Law Journal, LI (Winter, 1976), 419.

[8]Harold J. Rood, "Legal Issues in Faculty Termination," The Journal of Higher Education, XLVIII (March/April, 1977), 135.

an indication of unity among the professoriate and the administration and of the institution's concern for the general welfare of the public by providing a mechanism for uninhibited scholarship and its free dissemination.[9]

Tenure is not acquired gradually. Through its probationary provision, a tenure system enables the institution to make an extensive evaluation of a faculty member while making no reemployment commitment. In the absence of a tenure system, a multi-year period of employment might vest a faculty member with a reasonable expentancy of reemployment. The courts have interpreted tenure not as a lifelong reemployment guarantee but as the ending of a probationary period and the beginning of an expectancy of continued employment.[10]

In the absence of a tenure system, an unwritten policy could develop that certain people shall have the equivalent of tenure. Unwritten policies are subject to ambiguity and misunderstandings. The existence of a tenure system eliminates the ambiguities in that those not on tenure have no expectancy of reemployment. The existence of a tenure system protects an institution against a nontenured faculty member's

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[9]"The Bloomfield College Case," AAUP Bulletin, LX (September, 1974), 326.

[10]Rood, op. cit., pp. 132, 135.

showing that he/she has acquired a property interest in reemployment.[11]

Tenure prospects may serve to induce outstanding performance from the probationary faculty member. Upon determination by one's peers and the administration that the faculty member has sufficiently developed him/herself during a probationary period, the reward of tenure may be granted. Tenure is an academic status symbol in that it shows recognition of scholarly excellence as judged by one's peers.[12]

Tenure enables participative management or collegial governance in the university. The faculty is often asked to make recommendations and to contribute ideas concerning admissions, curriculum, personnel appointments, budgeting, and other matters. Candid proposals made in this capacity can bring the faculty into conflict with each other and with the administration. Tenure enables the faculty to freely contribute their ideas in this role without fear of reprisal.[13]

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[11] Ibid., pp. 133-34.

[12] Harry W. Pettigrew, "'Constitutional Tenure': Toward a Realization of Academic Freedom," Case Western Reserve Law Review, XXII (April, 1971), 476-77.

[13] George R. LaNoue, "Tenure and Title VII," The Journal of College and University Law, I (Spring, 1974), 206.

Academic Freedom

Tenure has evolved from the original concept of a granted privilege into a legal entitlement. The purpose of tenure, to provide the professor certain protections, has remained virtually unchanged. The primary purpose of tenure is the preservation of academic freedom, and the mechanism for that freedom is job security. Tenure provides an expectancy of continuous employment which cannot be terminated arbitrarily and without reason.[14]

Since professors are dependent upon teaching as a source of livelihood, a threat to their job security is one method by which academic freedom can be abridged. In order to maintain academic freedom, professors must be protected against extraneous influences and pressures that could compromise their ability to organize and convey knowledge to students.[15]

Academic freedom allows the professor to conduct independent research and to report all findings, however novel or controversal they might appear, to the students.[16]

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[14]Marjorie C. Mix, Tenure and Termination in Financial Exigency. (Washington, DC: ERIC Clearing House on Higher Education), Research Report No. 3, 1978, p. 2.

[15]Charles P. Leder, "Economically Necessitated Faculty Dismissals as a Limitation on Academic Freedom," Denver Law Journal, LII, No. 4 (1975), 911-12.

[16]Statement by Hiram Drawbridge, interview with John Yacavone, "Free Speech and the Unviersity: A Discussion of Policy," Connecticut Law Review, V (Winter, 1972-73), 502.

Kutner regarded tenure as essential to full academic freedom.[17] Prior to being granted tenure, the probationary professor should have academic freedom equal to that of the tenured professor; however, that is not the usual case. The probationary professor is more willing to follow advice, more susceptible to discipline, and his/her image is subject to the censure of nonreappointment. This tends to stifle full utilization or access to academic freedom. In order to have complete and unabridged access to academic freedom, the professor must attain tenure.[18]

Pettigrew pointed out the restrictions upon academic freedom caused by the limitations on granting tenure. He stated that "only those who have been granted tenure will carry the shield enabling them to better exercise academic freedom."[19] The exercise of academic freedom by probationary faculty entails risking the increased likelihood of nonrenewal of appointment or dismissal for unstated reasons. A university would be unlikely to give the exercise of free speech as the reason for termination although that might be the actual reason. Such a practice could have a significant inhibiting effect upon other nontenured faculty. Pettigrew

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[17]Luis Kutner, "The Freedom of Academic Freedom: A Legal Dilemma," Chicago-Kent Law Review, XLVIII (Fall-Winter, 1971), 169.

[18]Ibid., pp. 169-70. [19]Pettigrew, op. cit., p. 476.

concluded that academic freedom is a fundamental element of the structure of a democratic society which can only be adequately protected when arbitrary administrative action is effectively prevented.[20]

The idea that a degree of personal security enhances intellectual performance is incorporated in the concept of academic tenure. Intellectual creativity is more cyclical and sporadic than many other professional endeavors causing important accomplishments to be realized unevenly and sometimes over long periods. The summit of creativity varies from early to late among different fields and among different individuals.[21] Caplow and McGee stated the concept of academic freedom as follows:

> The ideal of academic freedom includes the assumption that men working on the fringes of established knowledge will often dissent from the truths of the majority, will appear unreasonable, eccentric, or disloyal, or will be unable to explain to others their motives for pursuing a particular line of effort.[22]

When one is working on the frontiers of new knowledge, some concessions should be made for the lack of precedent. The

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[20] Ibid., pp. 483-514.

[21] Theodore Caplow and Reece J. McGee, The Academic Marketplace (Garden City, NY: Anchor Books, 1965), p. 190.

[22] Ibid.

confirmation and evaluation of scholarly work varies among disciplines.[23]

There is a tendency for academic freedom to fluorish and subside depending upon the convictions about the purpose of education held by society.[24] Some of the greatest threats to academic freedom have arisen in times of war when the nation required unusual allegiance to its policies.[25] During the Great Depression of the 1930's academic freedom was endangered as professors having unconventional views were barred from permanent appointment or were dismissed immediately.[26] Another attack on academic freedom occurred during the McCarthy era of the early 1950's when the House Committee on Un-American Activities generated undue concern about communist associations or interests. The mere rumor of past communist associations was sufficient to stigmatize a professor, resulting in ostracism, withheld advancement, or dismissal.[27]

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[23]W. H. McConnell, "The Errant Professoriate: An Enquiry into Academic Due Process," Saskatchewan Law Review, XXXVII, No. 2 (1972-73), 268.

[24]William F. McHugh, "Faculty Unionism and Tenure," The Journal of College and University Law, I (Fall, 1973), 50.

[25]McConnell, op. cit., p. 258.

[26]Fred M. Hechinger, "Loss of Tenure: Return of a Nightmare," Saturday Review, II (May 31, 1975), 50.

[27]McConnell, op. cit., pp. 261-62.

Academic freedom does not accord a faculty member the freedom to disregard the goals of the employing institution.[28] Academic freedom means neither professional irresponsibility whereby the professor can refuse to be held accountable for anything,[29] nor a privileged social status on matters unreleated to teaching and research.[30] One's political veiws might be educational,[31] but academic freedom does not sanction a professor's using class time to convey political or other views unrelated to the subject matter at hand.[32]

By abusing the privilege of being allowed to earn additional income on university time, faculty members could threaten academic freedom. Faculty members can consult and develop marketable materials during working hours without affecting their university salaries. As a result of abuses,

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[28]Rood, op. cit., p. 148.

[29]Kutner, op. cit., p. 169.

[30]McHugh, op. cit., p. 51.

[31]Statement by P. Q. Devito, interview with John Yacavone, "Free Speech and the University: A Discussion of Policy," Connecticut Law Review, V (Winter, 1972-73), 493.

[32]Drawbridge, op. cit., p. 492.

some state legislators are asking universitites to develop policies limiting such activities.[33]

Criticisms of Tenure

Controversy has always surrounded the question of tenure in American education.[34] O'Toole contended that academic tenure creates a stagnation in the professoriate due to its limitations on mobility. Tenure reduces the flexibility of the institution and locks faculty members into their jobs. All professions need new people with newly acquired skills and new ideas if they are to remain vital and growing. Too much turnover is a negative indicator of organizational stability, but a steady rate of 10 to 15 percent per year among professionals is beneficial. During the 1960's, the turnover rate among tenured faculty in American higher education was about 8 percent; however, by 1972 the rate had decreased to 1.4 percent. The rate had probably dropped below 1 percent by 1978. Yet even O'Toole admitted that the major cause for the decreased turnover rate was declining student enrollment about which little could be done.[35] The

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[33]Beverly T. Watkins, "Outside Income on University Time: A Conflict for Professors," The Chronical of Higher Education, XV (February 21, 1978), 1.

[34]"The Bloomfield College Case," op. cit., p. 325.

[35]James O'Toole, "Tenure: A Conscientious Objection," Change, X (June-July, 1978), 25-26.

United States Census Bureau estimated in 1975 that the number of college age youth would experience a sharp drop after 1982 comparable to the sharp rises during the 1960's.[36]

O'Toole's stagnation, or low turnover rate, argument assumed that faculty members make no attempt to keep themselves abreast of current events and the changing world. It has not been established that mere faculty turnover causes quality improvement of faculty. A stable faculty as a group will tend to devote more energies to correcting problems of the institution than will a group which has a high turnover rate. During the 1960's, faculty members who found substantial problems in an institution simply moved to an institution which appeared to have fewer problems. With the decreased mobility of the 1970's, the weaknesses and deficiencies of an institution became of more personal interest to the faculty and consequently got more attention.[37]

One might argue that the institution cannot get rid of deadwood and, hence, cannot within a reasonable period accomplish a desired upgrading of its faculty. However, strict tenure rules make it imperative for an institution to be more careful in selecting its faculty and more courageous

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[36]Darrell Crase, "The Tenure Crisis: Implications for Higher Education Faculty," The Physical Educator, XXXII (October, 1975), 116.

[37]Charles C. Hanna, "Tenure In--Why Not?" Contemporary Education, XLIX (Spring, 1978), 183-84.

in sending away those who do not meet its standards. The observance of strict tenure rules should actually increase both the care and the courage of administration and senior faculty responsible for appointments and promotions, so much so that the quality of the faculty would be better under strict rules than under lax rules.[38]

The National Education Association (NEA) has argued for a three-year maximum probationary period in contrast to the AAUP seven-year maximum. NEA maintained that it does not take seven years for an institution to evaluate a person's creativity, productivity, and worth to the institution. NEA contended that such a long period is counterproductive to the individual and to the institution.[39] The extended apprenticeship of the probationary period can create a protracted uncertainty that inhibits rather than stimulates the professor.[40]

The probationary period preceding the tenure decision can be the high-pressure point in a person's career and leave him/her so exhausted that future professional growth

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[38]Fritz Machlup, "In Defense of Academic Tenure," Academic Freedom and Tenure: A Handbook of the American Association of University Professors, ed. Louis Joughin (Madison: The University of Wisconsin Press, 1967), p. 313.

[39]Virginia Lee Lussier, "Faculty Bargaining Associations: National Objectives Versus Campus Contracts," The Journal of Higher Education, XLVI (September/October, 1975), 509.

[40]McConnell, op. cit., p. 267.

will be stymied. During this period in competition with time, the tenure candidate is pressured into speedy production of publications which have more to do with vita enhancement than with scholarship.[41] Nielsen described the probationary period as a "continuation of the frenetic pace of graduate school and the results were similar--crisp, snappy lectures and trival research papers in 'good' journals."[42]

Restrictions on granting tenure have increased the pressure to publish. Scholarly journals are flooded with unsolicited manuscripts and are able to print only a small portion of them. Consequently, many short, insignificant articles are produced and sent to small nonrefereed publishers throughout the country.[43]

To comply with publishing standards of scholarship, a tenure candidate can show the most progress by concentrating on refereed journals rather than on time-consuming books. The tenure candidate cannot become involved with a study requiring a laborious collection of data extending over a long period since interim measurements are usually not

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[41] O'Toole, op. cit., pp. 26-28.

[42] Robert Nielsen, "In Defense of Tenure," American Teacher, LXII (February, 1978), 12.

[43] Dixie R. Crase and Darrell Crase, "New Tenure and Promotion Guidelines Produce Growth Pains," Peabody Journal of Education, LIV (October, 1976), 58-59.

attempted. Some professors publish until the time they get tenure and then stop. Perhaps these people never had a chance to examine their motives for publishing beyond meeting the requirements for tenure.[44] However, it should be noted that John Dewey, Albert Einstein and countless others made substantial scholarly contributions after they had attained academic tenure.[45]

O'Toole recommended a system of revolving contracts to replace the tenure system.[46] However, if the retention decision entailed only whether the individual was worthy of another brief appointment, the natural tendency would be to decide in favor of the individual. Since the decision would be of relatively low consequence to the institution, the rigor of test and comparison would tend to become lax. If the retention decision were based upon reoccurring annual reviews, the administrative committment would be increased by faculty members' sitting in constant judgment of one another.[47]

Hampshire College was formed during the late 1960's and began with a revolving contract system. A study of the

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[44]Margaret L. Weeks, "A Teacher Learns What Really Counts," The Chronicle of Higher Education, XIV (July 5, 1977), 3-4.

[45]Nielsen, loc. cit.

[46]O'Toole, op. cit., p. 27.

[47]Van Alstyne, op. cit., pp. 45-46.

system after six years revealed that the system had the overall impact of lowering the quality of the faculty. It was concluded that the ongoing faculty evaluations drained too much attention and energies away from the main educational function of the College. A paranoia developed among the faculty regarding reappointments, and an unwillingness among faculty to evaluate each other emerged. The study prompted Hampshire College to look for an alternative to the revolving contract system.[48]

Many variations of the revolving contract system have been suggested.[49] However, Farmer felt that "most alternatives to the tenure system seem to work primarily to reject people in an orderly, sequential manner rather than to help them achieve improved performance."[50]

O'Toole contended that tenure can lead to retention of the least creative faculty member and to discharge of the most creative. Since tenure granting is a momentous decision, the institution will tend to minimize its risk by granting tenure to those who are most conforming. Thus over the long

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[48]Charles R. Longsworth, "Designing New Personnel Policies: An Alternative to Tenure," College and University Personnel Association Journal, XXVIII (Spring, 1977), 25-27.

[49]Lester Mazor, et al., "Can You Suggest Workable Alternatives to the Tenure System?" Change, IX (December, 1977), 53-55.

[50]Charles H. Farmer, "Colleague Evaluation: The Silence is Deafening," Liberal Education, LXII (October, 1976), 435

run, few people on a faculty will be intellectually creative and take risks with new ideas.[51]

Flygare argued that the courts have removed one of the major reasons for the existence of tenure by establishing an elaborate due process procedure and granting all instructional personnel the full protection of the United States Constitution.[52] This provision may not be as protective as claimed since no individual has a constitutional right to hold a faculty position per se.[53] Court proceedings are expensive and time consuming, and the court can only require that the institution comply with its own commitments. Courts may enforce the procedural safeguards of tenure, but they do not devise them.[54] The courts cannot protect free speech and academic freedom on a day-to-day basis comparable to a tenure system. Assistance from the courts can only be attained by a burdensome cost to the professor.[55]

Tenure has been criticized for its discriminatory effects on women and other minority groups in academia.

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[51]O'Toole, op. cit., p. 27.

[52]Thomas J. Flygare, "Mandatory Retirement Is Fading Fast; Will Tenure Be Next?" Phi Delta Kappan, LIX (June, 1978), 711.

[53]Arthur C. Gentile, "Tenure Revisited," Change, IX (December, 1977), 55.

[54]Van Alstyne, op. cit., p. 46.

[55]Hechinger, op. cit., p. 51.

Florence Moog claimed that tenure systems have kept the number of women on university faculties low. She stated that tenure has created a self-perpetuating caste which prevents the creation of opportunities for women.[56] Stan Brassie found that institutions having highly tenured faculties will have to postpone their affirmative action plans of attaining sex, race, and ethnic balances among their faculty.[57] Cheit and Ford predicted that:

> while academicians discuss the merits of tenure and eminent commissions walk a tightrope to consensus, the courts may dramatically end the debate. It would not be the first time the courts, prodded by minority groups, interceded to overhaul educational practices. The most noteworthy casualty was segregation. Tenure may be next.[58]

The natural and physical sciences tend to attract greater proportions of males while females are more apt to enter the humanities and education. Salary increases and promotions tend to come faster in the sciences due to market conditions. Males are inclined to have more interest in research than in teaching and to publish more. Male

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[56]Florence Moog, "Women, Students, and Tenure," Science, CLXXIV (December 3, 1971), 983.

[57]Stan Brassie, Tenure--A Management Problem, U.S., Educational Resources Information Center, ERIC Document ED 121 783, April, 1976.

[58]Richard Cheit and Andrew Ford, "Can Colleges Have Tenure and Affirmative Action Too?" The Chronical of Higher Education, VIII (October 1, 1973), 16.

professors receive their doctorate earlier and are twice as likely to have the terminal degree as are female professors. Male preference and performance have placed them in circumstances more attuned to the institutional reward system.[59]

For good or bad, the basic academic tenure system has been established in nearly every major university in the United States. Institutions having tenure do not suffer in any fair comparison with domestic institutions without tenure or with countries using other systems.[60]

Tenure in Transition

During the decade of the 1970's, academic tenure in higher education underwent substantial scrutiny by those who granted tenure. In 1972, the New Jersey State Board of Higher Education revised its tenure policy to make the attainment of tenure more difficult. The intent of the new policy was to halt the rising percentage of faculty members with tenure by reviewing more rigorously any award of tenure that would increase the percentage of tenured faculty members in an academic department.[61] In 1973, tenure was abolished

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[59]LaNoue, op. cit., p. 209.

[60]Van Alstyne, op. cit., p. 47.

