The Association's Evolving Policy on Financial Exigency

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As the national economic recession of the 1970s gathered momentum, the administrations of many colleges and universities began to invoke pleas of financial difficulty, in some cases defined by them as "financial exigency," to justify terminating the appointments of tenured faculty members and persons in probationary status before the end of their terms. Beginning with Bloomfield College in New Jersey, in 1973, a steady stream of serious cases has come to the attention of the Association. From the spring of 1974 until March, 1984, ten cases involving issues relating to financial exigency that were investigated by *ad hoc* committees led to reports published under the auspices of Committee A in the Association's journal.[1] These cases required the respective investigating committees and the appropriate policy-making bodies of the Association to identify and evaluate the various issues involved when a college or university administration proclaims financial difficulty of a magnitude to justify the termination of faculty appointments. The 1940 *Statement of Principles on Academic Freedom and Tenure* recognized that financial crisis may be a legitimate reason for terminating faculty appointments, but stated that the declaration of financial exigency must be "demonstrably *bona fide*," without spelling out what the phrase means or how it was to be applied. Association policy, however, was developed in considerable detail in the 1976 edition of its *Recommended Institutional Regulations on Academic Freedom and Tenure,* the latest edition of which was adopted in 1982.[2] This document describes a financial exigency as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means" than termination of faculty appointments.

Since the American higher education community came upon hard times in the late 1970s and early 1980s, as a result of shrinking enrollments, prolonged economic recession, persistent inflation, and diminishing tax revenues, legislative appropriations, and donations, many colleges and universities have had to adjust the allocation of their funds. Retrenchment has taken many forms, but the release of tenured and nontenured faculty members has presented the academic profession with its most acute problem. Law reviews began to publish articles on the subject of financial exigency,[3] and AAUP publications have given the subject considerable attention.[4] Also, a number of federal and state appellate courts have spoken to the problems which have arisen in the course of litigation, and a considerable body of case law is now available. This is a good time to take stock of how Association policies on this vexing subject have developed.

A study of the published reports indicates quite clearly that AAUP investigating committees feel free to make independent judgments on the key question as to whether the institution was in fact confronted with such a severe financial crisis as to justify the termination of tenured appointments. These committees have not proceeded on the assumption that all an institutional administration has to prove is that it made its judgment in good faith.[5] Good faith represents a subjective approach to the problem, but AAUP committees have preferred to evaluate objective factors. The AAUP approach has been, consistently, to insist that the burden of proof that a demonstrably *bona fide* exigency exists rests with the institution's administration. The Court of Appeals for the District of Columbia Circuit, while acknowledging that in the usual contract case the burden of proof rests on the plaintiff as to all elements of his or her action for breach of contract, has held that there is merit in not saddling a released professor with the burden of proof in circumstances where the facts relating to financial exigency are peculiarly within the knowledge of the administration.[6] The Association has emphatically made this same argument. Its committees have never deviated from the position that since the institution's administrative officers have greater access to the underlying facts, and since the tenure concept carries with it a strong presumption of permanence of status, the administration should be required to prove affirmatively that a financial exigency exists. This seems much more rational than to require the complaining professor to prove the negative, that such a financial exigency does *not* exist, on facts not usually available to individual faculty members.

In at least half of the AAUP reports dealing with

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financial exigency, the investigating committees concluded, not on the basis of complex accounting data, but on the basis of a common-sense evaluation of relevant, readily observable facts, that the asserted condition of financial exigency did not in effect exist. In the first case to be discussed here, involving *Bloomfield College*, the AAUP investigating committee pointed out in its published report that shortly before the college president discovered that his institution was in such a state of dire financial crisis that he had to terminate thirteen faculty appointments, he had made a public statement proclaiming that the budget was in a healthy balanced condition. Moreover, the net worth figure advanced by the president, of some $12,000,000, did not take into account the value of the other real estate owned by the college (two well-located golf courses estimated to be worth about $15,000,000). The investigating committee noted that while thirteen faculty members (eleven tenured) were dismissed, with no right of reinstatement if the situation improved, they remained on full salary, but without duties, for another year; twelve new full-time and twenty-four part-time appointments were made, and at least four of the new full-time appointees and sixteen of the part-time appointees were given courses to teach that had been taught by those dismissed, or related courses which the dismissed were competent to teach. In addition, the existing tenure system was abolished, and all undischarged faculty members, most of whom were tenured, were given one-year contracts. Under these circumstances, the investigating committee concluded that there had been no demonstration of financial exigency which justified the termination of faculty appointments.

