

## Academic Freedom and Tenure

### BENNINGTON COLLEGE: A SUPPLEMENTARY REPORT ON A CENSURED ADMINISTRATION<sup>1</sup>

Bennington College was placed on the Association's list of censured administrations by the 1995 annual meeting as a result of the administration's action in June 1994 to terminate the services of more than two dozen faculty members, of whom some two-thirds held appointments with "presumptive tenure."<sup>2</sup> The board of trustees had reached a determination the previous January that the college was in a state of financial exigency, but withheld announcement of this decision for six months. In early April the board charged the administration of President Elizabeth Coleman with implementing a "Plan for Changes in Educational Policy and Reorganization of Instructional Resources and Priorities." In June the trustees made public the declaration of financial exigency and the adoption of the new plan. Most of the faculty members designated for release were informed either that the subjects they taught would no longer be offered or that they did not meet newly established professional requirements defined in the board's plan for teaching positions in their subject at the college. At the same time that these appointments were being terminated, the board abolished the further granting of presumptive tenure in favor of term appointments that would be renewable indefinitely at the administration's discretion.

The undersigned served as the Association's ad hoc committee charged with investigating the cases of concern at Bennington College. While recognizing that a parlous financial condition ex-

isted at the time notices were issued, we questioned whether the college was in a bona fide state of financial exigency necessitating the release of large numbers of faculty. We found that opposition to the policies and activities of the board and of the president played a significant, perhaps decisive, role in identifying faculty members for termination. Our report stated that, "in the absence of persuasive evidence to the contrary," we could not "reject the view that the terminations in number and designation of who was to be terminated were not the mere consequence of the implementation of an even-handed plan, but rather were intended, and served, to remove from the faculty most of those who were critical of the administration and the board." Our report further found that "the present climate at Bennington is not now conducive to the faculty's expressing strong opinions critical of . . . the board or the president." "Academic freedom," we concluded, "is insecure and academic tenure is nonexistent today at Bennington College. Both seem to have flourished in the past but not to have survived the abrupt, excessive, inhumane, and profoundly procedurally flawed actions that culminated in the events of June 1994."

#### I. The Case of Mr. Neil Rappaport

This supplementary report concerns the action taken by the administration of Bennington College to terminate the services of Mr. Neil Rappaport, an instructor of photography with presumptive tenure, after twenty-two years as a member of the faculty. Mr. Rappaport, long an outspoken critic of policies and actions of the board and the president, was the only full-time faculty member who had been designated for release in 1994 who had managed to retain his position.

In December 1991, when the dean of faculty notified Mr. Rappaport that the Faculty Personnel Committee had recommended that he receive a third five-year presumptive tenure contract beginning July 1993, she provided a very positive assessment of his academic performance, his work as a visual artist, and his service to the college. "Your students," she wrote, "perceive you as an outstanding teacher with a great body of knowledge about pho-

1. The text of this report was written in the first instance by the members of the investigating committee. In accordance with Association practice, the text was then edited by the Association's staff, and, as revised, with the concurrence of the investigating committee, was submitted to Committee A on Academic Freedom and Tenure. With the approval of Committee A it was subsequently sent to the faculty member whose case is the subject of the report, to the administration of Bennington College, and to other persons concerned in the report. In light of the responses received and with the editorial assistance of the staff, this final report has been prepared for publication.

2. "Academic Freedom and Tenure: Bennington College," *Academe* 81 (March–April 1995): 91–103. For the statement of Committee A on Academic Freedom and Tenure recommending to the 1995 annual meeting that censure be imposed on the Bennington College administration, see *Academe* 81 (September–October 1995): 48–49.

tography to impart to them. They believe that you set the highest standards for them and demand that their work meet those standards. They also appreciate your accessibility and dedication as a counselor." She reported that "your colleagues also comment very highly on your teaching effectiveness," and that most of them "appreciate the level to which you have developed your personal vision in photography. . . . They value you as a colleague and note the significant contributions you have made to the Visual Arts Division and the community at large through your service on college committees." Two and a half years later, when Mr. Rappaport was notified (along with twenty-six of his colleagues) of the administration's decision to terminate his services, the stated grounds had to do with his alleged failure to meet the new requirement for continued service set forth in the board-imposed plan that he be a "professionally active visual artist with work which is ongoing and professionally exhibited or commissioned." He appealed to the Faculty Review Committee, which found "sufficient evidence of ongoing work in visual art" to warrant his retention and recommended to President Coleman that she reconsider the decision. The review led to his reinstatement.