[61]"High Court in N.J. Upholds State's Tenure Restrictions," The Chronical of Higher Education, VIII (April 1, 1974), 3.

in Virginia's community college system.[62] Brassie found that one third of all institutions of higher education changed their tenure rules between 1974 and 1976 and that 40 percent were reviewing tenure in 1976.[63]

Simpson reported that an increasing number of institutions of higher education were making all new faculty appointments outside the tenure system. New faculty were hired under a single or a series of one-year appointments with the understanding that they would never be considered for tenure. While a tenure freeze has the advantage of avoiding a long-range faculty cost commitment and of maintaining flexibility, it has many disadvantages.[64]

Under the tenure-freeze policy, the academic quality of the faculty deteriorates due to a limited ability of the institution to recruit competent faculty. Faculty members devote so much time to seeking permanent positions that they have little time to devote to the employing institution. In disciplines where laboratory equipment assembly and a period of years are required to conduct serious research, a temporary faculty member need not even start. Simpson felt that

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[62]Ronald C. Brown, "Tenure Rights in Contractual and Constitutional Context," The Journal of College and University Law, VI (July, 1977), 308.

[63]Brassie, loc. cit.

[64]William A. Simpson, "The Case for a New Tenure Policy," Research in Higher Education, V (1976), 225.

a tenure freeze would result in a dichotomized faculty of those who have tenure and those who have no chance of ever attaining it. This division would strain working relations among the faculty and with the administration.[65]

The tenure debate may be more abstract than genuine. Behind the abstration, those who mount the seige on tenure are actually attacking the privileged status of secure employment granted the professoriate.[66] Those who wish to attack American higher education cannot find a distinct target because the system is the best in the world. Therefore, an attack on tenure is a broadside approach against a pervasive interest of the academic community.[67]

The attack on academic tenure results partially from the decline of public esteem held for college and university professors. Beginning in the mid to late 1960's, the status of the professions in general declined; the academic community was not immune to this trend. The press has reiterated that the learned professions are not the public

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[65] Ibid., pp. 226-27.

[66] Robert M. O'Neal, "Tenure Under Attack," The Tenure Debate, ed. Bardwell L. Smith (San Francisco: Jossey-Bass Publishers, 1973), p. 178.

[67] Nielsen, loc. cit.

servants and are not viewed with the respect that they once were.[68]

Erosion of faculty autonomy comes from various sources. The prestige of the academic community was greatly reduced during the campus disorders of the 1960's.[69] Academic freedom is usually viewed from the instructional standpoint. In terms of the student's interest, academic freedom can be destroyed when students cannot learn about disciplines because they are either untaught or undertaught.[70] Students have attained representation in academic senates, departmental and curriculum affairs, and in the faculty evaluation process. These changes have resulted in the traditional organization being transformed into a system of shared values and shared governance at the campus level.[71] Hechinger said that American higher education has passed its golden years, is now confused about its goals and purposes, and is in the midst of a serious identity crisis.[72]

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[68]Jacquez Barzun, "The Professions Under Siege," Harper's, CCLVII (October, 1978), 61.

[69]Ibid.

[70]Willard F. Enterman, "Tenure at Union College," Liberal Education, LX (December, 1974), 462.

[71]McHugh, loc. cit.

[72]Fred M. Hechinger, "Self-Doubts in American Higher Education," Phi Delta Kappan, LVIII (September, 1976), 48-49.

According to Muller, conventional programs and policies of our educational institutions have become special targets of criticisms.[73] Many American educators have become concerned about the diminished public confidence in, and support of, the country's entire educational system. Tenure did not cause the public's disenchantment with education, but it can be an obstacle to self-analysis and needed reforms.[74]

Market conditions have strongly influenced the changes in academic tenure. In academia the sellers' market of the 1960's has evolved into a buyers' market.[75] The decisive question before granting tenure is whether the person being considered is the best currently available who can be attracted by the institution. When the answer is no, the university may deny tenure regardless of the individual's qualifications and performance. Market conditions and shifting emphasis in academic programs rather than scholarly norms became the determining factor.[76] An untenured

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[73]Statement by Ron R. Muller, interview with John Yacavone, "Free Speech and the University: A Discussion of Policy," Connecticut Law Review, V (Winter, 1972-73), 488.

[74]O'Toole, op. cit., p. 31.

[75]Leonard Kaplan, "Survival Talk for Educators--Tenure and Promotion," Journal of Teacher Education, XXVIII (September-October, 1977), 37.

[76]LaNoue, op. cit., p. 207.

professor can therefore be dismissed when his/her tenured colleagues display the same scholarly inadequacies.[77]

The frequency with which the faculty and administration have gone to court since 1970 has eroded their autonomy. The ability of the faculty and administration of higher educational institutions to continue self-governance has been weakened.[78] Nisbet observed that as tenure has been litigated, the faculty and administration have assumed an adversary role. During the transformation, tenure has become "a system of job security for academic workers hardly to be differentiated from what one finds today in any industry."[79] A continued involvement of the courts in the employment practices of higher education could discourage administrators from freely using their independent judgment. In that case, their striving for educational objectives would be limited by fear of the legal consequences of their decisions.[80]

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[77]McConnell, op. cit., p. 270.

[78]W. O. Shultz, II, "Nontenured Faculty: Current Legal and Practical Problems in Connection with Nonrenewal of Such Appointments," The Journal of College and University Law, I (Fall, 1973), 74.

[79]Robert Nisbet, "The Future of Tenure," Change, V (April, 1973), 33.

[80]Schultz, op. cit., p. 83.

Tenure as an Administrative Problem

On the theoretical principle of tenure and its practical application, it has been observed:

> If there is any truth to the conception of tenure as unbreakable, it is because of institutional practices rather than because of precise protective doctrines developed by the courts. Nothing in the rationales, norms, or rules of tenure legally shields any faculty member from accountability for performance as teacher, scholar, and colleague.[81]

When properly applied, a tenure system can be an advantage to a university because such policies generally specify the conditions and procedures for terminating disfunctional faculty.[82] Yet the number of tenured professors who have been dismissed for cause is very small; in a large number of institutions of higher education, no tenured individual has ever been dismissed.[83] Many administrators feel that while in theory grossly incompetent or negligent tenured faculty can be dismissed through due process, the procedure is too troublesome, time-consuming, and disruptive to be put into practice.[84]

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[81]Commission on Academic Tenure in Higher Education, op. cit., p. 190.

[82]Robert K. Roney and Irma O. Perry, "Tenure Laws and Incompetency," NASSP Bulletin, LXI (February, 1977), 45.

[83]Nisbet, op. cit., p. 27.

[84]Hechinger, "Loss of Tenure," op. cit., p. 51

The term "tenured in" has been used to describe academic departments composed entirely of tenured faculty. This condition is particularly apparent for those institutions which recruited young faculties during the rapid expansion period of the 1960's.[85]

Higher education needs more flexibility in its tenure policies than do elementary and secondary education where compulsory attendance laws operate to their planning advantage.[86] Relying on the compulsory attendance laws and utilizing available planning techniques, elementary and secondary school officials can make long-range student enrollment projections;[87] higher education student enrollment does not lend itself to such reliable planning. Higher education needs additional flexibility to control costs and to provide for educational change and updating.[88]

The assumptions upon which positive or negative growth projections are based can rapidly change and invalidate the projections. For example, a small change in the percentage

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[85]Franklin F. Mendels, "Flexibility in an Age of Zero Growth: A New Type of Faculty Appointment," AAUP Bulletin, LXIII (November, 1977), 303.

[86]Morton J. Earley, "School Law--Nonrenewal of Nontenured Teacher's Contract--Procedural Due Process," Northern Kentucky Law Review, V. No. 1 (1978), 149.

[87]C. Kenneth Tanner, Designs for Educational Planning (Lexington, MA: D.C. Heath and Company, 1971), pp. 89-94.

[88]Earley, loc. cit.

of high school graduates wishing to attend college can quickly change faculty growth requirements from positive to negative or vice versa.[89]

A highly tenured faculty represents a long-range fixed cost in an area of the budget which consumes at least 60 to 70 percent of the total budget.[90] The use of part-time faculty has long been a method by which academic programs achieved flexibility and diversity at reduced cost.[91] Longsworth suggested that an institution might maintain a core of faculty which would be supplemented as needed with adjunct faculty. This arrangement would enhance educational and financial flexibility. However, if the institution is to have stability and continuity of objectives, it should concentrate on having full-time faculty with tenure and other policies designed to favor long-term commitments.[92]

Faculty Evaluation

Clifford described the effects of tenure upon evaluation as follows: "The awarding of tenure can remove the evaluation

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[89]David A. Katz, "Tenure Ratios Under Conditions of Positive or Negative Growth," AAUP Bulletin, LXIII (November, 1977), 302.

[90]Edward D. Eddy and Richard L. Morrill, "Living with Tenure Without Quotas," Liberal Education, LXI (October, 1975), 400.

[91]Ibid., p. 412.

[92]Longsworth, op. cit., p. 23.

stimulus to productivity, so critical in an academic environment."[93] The tenure evaluation process may emphasize different things at different times. Tenure committees may over emphasize and distort certain desirable attributes to the degree that other equally desirable attributes are ignored. McConnell described the emphasis on publications in American higher education as nearly an obsession. The institutional emphasis on publication can severly penalize the faculty member who strives for excellence in teaching. It is unlikely that a professor will reach maximum effectiveness in both teaching and research; one or the other will necessarily suffer, and the system does not allow for individuality.[94]

Allshouse referred to the condition in which higher education finds itself as a "financial and social crisis."[95] He felt that the development of a good formal evaluation system within an institution would lead to a stronger and more professionally competent faculty. A faculty so developed would be able to objectively and in a timely

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[93]Earl W. Clifford, "The Tenure Trap: Money or Mission," National Association of College Admissions Counselors Journal, XX (July, 1975), 25.

[94]McConnell, op. cit., pp. 263, 269.

[95]Merle F. Allshouse, "The New Academic Slalom: Mission--Personnel Planning--Financial Exigency--Due Process," Liberal Education, LXI (October, 1975), 356.

fashion implement the necessary therapeutic action to get the institution through the crisis.[96]

Gentile felt that peer evaluations were often excessively favorable since faculty members were generally unwilling to give injurious opinions of colleagues.[97] On the other hand, collegial evaluation can operate adversely for a professor who is too outstanding in achievements or who has unacceptable personal attributes. Harry Edwards, the former Black Panther, had written three books, fifty articles, and was popular with the students at the time of his tenure evaluation. His departmental colleagues voted against granting tenure.[98]

Farmer observed that an effective faculty evaluation system is highly reliant upon collegial evaluation. He contended that collegial evaluation is effectively used for the tenure candidate but such evaluation is virtually nonexistent in any scholarly sense once tenure has been granted. Tenured faculty felt that collegial evaluation could do them no good and was a source of potential harm.[99]

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[96] Ibid.

[97] Gentile, loc. cit.

[98] Beverly T. Watkins, "Black Sociologist Wins Tenure Battle at Berkely," The Chronical of Higher Education, XIV (July 11, 1977), 2.

[99] Farmer, op. cit., pp. 432-34.

Tenure Quotas

Upon completing its study of tenure in 1973, the Commission on Academic Tenure in Higher Education concluded that academic tenure is "fundamental in the organization of faculty service in American higher education."[100] and recommended the development of policies limiting the proportion of tenured faculty to between one-half and two-thirds of the full-time faculty;[101] that is, they recommended tenure quotas. Even AAUP has indirectly endorsed the idea of a quota system. AAUP recognized that an institution may wish to develop a "preferred distribution which it wishes generally to maintain" through gradual and flexible application of "stricter standards for the awarding of tenure."[102]

Dill offered justifications for tenure quotas. A complete control of tenure would enable institutional flexibility needed to allocate financial resources and would enhance institutional innovation and vitality through the ongoing introduction of young faculty. However, institutions which could not offer bright prospects of tenure for incoming

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[100]Commission on Academic Tenure in Higher Education, op. cit., p. 23.

[101]Ibid., p. 50.

[102]"On the Imposition of Tenure Quotas," AAUP Bulletin, LIX (December, 1973), 430.

faculty would have difficulty recruiting high-quality faculty.[103] Attaining tenure under the quota system is more a function of being in the right place at the right time than excelling in academic accomplishments.[104]

An institution needs flexibility to change the overall amount of its operating budget and to change the way funds are distributed among its programs and departments. West suggested a technique for measuring the extent to which an institution has committed itself through granting tenure which he called financial tenure. The amount of funds which the institution has committed by granting tenure is more meaningful than the number of people to whom tenure has been granted. Financial tenure is increased by a commitment which decreases financial flexibility. Tenuring high-paid professors reduces financial flexibility and increases financial tenure more than tenuring low-paid faculty. Rather than using a head count to establish the upper limits on tenure commitments, the percentage of the payroll going to tenured persons (financial tenure) would be used.[105]

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[103]David D. Dill, "Tenure Quotas: Their Impact and an Alternative," Liberal Education, LX (December, 1974), 468-70.

[104]David S. Luecke, "An Alternative to Quotas: A Model for Controlling Tenure Proportions," The Journal of Higher Education, XLV (April, 1974), 274.

[105]Richard R. West, "Tenure Quotas and Financial Flexibility in Colleges and Universities," Educational Record, LV (Spring, 1974), 96-99.

The criteria for promotions and tenure have become more strict; consequently, tenured and nontenured faculty have to be more productive than their cohorts to receive favorable recognition. Tenure quotas may lead to distrust and bickering among the faculty. For example, when only a small portion of those eligible for tenure in a department can be granted tenure due to quota limitations, faculty relations are apt to become strained.[106]

Eddy and Morrill suggested that a faculty profile be used rather than the quota system as the basis for granting tenure. The faculty profile approach uses a computerized faculty cost and tenure model. The profile considerations include rank, length of the probationary period, age, sex, years of service, salaries, etc. The intent is to grant tenure in such a manner that it brings the insitution and/or department closer to the desired faculty profile.[107]

Luecke proposed a similar mathematical model calling it tenure proportions. Luecke's model is similar to Eddy and Morrill's model in that it does not rely entirely on a one-in-for-one-out approach as is advocated in tenure quotas. It is similar to quotas in that it limits tenure to a

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[106]Crase, op. cit., pp. 117-18.

[107]Eddy and Morrill, op. cit., p. 403.

predetermined proportion and differs only in that the proportion is allowed to fluctuate.[108]

Simpson developed a tenure ratio model for long-range planning to encompass the span of faculty careers. He noted that whether such models are called ratios, quotas, or proportions, they have the effect of limiting tenure prospects. The greater the restrictiveness of these plans, the larger is the segment of unhappy faculty and the greater the impetus to unionize. Only those institutions which are in such dire financial difficulty that they have nothing to lose can risk making radical changes in faculty security.[109]

Due Process

Due process provisions and certain other protections are granted by the United States Constitution. The First through Tenth Amendments prohibit various actions by the federal government, and the Fourteenth Amendment prohibits states from enacting and enforcing certain laws. Thus people are protected from specific actions of both state and federal governments. In connection with employment practices these constitutional protections apply to actions taken by public institutions of higher education, but they do not apply to

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[108]Luecke, op. cit., pp. 273-84.

[109]William A. Simpson, "Tenure: A Prospective of Past, Present, and Future," Educational Record, LVI (Winter, 1975), 48-54.

private institutions. Actions taken by a public institution are state actions.[110]

First and Fourteenth Amendment rights are intertwined. The First Amendment has been included in the due process clause of the Fourteenth Amendment making a denial of a First Amendment right also a denial of due process. The public has a constitutional right to free communication and public dissemination of opinion.[111] Drawbridge noted that the conflicting values of democracy and individual liberty are among the most powerful and firmly established in all Americans.[112]

Public employment has previously been considered a privilege, not a right, that could be conditioned on the employee's surrendering constitutionally provided due process protections. It is considered that the Constitution precludes such restrictions; government may not place unconstitutional conditions on its employees.[113]

When a tenure system is in effect, a faculty member is either tenured or probationary. The tenured person has an

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[110]Rood, op. cit., p. 127.

[111]Eric Tanner, "The First Amendment Due Process and the University," University of Missouri-Kansas City Law Review, XLII (Spring, 1974), 393.

[112]Drawbridge, op. cit., p. 490.

[113]"The Due Process Rights of Public Employees," New York University Law Review, L (May, 1975), 310, 315.

expectancy of continued employment, and the probationary faculty has no such expectancy. The expectancy of continued employment created by tenure is a property right which is protected by the Fourteenth Amendment. This constitutional protection prohibits the deprivation of the tenure property right without both substantive and procedural due process of law. At a minimum, this requires a notice of the reasons for the termination and the opportunity for a hearing.[114] One of the purposes of a formal dismissal procedure is to protect the academic freedom of the tenured faculty member. A dismissal procedure insuring adequate due process is a fundamental and necessary element in any academic tenure system.[115]

The hearing may provide the administration and governing board additional information and an opportunity to review the decision. If new information is presented or if the facts are perceived differently as a result of the hearing, the institution can make appropriate adjustments and possibly avoid court proceedings. Providing a hearing avoids the appearance that the administration has something to hide, and it is an additional means of exercising administrative responsibility.[116]

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[114] Rood, op. cit., p. 132.

[115] McHugh, op. cit., p. 52.

[116] Rood, op. cit., p. 143.

Palmer recommended granting a due process-type hearing to terminated nontenured faculty members in some cases. The intent was to show good faith and to reduce the likelihood of litigation. Whenever an institution is forced to explain its employment policies in a public court, it loses a degree of its autonomy.[117] On the other hand, Schultz pointed out that a hearing is not required for the termination of a nontenured faculty member and recommended that none be given. When an unrequired hearing is granted, the administration may be drawn into a defensive position where no defense was otherwise required.[118] A complicating factor in a hearing is that teaching competency is judgmental and does not readily lend itself to factual determination in an adversarial proceeding.[119]

Termination for Cause

A tenure system is, for all practical purposes, a private grievance procedure operating under privately developed standards. Once the administrative governing body has adopted a dismissal for cause rule, it cannot be retracted

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[117]Walter H. Palmer, "Due Process Termination of Untenured Teachers," Journal of Law and Education, I (July, 1972), 475-76.

[118]Schultz, op. cit., p. 80.