As Judge Melvin Antell of the New Jersey Superior Court noted, in registering approval of the AAUP position, obviously the primary objective of the college administration was to abolish the tenure system on grounds unrelated to financial crisis.[7] Judge Antell ruled that the test of the existence of financial exigency is when "the survival of the college is imperilled, and then only where the good faith of the administration in seeking the severance of tenured personnel has been clearly demonstrated as a measure reasonably calculated to preserve its existence as an academic institution. It is not a sufficient justification only that the college acted on the belief that the measure would in some degree advance the financial fortunes of the institution." Furthermore, "conceding that the college is under financial stress, and that 'something had to be done,' it does not follow that the college's freedom of response extends to the unilateral revocation of a contractually protected employment status and the discharge of tenured teachers as a matter of unbridled discretion." To permit the college administration to be the sole judge of its behavior, Judge Antell observed, would render tenure meaningless.

Not only does the administration bear the burden of proof that a state of financial exigency exists, according to Judge Antell, but the burden of proof is "extraordinary" to justify dismissing tenured members of the faculty. The test is whether "sufficient evidence of 'exigency' and 'extraordinary circumstances' exists as to provide a basis for the conclusions reached in the exercise of a reasonable and prudent judgment." Furthermore, Judge Antell asserted, putting the remaining (undischarged) faculty on one-year contracts could have produced no immediate financial benefit. Thus, this was "a calculated repudiation of a contractual duty without any semblance of legal justification. It was a gratuitous challenge to the principle of academic tenure. Its clear implication of ulterior design and lack of sensitivity to the question of moral correctness reflect adversely upon the claimed *bona fides* of discharging the thirteen faculty members for the same given reason." The argument for economy, Judge Antell concluded, was but a "subterfuge." Obviously, the primary objective of the administration was to abolish the tenure system rather than to alleviate financial exigency. In addition, it was open to the college administration to ease the financial situation by other expedients, such as across-the-board salary reductions, or reduction of faculty size by not renewing the appointments of nontenured faculty.

The major premise on which Judge Antell's reasoning rested was an understanding of the crucial, indispensable role of the concept of academic tenure. This concept, he asserted, "is not merely a reflection of solicitude for the staffs of academic institutions, but of concern for the general welfare by providing for the benefits of uninhibited scholarship and its free dissemination." This is in accord with the historic AAUP position that the ultimate justification of tenure is that it protects academic freedom, and that such freedom serves vital interests of the society as a whole. The New Jersey Court of Appeals affirmed the decision of the Superior Court, holding that the college ad-

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ministration's invocation of financial exigency as cause for its actions was a mere subterfuge, and that there was "adequate, substantial and credible evidence" to support the trial court's finding on this issue.[8]

In the cases that followed *Bloomfield,* AAUP committees felt free to make independent judgments on the substantive issue as to whether the institution was confronted with a demonstrably *bona fide* financial exigency. In the massive case involving the *State University of New York,* the AAUP investigating committee concluded that while the financial situation of the university was serious, as a result of a legislative cutback in total funds of about 4 percent, it was not remotely so bad as to threaten the survival of the university as a whole. Total available funds were reduced from $967,000,000 to $928,000,000. The committee also noted that efforts to relocate some 100 dismissed faculty members were at best routine and that new appointments were made after the dismissals occurred. Clearly, the committee asserted, the administrators were interested in reorganization as well as economy. The State University of New York had more faculty members in 1976-77, after the dismissals were effected, than in 1974-75, before they began. Evidently, the campus presidents took the opportunity to hire new faculty members at lower salaries.

Similarly, in the case of *Sonoma State University (California),* where 24 tenured professors were notified of layoff in 1982, the investigating committee noted that while the layoffs were occurring a new presidential assistant was appointed with a substantial salary and two new associate deanships were created without consulting the faculty. There were other increases in the size of the administrative staff and of the intercollegiate athletics staff. In addition, about a dozen new faculty members were appointed for the following year. These various facts were not reconcilable with the administration's assertion that a state of financial exigency existed. The investigating committee found that the administration, which under the institution's regulations did not have the burden of proving the existence and extent of financial exigency, terminated the appointments of tenured faculty members not because a state of financial exigency required these actions, but because the president wished to reorganize the faculty as he saw fit.