Following his reinstatement to the faculty, Mr. Rappaport continually found himself at odds with the administration and with some of his faculty colleagues. He spoke out frequently and critically on various issues brought before the faculty. He participated actively in general discussions about curricular matters, personnel policies and practices, the development of a statement on academic freedom, and the establishment of a new governance structure for the college, and he wrote lengthy memoranda to his colleagues, setting forth his (sometimes controversial) suggestions and ideas. Despite his evident interest and his previously commended record of service, he was not appointed or elected to any committees charged with addressing these matters.

During this period, while continuing to raise objections to the actions that had been taken against him and his former colleagues and to seek vindication of their rights in court, Mr. Rappaport engaged in a running dispute with the administration over his status as a presumptively tenured member of the faculty. Under the faculty handbook in effect prior to June 1994, faculty members with presumptive tenure had an entitlement to certain procedural safeguards in any action to terminate their services involuntarily. Paragraph 9.43 of the handbook called for them to receive

another five-year contract at the termination of the one then being served unless it can be demonstrated by the College that the contribution to College life of the faculty member concerned has markedly deteriorated or that he/she has substantially failed to perform the terms of the contract. . . . A second or subsequent five-year contract will only be denied after an appropriate hearing has been held before the FPC (faculty personnel committee), at which hearing the faculty member is given the opportunity to hear and challenge the arguments against reappointment.

To Mr. Rappaport's assertion that the administration was bound "by the terms of my agreement with the College at the time of my last reappointment [in 1991], under which terms the College has committed itself to offering me another five-year presumptive tenure contract unless it meets the conditions and due process guarantees specified in 9.43," President Coleman responded by letter of May 18, 1995, taking issue with "certain assumptions" made by Mr. Rappaport regarding his rights under the previous handbook. Citing the provision in the board's 1994 plan that "presumptively tenured faculty not affected by faculty reductions will retain presumptive tenure but the standards for future reviews will conform to the changes in educational policy set forth in this plan," she emphasized to Mr. Rappaport that his "level of professional activity will, therefore, be reviewed under those standards."

After the events of 1994, a new Faculty Review Committee (FRC), consisting of five members elected at large from the faculty, was created to replace the Faculty Personnel Committee. The current FRC has as its "primary responsibility . . . to make recommendations concerning reappointment of certain members of the faculty to the Dean of the College who thereafter makes a recommendation to the President." According to the "working document" under which the FRC was operating during the 1996-97 academic year, "Any faculty member, including those with presumptive tenure . . . , shall be reviewed by the committee in the year preceding the year in which the faculty member's contract expires." The review is to consist of an assessment of the faculty member's performance in three broad categories: teaching effectiveness, professional activity, and collegiality and service to the college community. In addition to the specific criteria set forth in the working document, the FRC is to "take cognizance of the faculty review criteria" set forth in the board's plan. A major change in the review procedure with important ramifications for academic freedom and tenure involved the burden of proof. Whereas under the old handbook the system of periodic "post-tenure review" required the administration to carry the burden of demonstrating adequate cause for nonretention of a presumptively tenured faculty member, under the current procedures the affected faculty member bears the burden of producing evidence demonstrating why he or she should be retained on the faculty.

In fall 1996, Mr. Rappaport was evaluated by the Faculty Review Committee for renewal of his contract. He provided the FRC—whose number was reduced to four when one member recused himself and was not replaced—with a statement of his teaching and artistic philosophy, a summary of his accomplishments in the reviewable areas, and documentation of his professional activity since his last review. The committee also solicited written evaluations from his colleagues, from students and staff, and from a handful of outside referees. After reviewing the documents and interviewing various individuals, the committee met with Mr. Rappaport (who was accompanied by a faculty adviser) on November 20, for the purpose of discussing "mutual concerns."