[119]Pettigrew, op. cit., p. 507.

in order to permit present employees to be dismissed for less than cause.[120]

The termination for cause procedure for a tenured faculty member requires that the preson have a due process hearing. The faculty member must know the facts which prompted the termination decision and must have an opportunity to present defensive evidence. The hearing must be prior to actual termination, and a record of the proceedings must be kept.[121]

The most common grounds for termination for cause are incompetence and moral turpitude.[122] The Tennessee State Board of Regents (SBR) defines adequate cause as:

> (a) Incompetence or dishonesty in teaching or research;
>
> (b) Willful failure to perform the duties and responsibilities for which the faculty member was employed, or refusal or continued failure to comply with the policies of the Board, the institution or the department, or to carry out specific assignments, when such policies or assignments are reasonable or nondiscriminatory;
>
> (c) Conviction of a felony or crime involving moral turpitude;
>
> (d) Improper use of narcotics or intoxicants which substantially impairs the faculty

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[120] Kutner, op. cit., p. 170.

[121] Rood, op. cit., p. 139.

[122] Matheson, op. cit., p. 605.

member's fulfillment of his or her departmental and institutional duties and responsibilities;

(e) Capricious disregard of accepted standards of professional conduct;

(f) Falsification of information on an employment application or other information concerning qualifications for a position;

(g) Failure to maintain the level of professional excellence and ability demonstrated by other members of the faculty in the department or division of this institution.[123]

More concisely, the University of Tennessee (UT) defines adequate cause as:

> Incompetency (which shall include willful neglect of duty) or moral turpitude related to the fitness of a faculty member in his or her professional capacity as a teacher or researcher. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights as American citizens. Dismissal on the grounds of moral turpitude is based on that behavior which is utterly blameworthy with respect to the faculty member's fitness in his professional capacity. The standard is behavior that would evoke condemnation by the academic community generally.[124]

The AAUP's 1940 Statement on Tenure and Academic Freedom states that termination for cause:

> Should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed

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[123]Tennessee State Board of Regents Policy on Academic Freedom, Responsibility, and Tenure, July 1, 1976.

[124]The University of Tennessee. Handbook of the Faculty, 1973, (Knoxville: The University of Tennessee, 1973), p. 23.

> before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned.[125]

This statement clearly defines the due process right to which the tenured faculty member is entitled. The statement further declares that when the charge is incompetence, other teachers and scholars from various institutions should be called upon to testify to the competence or lack of competence of the accused. If the decision following the hearing is to terminate the appointment, then the faculty member should receive his/her salary for at least a year from the date of dismissal notice, whether or not they continue to fulfill their duties at the institution. The salary stipulation does not hold in cases of moral turpitude.[126]

Termination for Financial Exigency

The AAUP 1940 Statement of Principles on Academic Freedom and Tenure reads as follows:

> After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should

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[125]"Academic Freedom and Tenure: 1940 Statement on Principles and Interpretive Comments," AAUP Bulletin, LXIV (May, 1978), 109-10.

[126]Ibid., p. 110.

> be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.[127]

The AAUP recognized the necessity of terminating tenured professors in its 1976 Statement on Financial Exigency. Financial exigency was defined as "an imminent financial crisis which threatens the survival of the institution as a whole, and which cannot be alleviated by less drastic means."[128]

The problem of financing in higher education was compounded by a decade of plentiful resources in the 1960's which often led to rapid and ill-planned growth. This growth was accompanied by tenure commitments made at a time when faculties seemed to be expanding forever. Due to decreasing student enrollments and increasing inflation of the 1970's, some institutions found that they could not comply with all the commitments made to their faculty members.[129]

When financial exigency is claimed and supported, tenure is not enforceable. The burden of substantiating the

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[127]"Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments," AAUP Bulletin, LX (Summer, 1974), 270.

[128]"Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons," AAUP Bulletin, LXII (Spring, 1976), 17.

[129]James B. Wilson, "Financial Exigency: Examination of Redent Cases Involving Layoff of Tenured Faculty," The Journal of College and University Law, IV (Spring, 1977), 187.

existence of financial exigency is upon the institution asserting it, and the burden of showing that the decision was not made in good faith is upon the rebutting faculty member.[130] Establishing a distinct test for the existence of financial exigency is not workable because the finances of each institution will be unique. The authority to terminate tenured faculty when financial emergencies develop helps the institution maintain financial stability, but it offers a possible pretext for circumventing protective provisions of the tenure system. This possibility endangers the academic freedom which tenure systems purport to protect.[131]

Leder felt that the ease with which faculty could be discharged for financial exigency is a solemn threat to academic freedom. Dismissals due to financial exigencies can constitute a serious hazard for academic freedom if such reductions are used as a means of discharging dissidents.[132]

Precedent has clearly established the substantive and procedural due process provisions to be accorded a faculty member when the termination is for cause; however, there is

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[130]Mix, op. cit., pp. 10-14.

[131]Petersen, op. cit., pp. 417-20.

[132]Leder, op. cit., p. 913.

no clear indication of the specific rights of faculty when the termination is necessitated by budgetary constraints.[133]

According to Marjorie Mix, the determination of a financially exigent condition seems to depend on the interpretations of administrators who view their fiscal problems as pressing enough to curtail programs and/or faculty. Tenure guarantees some protection through due process requirements regardless of the reason for termination; however, when dismissal is for financial reasons, the constitutional safeguards provided by tenure are at a bare minimum and have not been fully settled.[134]

It has been argued that the government should always be responsible for explaining the dismissal of an employee. Whenever a public employee establishes that a property interest exists, he/she should be entitled to a full hearing before an impartial examiner at some meaningful point in time.[135] It is not necessary that the hearing occur prior to actual dismissal in the case of financial exigency termination.[136]

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[133]Mix, op. cit., p. 10.

[134]Ibid., pp. 2-7.

[135]"The Due Process Rights of Public Employees," op. cit., p. 359.

[136]Wilson, op. cit., p. 196.

In addition to contractual or statutory provisions, the manner in which the administration proceeds in deciding who goes and who stays can influence whether litigation will follow. Secrecy and deception have been associated with generating litigation[137] whereas openess and frankness are less apt to do so.[138] A number of institutions have terminated tenured faculty without totally eliminating a program or department and without causing litigation. Such was the case at Baldwin-Wallace College, Eckert College, and Defiance College.[139] Mankato State University, a regional university of the Minnesota State University System, reduced its faculty by 150 positions from 1970 to 1975 without causing litigation.[140]

Since most people including administrators in higher education are optimists, there is a natural tendency to overlook contingency plans for a possible financial exigency caused by declining student enrollment or other reasons. Tucker found that most tenure contracts were silent as to

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[137]George W. Bonham, "The Carbondale Disease," Change, VI (May, 1974), 13.

[138]Kent G. Alm, et al., "Managing Faculty Reductions," The Journal of Higher Education, XLVIII (March/April, 1977), 159.

[139]Allshouse, op. cit., p. 354.

[140]Alm, op. cit., p. 154.

procedures to be followed in the event of terminations for financial need.[141]

The tenure contract should define financial exigency and should clarify the provisions, if any, for retraining and/or relocating terminated faculty within other areas of the institution or university system. This can be accomplished in the contract by reference to the faculty handbook or to other guidelines. If the university wishes to commit itself to attempting such a relocation, the tenure contract should specify that the final decision is completely within the judgment of an appopriate university official and that relocation is not an enforceable contract right under any circumstances. Tucker said that many administrators advocate describing the provisions for continuation or termination of employment as vaguely as possible; however, he pointed out that this invites costly and time-consuming litigation.[142]

A tenure contract can adopt guidelines issued by AAUP by reference to them and thus create an unintentional commitment.[143] The principles of AAUP, other professional associations, or accrediting agencies do not bind institutions unless they specifically adopt these principles.[144]

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[141]John C. Tucker, "Financial Exigency--Rights, Respons Responsibilities, and Recent Decisions," The Journal of College and University Law, II (Winter, 1974/75), 107.

[142]Ibid., pp. 107, 112.

[143]Ibid., p. 105.

[144]Rood, op. cit., p. 132.

Universities operating under contracts which are silent on the subject are probably just as well off as those whose contracts contain a vague and poorly defined financial exigency clause.[145]

The SBR defines financial exigency as:

> A condition at this institution resulting from a current or projected absence of sufficient funds, appropriated or nonappropriated, to maintain current programs and activities at their previous level, or to implement approved programs or activities, based upon the educational goals and priorities of this institution.[146]

The guidelines expand this concept to include curricular reasons including declining student interest, elimination of courses, and departmental reorganization.[147] Both SBR and UT specify that positions previously held by faculty members released for financial or curricular reasons will not be filled within a period of two years by a person with the same area of specialization unless the position is offered, in writing, with comparable renumeration to the terminated faculty member and he/she refuses the appointment.[148, 149]

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[145] Tucker, op. cit., p. 103.

[146] Tennessee State Board of Regents Policy on Academic Freedom, Responsibility, and Tenure, July 1, 1976.

[147] Ibid.

[148] Ibid.

[149] The University of Tennessee, op. cit., p. 24.

Termination for Retirement

An amendment to the 1967 Age Discrimination in Employment Act which extended retirement to age 70 became law on April 6, 1978. For all except tenured members of higher educational faculties, the law became effective on January 1, 1979. The law will apply to tenured professors commencing July 1, 1982.[150] This law is expected to make the administration of tenure policies more difficult. According to a study conducted by AAUP, during the first five years of application of the law after it applies to tenured professors, the number of new faculty employed is expected to be about one-third lower than if the retirement age had remained at 65.[151]

College and university administrators argued during deliberations on the bill that senior tenured faculty members were a source of difficulty to institutions of higher education and thus their exemption from the law was justifiable.[152] The salaries of professors approaching retirement are approximately twice that of newly hired faculty members.[153]

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[150]"Age of Retirement to Be Extended," Academe, XII (June, 1978), 4.

[151]Ellen K. Coughlin, "AAUP Finds Change in Retirement Age Could Lead to Layoffs, Reduced Hiring," The Chronical of Higher Education, XVI (July 24, 1978), 1.

[152]Morton S. Baratz, "A New Retirement Age and a New Attack Upon Tenure," AAUP Bulletin, LXIV (May, 1978), 69.

[153]Coughlin, loc. cit.

The University of Chicago Provost Gale Johnson predicted that the new law will prevent Chicago from hiring 100 new assistant professors during the first five years following 1982.[154] However, some companies in private industry changed their policies early or never did force retirement at 65. These firms have indicated that the number of people wishing to work beyond 65 will be small. White collar workers who occupy desks in pleasant surroundings may remain in larger numbers, but, as a rule, few workers want to stay past 65.[155]

Under guidelines proposed by the United States Department of Labor, colleges and universities may transfer tenured personnel to part-time or nontenured positions or some other status short of forced retirement during the transition period which is until July 1, 1982.[156]

Professional Negotiations and Tenure

At its annual meeting in May, 1972, the AAUP voted to pursue collective bargaining and to "allocate such resources and staff as are necessary for the vigorous selective

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[154]"Private Colleges Cry 'Help'," Time, CXIII (January 15, 1979), 39.

[155]"Lucking Out on Later Retirement," Time, CXIII (January 15, 1979), 62.

[156]"Proposed Retirement Rules Clarify Colleges' Exemption," The Chronical of Higher Education, XVII (December 18, 1978), 10.

development of this activity beyond present levels."[157] The American Federation of Teachers and the National Education Association are also promoting professional negotiations in higher education. These external organizations have more practical appeal than do local groups. Labor relations acts specify employment status and will not permit representative organizations unless there is a common interest among the employees to be represented. External organizations have the trained staff and resources to organize, negotiate, and engage the legal process of labor acts.[158]

According to McHugh, there are no major legal constraints to negotiating aspects of tenure. Terms and conditions of employment are among the negotiable items recognized by the National Labor Relations Act. Matters relating to job security have traditionally been considered within the meaning of terms and conditions of employment under most collective bargaining laws.[159] A grievance procedure is considered a mandatory subject of bargaining by the National Labor Relations Board (NLRB). Since tenure serves primarily the

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[157]"Council Position on Collective Bargaining," AAUP Bulletin, LVIII (Spring, 1972), 52.

[158]McHugh, op. cit., p. 49.

[159]Ibid., p. 58.

same function as a grievance procedure, NLRB will probably view it as a mandatory subject of bargaining.[160]

The tenure system is likely to be a major negotiable issue when professional negotiations reach a campus. At institutions having high percentages of nontenured faculty, the bargaining agent will be pressured by those disciplines where job mobility is poor to attain job security.[161] Menard predicted that collective bargaining in public institutions will decrease if not eliminate the individual contract concept. As a result, tenure matters will shift from board policies to the collective contract.[162]

The bargaining representative elected by a majority of the employees has exclusive authority to bargain for all employees including nonunion members in the unit. The employee's representative must have exclusive authority because of the adversary nature of negotiations if its role is to be meaningful. Otherwise the employer could encourage the various factions among the employees against each other. The rationale is that bargaining is viewed as a means of

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[160]Arthus P. Menard, "May Tenure Rights of Faculty be Bargained Away?" The Journal of College and University Law, II (Spring, 1975), 260.

[161]McHugh, op. cit., p. 57.

[162]Menard, op. cit., p. 266.

achieving the national goal of peaceful labor relations and the most favorable results for the majority of the employees.[163]

A possible outcome of the bargaining process is that the prospects of tenure for nontenured faculty may be bargained away due to the collective nature of the process. The final agreement might specify a limitation or a quota for tenure. Since nontenured faculty have no vested rights in tenure, there is nothing to prevent the prospects of their receiving tenure from being changed.[164]

The situation regarding tenured faculty is more difficult because they have a property right in continued employment. Individual contracts are suspended by the establishment of a collective bargaining agent due to the collective nature of the process. However, any faculty member retains freedom of contract which may be exercised if he/she can obtain better terms than those obtained by the group.[165]

Summary

The concept of academic tenure in American higher education, like many other social institutions, is evolutionary. Beginning in the mid 1960's, the social prestige

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[163] Ibid., pp. 261-62.

[164] Ibid., pp. 262-63.

[165] Ibid., p. 263.

of all facets of higher education declined, and the importance of academic freedom was not immune to that trend. If academic freedom is not important to society, then neither is academic tenure, the primary justification of which is the preservation of that freedom. While due process procedures have been effectively established to protect against unjust terminations of tenured faculty for cause, the ease with which all faculty members can be terminated for financial urgencies has placed academic freedom in a precarious position.

There are administrative advantages and disadvantages in a tenure system, and the disadvantages may be increased by the extended retirement age law. In order to avoid the administrative disadvantages, an increasing number of faculty have been appointed outside the tenure system. This practice has made the professoriate more transitory and placed limitations on serious research. Administrative demands for increased quantities of publications had led to a hurried and declining quality of research.

Administrators and governing boards have reacted to the buyers' market by requiring more stringent evaluations of tenure candidates, granting tenure more begrudgingly, and striving for more productivity from all faculty. Restrictions on granting tenure with its accompanying decrease in job security have increased the impetus for faculties to seek collective bargaining.

# CHAPTER III

## COURT DECISIONS WHICH INFLUENCE ACADEMIC TENURE IN TENNESSEE PUBLIC HIGHER EDUCATION

### Introduction

Those court cases which help to explain the meaning of academic tenure in Tennessee public higher education are presented in this chapter. A case bibliography was compiled from the American Digest System using the topical method of legal research. The topic was Colleges and Universities, Key 8--Faculty, Professors, and Tutors. The case synopsis in the digest was read to determine whether the work "tenure" or its derivatives were used. The presence of the word "tenure" or its derivatives included the case; otherwise, it was excluded.

The cases were located and examined for subject relevancy; the relevant cases were traced through the Shepard's Citation System to determine whether they had been cited in subsequent cases. The citation process revealed whether cases had been modified, reversed, or confirmed by higher courts. Those protions of cases which were modified and those cases which were reversed are not relevant case law and accordingly were disregarded.

The scope of the legal search was the entire National Reporter System. Academic tenure in public higher education is created by state law, but many of its attributes are

protected by the United States Constitution. Particular emphasis was placed on federal court cases in which federal constitutional and statutory questions were litigated and interpreted. This type of federal court decision has application to Tennessee regardless of the federal district or circuit from which it originated. State courts were also included since they occasionally hear federal constitutional and statutory claims.

Opinions rendered since 1972 were of primary interest for two reasons: (1) since that time higher education has entered a period of stabilized to declining enrollment which led to faculty termination decisions, and (2) the United States Supreme Court rendered two landmark decisions on June 29, 1972, which concerned faculty employment rights and security in institutions of public higher education.

The statutes, the State Constitution, and opinions of the Attorney General of Tennessee pertaining to academic tenure in public higher education were reviewed and included when relevant. One hundred thirty-eight reported cases selected from bound volumes, advance sheets, and slip opinions available March 31, 1979, comprised the case data for this study. All of these cases evolved from institutions of public higher education except 11. In private higher education, academic tenure is primarily a contractual arrangement. The 11 cases from private higher education

were used because tenure in public higher education also has contractual attributes. The cases from private higher education also helped to show the different applications of the United States Constitution between the two segments of higher education.

In a litigous proceeding, the courts have the responsibility of interpreting a faculty member's claim within the confines of statutory and constitutional constraints. However, sometimes the court supplements its opinion with subjective views which are called dicta. Dicta were frequently included in this study as an indication of how the judiciary felt about academic tenure; that is, they were included as an indication of the mood of the courts.

Each case was read to determine the fact situation and the court's disposition of the issue(s). Common features of the cases were grouped by subject to form a specific attribute, interpretation, or provision of academic tenure. The findings were presented in narrative form.

## Distinctions of Tenure

Tenure, the mechanism of academic freedom,[1] in public higher education is uniquely distinguishable from tenure in elementary and secondary educational institutions or in

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[1] Drans v. Providence College, 383 A.2d 1033, 1039 (R.I. 1978).

private institutions of higher education. The range of subjects and depth of treatment in certain social sciences is more restrictive in elementary and secondary education where students are in their formative years. Sensitive subjects may be discussed at greater depths with older, more mature students in the "more liberal, open, robust college surroundings."[2]

In higher education faculty self-governance and its contributions to administrative decision making are more prevalent than in elementary and secondary education. An additional concern of higher educational institutions, which is absent in elementary and secondary educational institutions, is that of a research goal as well as a purely instructional one.[3]

In a public institution, faculty members may invoke the Bill of Rights and the Fourteenth Amendment of the United States Constitution to protect their tenure rights since actions by the institution are state actions. This protection is not readily available to professors in private institutions. In Wahba v. New York University, the court held that "a finding of state action must precede" a finding

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[2]Textron v. Hancock, 359 So.2d 895, 897 (Fla. Dist. Ct. App. 1978).