In the case of the *University of Detroit,* the investigating committee found that it could not reach a definitive judgment as to whether a *bona fide* financial exigency existed, and it limited its inquiry to the question as to whether the University administration had demonstrated the necessity for terminating tenured appointments. The administration had based its case mainly on a loss in enrollment of about 7 percent in 1975, and a drop of full-time students from 61 percent to 53 percent. Financial calculations were made in great haste; the basic decisions were made by the deans in one week. The investigating committee stated that the termination of appointments of tenured faculty is a structural remedy which may apply to a fundamental problem but not to the transitory problem of cash flow that confronted the University of Detroit late in 1975. The committee also noted that for the year 1975-76 the administration committed an additional sum of $175,000 for administrative staff. Furthermore, the administration's sudden termination of the services of some forty professors did not help the cash flow problem because under the university's rules the professors were entitled to severance pay of one year. It follows that the mid-year terminations were "unnecessary and unwarranted." The university rules stated simply that financial exigency exists when the board of trustees asserts its existence, and the burden of refutation was placed on those whose appointments were terminated. The investigating committee concluded that the administration's analysis of the relevant economic facts was "incomplete, misleading, and essentially inadequate" and that it had failed to assume the burden of justifying the terminations it had ordered.

In the case arising at *Eastern Oregon State College,* that of a professor whose tenured appointment was terminated because of an anticipated budget shortfall as announced by the president, the administration acted under state regulations that distinguish between "financial exigency" and "program reductions," with financial exigency defined essentially as an emergency program reduction. The AAUP investigating committee noted that while the administration had not claimed financial exigency, such a claim would not have been warranted. In this instance, only $12,000 was involved in a budget of $80,000,000. Surely, this "does not approach the order of magnitude of a financial exigency."

In the case of the *University of Idaho,* the State

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Board had declared a financial exigency in April, 1981. The investigating committee concluded that this declaration was not *bona fide*, "but was contrived and intentionally produced by Idaho's legislature." The board had asked for $73,000,000; the governor had recommended $70,000,000; and the legislature appropriated about $67,000,000. For the 1982 fiscal year, the legislature "mandated" a 7 percent salary increase, but since it was not fully funded, it was generally understood in Idaho that this was contrived to force the State Board to make selective personnel cuts and to consolidate programs. The president declared that a financial exigency existed only in the College of Agriculture, which had a shortfall of $508,300 in a total appropriation for that college of $12,197,000. Actually, the dean of the college reported in October, 1981, that there was a surplus of $383,500 in the funds available for the affected programs. In May, 1981, the president notified seventeen faculty members of the College of Agriculture, a majority of whom were tenured, of termination on the ground of financial exigency. The State Board had previously suggested that a financial exigency exists, even without a formal declaration to this effect, whenever higher education is underfunded by the legislature. In March of that year, however, it amended its regulations to define financial exigency as an "imminent financial crisis which threatens the viability of an agency, institution, office, or department as a whole, or one or more of its programs, or any other distinct units, and which cannot be wholly alleviated by means other than a reduction in the employment force." Thus, the institution as a whole need not be threatened. The AAUP committee pointed out that the Board's policy permitted a financial exigency to exist in the smallest subunit and to enable the board to reach almost every individual tenured faculty member. Accordingly, the committee argued that the administration's actions amounted to dismissal of tenured faculty members for cause, under the cover of a declared financial exigency, without the procedural guarantees which a tenured professor may claim under established academic due process. The investigating committee concluded that there was no threat to the survival of the programs in question and that less drastic choices than termination of tenured faculty appointments were available. Funds could have been shifted from operating expenses and capital outlay budgets, and the possibility of early retirements could have been explored, but these alternative solutions were not pursued by the administration.

The investigating committee in the case of *Goucher College* concluded that the administration did not demonstrate the existence of financial exigency. The administration's position regarding financial exigency was based on long-range enrollment projections which had not yet materialized. The committee pointed out that a number of less drastic means to ward off a financial crisis—such as coeducation, creation of new curricular areas, freezing salaries, increasing teaching load, nonreappointment of part-time and probationary faculty members—had not yet been attempted. The committee took the position that using the term "financial exigency" for the situation faced by Goucher College "robs that term of its essential meaning, weakens tenure, and jeopardizes academic freedom." Before formally declaring a financial exigency, the college administration terminated selectively the appointments of several tenured faculty members in order to expand curricular offerings in areas of predicted but as yet unproved student interest. The investigating committee expressed the belief "that tenure has little meaning if it can be lost in such circumstances." In addition, in the case of the termination of the appointment of a tenured art history professor, the college one year later advertised for a teacher of art history. The committee expressed concern that in this case it was not finances but the ability to interest students which was the issue in the termination of faculty positions and that, since ability to interest students is a matter of professional competence, there was merit to the professor's claim that she was dismissed for cause but without requisite academic due process. The failure to afford due process, the investigating committee concluded, left unresolved the professor's "serious and plausible claim that the assertion of financial exigency at Goucher College was a pretext for violating her academic freedom."