[3]Mabey v. Reagan, 537 F.2d 1036, 1047-48 (9th Cir. 1976).

of withholding provisions of the Bill of Rights.[4] Dr. Wahba claimed state action on the basis of his project being furnished by a federal rearch grant. The court found that such support did not convert the private university into a public institution.[5]

In Pendrell v. Chatham College, the plaintiff tried to show state action in a private institution through the state charter, the state's certification of educational programs, the state's funding of student loans and scholarships, and the receiving of various federal funds. The court acknowledged that private conduct may become so entwined with governmental policies and regulations as to become subject to the constitutional limitations placed upon state action.[6] The court went on to say:

> As a policy matter, in view of the overriding federal interest in guaranteeing constitutional rights, it would seem that close cases should be resolved in favor of finding governmental control and state action.[7]

In Pendrell the court applied the extent of control standard and found that the combined levels of government did not

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[4]Wahba v. New York Univ., 371 F.Supp. 567, 569 (S.D. N.Y. 1973).

[5]Wahba v. New York Univ., 492 F.2d 96, 102 (2nd Cir.); cert. denied 419 U.S. 874 (1974).

[6]Pendrell v. Chatham College, 370 F.Supp. 494, 496-99 (W.D. Pa. 1974).

[7]Id. at 498.

have a significant effect on policy making or administration at the institution. Consequently, state action was not established.[8]

Government financial support has been held to bring a private institution within the confines of the Fourteenth Amendment. A private institution found to be primarily financed and controlled by the Commonwealth of Puerto Rico was adjudicated to be a source of state action.[9]

The Supreme Court of Tennessee has spoken supportively of Tennessee public higher education tenure laws. In the opinion of the Court, the fault for any promotion of institutionalized mediocrity must lie with administrators who have failed to take appropriate action. When administrators do not have the courage to terminate mediocre faculty members prior to tenure's being granted, they cannot rationally criticize the courts for enforcing the laws. The Court went on to say:

> The law permits colleges and universities to lengthen the probationary period--in fact it may be prolonged indefinitely. If they have sat idly by and galvanized incompetents into permanent fixtures, they have only themselves to blame. The legislature gave them a sound and workable law.[10]

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[8] Id. at 499.

[9] King v. Conservatorio de Musica de P.R., 378 F.Supp. 746, 750 (D. P.R. 1974).

[10] State ex rel. Chapdelaine v. Torrence, 532 S.W.2d 542, 551 (Tenn. 1975); cert. denied 425 U.S. 953 (1976).

The courts will not attempt to resolve a dispute unless the plaintiff has exhausted the possibility of settling the conflict through administrative procedures of the institution.[11] Disputes concerning tenure rights can be heard in either federal or state courts when the dispute includes a federal constitutional claim. The capacity of the state courts does not preempt federal jurisdiction. The federal jurisdiction has the role and duty of providing a litigant the choice of a federal forum for hearing and decision concerning federal constitutional claims. The state courts have the responsibility, equal with federal courts, to protect every right granted by the Constitution of the United States. If a state law from which a tenure claim evolves is ambiguous, the state court has the duty to decide the intent of such law.[12] Abstention from hearing a case by a federal court is not required merely because a possible remedy exists under state law.[13]

Public employee tenure rights arise solely from statutes or, in the case of a higher education governing board, from

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[11] Jablon v. Trustees of Cal. State Colleges, 482 F.2d 997, 998-99(9th Cir. 1973); cert. denied 414 U.S. 1163 (1974).

[12] Ward v. Kentucky State Univ. Bd. of Regents, 360 F.Supp. 1179, 1181-82 (E.D. Ky. 1973); aff'd 559 F.2d 1223 (6th Cir. 1977).

[13] Barszcz v. Board of Trustees of Community College Dist. No. 504, Ill., 400 F.Supp. 675, 676 (N.D. Ill. 1975); aff'd 539 F.2d 715 (7th Cir. 1976); cert. denied 429 U.S. 1080 (1977).

regulations adopted pursuant to statutory delegation of authority.[14] Being mindful of the many variations in the meaning of academic tenure, the Fifth Circuit Court of Appeals has noted one common characteristic: "The institution is making a general commitment for employment which is normally expected to continue, with the individual's consent, until his death or retirement."[15] Academic tenure does not ensure an absolute right. The Supreme Court of Ohio has stated:

> Academic tenure does not . . . . vest a faculty member with the right to continued reappointment to the faculty, and we so hold. A vested right is a right fixed, settled, absolute, and not contingent upon anything. Such is not the case.[16]

When compared to a state such as California which established academic tenure in public higher education in 1920,[17] tenure in Tennessee institutions of public higher education is a relatively recent development. The University of Tennessee's charter, granted by the legislature, designated the Board of Trustees as the governing body of The

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[14] Papadopoulos v. Oregon State Bd. of Higher Educ., 14 Or. App. 130; 511 P.2d 854, 872 (Or. Ct. App. 1973); cert. denied 417 U.S. 919 (1974).

[15] Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1142 (5th Cir. 1977).

[16] Rehor v. Case W. Reserve Univ., 43 Ohio St.2d 224; 331 N.E.2d 416, 420 (Ohio); cert. denied 423 U.S. 1018 (1975).

[17] CAL. EDUC. CODE sec. 20391 et seq. (now CAL. EDUC. CODE sec. 22600 et seq.).

University, with complete and full authority over its administration and organization. Under authorization of that charter, the Board adopted a tenure policy on November 4, 1955.[18] Tenure at the State Board of Regents institutions originated through a specific legislative enactment: Tennessee Code Annotated (TCA) 49-1421 of 1961. This statute required that the State Board of Education (now the State Board of Regents) would promulgate and publish rules and regulations regarding a tenure system by September 1, 1961.[19] TCA 49-1421 was repealed and the governance change designated in TCA 49-3255.[20]

Administrative Advantages of Tenure

A fundamental purpose of the traditional tenure system is to provide the state a method of staffing its state colleges and universities with the most competent professors.[21] An established tenure system will generally protect an institution against proof by a nontenured faculty member that he/she has achieved an expectancy of reemployment. In

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[18]The University of Tennessee Board of Trustees. Minutes of Annual Meeting, November 4, 1955, 24-26.

[19][1961] Tenn. Pub. Act, Chap. 252, 1.

[20][1976] Tenn. Pub. Act, Chap. 839, 1.

[21]Shields v. Watrel, 333 F.Supp. 260, 264 (W.D. Pa. 1971).

Haimowitz v. University of Nevada, the court expressed an advantage of tenure as follows:

> The entire thrust of formal tenure provisions is to standardize the process of faculty selection and employment security. In other words, formal tenure regulations are designed to avoid the de facto tenure problem . . . . Consequently, the existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment absent extraordinary circumstances.[22]

The existence of an explicit tenure system weighs heavily against a court's finding that an unwritten common law or rules for determining employee rights exists.[23, 24] The purpose of the probationary period required prior to tenure is to give the administration a chance to evaluate the professor without making a rehiring commitment.[25] The fact that most professors who are hired on a year-to-year basis are generally rehired does not occasion a right to reemployment; there is no such common law right.[26] Nothing

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[22] Haimowitz v. University of Nev., 579 F.2d 526, 528 (9th Cir. 1978).

[23] Cotten v. Board of Regents of Univ. Sys. of Ga., 395 F.Supp. 388, 393 (S.D. Ga. 1974); aff'd 515 F.2d 1098 (5th Cir. 1975).

[24] Willens v. University of Mass., 570 F.2d 403, 404-05 (1st Cir. 1978).

[25] Blair v. Board of Regents of State Univ. and Community College Sys., Tenn., 496 F.2d 322, 324 (6th Cir. 1974).

[26] Podder v. Youngstown State Univ., 480 F.2d 192, 194 (6th Cir. 1973).

in the United States Constitution protects mere subjective expectancy of tenure.[27]

A well defined tenure system will enable the court to readily determine whether a litigant claiming tenure status has qualified.[28, 29] Administrative oversights and neglect are not a justifiable basis for granting tenure. In a case in which an arbitrator awarded reinstatement to a professor who had not been accorded evaluation hearings in accordance with the tenure plan, the court did not honor the arbitrator's decision. The court held that reinstatement would be equivalent to awarding tenure, a matter left exclusively to the discretion of the governing board.[30]

The definite procedure by which tenure is established avoids the hazard of granting tenure by neglect. Cusumano v. Ratchford involved professors who had not received termination notice during the probationary period and who had continued to work. The professors were claiming, in the

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[27] Smith v. Greene, 86 Wash.2d 363; 545 P.2d 550, 553 (Wash, 1976).

[28] Plummer v. Board of Regents, Murray State Univ., 552 F.2d 716, 716 (6th Cir. 1977).

[29] Megill v. Board of Regents of State of Fla., 541 F.2d 1073, 1078 (5th Cir. 1976).

[30] Legislative Conference of City Univ. of N.Y. v. Board of Higher Educ. of City of N.Y., 38 App. Div.2d 478; 330 N.Y.S.2d 688, 690 (N.Y. App. Div.); aff'd 31 N.Y.2d 926; 340 N.Y.S.2d 924 (N.Y. Ct. App. 1972).

words of the court, "tenure by default."[31] In denying the professors' claim, the court stated:

> It cannot serve the public welfare or promote the best interest of either the University or its professorial staff to have a body of teachers, whatever their number, the permanent tenures of whom rest upon administrative neglect or oversight as to notice of termination.[32]

The court upheld the terminations and did not require the university to provide reasons for the dismissals.[33]

A faculty member may teach beyond the probationary period without acquiring tenure status. In Sheppard v. West Virginia Board of Regents, the professor taught six years in a tenure system having a five year probationary period and requiring a one-year notice of nonrenewal. The court concluded that terminating the professor was proper since the entire five years could be used to make the decision regarding tenure.[34] The issue of teaching beyond the probationary period and thus acquiring an expectancy of reemployment was raised in Kilcoyne v. Morgan. In that case, as in Sheppard, the one-year period beyond the probationary period was used to meet the requirements of a year's

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[31] Cusumano v. Ratchford, 507 F.2d 980, 984-86 (8th Cir. 1974); cert. denied 423 U.S. 829 (1975).

[32] Id. at 986.

[33] Id. at 987.

[34] Sheppard v. West Va. Bd of Regents, 516 F.2d 826, 829 (4th Cir. 1975).

notice, and the court found termination under such conditions permissable.[35]

The entire employment period preceding the granting of tenure is probationary. At any time during this period, the institution is limited in its powers to terminate the faculty member only by its contractual agreements and regulations, not by any tenure provisions. In Perkins v. Regents of University of California, the court upheld the dismissal of a faculty member who had taught seven years in a system where the tenure decision was made after the sixth year of teaching.[36]

However, tenure has been granted by default. In those situations, the tenure provisions specified either the awarding of tenure or dismissal after a specified period of service. Failure of the institutions to implement in a timely fashion its decision to dismiss caused the courts to hold that the professors were entitled to tenure.[37, 38]

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[35] Kilcoyne v. Morgan, 405 F.Supp. 828, 831 (E.D. N.C. 1975); aff'd 530 F.2d 968 (4th Cir. 1975); aff'd in part, vacated, remanded 535 F.2d 1250 (4th Cir. 1976).

[36] Perkins v. Regents of Univ. of Cal., 353 F.Supp. 618, 619 (C.D. Cal. 1973).

[37] Chung v. Park, 377 F.Supp. 524, 529 (M.D. Pa. 1974); aff'd 514 F.2d 382, 384 (3rd Cir. 1975); cert. denied 423 U.S. 948 (1975).

[38] Bruno v. Detroit Inst. of Technology, 51 Mich. App. 593; 215 N.W.2d 745, 748 (Mich. App. 1974).

The First Amendment and Academic Freedom

The First Amendment of the United States Constitution prohibits all levels of government from impairing the right of free speech, press, and association.[39] Public employment may not be conditioned upon a waiver of constitutional rights; unless a compelling public interest intervenes, a public employee may not be dismissed for the exercise of a First Amendment right[40] or any other constitutional freedom.[41]

In two cases concerning applications of the First Amendment in institutions of public higher education, the United States Supreme Court has described academic freedom as an educational feature of special concern. In Sweezy v. New Hampshire, the Court stated.

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperill the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity

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[39] U.S. CONST. amend. I.

[40] Keyishian v. Board of Regents, 385 U.S. 589, 604-05 (1967).

[41] Zumwalt v. Trustees of Cal. State Colleges, 33 Cal. App.3d 665; 109 Cal. Rptr. 344, 352 (Cal. Ct. App. 1973).

> and understanding; otherwise our civilization will stagnate and die.[42]

A decade later the Court reiterated its stand in Sweezy when rendering an opinion in Keyishian v. Board of Regents. In Keyishian the Court stated:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, . . . .[43]

The Supreme Court of California ordered reinstatement of a tenured professor dismissed 21 years earlier in violation of his First Amendment right of academic freedom. The Court also awarded full salary and pension benefits from the time of the plaintiff's initiating an administrative request for reinstatement. The professor had been terminated without a statement of charges and without a hearing.[44]

The Supreme Court of Montana has defended academic tenure through the following: "Its basis is academic freedom; freedom within the law to teach the truth and to stimulate the thinking of free men in a free society without fear of reprisal."[45] Although academic freedom is not one of the

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[42] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[43] Keyishian, 385 U.S. at 603.

[44] Monroe v. Trustees of Cal. State Colleges, 99 Cal. Rpts. 129; 491 P.2d 1105, 1107 (Cal. 1971).

[45] Sibert v. Community College of Flathead County, 587 P.2d 26, 28 (Mont. 1978).

enumerated rights of the First Amendment, it does preserve the classroom as a "market place of ideas"[46] and is one of the safeguarded rights. Academic freedom is not a license for uncontrolled expression at variance with established curricular content or for being internally destructive of the proper functioning of the institution. First Amendment rights must be applied circumspect of the special characteristics of the environment in the particular case.[47] The state has certain legitimate interests in limiting a faculty member's right to uninhibited speech: for example,

(1) the need to maintain discipline or harmony among co-workers;

(2) the need for confidentiality;

(3) the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties; and

(4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.[48]

The Sixth Circuit Court of Appeals has rejected the idea of substituting the First Amendment for tenure because that would succeed in elevating contract law to constitutional

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[46] Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972); cert. denied 411 U.S. 972 (1973).

[47] Keddie v. Pennsylvania State Univ., 412 F.Supp. 1264, 1270 (M.D. Pa. 1976).

[48] Clark, 474 F.2d at 931.

status. This Court also stated that academic freedom does not accord a professor the privilege of having their teaching styles insulated from administrative review just because the "methods and philosophy are considered acceptable somewhere within the teaching profession."[49]

Court action has determined that teaching philosophies and styles and the assignment of grades are not protected by academic freedom. In Hetrick v. Martin, the court stated:

> The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has a right to require some conformity with whatever teaching methods are acceptable to it.[50]

The public has an interest in the ongoing process of the university which must be considered by maintaining an image of competency and integrity among the faculty.[51] The right to free speech is not absolute; frequently it must be balanced against legitimate established interests.[52] The First Amendment is silent toward private speech in which the

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[49] Hetrick v. Martin, 480 F.2d 705, 709 (6th Cir.); cert. denied 414 U.S. 1075 (1973).

[50] Id. at 707.

[51] Duke v. North Tex. State Univ., 469 F.2d 829, 830 (5th Cir. 1972); cert. denied 412 U.S. 932 (1973).

[52] Dougherty v. Walker, 349 F.Supp. 629, 644 (W. D. Mo. 1972).

public has no interest. There is no free speech right to attack the character of the department head at faculty meetings,[53] to constantly complain and maintain a running dispute with the department head,[54] to make threats of physical harm to other faculty members,[55] nor to act in disharmony with the administration.[56, 57]

The faculty member's right to protest any phase of the universities policies or operations is protected by the Constitution so far as free speech is concerned. Any protests must be conducted in such a manner as to not disrupt the educational mission of the university. The professor's right to free speech as a citizen must be balanced with the right of the state to insure an orderly educational process.[58] Public criticism of the administration or specific administrators will customarily be protected[59] provided it does not

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[53] Roseman v. Hassler, 382 F.Supp. 1328, 1340 (W.D. Pa. 1974); aff'd sub nom. Roseman v. Indiana Univ. of Pa. at Ind., 520 F.2d 1364 (34d Cir. 1975); cert. denied 424 U.S. 921 (1976).

[54] Chitwood v. Feaster, 468 F.2d 359, 360-61 (4th Cir. 1972).

[55] Phillips v. Puryear, 403 F.Supp. 80, 88 (W.D. Va. 1975).

[56] Watts v. Board of Curators, Univ. of Mo., 495 F.2d 384, 389 (8th Cir. 1974).

[57] Podder, 480 F.2d at 193.

[58] Dougherty, 349 F.Supp. at 644.

[59] Rampey v. Allen, 501 F.2d 1090, 1099 (10th Cir. 1974); cert. denied 420 U.S. 908 (1975).

amount to personal slander of an individual.[60] The First Amendment does not protect a faculty member's false statements about any phase of the university, its administration, or governance.[61]

In Ferguson v. Thomas, the court stated that a university has no right to control a faculty member's speech or curtail freedom of association. The institution does have a right to terminate a faculty member at the point where the exercise of such constitutional privileges clearly over-balances the professor's usefulness as an instructor.[62]

A professor's tenure status is irrelevant in a First Amendment inquiry because tenured and nontenured faculty members are protected equally against a discharge resulting from the exercise of a First Amendment right.[63, 64, 65] The First Amendment protects a faculty member's right to engage in oral and written public communications and to supportively participate in public demonstrations. Such activities are

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[60] Duke, 469 F.2d at 840.

[61] Megill, 541 F.2d at 1083.

[62] Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970).

[63] Mabey, 537 F.2d at 1045.

[64] Prebble v. Brodrick, 535 F.2d 605, 617 n. 11 (10th Cir. 1976).

[65] Haimowitz, 579 F.2d at 529-30.

protected provided that they do not interfere with the normal functions of the faculty member or the educational function of the institution.[66]

In Podder v. Youngstown State University, a terminated professor was claiming a First Amendment right violation. The professor had used his classroom to discuss his personal differences with the administration and had maintained an ongoing feud with his departmental members. The court stated the following conerning the balance between a professor's duties and his protected rights:

> The exercise of First Amendment protection cannot completely supercede the need for orderly school administration and in this particular case, the need for maintaining harmony among fellow teachers within the same department.[67]

In Stolberg v. Members of Board of Trustees, the court found that a faculty member had been dismissed for exercising First Amendment rights. The court ordered reinstatement without loss of seniority which had the effect of granting tenure. Immediately after termination, the professor accepted a position at another college at a lower salary. The court awarded the difference between the lower salary and that which would have been received had termination not occurred. Attorney fees were also awarded. The court considered awarding

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[66]Stolberg v. Members of Bd. of Trustees for State Colleges of Conn., 474 F.2d 485, 487-88 (2nd Cir. 1973).

[67]Podder, 480 F.2d at 193.

compensation for the professor's humiliation, distress, and injury to his reputation; this was withheld since the professor had been elected to the state house of representatives in the interim which effectively rebutted injury to his reputation.[68] As much as seven years back pay and reinstatement have been awarded to a faculty member who was terminated as a result of exercising First Amendment freedoms.[69]

Professors unquestionably enjoy the First Amendment right to comment upon matters of public concern and to offer constructive criticism of school policy under the umbrella of academic freedom. These freedoms must be balanced with the interests of the educational institution in performing its public service.[70] However, engaging in constitutionally protected conduct does not insulate a professor from review by superiors.[71]

The Employment Agreement

The courts do not have the responsibility of ruling on the wisdom of tenure policies of tenure policies of state

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[68] Stolberg, 474 F.2d at 488-89.

[69] Ofsevit v. Trustees of Cal. State Univ., 21 Cal. App.3d 763; 582 P.2d 88, 95-96 (Cal. 1978).

[70] Cotten, 395 F.Supp. at 394.

[71] Cherry v. Burnett, 444 F.Supp. 324, 332 (D. Md. 1977).

educational institutions.[72] The courts, not the jury, have the duty to interpret written contracts and to decide what is and what is not within their terms.[73] In interpreting contracts, the court tries to determine the original intent of the parties. A contract is not rendered ambiguous by the fact that the parties do not agree upon its meaning. Where no ambiguity exists in the written agreement, courts cannot go outside the agreement and make a new contract for the parties.[74] Clear and unambiguous language of an agreement will not be substituted by what the parties thought the agreement meant or was intended to mean; the court will presume that the parties meant what they expressed.[75]

The intent of the parties as established through an "arm's length" transaction may control over the letter of the law. This was established in the consolidated case Eads v. Humphries. At the time of initial employment of the plaintiff professors, the statute controlling the Tennessee State Board of Education (now the Tennessee State Board of

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[72] Rennert v. Board of Trustees of State Colleges, 363 Mass. 740; 297 N.E.2d 60, 63 (Mass. Sup. Jud. Ct. 1973).

[73] Curbelo v. Board of Trustees of Community College Dist., 38 Mich. App. 432; 196 N.W.2d 843, 845 (Mich. Ct. App. 1972).

[74] Grantham v. Rockhurst Univ., 563 S.W.2d 147, 150 (Mo. Ct. App. 1978).

[75] Board of Trustees of State Colleges v. Sherman, 280 Md. Rpts. 373; 373 A.2d 626, 629 (Md. Ct. App. 1977).

Regents) professoriate stipulated a three year probationary period. However, the initial employment contracts were based on a State Board of Education resolution attempting to change the probationary period from three to five years. Even though the resolution was later held to be invalid, the resolution was the focal point of contractual agreement between the institutions and the professors.[76]

The plaintiff professors in Eads claimed to have acquired tenure after the third year of employment. Each professor was informed upon receipt of his/her contract document for the fifth year that the contract would be a terminal one. The court concluded that the universities had complied with the original good faith, "arm's length" agreement and upheld the universities positions based on the original intent of the contracting parties even though the agreement was outside the letter of the law.[77]

Due to their broad generalities, principles of the American Association of University Professors (AAUP) can become a complicating factor when they have been incorporated into an employment contract. In Cusumano v. Ratchford, the court spoke against adopting AAUP principles as part of a professor's contract. These principles were not intended by

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[76] State ex rel. Eads v. Humphries, 562 S.W.2d 805, 806-07 (Tenn. 1978).

[77] Id.

its promulgators to be binding legal documents. The principles are merely norms by which the profession can judge academic practices. The court recommended that the precise terms and conditions of every appointment be individually documented in precise contractual terms.[78]

Courts have found AAUP policy documents and reports to be completely irrelevant when such policies have never been adopted by the institution and thus have not been incorporated into the university's contractual relations with its faculty.[79, 80] AAUP guidelines have been used as appendiges to faculty handbooks with certain portions of the guidelines disclaimed in the body of the handbook. While this can give the administration a legal basis for its intent, it can cause misunderstandings and prompt faculty members to seek court action.[81]

Attempts by administrators at using reservation clauses to disclaim contractual obligations in policy statements has met little success. In Greene v. Howard University, the the court was concerned with the phrase "without any

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[78] Cusumano, 507 F.2d at 985.

[79] Mabey, 537 F.2d at 1043.

[80] Greenya v. George Washington Univ., 512 F.2d 556, 563 (D.C. Cir.); cert. denied 423 U.S. 995 (1975).

[81] Johnson v. Christian Bros. College, 565 S.W.2d 872 (Tenn. 1978).

contractual obligation to do so"[82] used when describing the institution's policy concerning faculty employment provisions. The university had relied on this phrase when it did not timely notify a nontenured professor of contract nonrenewal, and the court denied the legality of the disclaimer.[83]

An attempt by a public university to use a disclaimer of similar wordage in the same manner was again denied by the court in Hillis v. Meister. Relying heavily on the Greene decision, the court said:

> The issue here does not involve the public or private character of the University . . . . The issue here simply involves the law of contracts.[84]

A reservation clause giving financial flexibility has been successfully used when placed in a faculty handbook. In Rehor v. Case Western Reserve University, the court held that a properly worded reservation of the institution's rights in the handbook would enable the institution to change a retirement policy provided that there was adequate accompanying compensation to support the new modifying agreement.[85]

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[82] Greene v. Howard Univ., 412 F.2d 1128, 1134 (D.C. Cir. 1969).

[83] Id. at 1135.

[84] Hillis v. Meister, 82 N.M. 474; 483 P.2d 1314, 1317 (N.M. Ct. App. 1971).

[85] Rehor, 331 N.E.2d at 421.

Litigants often stipulate or the court holds that the faculty handbook is an integral part of the total employment agreement.[86, 87] Proof of usage or custom is admissible to explain or interpret the meaning of contractual language. In Nzomo v. Vermont State College, the faculty handbook was established to be the policy governing terminations, and this had not been modified through past conduct. Failure of the administration to follow the handbook procedure instilled a terminated faculty member with a valid claim of discriminatory treatment.[88]

In an employment contract stipulating that the contract was subject to the rules and regulations of the governing board, the court ruled that both parties were bound by that agreement as supplemented by the rules and regulations.[89] Tenure status has been declared by the Ninth Circuit Court of Appeals for a professor based on statements in the faculty handbook. The Court found that the professor had acquired

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[86] Hillis, 483 P.2d at 1315.

[87] Zimmerman v. Minot State College, 198 N.W.2d 108, 114 (N.D. 1972).

[88] Nzomo v. Vermont State College, 385 A.2d 1099, 1101 (Vt. 1978).

[89] Assaf v. University of Tex. Sys., 399 F.Supp. 1245, 1248 (S.D. Tex. 1975); appeal dismissed 557 F.2d 822 (5th Cir. 1977).

de facto tenure, a justifiable expectancy of continued employment despite nontenured status.[90]

The last line of a letter from a college president to a new faculty member who had not yet assumed duties stated: "It is our sincere hope that your tenure with us will be happy and fruitful."[91] Prior to any formal job offer being extended, the faculty member had written the president stating that the position applied for was to carry tenure. As a result of these exchanges, the faculty member was led to believe and he so contended in court that tenure was granted at the time of initial employment. The faculty handbook explained that newly appointed faculty were hired on a year-to-year basis and described the probationary period which could possibly lead to tenure. The probationary period specified a minimum, and eligibility was expressed through a "no sooner than" statement. The court admitted that there was some confusion regarding the professor's tenure status but relied primarily upon the faculty handbook to decide that tenure had not been granted.[92]

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[90] Bignall v. North Idaho College, 538 F.2d 243, 249 (9th Cir. 1976).

[91] Walker v. California State Bd. of Trustees, 351 F.Supp. 997, 997 (W.D. Pa. 1972); aff'd 485 F.2d 683 (3rd Cir. 1973).

[92] Id. at 998.

Institutional Tenure Standards

A professor's value to the institution depends upon his/her creativity, rapport with students and colleagues, teaching ability, and numerous other intangible qualities which cannot be measured by objective standards.[93] It is important that the institution be essentially free in its judgment to grant tenure only to those faculty members who merit retention. If the courts require the institution to justify the withholding of tenure, an elaborate record system will become necessary, all professors will have the accruements of tenure, and the system will be deprived of vitality. This does not leave the nontenured professor without protections because the courts do not permit any faculty member to be dismissed for constitutionally impermissible reasons.[94]

Courts are reluctant to question the judgment or decisions of educational administrators which are appropriately within their discretion. The courts are concerned only if a legal issue is involved; they are not concerned simply because the decision lacks wisdom and

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[93] Lewis v. Chicago State College, 299 F.Supp. 1357, 1359 (N.D. Ill. 1969).

[94] Shields, 333 F.Supp. at 264.

compassion.[95, 96, 97] Tenure is a privilege, a high recognition of merit, and a distinctive honor which cannot be accorded to all; it is the reward for academic excellence. The very nature of tenure precludes its being awarded by a court; it must be made by the faculty, administration, and governing board.[98]

In Stebbins v. Weaver, the court was asked to rule on the merits of the decision which withheld the granting of tenure, and the court declined. The court could find no basis upon which it might make a decision and noted that if such basis were possible its review would be limited to determining whether it was arbitrary and capricious. The court stated that the decision would be reviewed if the plaintiff could show that the withholding was based upon impermissible discrimination or made in retaliation for the exercise of a protected right.[99]

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[95] Cussler v. University of Md., 430 F.Supp. 602, 606 (D. Md. 1977).

[96] Regents of Univ. of Mich. v. Michigan Employment Relations Comm'n, 389 Mich. 96; 204 N.W.2d 218, 221 (Mich. 1973).

[97] Cherry, 444 F.Supp. at 332.

[98] Johnson v. University of Pittsburgh, 435 F.Supp. 1328, 1353 (W.D. Pa. 1977).

[99] Stebbins v. Weaver, 396 F.Supp. 104 (W.D. Wis. 1975); aff'd 537 F.2d 939, 943 (7th Cir. 1976); cert. denied 429 U.S. 1041 (1977).

In Stebbins the court spoke favorably of the practice of placing the major emphasis of the tenure granting decision with the departmental faculty. At the departmental level, the decision can be based on several years of observation, intuitive responses, and opinions exchanged with others. Subjectivity will inevitably enter into the decision, but the faculty evaluations are not expected to be as free of prior knowledge as are judges and jurors in courtrooms. Asking the departmental faculty to make completely objective decisions based upon evidential materials placed before them without considering prior knowledge would defeat the justification for lodging the evaluation with them.[100]

In Keddie v. Pennsylvania State University, a professor was contesting his not being granted tenure. The court concluded its concern upon establishing that tenure had not been withheld due to the professor's exercise of constitutional rights. In declining to review the decision to not grant tenure, the court stated:

> This court is powerless to substitute its judgment for that of the University as to whether plaintiff's academic credentials are such that tenure should have been awarded. The judiciary is not qualified to evaluate academic performance. The courts do not possess the expert knowledge or have the academic experience which should enlighten an academic committee's decision. The courts will not serve as a Super-Tenure Review Committee.[101]

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[100] Stebbins, 396 F.Supp. at 113.

[101] Keddie, 412 F.Supp. at 1270.

In some circumstances it might not be possible for an institution to grant tenure to even outstandingly qualified individuals. The authority to grant tenure in public higher education stems from state law. In the absence of a statute conferring authority to a governing board to grant tenure, such a grant is beyond their authority.[102] An institution may deny tenure for no reason, a reason based on erroneous facts, or any reason it chooses, except for a reason which violates a professor's constitutional rights. When a person is terminated partially for unconstitutional reasons, the entire action is defective.[103]

A case involving the denial of tenure because of alien status was decided by a federal district court in Illinois in 1971. The court ruled that the equal protection clause of the Fourteenth Amendment applied not only to citizens but to all persons who are lawfully admitted resident aliens. This provision also applied in the employment of professors in public colleges. This federal district court concluded that restrictions on granting tenure to alien professors could not be justified as having some rational relationship to a legitimate state end or national interest of the state in providing its own citizens with work. In the area of imigration, the federal government has to a great extent preempted

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[102] Sibert, 587 P.2d at 27.

[103] Megill, 541 F.2d at 1077-81.

the field of legislation, and to the extent that state laws and regulations are inconsistent, the latter cannot stand. The court ordered the granting of tenure and monetary compensations from the time tenure had been withheld since becoming eligible.[104]

The attainment of tenure by aliens in Tennessee public higher education was statutorily prohibited at one time. TCA 49-1303 prohibited any public educational institution from granting tenure to any person not a citizen of the United States.[105] Although this statute has not been repealed, it was held to be unconstitutional by the Attorney General of Tennessee on August 20, 1974.[106]

Title VII

Title VII of the Civil Rights Act of 1964 became applicable to educational institutions on March 24, 1972. Title VII, Public Law 92-261, makes it unlawful for an employer to discriminate in initial employment and in terms and conditions of employment with regard to race, color, religion, sex, or national origin. Since the 1972 amendments

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[104] Younus v. Shabat, 336 F.Supp. 1137, 1139-40 (N.D. Ill. 1971).

[105] Soni v. Board of Trustees of Univ. of Tenn., 513 F.2d 347, 350 (6th Cir. 1975); cert. denied 426 U.S. 919 (1976).

[106] Tenn. Att'y Gen. Op. No. 28 (1974).

were not retroactive, Title VII does not provide a remedy for discrimination suffered in educational institutions prior to March 24, 1972.[107]

As with federal constitutional claims, Title VII claims may be heard in state courts as well as federal courts; state courts are fully authorized to resolve such issues.[108] In Title VII cases the courts are concerned with determining whether reasonably good faith was shown through fair consideration by decision makers. In a situation where the Equal Employment Opportunity Commission (EEOC) had found sex discrimination, the court heard the case anew, considered the EEOC findings along with other evidence, and ruled that sex discrimination was not a legitimate conclusion.[109]

There have been many other unsuccessful attempts under Title VII to show sex discrimination through the denial of tenure, promotions, salary increases, and other terms and conditions of faculty employment in institutions of public

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[107] Cussler, 430 F.Supp. at 605.

[108] Cornwell v. Ferguson, 545 F.2d 1022, 1024 (5th Cir. 1977).

[109] Johnson, 435 F.Supp. at 1357-72.

higher education.[110, 111, 112, 113, 114, 115, 116] Race discrimination cases have also been generally unsuccessful.[117, 118, 119]

Eleventh Amendment Immunity

The Eleventh Amendment of the United States Constitution reads as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

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[110] Perham v. Ladd, 436 F.Supp. 1101, 1107 (N.D. Ill. 1977).

[111] Taliaferro v. Dykstra, 434 F.Supp. 705, 708-09 (E.D. Va. 1977).

[112] Cussler, 430 F.Supp. at 609.

[113] Abramson v. Board of Regents, Univ. of Hawaii, 56 Hawaii Rpts. 680; 548 P.2d 253, 263-64 (Hawaii 1976).

[114] Winsey v. Pace College, 394 F.Supp. 1324, 1332 (S.D. N.Y. 1975).

[115] Rackin v. University of Pa., 386 F.Supp. 992, 1008-09 E.D. Pa. 1974).

[116] Jaroch v. Board of Regents, Univ. of Wis. Sys., 372 F.Supp. 106, 107 (E.D. Wis. 1974).

[117] Citron v. Jackson State Univ., 456 F.Supp. 3, 16 (S.D. Miss. 1977); aff'd 577 F.2d 1132 (5th Cir. 1978).

[118] Chambliss v. Foote, 421 F.Supp. 12, 16 (E.D. La. 1976); aff'd 562 F.2d 1015 (5th Cir. 1977).

[119] United States v. University of Md., 438 F.Supp. 742, 759 (D. Md. 1977).

> the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[120]

The purpose of the Eleventh Amendment is to protect against federal court litigation which seeks to impose a liability which must be paid from state government funds. The Eleventh Amendment does not protect against suits to require state officials to act in accordance with the Constitution or to prohibit their invading constitutional rights. In faculty termination cases heard in federal courts, it prohibits the awarding of back pay but does not prohibit reinstatement with benefits for future services. That is, the Eleventh Amendment protects the state against former but not future monetary judgments; it offers no protection against claims of other types.[121, 122]

The applicability of the Eleventh Amendment is judged by the nature and effect of the proceeding rather than by the litigating parties. If the state is the ultimate party affected, the suit is in reality one opposing the state and thus is bared from suit. Whether the state is the ultimate party affected is properly determined through federal proceedings. State laws define the relationship and thus

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[120] U.S. CONST. amend. XI.

[121] Stebbins, 396 F.Supp. at 109-10.