Finally, in the recent report on the *Metropolitan Community Colleges (Missouri)*, where sixteen full-time tenured faculty members were laid off, the investigating committee stressed that the local faculty hearing committee had concluded that the alleged financial crisis was only "a projected or hypothetical one based on predicted events which never occurred." The committee also noted that administrative costs were disproportionately high and that the administration was animated by a desire to re-

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place full-time faculty with part-time teachers. Finally, the investigating committee noted that the budget had become nearly normal before the layoffs went into effect. During that year, $150,000 was transferred out of regular budget lines to a construction (facilities) fund, and the following year $200,000 was similarly transferred. An additional $100,000 was placed in a new incentive fund, and a "working capital fund balance" of $1,500,000 was scheduled. A substantial increase in the number of senior administrative officials was also noted. The investigating committee concluded that this was decidely not the sort of situation which can be described as financial exigency.

Three major clusters of issues were developed by the AAUP investigating committees looking into financial exigency problems. One group of issues, just discussed, related to the meaning of the term "financial exigency." A second group was concerned with the over-arching question of faculty consultation or faculty participation in the decision-making processes. A third was concerned with procedural questions, such as the availability and sufficiency of review in individual cases, adequacy of notice, and provisions for relocation and reinstatement.

In almost all of the ten cases which resulted in a published report, the AAUP investigating committees found that faculty consultation at various stages of the process was either inadequate or nonexistent. The committee found that at *Bloomfield College* there had been no faculty involvement in making the exigency decision. In the case of the *City University of New York,* there was no significant faculty role in making decisions relating to budget income because these decisions were not made by the university. Emergency guidelines for retrenchment were promulgated in great haste without any consultation beyond the chief administrators. Thus, faculty consultation was lacking on such matters as the existence of a state of financial exigency, the pursuit of all feasible alternatives to faculty layoffs, the specific location of personnel cuts, and the criteria for identifying those individual faculty members whose appointments were to be terminated. "Faculty participation and responsibility were barely visible." The general conclusion of the committee was that the central and college administrations "did not seek or encourage faculty participation." Essentially, the system was one of unreviewable administrative discretion, and the machinery for faculty participation in the central decisions of the university was "intrinsically and chronically inadequate."

In the case of the *State University of New York,* the central administration failed to consult with the university faculty senate before determining a retrenchment policy and setting it in motion. Subsequent consultation varied widely in form and scope from campus to campus. Consultation was found wanting at Stony Brook, where the faculty senate, by a vote of forty-nine to six, declared that it had no confidence in the administration on the ground that the administration abrogated the faculty's right to participate in making critical decisions relating to retrenchment.

The investigating committee also concluded, in the case of *Sonoma State University,* that there had been little genuine consultation between the administration and the faculty before notice of layoff was issued to twenty-four faculty members. Not only was the decision that there was a state of emergency made without any prior faculty consultation, but the criteria for terminating appointments were also spelled out unilaterally by the administration. The faculty senate's executive committee proposed that it be invited into the allocation process, but it was rebuffed by the academic vice-president. The AAUP investigating committee wrote that "the administration has followed whatever procedure it has found convenient." On two occasions, the faculty senate voted to censure the president, and the faculty as a whole voted no confidence by a large majority.

So far as the *University of Detroit* was concerned, the AAUP investigating committee concluded that "the faculty took virtually no part in deciding how the reductions were to be implemented or in setting the educational priorities which these decisions entailed." The faculty had no role in deciding whether a financial exigency existed, this being entirely in the hands of the board of trustees. There was no meaningful faculty participation in deciding whether it was necessary to terminate faculty positions, what units were to be affected in the retrenchment process, and what criteria were to be employed in making specific retrenchment decisions. The AAUP committee deplored "the precipitate, disorderly way" in which the appointments of approximately forty faculty members were suddenly terminated in midyear by administrative action.