[122] Byron v. University of Fla., 403 F.Supp. 49, 51-52 (N.D. Fla. 1975).

determine whether a public university is so closely related to the state as to share its Eleventh Amendment protection. State law is the context through which the federal court proceeds.[123]

Goss v. San Jacinto Junior College concerned a faculty member who was terminated under the guise of declining enrollment and poor evaluation of her work. The plaintiff alleged violation of First Amendment rights and sought a compensating monetary judgment. At the jury trial, where the jury was not instructed to consider anything concerning declining enrollment or poor evaluation, it was determined that the plaintiff had been terminated in retribution for her protected political and association activities. The College claimed that it could not be held liable for a monetary judgment under shield of the Eleventh Amendment. The court rejected this claim and awarded back pay of $23,400 to the professor. The findings of the trial court in Goss were affirmed by the Fifth Circuit Court of Appeals[124] where it had been previously determined that the defendant San Jacinto Junior College had a de facto tenure system.[125] The

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[123] Gordenstein v. University of Del., 381 F.Supp. 718, 720 (D. Del. 1974).

[124] Goss v. San Jacinto Junior College, 588 F.2d 96, 97-100 (5th Cir. 1979).

[125] Zimmerman v. Spencer, 485 F.2d 176, 177-78 (5th Cir. 1973).

cases prior to Goss involving San Jacinto Junior College in this Court also concerned the violation of constitutionally protected rights.[126, 127]

State charters and legislative enactments determine whether an institution of public higher education may sue and be sued. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, federal courts will find waiver only where so stated by explicit terms or by such overwhelming implication as to leave no room for any other reasonable interpretation. A clear declaration of a state's intention to submit its fiscal problems to a court other than that of its own creation must be found.[128]

The University of Tennessee's charter, granted by the legislature in 1807, provided that The University "may sue and be sued in any court of law or equity in this state or elsewhere."[129] In Soni v. Board of Trustees of University of Tennessee, the court discovered this charter provision and concluded that "consent to be sued inescapably subjected the university to the hazards of having a money judgment

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[126] Lewis v. Spencer, 468 F.2d 553, 558 (5th Cir. 1972).

[127] Lewis v. Spencer, 490 F.2d 93, 94 (5th Cir. 1974).

[128] Martin v. University of Louisville, 541 F.2d 1171, 1174 (6th Cir. 1976).

[129] The Univ. of Tenn. CHARTER art. 5, sec. 1.

rendered against it."[130] The Soni decision from the Sixth Circuit Court of Appeals awarded back pay to the nontenured professor from the date of termination until procedural due process had been completed because de facto tenure was established. While employed the professor had been led to believe that his employment with the university was an ongoing arrangement.[131]

In the same federal court, a claim for a monetary judgment against Memphis State University failed because its charter contained no language comparable to that found in the charter of The University of Tennessee.[132] In Martin v. University of Louisville, a tenured faculty member sued for back wages. The Sixth Circuit Court of Appeals could find nothing in the charter of the University of Louisville as sweeping as the waiver of sovereign immunity found in the charter of The University of Tennessee. Consequently, the Court did not award back wages in this case.[133] In Chapdelaine v. Torrence, the Tennessee Supreme Court awarded a year's salary with interest to a tenured professor who had been dismissed for adequate cause but who had not been

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[130] Soni, 513 F.2d at 353. [131] Id. at 351.

[132] Long v. Richardson, 525 F.2d 74, 79 (6th Cir. 1975).

[133] Martin, 541 F.2d at 1174.

accorded procedural due process prior to dismissal. Since this was a state court, the Eleventh Amendment had no application.[134]

Since the Soni decision, the Tennessee General Assembly has expressed its specific intent that the charter provisions not be constructed as an implied waiver of Eleventh Amendment protection for the University of Tennessee. TCA 20-1702 was amended to provide:

> No statutory or other provision authorizing the University of Tennessee and its Board of Trustees to sue and be sued shall constitute a waiver of sovereign immunity.[135]

The Tenure Property Right

The Fourteenth Amendment of the United States Constitution specifies that no state shall "deprive any person of life, liberty, or property, without due process of law."[136] The due process clause does not prohibit the government from depriving people of liberty or property, but requires that government action be preceded by allowing the effected person an opportunity to be heard.[137]

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[134] Chapdelaine, 532 S.W.2d at 550.

[135] [1977] Tenn. Pub. Act, Chap. 170, 1 (effective May 9, 1977).

[136] U.S. CONST. amend. XIV.

[137] Nance v. Oregon State Sys. of Higher Educ., 23 Or. App. 558; 543 P.2d 687, 690 (Or. Ct. App. 1975); cert. denied 429 U.S. 827 (1976).

In Board of Regents v. Roth, the United States Supreme Court established that a nontenured faculty member, subject to a tenure policy, does not have a property interest in reemployment and thus no right to a due process hearing. The university gave no reason whatever for terminating the nontenured professor, and the Court upheld that procedure. The Fourteenth Amendment due process clause requires a notice of charges and a hearing opportunity for a terminated faculty member only when the faculty member can show that there was deprivation of a property or liberty interest through the termination.[138] Prior to the Roth decision, failure to provide a statement of causes and an opportunity for a hearing to nontenured faculty members had been held to be an unconstitutional denial of due process.[139]

The property interests of tenure systems are not created by the United States Constitution. They are created by interactions of the parties,[140] and their dimensions are defined by existing rules and understandings that stem from an independent source such as state laws and/or governing

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[138] Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

[139] Auerbach v. Trustees of Cal. State Colleges, 330 F.Supp. 808, 812 (C.D. Cal. 1971).

[140] Ducorbier v. Board of Supervisors of La. State Univ., 386 F.Supp. 202, 208 (E.D. La. 1974).

board policies.[141, 142] During the span of a term contract, a nontenured faculty member has property interest equal to that of a tenured person.[143] The Supreme Court of Nevada has described the property attribute of tenure as a mode or system of holding a position, especially with regard to time. The Court went on to say:

> There is little question that tenure when acquired by a faculty member is a valuable right and an important part of the university system throughout the United States.[144]

A plaintiff need not show formal tenure status to invoke due process property protection, but it must appear that the policies and practices of the institution at least rise to the level of implied or de facto tenure. An objective expectancy of continued employment, proven by a specific or implied contract right or by a de facto tenure system, is protected by the Fourteenth Amendment.[145, 146] Failure to give a timely notice has been ruled to vest an untenured

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[141] Roth, 408 U.S. at 577.

[142] Wells v. Board of Regents of Murray State Univ., 545 F.2d 15, 17 (6th Cir. 1976).

[143] Stewart v. Bailey, 556 F.2d 281, 285 (5th Cir. 1977).

[144] Winterberg v. University of Nev. Sys., 89 Nev. 358; 513 P.2d 1248, 1250-51 (Nev. 1973).

[145] Decker-Gregg v. Scarlett, 392 F.Supp. 1352, 1355 (M.D. Tenn.); aff'd 524 F.2d 1405 (6th Cir. 1975).

[146] Decker v. North Idaho College, 552 F.2d 872, 874 (9th Cir. 1977).

professor with a property right sufficient to require a due process hearing prior to termination and retention at the university for another year.[147]

De facto tenure may result from an institution's written and unwritten policies or practices which grant qualified employees a concrete expectancy that their future employment is secure. This concrete or objective expectancy entitles them to procedural due process prior to termination.[148] Although de facto tenure can develop in the absence of a formal tenure system, it does not necessarily happen. A professor at an institution which had no formal tenure system taught eighteen consecutive years on successive one-year contracts without establishing a property interest. The faculty handbook stated that no formal tenure existed for any member of the faculty, regardless of rank.[149]

An objective expectancy of reemployment can be established in an indirect manner. In Hillis v. Meister, the faculty handbook was treated as controlling the relationship between the faculty and administration. Procedures were set forth in the handbook concerning the treatment of a first year faculty member who was not to be reemployed.

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[147] Assaf, 399 F.Supp. at 1250.

[148] Abramson, 548 P.2d at 262.

[149] Laubach v. Bradley, 572 P.2d 824, 826 (Colo. 1977).

In situations where the procedures were not followed, the professor involved had been reappointed. The court found that as a result of the precedent, not following the procedures instilled a reasonable objective expectancy of reemployment.[150]

A mere subjective expectancy of continued employment is not protected.[151] A faculty member who was appointed under a one-year contract exchanged letters with other faculty of the department prior to his arrival on campus as to the likelihood of a one-year appointment being extended. Through these exchanges the faculty member developed a subjective expectancy of reemployment which the court did not recognize because the letters were not from university officials acting in a legal capacity.[152]

An objective basis may develop as a result of rules, regulations, and policies which justify an expectancy of continued employment.[153] Soni was a successful attempt by a nontenured faculty member within a tenure system to prove a property interest. The faculty member was prohibited from obtaining tenure by state law because of his alien status.

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[150] Hillis, 483 P.2d at 1315.

[151] Decker-Gregg, 392 F.Supp. at 1355.

[152] Seitz v. Clark, 524 F.2d 876, 881 (9th Cir. 1975).

[153] Berry v. Hamblin, 356 F.Supp. 306, 308 (M.D. Pa. 1973).

Yet a sufficient property interest was acquired to become entitled to the due process provisions of tenure. The property interest developed by his participating in benefits, privileges, and responsibilities which were open only to tenured faculty members.[154]

Mere inconveniences are not protected by the due process clause. Lewis v. Spencer concerned a governing board policy prohibiting a husband and wife from teaching in the same department. This policy had the effect of depriving one of the Lewises of remaining to teach in their existing department. The court ruled that the range of opportunities foreclosed was narrow, that neither employment opportunities in other parts of the institution or other areas of governmental service were foreclosed. Those affected by the new policy were not entitled to a due process hearing.[155]

Liberty Interests and Due Process

In the case of a nontenured faculty member, the property interest expires on the same day when the term contract expires. However, nontenured faculty members enjoy as much liberty protection against state action as do tenured faculty. A liberty interest is abridged when the institution acts in such a way as to limit future employment prospects

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[154] Soni, 513 F.2d at 350-51.

[155] Lewis, 468 F.2d at 557.

through, for example, public statements which damage a professor's good name through a questioning of character. This does not require that the institution become concerned with whether the job market can absorb the individual.[156]

In Perry v. Sindermann, the United States Supreme Court ruled on a situation where the governing board had issued press releases charging a professor with insubordination in an attempt to justify the termination. The Court, reasoning that the press releases had hampered the professor's ability to find other employment, ordered the governing board to allow the professor a hearing to refute the allegations and to prove his claims regarding other points.[157] The mere nonretention alone does not place a stigma upon the professor's reputation.[158, 159] Public actions by an institution which jeopardize a person's reputation or integrity and injure his/her social position in the community establish a deprivation of liberty.[160, 161]

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[156] Perkins, 353 F.Supp. at 622-23.

[157] Perry v. Sindermann, 408 U.S. 593, 598 (1972).

[158] Roth, 408 U.S. at 574 n. 13.

[159] Haimowitz, 579 F.2d at 529.

[160] Francis v. Ota, 356 F.Supp. 1029, 1032 (D. Hawaii 1973).

[161] Kaprelian v. Texas Woman's Univ., 509 F.2d 133, 137 (5th Cir. 1975).

Keeping confidential records of appraisals for purposes of internal decisions are not viewed as a deprivation of liberty.[162] The discussion of professional inadequacies at a confidential evaluation conference attended by several administrators has been held to not deprive a faculty member of liberty.[163] If a hearing is made public at the request of the faculty member and stigmatizing information is thereby made public, the institution cannot be held responsible.[164]

In Ortwein v. Mackey, the court ruled that a professor's liberty was not infringed by the mere presence of derogatory information in confidential files. In order for the court to have found a deprivation of liberty, the university would have had to officially or intentionally make the allegedly stigmatizing charges public in a situation other than in connection with the legal defense.[165] Charges of immorality made public at a trial have been held not to be administrative actions which are liberty depriving.[166]

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[162] Kennedy v. Engel, 348 F.Supp. 1142, 1148-49 (E.D. N.Y. 1972)

[163] Bradford v. Tarrant County Junior College Dist., 492 F.2d 133, 134-35 (5th Cir. 1974).

[164] Cornwell v. University of Fla., 307 So.2d 203, 210 (Fla. Dist. Ct. App. 1975).

[165] Ortwein v. Mackey, 511 F.2d 696, 699 (5th Cir. 1975).

[166] Wood v. University of S. Miss., 539 F.2d 529, 532 (5th Cir. 1976).

A detailed set of reasons set forth in a personal letter to a discharged faculty member from the president was found not to be liberty depriving. The letter contained descriptions of professsional inadequacies. The court ruled that while these charges may be professionally injurious, if made public, they were not processed in a manner which would entitle the plaintiff to a defensive hearing.[167] When it is the terminated party who publicizes the reasons for termination, the institution is not the perpetrator of liberty deprivation.[168, 169]

An unpleasant experience with a tenure committee does not automatically justify a claim of liberty deprivation; rather, something tantamount to a "badge of infamy" must be pinned upon the complainant.[170] Reasons of inadequate academic performance raised at a grievance hearing have been held to be inadequate to constitute a liberty deprivation.[171] Liberty interests are not compromised when a professor is

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[167] Berry, 356 F.Supp. at 308.

[168] Hostrop v. Board of Junior College Dist. No. 515, 399 F.Supp. 609, 610 (N.D. Ill. 1974); aff'd in part 523 F.2d 569, 573 (7th Cir. 1975); cert. denied 425 U.S. 963 (1976).

[169] Keddie, 412 F.Supp. at 1275.

[170] Perkins, 353 F.Supp. at 622.

[171] Jablon, 482 F.2d at 1000.

charged with failure to meet minimum standards in his professional relationship with students.[172]

Requiring a psychiatric examination,[173] or publicly charging a faculty member with dishonesty have been ruled to be liberty depriving.[174] In a case finding that a professor had been dismissed and stigmatized in violation of his constitutional rights, the court ordered reinstatement. The institution was also required to expunge the professor's record of any mention of the dismissal proceedings described in court.[175]

The Due Process Hearing

In Slochower v. Board of Higher Education, the United States Supreme Court ruled that a tenured public college professor has a protected interest in continued employment which is safeguarded by the due process clause and which includes the right to a hearing prior to termination.[176] More recently a federal district court stated the requirement with equal specificity: "When a public college faculty

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[172] Blair, 496 F.2d at 324.

[173] Stewart v. Pearce, 484 F.2d 1031, 1034 (9th Cir. 1973).

[174] Hostrop, 523 F.2d at 574.

[175] Phillips, 403 F.Supp. at 88.

[176] Slochower v. Board of Higher Educ. of City of N.Y., 350 U.S. 551, 554 (1956).

member is tenured, . . . . procedural and substantive due process must be provided before employment may be terminated."[177] Although a faculty member may waive the right to a hearing, the waiver of any constitutional right is not lightly concluded and every reasonable presumption against it is allowed by the courts.[178]

The professor must be provided with a written statement of the charges in sufficient time prior to the hearing that a rebuttal can be prepared. The charges must be stated with sufficient specificity that they can be definitely and individually challenged. A valid claim of surprise due to lack of specificity of the charges or for other reasons will entitle the faculty member to an adjournment and postponement of the hearing.[179]

When protected interests are at stake, the opportunity for a hearing prior to any deprivation is essential except in extraordinary circumstances where a valid governmental interest is at stake which justifies postponing the hearing until after the depriving event.[180] The hearing should

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[177] Shaw v. Board of Trustees of Frederick Community College, 396 F.Supp. 872, 886 (D. Md. 1975); aff'd 549 F.2d 929 (4th Cir. 1976).

[178] Stewart, 484 F.2d at 1034 n. 4.

[179] Jaroch, 372 F.Supp. at 108.

[180] Roth, 408 U.S. at 570 n. 7.

normally be held prior to the deprivation, but it is not necessary that it precede the administrative decision to deprive.[181] A tenured professor confessed that he had forged documents contained in his dossier submitted for promotion and was terminated prior to a due process hearing. The court ruled that this was not an extraordinary situation so disruptive to the educational process as to justify dismissal prior to a hearing. Reinstatement with back pay was ordered. The court noted that the institution could commence termination proceedings following reinstatement, provided that adequate procedural safeguards were provided.[182]

For a professor to be entitled to procedural due process prior to employment termination, the professor is not required to demonstrate with certainty that an entitlement of tenure exists. The only requirement is the ability to demonstrate that rules or understandings support a claim of entitlement to the benefits of tenure.[183]

Due process requires a fair hearing before an impartial tribunal; however, this requirement cannot normally be utilized to disqualify all members of the governing board making it impossible for the board to perform its lawful

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[181] Chung, 514 F.2d at 387.

[182] Anapol v. University of Del., 412 F.Supp. 675, 676-80 (D. Del. 1976).

[183] Kennedy, 348 F.Supp. at 1147 n. 4.

function. In a situation where a college president had indicated to the board prior to the hearing the action expected of them regarding termination of a tenured professor, the court found that this was insufficient to disqualify the board from acting. The president did not transmit any further information to the board between the time of hearing and their decision. The due process provision was not so rigid as to require the board to ignore facts generally known to them by virtue of their position.[184]

There is a risk of biasness when the hearing panel consists of those within and associated with the institution. Courts have balanced the need for an objective decision maker against the cost of employing outsiders, administrative efficiency, and the body's having some expertise in institutional structures.[185]

In Potemra v. Ping, a tenured faculty member dismissed for cause claimed lack of due process because the witnesses at the hearing were not under oath. The court noted that where other procedural protections are lacking, the use of an oath could be an important indicator that minimal due process was utilized. The precise due process requirement may vary from case to case. In rejecting the claim that

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[184] Shaw, 396 F.Supp. at 887-88.

[185] Bignall, 538 F.2d at 247.

witnesses at the hearing should have been under oath, the court stated:

> While there are clear examples of cases in which oaths were not administered at due process hearings, research has not disclosed any case which expressly considers the need for an oath in this context.[186]

An administrator can create a situation which requires a due process hearing where none was otherwise necessary. In Ferguson v. Thomas, the court stated:

> A college can create an obligation as between itself and an instructor where none might otherwise exist under the legal standards for the interpretation of contract relationships regularly applied to transactions in the marketplace if it adopts regulations or standards of practice governing nontenured employees which create an expectation of reemployment.[187]

In Whitney v. Board of Regents, a nontenured professor designated for termination was not entitled to any procedural due process protection; however, a public hearing was conducted at which time the university charged the professor with inadequate teaching and personal immaturity without giving specifics. This public statement of charges impaired the professor's good name and entitled him to a due process hearing where the charges could be refuted. In a second hearing held in private, the university elaborated upon the

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[186] Potemra v. Ping, 462 F.Supp. 328, 332-35 (S.D. Ohio 1978).