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While the president of the *University of Texas of the Permian Basin* appointed a Committee on Financial Exigency consisting of five faculty members and one senior administrator, this committee did not represent or consult with the faculty. In fact, the faculty was ignorant of its existence. The investigating committee therefore concluded that there had been no meaningful faculty involvement in the determination of a state of financial exigency and of which positions should be terminated. In the case of the *University of Detroit*, the AAUP investigating committee found, "the faculty took virtually no part in deciding how the reductions were to be implemented or in setting the educational priorities which these decisions entailed." The same lack of faculty involvement in identifying the existence of financial exigency and in making the other retrenchment decisions was pinpointed by the investigating committees in the cases of *Eastern Oregon State College* and *Goucher College*, while at the *Metropolitan Community Colleges* the faculty was consulted up to a point, but its views were apparently disregarded.

Various procedural flaws were identified by the investigating committees in almost all cases. It was noted, for example, that in the cases of *Bloomfield College* and *Eastern Oregon State College*, no provision was made for reinstatement should the situation improve later on, and in several cases, as in those involving the *University of Idaho*, the *University of Texas of the Permian Basin*, the *University of Detroit*, *Sonoma State University*, and the *State University of New York*, any effort by the administration to achieve relocation of terminated professors within the institution was made in a routine and desultory fashion.

The whole gamut of procedural flaws appears in the events at the *University of Idaho*. The administrative guidelines made no reference to tenure considerations. Unexplored was the feasibility of alternatives, such as potential economies, postponement of commitments, and other less drastic steps which might have avoided faculty layoffs. Those whose appointments were terminated were given only a little over a month's notice, whereas Association policy requires a year's notice for tenured faculty members. There was a possibility of review by a faculty committee, which could make recommendations back to the president, the same person whose decisions were appealed, for final action. The board's judgment as to the existence of financial exigency was not subject to contest.

Similarly, at *Goucher College*, a number of less drastic means of warding off a financial crisis were not attempted. The only available review procedure before the faculty grievance committee did not provide for an adversarial hearing; no right to the assistance of counsel or an adviser was recognized; there was no right of cross-examination; and the burden of proof was on the faculty member challenging a decision. At the *University of Detroit*, where the services of tenured professors were terminated without advance notification in the middle of the academic year, the review procedures provided no right to counsel and to confrontation, and a hearing before the full faculty review committee was not permitted. At the appeal, those who had been notified of termination were told that they could not inquire into the substantive issue of the existence of a financial exigency. Above all, tenure rights were utterly disregarded. Little effort was made to relocate affected faculty members within the institution or to provide for subsequent reinstatement.

In the case of the *Metropolitan Community Colleges*, no administrative official would appear at the hearings of the Faculty Hearing Committee, and part-time faculty members were appointed or retained in courses formerly taught by tenured professors whose appointments were terminated. In the case of the massive terminations at the *City University of New York*, the affected professors were afforded only a post-termination hearing, and essentially the only issue that could be raised at the hearing was the nature of one's seniority. Such issues as the definition of the retrenchment unit and the assignment of specific cuts to each unit were explicitly shielded from review. "All the victims of financial exigency at City University could do was to complain about mistakes in calculating their seniority." In all cases, "the burden of proof is placed on the appealing faculty member with no apparent regard for the obstacles he or she may face in sustaining that burden." At the *State University of New York*, in all campuses, the responsibility for designating the individuals whose appointments were to be terminated was exercised by the president. Teachers who were released complained that they had either a limited opportunity or no opportunity at all to present their cases to review committees or administrators.

Similarly, at *Sonoma State University*, the criteria

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for terminating appointments were established unilaterally by the administration, and only brief notice was given. The scope of review was limited, since the administrative decision as to the existence and extent of a state of financial exigency could not be challenged before the review committees. At the *University of Texas of the Permian Basin,* the burden of proof of the existence and scope of financial exigency was on the professors, and the six weeks' notice was very brief. At *Eastern Oregon State College,* the faculty merely reacted to the initiative of the president, review procedures were inadequate, and the burden of proof was on the faculty member. Reinstatement rights were disregarded when part-time faculty members were appointed to offer courses previously given by the tenured faculty member who was released.

Professors involved in disputes growing out of the declaration by the institution of a state of financial exigency are well advised to rely upon the policy formulations of the American Association of University Professors. Reliance upon academic freedom as understood by the organized teaching profession is likely to be more fruitful than reliance upon common law principles of contract law, or general principles of constitutional law, which judges invoke. A distinguished judge, Charles E. Wyzanski of the First Circuit, recently wrote: "A mere breach of a contractual right is not a deprivation of property without *constitutional* due process of law."[9] That may be so, but it is a breach of a right of an academic person as spelled out in professional policy. As one student has written, "because tenure protects academic freedom as well as job security, the existence of objective cause for discharge would appear to be more important in the academic than in the commercial sphere."[10]

AAUP committees have repeatedly stressed that terminating tenured appointments is a very serious matter which should be resorted to only when all other possible remedies have been exhausted. As the 1925 Conference *Statement on Academic Freedom and Tenure* declared: "Termination of permanent or long-term appointments because of financial exigency should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution. Situations which make drastic retrenchment of this sort necessary should preclude expansions of the staff at other points at the same time except in extraordinary circumstances."[11]

Thus, many of the AAUP investigating committees took due notice of the fact that administrations, after terminating tenure appointments on the ground of financial exigency, made new appointments, often to give courses offered previously by those who have just been terminated. A basis for terminating an indefinite appointment does not exist if the institution continues to have work that the tenured professor is capable of doing. Similarly, most of the AAUP investigating committees noted that the administration's efforts to find some other suitable position at the institution were not serious, and the right of reinstatement was often ignored. Conditions change, and the right to reinstatement of discharged professors is not to be taken lightly.[12]

Furthermore, although there is some judicial authority for the proposition that the concept of financial exigency may be applied in a single school or department of the institution,[13] the Association's position has always been that the institution as a whole must be in dire peril before a state of financial exigency may be declared and acted upon. In addition, while some courts have ruled that the Constitution does not require that a nontenured professor must be terminated before a tenured professor can be dismissed,[14] where there is a choice, Association policy leans strongly in the direction of protecting tenure, if it is at all possible to do so.

Most of the Association's investigating committees seized upon the fact that in the whole process of declaring financial exigency and implementing action to deal with it, there must be significant faculty involvement. This is in accord with the longstanding principle that the faculty has the primary responsibility in personnel matters. In most of the cases reported by Committee A for publication, faculty involvement was either nonexistent or grossly inadequate. On this point the Association is firmly committed. In addition, it has consistently held to the view that when a professor is designated for layoff, he or she is entitled to fair notice and a proper hearing before a faculty committee wherein all relevant issues may be contested in an adversarial fashion with the assistance of counsel or other adviser.[15]

Clearly, AAUP statements of policy carry weight in the courts as guides to judgment. Judge Hufstadler of the Ninth Circuit once observed that

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while the AAUP document on financial exigency is not binding on the court, it is useful.[16] Actually, Association policy statements are cited and relied upon frequently by courts as reflecting accepted principles of the educational community. It has been observed by an expert legal scholar that "the 1940 *Statement*, whose function initially was entirely normative, has become so widely accepted throughout American higher education that it has achieved judicial recognition as a usage of the profession. That recognition is entirely consistent with orthodox contract law."[17]

A federal judge well-known for his enlightened and liberal views, James E. Doyle of the Western District of Wisconsin, once ruled, in a carefully drawn opinion, that tenured professors are entitled to some minimal procedural protection afforded by the Fourteenth Amendment.[18] Thus, he held that participation by the faculty in stages of decision-making *prior* to the determination of individual layoffs of tenured faculty is not mandated by the U.S. Constitution. He was not persuaded that the Fourteenth Amendment requires that the tenured professor be afforded an opportunity to express an opinion as to which branch of the campus, or which department, shall absorb the cuts. The decision on individuals, Judge Doyle ruled, lies "within the discretion of the state government." At the same time, he ruled that constitutional due process requires a fair opportunity for the professor to be heard on such matters as priority in seniority or performance records. But he thought it was burdensome and impracticable from an institutional viewpoint to permit the individual professor to participate in the initial decision. A tenured teacher in a state institution is protected from termination or layoff only if he can demonstrate a constitutionally impermissible reason, such as race discrimination, or violation of free speech or freedom of religion. In other words, the professor is protected from any termination which is "wholly arbitrary or unreasonable." Concluding the analysis, Judge Doyle wrote: "In defining these minimally required procedures, the courts must take into account not only the interest of the teacher but the institutional context."[19] More specifically, Judge Doyle ruled that the minimum procedures required by constitutional due process were as follows: (1) each plaintiff must be furnished "a reasonably adequate written statement" as to the basis for the initial layoff decision; (2) there must be "a reasonably adequate description of the manner in which the initial decision had been arrived at"; (3) the institution must make "a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-maker had relied"; and (4) each plaintiff must be provided an opportunity to respond.[20]