[187] Ferguson, 430 F.2d at 856.

charges, but the court later determined that even after the private hearing, the charges were too vague. The court ordered that the professor be informed of the origin of specific allegations so that an effective rebuttal could be developed against them and that another public hearing be provided.[188] Under normal circumstances when a faculty member is entitled to a hearing, a public hearing is not required.[189]

Employment Outside the Institution

Gross v. University of Tennessee concerned two tenured professors who were terminated for their refusal to sign income limiting agreements. The professors claimed to have a right, which was protected by the due process clause of the Fourteenth Amendment, to engage in the unlimited private practice of medicine outside their teaching positions. The court ruled that their claim was invalid and that the income limiting agreements were rationally related to the legitimate goals of fostering full-time devotion to their teaching duties. The terminations were upheld.[190]

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[188] Whitney v. Board of Regents of Univ. of Wis., 355 F.Supp. 321, 322-25 (E.D. Wis. 1973).

[189] Shaw, 396 F.Supp. at 887.

[190] Gross v. University of Tenn., 448 F.Supp. 245, 248 (W.D. Tenn. 1978).

An Arkansas statute recognized six professorial ranks from distinguished professor to lecturer in one of its state university law schools. Full-time professors in three of the classifications were permitted to practice law outside the university without restrictions while professors in the other three classifications were prohibited to practice for fees. The Supreme Court of Arkansas held that the unequal restrictions of the statute were invalid under the equal protection clause of the Fourteenth Amendment since no reasonable objective for the disparity could be shown.[191] Although the statute was held unconstitutional, the Court recognized the merits of such legislation:

> Certainly, the object or purpose of such legislation, i.e., to require law school personnel to devote full time to the duties for which they were employed, fosters a policy which cannot be said to be without merit, for when an individual accepts a position, he owes an obligation to fully perform the duties required, without hindrance from outside activities.[192]

In Trister v. University of Mississippi, two law school professors were challenging a rule prohibiting all law school faculty members (full- and part-time) from part-time employment with a specific organization. The activities of the organization were highly unpopular in the community and throughout the state. The professors contended that it was

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[191] Atkinson v. Board of Trustees of Univ. of Ark., 559 S.W.2d 473, 475 (Ark. 1977).

[192] Id. at 477.

constitutionally invalid for a state university which permitted outside employment to all faculty members to adopt a rule that specified a single organization in which faculty members may not be employed.[193]

The court agreed. In rendering its decision, the court stated:

> The University may well decide not to employ any part-time professors, and it may decide to forbid the practice of law to every member of its faculty. What the University as an agency of the State must not do is arbitrarily discriminate against professors in respect to the category of clients they may represent. Such a distinction is an abuse of discretion which denies to plaintiffs the equal protection of the law guaranteed to them by the Fourteenth Amendment.[194]

In Orr v. Koefoot, two faculty members, one tenured and one nontenured, were challenging a university regulation prohibiting full-time faculty members at a university medical center from rendering medical services outside university facilities. This regulation was incorporated into the employment contract with full-time professors. Part-time faculty members were not subject to such restrictions, and the challenge was based on the equal protection clause of the Fourteenth Amendment. While the plaintiff professors were operating a private abortion clinic, the number of

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[193] Trister v. University of Miss., 420 F.2d 499, 500-02 (5th Cir. 1969).

[194] Id. at 504.

patients seeking abortions at the university medical clinic had declined to the point of not providing adequate training in this area to medical students. During the course of the dispute prior to court action the governing board passed a resolution providing terminations for full-time faculty members who performed abortions outside university facilities.[195]

In Orr the court held that the restriction was not unconstitutional because all full-time faculty members were so restricted. It was also proper since the restriction was a contractual provision and that the professor's practice outside university auspices had the effect of defeating the purpose of the university medical center. The court concluded that if the professors did not comply with the restrictions, the tenured faculty member could be terminated for cause subject to due process provisions and that the nontenured faculty member could be unconditionally terminated.[196]

A professor at an institution of public higher education which had a regulation limiting and controlling outside employment was terminated for noncompliance. Noncompliance consisted of exceeding the limitation of one day per week and for not disclosing the nature of the outside

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[195] Orr v. Koefoot, 377 F.Supp. 673, 676-84 (D. Neb. 1974).

[196] Id. at 687-89.

employment. The court found that the professor had received favorable student evaluations during the period in question, had not neglected his classes or students, and that he averaged no more than one day per week. The court concluded that termination was excessive punishment under the circumstances. However, there was a dissenting opinion.[197]

Termination for Cause

If a statute or governing board policy authorizes the granting of tenure and specifies the procedures for removing a tenured professor, these procedures are valid and the courts will not interfere. To hold otherwise would enable a faculty member to enjoy the benefits of the system and yet challenge its procedures.[198] However, the employment of instructional personnel in public educational instiutions may not be terminated as a result of exercising constitutionally protected rights.[199]

In reviewing the decision of an educational institution to discharge one of its employees, a federal court is limited to two levels of inquiry:

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[197] Lahasky v. Board of Higher Educ. of City of N.Y., 410 N.Y.S.2d 853, 853 (N.Y. App. Div. 1978).

[198] Barszcz, 400 F.Supp. at 678.

[199] Shields, 333 F.Supp. at 262.

(1) whether the procedures followed by school authorities adhered to due process requirements, and if so

(2) whether the action taken was supported by substantial evidence.[200]

These same levels of inquiry have been applied in a consolidated case.[201]

In Starsky v. Williams, the court heard a mixture of reasons for terminating a professor who had attained de facto tenure.[202] In evaluating each allegation which the governing board had compiled against the professor, the court found constitutionally protected and unprotected reasons. The court stated that when there are valid and invalid reasons for a dismissal, the discharge will not be overruled by the federal court provided that the invalid reasons are not the primary reasons or motive for the discharge.[203]

In Adamian v. Jacobsen, the court recognized the difficulty of defining adequate cause in its statement:

> The term "adequate cause" must be interpreted in the context of traditional standards of faculty behavior; its vagueness is a necessary result of

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[200] Viverette v. Lurleen B. Wallace State Junior College, 587 F.2d 191, 193 (5th Cir. 1979).

[201] Bowling v. Scott, 587 F.2d 229, 231 (5th Cir. 1979).

[202] Starsky v. Williams, 512 F.2d 109, 110-11 (9th Cir. 1975).

[203] Starsky v. Williams, 353 F.Supp. 900, 916 (D. Ariz. 1972).

> the many forms of faculty conduct which might justify dismissal.[204]

In Shaw v. Board of Trustees, a tenured faculty member terminated for cause was charging denial of substantive due process due to the harsh sanction of termination. The professor had refused to attend two workshops and a commencement exercise as an expression of his dissatisfaction with changes made in the institution's tenure plan. Attending workshops and participating in commencement exercises were conditions of employment contained in the institution's policy manual. In refusing to accept the extent of punishment as an indication of a denial of substantive due process the court stated:

> It is not the function of the court, in the guise of enforcing constitutional standards, to supplant the discretionary authority of state administrative bodies in the administration of their personnel policies regarding administrative level personnel. While an egregious case of extreme inconsistency between the triviality of the act and the severity of the punishment for the act might justify the inference that the punishment was, in fact, imposed for some reason other than the stated one, the harshness of the punishment in and of itself does not justify a federal court to intervene.[205]

Although this opinion was affirmed upon appeal, there was a dissenting opinion.[206]

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[204] Adamian v. Jacobsen, 523 F.2d 929, 932 (9th Cir. 1975).

[205] Shaw, 396 F.Supp. at 889.

[206] Shaw, 549 F.2d at 934.

When a professor is to be terminated for cause and the termination is opposed, minimum procedural due process requires that:

> (1) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist,
>
> (2) he be advised of the names and the nature of the testimony of witnesses against him,
>
> (3) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense,
>
> (4) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.[207]

In the dismissal of a tenured faculty member for cause, the question of using different hearing bodies during the dismissal process was litigated in Bates v. Sponberg. A faculty committee had conducted the hearing and the governing board ruled to dismiss based on the committee's recommendations without reviewing the record. The court ruled that the faculty member had not been deprived of procedural due process even though this procedure violated the board's rules.[208]

Arguments were presented in Gross that tenured faculty members terminated for cause should be accorded as great a

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[207] Ferguson, 430 F.2d at 856.

[208] Bates v. Sponberg, 547 F.2d 325, 333 (6th Cir. 1976).

period of prior notice as is given probationary faculty. The faculty handbook, in dealing with probationary faculty stated: "If the individual has served two or more years at the University, such notice will be given no later than twelve months before the expiration of the appointment."[209] The court rejected this argument stating that termination provisions for probationary faculty not being terminated for cause could not be extended to terminations of tenured faculty for cause.[210]

Termination for Financial Exigency

The rapidly changing needs of students and society demand that university administrators have sufficient discretion to retrench in areas faced with financial problems.[211] An overstaffing condition in one department does not constitute a state of financial exigency, but overstaffing within a particular department does materially affect retention and dismissal decisions. Educational institutions have limited funds and must elect to spend them in an optimum way; allocating these funds encompasses decisions to terminate faculty members.[212]

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[209] Gross, 448 F.Supp. at 249. [210] Id.

[211] Scheuer v. Creighton Univ., 199 Neb. 618; 260 N.W.2d 595, 601 (Neb. 1977).

[212] Mabey, 537 F.2d at 1043-44.

The Fifth Circuit Court of Appeals has defined a reduction-in-force to mean that someone who would otherwise probably stay must be dismissed. Employing general criteria determines who among qualified faculty members is most expendable, rather than deciding who warrants dismissal for cause. There is no future employment depriving stigma associated with a reduction-in-force termination. Once the need for a reduction-in-force has been established, the governing body may employ any standard to implement the reduction. The plan may be as arbitrary as drawing lots or otherwise leaving the decision to chance, so long as the actual reason for dismissal is not retaliation against an individual's constitutionally protected activities.[213] However, leaving the selection completely to chan e could be subject to legal attack by asserting a lack of substantive due process and the presence of arbitrariness.[214]

A leading financial exigency termination case in public higher education is Johnson v. Board of Regents of University of Wisconsin System. It was necessary that these terminations be designated layoffs because the applicable state statutes did not specify financial exigency as a basis for

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[213] Collins v. Wolfson, 498 F.2d 1100, 1103-04 (5th Cir. 1974).

[214] Hibbs v. Board of Educ. of Iowa Cent. Community College, 392 F.Supp. 1202, 1208 (N.D. Iowa 1975).

terminating tenured faculty.[215] The due process hearing requirements outlined in Johnson are as follows:

> (1) furnish each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay-off;
>
> (2) furnish each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at;
>
> (3) making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and
>
> (4) providing each plaintiff the opportunity to respond.[216]

In the case of financial exigency terminations, only minimal procedural protections of substantive due process are required by the Fourteenth Amendment. After the initial decision, each person designated for termination should have an opportunity to show that the dismissal was for constitutionally impermissable reasons or that the ultimate decision was arbitrary and unreasonable.[217]

In Hibbs the court recognized the difficulty of identifying the person(s) for termination during retrenchment proceedings. A professor charged that the institution had used the retrenchment opportunity to dismiss him because of

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[215] Johnson v. Board of Regents of Univ. of Wis. Sys., 377 F.Supp. 227, 231 (W.D. Wis. 1974); aff'd 510 F.2d 975 (7th Cir. 1975).

[216] Id. at 240.

[217] Id. at 239-40.

his outspokeness on controversial issues. In dismissing the professor's complaint, the court noted that had retrenchment not become necessary, the plaintiff would still be teaching. To rule otherwise would force the institution during future retrenchment plans to retain those who were most vocal in asserting their First Amendment rights, or face a lawsuit.[218]

The Fourteenth Amendment does not require that the faculty member participate in the decision-making process which identifies those to be terminated. Identity by the decision makers and the choice of a basis for selection including judgment about personalities are within the discretion of the state government. The terminated professor is not entitled to an adversary proceeding similar to a courtroom where the decision makers are confronted and cross examined. It is not required that the person presiding at the hearing have a degree of neutrality or impartiality which characterizes a court of law.[219]

Levitt v. Board of Trustees of Nebraska State Colleges, a financial exigency case similar to Johnson, was decided six weeks earlier. Levitt also involved laying off tenured faculty members, but this court was more concerned with the objective criteria used to make the termination selections.

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[218] Hibbs, 392 F.Supp. at 1207-08.

[219] Johnson, 377 F.Supp. at 240-42.

The selections had been made through sixteen subjective criteria applied by individual deans. The evaluations sought to identify those professors who were most essential to maintaining the most necessary programs at the college.[220] In upholding the terminations and the procedure by which those to be terminated were identified, the court held:

> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives it is not the province of a court to interfere and substitute its judgment for that of the administrative body.[221]

The same reduced legislative budget which generated Levitt resulted in another financial exigency case at a different college where the plaintiff chose to litigate through the state courts. In Brady v. Board of Trustees of Nebraska State Colleges, a tenured professor was eliminated while his position was retained and filled by nontenured faculty members. At the time of termination, a nontenured faculty member within the department was retained and another nontenured person was employed at a salary higher than other members in the department. It was uncontested that Brady was a good teacher and that no termination for

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[220] Levitt v. Board of Trustees of Neb. State Colleges, 376 F.Supp. 945, 949 (D. Neb. 1974).

[221] Id. at 950.

cause could be justified. The court found that the plaintiff had not been accorded the required due process and awarded him a year's salary based on the last year of employment less what he could have earned with reasonable diligence from other employment. Brady was not reinstated.[222]

University of Alaska v. Chauvin concerned the financial exigency termination of an administrator who held academic tenure. University regulations stipulated that a faculty member must be given fifteen days' notice of termination prior to the hearing. The employee was notified of the termination only three days prior to being removed from the payroll. Even though the university offered Chauvin an alternate position involving less pay and a nontenured status, the court ruled that Chauvin had been deprived of his Fourteenth Amendment rights of a due process hearing. The court ordered that he be reinstated in his former position with an award of damages for unpaid salary and lost benefits. The court noted that the reinstatement order did not preclude the university from further proceedings if it chose to terminate Chauvin.[223]

In Bignall v. North Idaho College, a case of financial exigency termination of tenured faculty, the court criticized

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[222]Brady v. Board of Trustees of Neb. State Colleges, 196 Neb. 226; 242 N.W.2d 616, 619-21 (Neb. 1976).

[223]University of Alaska v. Chauvin, 521 P.2d 1234, 1235-39 (Alaska 1974).

the college for not including the reason for the termination in the initial notice. The purpose of a notice is to allow a complainant to marshall a case against the firing body. The court noted that more elaborate procedures at one stage could compensate for deficiencies at other stages.[224]

In order to discharge tenured faculty, the institution has the burden of proving that a financial exigency exists and that a uniform set of procedures has been used for determining who would be discharged. The biasness of the hearing body was raised in Bignall where the governing board ordered the budget cuts and held the termination hearing. The court concluded that this alone would not render the hearing so biased as to deprive the professor of an adequate due process hearing. So far as the timing of the hearing was concerned, the court concluded that a professor is not denied due process when the hearing is held while the professor is still employed on the same job and while adequate procedures remain to challenge and forestall the nonretention.[225]

Klein v. Board of Higher Education of City of New York was concerned with financial exigency terminations of tenured faculty which were done according to a detailed retrenchment plan. The court established that the retrenchment guidelines

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[224]Bignall, 538 F.2d at 246-47.

[225]Id. at 246-49.

developed by the City University of New York (CUNY) had been substantially followed and then looked at the details of the plan. The court characterized Johnson and Bignall as the two leading decisions concerning financial exigency terminations in public higher education and relied heavily upon them.[226]

The CUNY guidelines stipulated that the faculty was not entitled to participate in the retrenchment plan nor a pretermination hearing. Faculty were not given an opportunity to rebutt the existence of a financial exigency or to show that a greater fiscal sacrifice should have been made in other departments or nonacademic areas. The CUNY plan did provide a 30-day notice prior to dismissal and the plan was made available to the faculty. Tenured personnel were dismissed in inverse order of seniority and they were granted a post-termination hearing at which time they could challenge the computation of seniority. The court concluded in Klein that the terminations were neither arbitrary or capricious and that the procedural rights and protections were more than adequate in consideration of the competing interests involved.[227]

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[226] Klein v. Board of Higher Educ. of City of N.Y., 434 F.Supp. 1113, 1116-18 (S.D. N.Y. 1977); aff'd 577 F.2d 726 (2nd Cir. 1978).

[227] Id. at 1116-19.

In Brenna v. Southern Colorado State College, the institution terminated tenured professors while leaving nontenured professors on the staff. The selection process consisted of each department head's recommending to the administration which faculty member "his department would best get along without."[228] The court held that the selections were not so arbitrary or capricious as to violate substantive due process and were reasonable in view of the authentic budgetary exigencies which the insitution faced.[229]

Termination for Retirement

In Nelson v. Miwa, the Supreme Court of Hawaii could not find a compelling state interest which justified forced retirement of professors at age 65. The Court held that the university's employment policy foreclosing continued employment to professors solely because they reached age 65 was a denial of equal protection and unconstitutional. The Court considered the possible state interest of conserving its funds through forced retirement. It was argued that retirement was justified because a post-65 year old tenured professor was paid more than a young nontenured professor. This argument was rejected because it assumed that younger

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[228] Brenna v. Southern Colo. State College, West's Federal Case News, Dec. 29, 1978, at 3 (10th Cir. Dec. 13, 1978).