This is not an unenlightened position, but, to the extent that the Association would tilt the scales more firmly in favor of the rights of tenured professors, its policies go beyond the minimum requirements of constitutional due process, at least as Judge Doyle construes the Constitution. Due process is a generously vague concept, and it can be construed to embrace all those elements of complex situations which have an ultimate bearing on academic freedom. If one bears in mind that tenure for the most part is not granted carelessly or routinely and that it is essential for the preservation of academic freedom, then it seems wholly appropriate to protect the positions of tenured professors in the manner and to the extent specified in Association policy. Judge Doyle said that the Fourteenth Amendment does not require that tenured professors who are laid off should be given a hearing on the issue of whether proper procedures were followed by the administrative officers of the university. The Association position is that proper procedures go to the very heart of the matter. Judge Doyle declared that the Fourteenth Amendment does not forbid "judgments about personalities" where layoffs occur on the basis of financial exigency. The Association position is that "judgments about personalities" amount to dismissals for cause, for which it is imperative to observe the full requirements of academic due process. For the American professoriate, the Association holds, academic due process, not Fourteenth Amendment due process, is the appropriate measure of the tenured professor's rights. But the Association does not believe that academic due process is at war with constitutional due process. A generous reading of a generous constitutional clause can easily reconcile the two concepts, for one informs the other.

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NOTES

1. The ten published case reports, with the issue of *Academe* (prior to 1979, the *AAUP Bulletin*) in which they appear provided in parentheses, are as follows:
Bloomfield College (New Jersey) (Spring, 1974);
City University of New York (April, 1977);
State University of New York (August, 1977);
University of Detroit (March, 1978);
University of Texas of the Permian Basin (May, 1979);
Eastern Oregon State College (May-June, 1982);
University of Idaho (November-December, 1982);
Sonoma State University (California) (May-June, 1983);
Goucher College (May-June, 1983);
Metropolitan Community Colleges (Missouri) (March-April, 1984).
The author of this article was chairman of the *ad hoc* committee that investigated the case at *Bloomfield College*. Each of the ten institutions was subsequently placed on the Association's list of Censured Administrations. *Bloomfield College* (in 1978) and the *City University of New York* (in 1983) were later removed from the censure list after corrective actions were taken.

2. *Academe* 69 (January-February, 1983): 15a-30a.

3. See, especially, Matthew W. Finkin, "Regulation by Agreement: The Case of Private Higher Education," *Iowa Law Review* 65 (1980): 1119-1199; Note, "Financial Exigency as a Cause for Termination of Tenured Faculty Members in Private Post-Secondary Educational Institutions," *Iowa Law Review* 62 (1976): 481-521; James L. Petersen, "The Dismissal of Tenured Faculty for Reasons of Financial Exigency," *Indiana Law Journal* 51 (1976): 417-432; Richard H. Miller, "The Role of Academic Freedom in Defining the Faculty Employment Contract," *Case Western Reserve Law Review 31* (1981): 608-655; John C. Tucker, "Financial Exigency—Rights, Responsibilities, and Recent Decisions," *Journal of College and University Law* 2 (1975): 103-113.

4. See especially Ralph S. Brown, "Financial Exigency," *AAUP Bulletin* 62 (Spring, 1976): 5-19; Symposium on "The Faculty and Higher Education in Hard Times," *Academe* 69 (January-February, 1983): 3-28, particularly Howard R. Bowen, "The Art of Retrenchment," pp. 21-24, and James C. Garland, "What Financial Exigency Means," pp. 24-26.

5. Several court decisions indicate that some judges are prepared simply to take the administration's word at face value as to whether a financial exigency existed, if they are persuaded that the judgment was made in good faith. See, e.g., *Bignall* v. *North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Krotkoff* v. *Goucher College*, 585 F.2d 675, 681 (4th Cir. 1978); *Levitt* v. *Board of Trustees of Nebraska State Colleges*, 376 F. Sup. 945, 950 (D.C. Nebr. 1974): It is enough that the administrative body "acts from honest convictions, based upon facts which it believes for the best interest of the school, and where 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." AAUP investigating committees and Committee A have been willing to make independent judgments of their own on this subject, on the basis of objective considerations.

6. *Browzin* v. *Catholic University of America*, 527 F2d 843, 849 (D.C. Cir. 1975). Actually, counsel for the plaintiff professor agreed to stipulate that the University was confronted with a *bona fide* financial emergency. Apparently, this was in exchange for another stipulation that the AAUP's *Recommended Institutional Regulations* were a part of the contract between the plaintiff and the University; otherwise, the stipulation that there was a *bona fide* financial emergency seems to have thrown away the plaintiff's case. It is worth noting that AAUP committees do not look into the common law of contracts nor consider the Association to be limited to common law rules.

7. *AAUP (Bloomfield College Chapter)* v. *Bloomfield College*, 129 N.J. Super. 249 (Chan. Div.), 322 A.2d 846, 858 (1974). For reviews of this case, see Petersen, above, note 3, and Tucker, above, note 3. The quotations in this and the following two paragraphs are from Judge Antell's opinion.

8. 346 A. 2d 617 (App. Div. 1975).

9. *Jimenez* v. *Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981). This court upheld a "good faith" termination of three tenured professors on programmatic grounds (slight enrollment, evaluation of the program, etc.). For the AAUP *"bona fide"* means much more than "good faith." The Association has repeatedly taken the position that however laudable the intentions of the administration may have been, the test of the existence of financial exigency is to be found in objective factors which, unlike states of mind, can be evaluated with considerable confidence.

10. Note, *Iowa Law Review*, note 3 above, p. 519.

11. *AAUP Bulletin* 11 (February, 1925): 99-101

12. In *Krotkoff* v. *Goucher College*, 585 F.2d 675 (4th Cir. 1978), the court stressed that a demonstrably *bona fide* termination requires that the college make a reasonable effort to find alternative employment at the college, although the court also ruled that "tenure does not entitle a professor to training for appointment in another discipline." 585 F.2d 682.

13. See, e.g., *Scheuer* v. *Creighton University*, 199 Nebr. 618, 260 N.W.2d 595 (1977), where both the institution and the court conceded that the university as a whole was not in a condition of financial emergency. The court ruled that it was sufficient to show financial exigency in the school of pharmacy, reasoning that "the rapidly changing needs of students and society demand that university administrators have sufficient discretion to retrench in areas faced with financial problems." 260 N.W.2d 601. Association policy rejects the position adopted by the Nebraska court.

14. *Brenna* v. *Southern Colorado State College*, 589 F.2d 475, 476 (10th Cir. 1978). The court held that the Constitution does not require any particular selection process, so long as the chosen procedure is a reasonable one. The Association policy makers have never said that a tenured professor must always be preferred to a nontenured one, so far as a layoff is concerned, but they stress that there must be a very persuasive reason for dismissing a tenured professor while retaining a nontenured professor, where there is a choice between them.

15. The right of a dismissed professor to notice and a hearing is implicit in the doctrine of constitutional due process, *Brady* v. *Board of Trustees of Nebraska*, 196 Nebr. 226, 242 N.W. 2d 616 (1976). The right to notice and a hearing must be recognized "at a meaningful time and in a meaningful manner." *Bignall* v. *North Idaho College*, 538 F.2d 243 (9th Cir. 1976).

16. *Mabey* v. *Reagan*, 537 F.2d 1036, 1043 (9th Cir. 1976).

17. Finkin, note 3 above, pp. 1150-51. See Miller, note 3 above, p. 655. "The 1940 *Statement* has become a normative standard governing the fundamental principles of academic freedom." Association policies are frequently relied upon by courts as authoritative guides to decision, as is shown in many cases. See, e.g., *Greene* v. *Howard University*, 412 F.2d 1128, 1133-35 (D.C. Cir. 1969); *Adamian* v. *Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975); *Levitt* v. *Board of Trustees of Nebraska State Colleges*, 376 F. Supp. 945, 950 (D.C. Nebr. 1974). See Ralph S. Brown, Jr., and Matthew W. Finkin, "The Usefulness of AAUP Policy Statements," *AAUP Bulletin* 64 (March, 1978): 5-11, and David M. Rabban, "AAUP in the Courts: the Association's Representation of Faculty Members and Faculty Causes in Appellate Litigation," *Academe* 69 (March-April, 1983): 1a-12a.

18. *Johnson* v. *Board of Regents of the University of Wisconsin System*, 377 F. Supp. 227 (W.D. Wis. 1974, *aff'd. mem.*, 510 F.2d 975 (7th cir. 1975).

19. 377 F. Supp. 239.

20. 377 F. Supp. 240.