[229] Id.

nontenured professors were equally competent and that tenured professors were overpaid; the Court could find no basis for these assumptions.[230]

Taliaferro v. Dykstra concerned a professor who had been granted tenure when the college had a retirement age of 70. Subsequently, in responding to an AAUP questionnarie on retirement policies, the institution stated that tenured faculty were entitled to remain in their positions until age 70. A new retirement policy was later instituted whereby the president could retire any faculty member at age 65, and the plaintiff professor was accordingly retired. The court held that the unilaterally imposed involuntary retirement constituted an impermissable deprivation of due process surrounding an established right. Compensation which would have been paid had the professor worked until age 70, less the amount actually earned or which might have been earned by reasonable effort, was awarded. Reinstatement was denied.[231]

Forced retirement at age 65 was challenged in Klain v. Pennsylvania State University based on the equal protection clause of the Fourteenth Amendment. The court limited its inquiry into whether such a retirement policy of a state

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[230]Nelson v. Miwa, 56 Hawaii Rpts. 601; 546 P.2d 1005, 1010-13 (Hawaii 1976).

[231]Taliaferro, 434 F.Supp. at 710-12.

institution of higher education is rationally related to furthering a legitimate state interest. The court found that a legitimate state interest did exist in that it enabled the university to plan toward updating faculty skills. The court recognized some disadvantages of mandatory retirement but concluded that these imperfections did not violate the equal protection clause of the Fourteenth Amendment.[232]

The Klain decision was affirmed by the Third Circuit Court of Appeals on May 17, 1978.[233] On April 6, 1978, an amendment to the Age Discrimination in Employment Act of 1967 extending retirement to age 70 became law. The effective date of this amendment was January 1, 1979; tenured faculty members in institutions of higher education were exempted from the law until July 1, 1982.[234] Until the amendment becomes effective, professors at state institutions in Tennessee are bound by the decision reached by the Supreme Court of Tennessee in Sprunt v. University of Tennessee. In Sprunt the Court decided that the Board of Trustees has a lawful right to retire any employee of the university upon

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[232]Klain v. Pennsylvania State Univ., 434 F.Supp. 571, 574-79 (M.D. Pa. 1977); aff'd 577 F.2d 726 (3rd Cir. 1978).

[233]Klain, 577 F.2d at 726.

[234]Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 1; 92 Stat. 189.

the employee's reaching age 65, whatever the motive of the governing board in so doing.[235]

Professional Negotiations and Tenure

In 1971 the governing board of Frederick Community College in Maryland replaced the tenure system with a system of continuing appointments for all nontenured faculty. Tenured faculty were protected by a grandfather clause. The change generated considerable dissent and led to the formation of a new faculty organization which demanded recognition as a collective bargaining agent.[236]

Professors in institutions of public higher education have a First Amendment right to form and join a labor union.[237] Attempts to show that dismissal resulted from union membership have generally been unsuccessful.[238, 239] Statutory provisions or governing board policies may be incorporated into the contract between the faculty organization and the institution.[240] However, none of these provisions authorize a faculty member to act unlawfully. Protected

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[235] Sprunt v. Members of Bd. of Trustees of Univ. of Tenn., 223 Tenn. 210; 443 S.W.2d 464, 466 (Tenn. 1969).

[236] Shaw, 549 F.2d at 931.

[237] Cherry, 444 F.Supp. at 330.

[238] Id. at 333.

[239] Jablon, 482 F.2d at 998-99.

[240] Barszcz, 400 F.Supp. at 677.

liberty interests were not infringed when faculty members at a community college were discharged for violating a state statute prohibiting public employee strikes.[241]

Neither federal or state courts have the authority to amend the academic grievance procedures adopted by the institution.[242] A faculty member's beginning a grievance procedure under a collective bargaining agreement is not a waiver of the due process hearing required prior to termination. Institutional representatives are required to meet personally with the person designated for termination for the hearing.[243]

The governing board of New Jersey state colleges adopted new tenure policies which restricted the granting of tenure and which established a procedure to evaluate those holding tenure. The collective bargaining unit challenged the new policy claiming that changes in terms and conditions of employment were mandatorily negotiable. The Supreme Court of New Jersey ruled that tenure policies were the

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[241] Lake Mich. College Fed'n of Teachers v. Lake Mich. Community College, 518 F.2d 1091, 1097 (6th Cir. 1975); cert. denied 427 U.S. 904 (1976).

[242] Jablon, 482 F.2d at 997.

[243] Brady, 242 N.W.2d at 620.

perogative of the governing board and were not mandatorily negotiable.[244]

Summary

A distinctive feature of academic tenure in institutions of public higher education is that its attributes are protected by the Bill of Rights and the Fourteenth Amendment. These protections are generally not available to professors in private institutions which are not sources of state action; however, a private institution can become so dependent upon and controlled by the state as to be a source of state action. A well defined tenure system is an advantage to a university by establishing who does and who does not have a legitimate expectancy of reemployment. Tenure systems are often effective in preventing the many questions and ambiguities which evolve under a de facto tenure system.

The courts make every reasonable concession in interpreting the First Amendment and academic freedom in such a way as to preserve the campus as a source of new ideas, but they recognize that these freedoms must be balanced with the mission of the university which at times requires some restrictions on free speech. The First Amendment also protects a professor's freedom to form and join a labor union.

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[244] Association of N.J. State College Faculties, Inc. v. Dugan, 64 N.J. 337; 316 A.2d 425, 433-35 (N.J. 1974).

Employment agreements may originate through statutes, governing board policies, faculty handbooks, and custom. These provisions are binding on both parties and contract disclaimers are generally not upheld by the courts. Each contract should specify the conditions of employment without resorting to third party organizations such as AAUP. Courts tend to uphold virtually any institutional tenure standards provided they are constitutional. The courts do not attempt to rule on the wisdom of tenure policies or to supplant its judgment for that of institutional administrators. Public institutions are generally protected against monetary judgments by the Eleventh Amendment provided that they have not expressly waived sovereign immunity.

Tenure creates a valuable property right for tenured faculty members and provides protection through substantive and procedural due process. Tenure status is not relevant in a liberty interest or First Amendment inquiry nor does tenure restrict the institution in limiting outside employment of full-time faculty members. Plaintiff faculty members have been unsuccessful in opposing financial exigency terminations and in showing sex or race discrimination. Retirement at age 65 as opposed to later retirement is contractual rather than an attribute of tenure.

# CHAPTER IV

# FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

## Introduction

The restricted higher education academic job market of the 1970's was accompanied by an increased willingness of faculty members to protest terminations and other terms and conditions of employment through litigation. In such a job market, academic tenure is a valuable property right. Faculty employment rights in public higher education develop through statutes, constitutions, governing board policies, and administrative practices; the ultimate interpretation of these rights rests with the courts.

The researcher purported to locate and analyze applicable state and federal court cases for probable impact on future tenure decisions in Tennessee public higher education. The most effective utilization of legal information is to prevent costly, disruptive, and divisive litigation; however, if litigation does develop, legal knowledge increases the likelihood of a successful defense. The study was intended to provide administrators and faculty members current access to the privileges and constraints of the system of academic tenure. The researcher sought to show administrators what special obligations the institution had assumed by granting tenure and to show faculty members what rights, privileges,

responsibilities, and restrictions they might have as a result of having or not having tenure.

A review of educational literature and legal periodicals was conducted to determine how tenure was being viewed and the extent of litigation generated thereby. The literature review was restricted to the 1970's with rare exception because public higher education was greatly changed during the 1970's through new enrollment patterns, inflation, curtailed legislative appropriations, and significant legal developments. An equal effort was made to locate literature supportive as well as condemnatory of academic tenure.

The data consisted primarily of appellate court cases and were collected using the topical method of legal research. The scope of the search was the entire National Reporter System as designated in the American Digest System. Court cases which had not yet reached the digest system were located by searching all bound volumes, advance sheets, and slip opinions extending through March 31, 1979. Cases located through the digest system were included when the digest synopsis contained the word "tenure" or its derivatives. Cases more recent than digest listings were read in the entirety for such wordage as a basis for inclusion. All cases were Shepardized to determine their standing as relevant case law prior to their inclusion in the data collection. The legal issues or principles of relevant cases were grouped by subject and presented in narrative form.

Although several earlier cases were included, the primary emphases were placed upon locating cases decided since 1972 when the United States Supreme Court rendered two landmark decisions, Board of Regents v. Roth and Perry v. Sindermann, concerning faculty rights in institutions of public higher education. One hundred twenty-seven cases from public higher education and eleven cases from private higher education comprised the court decisions. The cases came from throughout the country, and most of them were decided in federal courts. In Tennessee and all states except Wisconsin, academic tenure in public higher education is promulgated by the institutional governing board. Court decisions concerning federal statutory and constitutional provisions can influence Tennessee public higher education regardless of the geographical location or level of the federal judiciary rendering the decision. Decisions from the Sixth Circuit Court of Appeals and the United States Supreme Court have direct impact; decisions from other federal courts have persuasive impact.

## Summary of Findings

Based on the courts' interpretation and disposition of the issues before them, the following findings were extracted from the study:

1. Relative to elementary and secondary education, academic tenure in public higher education is

unique through a broader interpretation of academic freedom and the practice of participative management.

2. Relative to private higher education, academic tenure in public higher education is more binding upon the institution because such public provisions are protected by the Bill of Rights and the Fourteenth Amendment of the United States Constitution.
3. Academic tenure in Tennessee public higher education is characteristic of that found in most states in that it is the sole prerogative of the governing boards.
4. In a well defined tenure system, the problems of de facto tenure are virtually eliminated.
5. Most tenure disputes are heard in federal courts and are based upon the First or Fourteenth Amendment of the United States Constitution.
6. The judiciary was supportive of the concept and general practices of academic tenure in public higher education and justified that support primarily through academic freedom.
7. The judiciary viewed academic freedom as being absolutely essential for the preservation of our free society.

8. While the courts were deeply committed to preserving academic freedom, they enumerated various activities which academic freedom does not protect.
9. Academic freedom does not insulate a professor's teaching methods and grading procedures from review by superiors or provide protection for acting disharmoniously with colleagues and the administration.
10. Academic freedom does not authorize a professor to create an image of incompetency and dishonesty which reflects unfavorably upon the institution.
11. Although tenure is generally not granted by default or neglect, failure to timely notify nontenured faculty members of termination is a potential source of litigation.
12. The generalities of AAUP principles are too broad for inclusion in faculty employment contracts or faculty handbooks.
13. When it can be shown that faculty handbook provisions have been fairly consistently practiced, its provisions are an integral part of the employment agreement and binding upon the institution and the faculty member.

14. The courts do not recognize contract and faculty handbook disclaimers unless the resulting modification is supported by adequate compensation.
15. Casual use of the word "tenure" in institutional correspondence with faculty members and prospective faculty members can create misunderstandings and prompt litigation.
16. Courts are not concerned with the administration or governance of institutions of public higher education. The courts only require that the institution comply with its commitments to its faculty as established through institutionally adopted terms and conditions of employment.
17. A professor who is a legal resident alien enjoys all the protections of the United States Constitution equally with a professor who is a citizen.
18. Tenure litigation claiming sex or race discrimination has been generally unsuccessful for plaintiff professors.
19. Tenure granting creates a valuable property right for the recipient because

the institution is making a long-term reemployment commitment conditioned only upon extraordinary circumstances.

20. The tenure property right expires upon retirement which is established through contractual provisions and federal legislation.

21. The liberty deprivation clause of the Fourteenth Amendment prohibits an institution from publicly criticizing a faculty member's professional competencies or behaviors; however, there is no restriction upon keeping disparaging information in confidential files or such disparagements being discussed among appropriate administrators.

22. In a litigous proceeding, a faculty member's tenure status is irrelevant when claiming an academic freedom or liberty interest deprivation.

23. The due process requirement and/or the due process hearing is a pervasive concern of the courts in a proceeding contesting a termination by either a tenured or nontenured faculty member.

24. A hearing is not required for a terminated nontenured faculty member unless the administration or governance creates the requirement through improper acts such as public statements damaging the professor's reputation.
25. A pre-termination due process hearing must be provided for a tenured faculty member unless the person is disruptive of the educational mission of the institution in which case a post-termination hearing will suffice.
26. Genuine surprises due to additional charges or witnesses at a due process hearing will entitle the faculty member to an adjournment and postponement of the hearing.
27. There is no infringement upon any protected right when an institution restricts outside employment of its full-time faculty provided that all full-time faculty are equally restricted and provided that no discrimination against outside employers is created.
28. In terminations of tenured faculty members for cause, the courts require only that institutional officials adhere to due process

requirements and that the termination be supported by substantial evidence.

29. When an institution can substantiate an authentic financial exigency, the security of tenure diminishes, and the courts will uphold any nonarbitrary termination selection process provided that it is uniformly applied.

30. When retrenchment plans have not been revealed to the faculty, the courts are suspicious that financial exigency terminations may have been used to conceal other termination motives.

31. Litigation concerning academic tenure in public higher education, as revealed through the research technique used for this study, has only ancillarily involved collective bargaining litigation.

Conclusions

Inferences from the findings of the study led to the following conclusions:

1. Since well defined tenure systems preclude the ambiguities and misunderstandings of de facto tenure, formal tenure systems are thereby effective in preventing litigation.

2. Since this study did not reveal a logical proposal whereby academic freedom can be preserved in the absence of a tenure system and since the judiciary has described academic freedom as being absolutely essential for the preservation of our free society, the administrative inconveniences of a tenure system are justifiable.
3. Since academic tenure in Tennessee public higher education is the sole prerogative of the governing boards, the primary questions in a litigous proceeding are whether the governing board policies are constitutional and whether they have been followed.
4. Since the courts recognize faculty handbook provisions only if they have been fairly consistently followed, their relevancy is determined by consistency of application.
5. Since the courts do not recognize contract and faculty handbook disclaimers, documents describing terms and conditions of employment either bind the institution in total or the document is invalid through inconsistency of application.
6. Although sex and race discrimination cases have been generally unsuccessful for plaintiff

professors, this was at the judiciary level. This does not eliminate the day-to-day concern which an institution may have with governmental administrative agencies.

7. Since the courts are not concerned with the governance and administration of institutions of public higher education, the court's extension of First Amendment protections of academic freedom to all faculty members does not eliminate the need for a tenure system.
8. Since the courts have frequently found it necessary to describe events which academic freedom does not protect, the professoriate has an inflated interpretation of academic freedom.
9. Since failure to provide notices of termination to nontenured faculty members has generated considerable litigation and has even resulted in court granted tenure, orchestration of the evaluation and notice procedures well in advance of the deadline reduces the likelihood of litigation.
10. Since no reason for terminating a nontenured faculty member is required and since giving

such reason(s) could obligate the institution to a due process hearing, providing a reason subjects the administration to an unnecessary risk.

11. Since the courts only require a showing of adequate due process and a justification supported by substantial evidence for terminations of tenured faculty members, the tenure commitment is not irreversible.

12. Since a pre-termination due process hearing is not required when a faculty member is disruptive of the educational process, disruptive faculty may be terminated immediately provided a post-termination hearing is held.

13. Since a faculty member may adjourn and postpone a due process hearing when surprises develop, specificity of charges and identification of witnesses adverse to the faculty member are required due process provisions which must be provided well in advance of the hearing.

14. Since courts are suspicious of retrenchment plans shrouded in secrecy, informing the faculty during the developmental and

implemental stages of such plans enhances internal and judiciary trust.

15. Since legal resident aliens and citizens are protected equally by the United States Constitution and since institutions of public higher education are sources of state action, public institutions may not discriminate against legal resident aliens.
16. Since tenure is a long-term reemployment commitment by the institution, tenure granting enhances institutional stability, but that stability diminishes the institution's financial flexibility.
17. Since the tenure property right expires upon retirement, an institution of public higher education in Tennessee may rely upon this provision in its faculty recruitment plans.
18. Since tenure cases, as collected through the research technique used for this study, rarely discussed professional negotiations, the attributes of academic tenure have not been substantially affected by collective bargaining.
19. Since the courts are deeply committed to preserving academic freedom and recognize

tenure as the support mechanism, it is unlikely that professional negotiations will significantly alter academic tenure.

Recommendations

The findings and conclusions of the study led to the following recommendations:

1. A faculty member should exhaust all possibilities of settling a dispute at the administrative and/or governance level before seeking court action. Otherwise, the court will not hear the dispute.
2. Faculty members should be circumspect of the fact that the property right of tenure is not a vested right and that academic freedom does not grant a right to change the educational mission of the institution.
3. Tenured and nontenured faculty members should be cognizant that their employment or continued employment in institutions of public higher education may not be dependent upon the surrender or restriction of any constitutionally protected right.
4. The administration should conduct a due process hearing with the understanding that

this proceeding may likely determine whether court action will follow.

5. The term "tenure" in contracts and correspondence with faculty members and prospective faculty members should be used only in its legal meaning as defined by the governing board.
6. Faculty handbooks should be written circumspect of their being legally binding documents.
7. Specificity should pervade the descriptions of terms and conditions of employment; vagueness promotes disagreements and prompts litigation.
8. An institution should include in its faculty handbook only those provisions which it wishes to follow consistently.
9. Contracts and faculty handbooks should be written without reference to third party organizations such as AAUP and with the understanding that provisions so stated are not readily disclaimed.
10. In financial exigency retrenchments, faculty dismissals should follow a documented plan which has been made available to the faculty.

11. The Tennessee Legislature should repeal TCA 49-1303, the statute prohibiting the granting of tenure to aliens, because it is unconstitutional.
12. When professional negotiations become more prevalent, a study of the impact of collective bargaining upon academic tenure should be conducted.

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# VITA

Delano R. Phelps was born August 1, 1933, in Ash, North Carolina, where he spent his formative years and graduated from Waccamaw High School. He served in the Navy during the Korean War and worked in industry several years thereafter. He graduated from North Carolina State University in 1966 with a bachelor of science degree in chemical engineering and succeedingly worked in the aluminum industry.

He received a second baccalaureate degree and a master's degree in accountancy from Memphis State University in 1972 and 1974, respectively. The accounting education was utilized in teaching at the post-secondary level.

The doctorate of education in educational administration and supervision with collaterals in continuing and higher education and in statistics was received from The University of Tennessee in 1979. He resides in Cookeville, Tennessee, with his wife, Margaret S. Phelps.