The members of the FRC were unable to reach a consensus in their assessment of Mr. Rappaport and his candidacy for retention. Along with a cover memorandum dated December 19, 1996, they presented two sets of recommendations to Dean of the College Robert Waldman. Two members of the committee recommended reappointment. "In sum," they wrote, "Neil's exceptional talents as a teacher and his accomplishments as a professional photographer persuaded us to decide in his favor, despite our disquiet concerning his record in other areas." While commending him as "an artist of great skill, sensitivity, and integrity," they expressed concern that his work "remains largely invisible," contrary to the college's requirement that professional practice "must take place in a public arena beyond the confines of the College, where it is subject to the evaluation of peers other than immediate colleagues." "The third and final category of evaluation," they wrote,

was by far the most troubling. First, with respect to community service, Neil has not had an active role since 1994. However, Neil protested that he had been excluded from appointive committees; as for other committees, Neil simply had not won election. We found his claim of exclusion substantiated, and while it is not for us to second-guess the motives of Deans and electors, we nevertheless felt compelled to exclude his lack of committee work from our considerations. But in the realm of collegiality, we found no such mitigation. By his own characterization, Neil is 'a person of considerable adamance.' Unfortunately, a disconcertingly large number of his colleagues experience this as intransigence. Almost without exception, the reports we received from Neil's colleagues described a person who isolates himself personally and his discipline academically. Particularly in dealings with his fellows in the Visual Arts, Neil's perceived rigidity has obstructed the curricular integration of photography with other fields. It should be clearly understood that we do not regard collegiality as a one-way street, and therefore that Neil is not solely to blame for the poor state of his relations with other faculty. Nor do we imagine that faculty relations can, or even should, be uniformly placid. By the same token, however, we cannot overlook the clear evidence of his part in these transactions. In his interview with the FRC, Neil presented himself as one who engages openly with others in honest debate, who stands by his principles without begrudging disagreement. Similarly, he expressed his wish to contribute fully and constructively on College committees. We welcome both attitudes wholeheartedly; moreover, we believe that Neil, in the future as in the past, has a great deal to offer the college community. But for collegial relations to unfold as he desires, Neil must display greater sensitivity to the effect of his personality on others and greater flexibility in his professional dealings with his colleagues. In recommending him for renewal, we urge him to make every effort in this direction.

The other two members of the committee recommended against Mr. Rappaport's retention, having been persuaded by "the preponderance of the evidence . . . that Neil fails to meet standards of professional activity and collegiality." While recognizing "the overwhelming support of his students," they pointed out that colleagues criticized him for failing to coordinate his teaching of photography with teaching in other areas in the visual arts and for being too isolated and uncooperative with other visual artists. They cited complaints about his aesthetic domination over students. While acknowledging his talents as a photographer, they criticized him for failing to fulfill his obligation "for public showing of his work where it is subject to the evaluation of peers." In the area of academic citizenship they faulted him for a lack of collegiality, for what they variously described as "a history of highly charged personal interactions with colleagues which were much more than just respectful disagreements," for "the isolationist and obstructionist perspective he has assumed relative to faculty colleagues," and for "his inability to compromise and his difficulty in accepting the legitimacy of other points of view, as well as his certainty of his own veracity."

On January 8, 1997, Dean Waldman transmitted the FRC's two memoranda to President Coleman, along with his own recommendation that Mr. Rappaport's contract not be renewed. By letter of February 19, President Coleman advised Mr. Rappaport that she was accepting the dean's recommendation. In view of Mr. Rappaport's "years of dedicated service," the president offered him relief from teaching duties, if he wished, during his terminal year.

On March 7, Mr. Rappaport appealed the president's decision to the newly established three-member Faculty Grievance Committee, challenging the stated grounds for the decision and alleging violations of academic freedom and of due process rights. The committee, in a report dated June 11, denied his appeal, having found "no violations of faculty review procedures . . . [and] no violations of the College's principles of academic freedom . . . in the conduct of the review process."

Mr. Rappaport had earlier sought the Association's assistance and on March 18, 1997, the staff wrote to President Coleman setting forth two principal concerns: that academic due process to which he was entitled had not been afforded and that the action may have been based on reasons violative of his academic freedom. The staff's letter urged the president to rescind the notice of termination. Counsel for the college, replying on behalf of President Coleman on May 1, declined to comment on grounds that litigation was pending and that "it is inappropriate to comment on individual personnel matters." With the prospect of a resolution of the Association's concerns, the general secretary authorized the preparation of this supplementary report. Having served as the ad hoc committee that produced the 1995 Bennington report, the undersigned were invited to take on this assignment, and we did so on the basis of the available documentation.

## II. Academic Freedom and Tenure at Bennington College in Light of the Rappaport Case

We find several aspects of the 1996–97 review and subsequent dismissal of Mr. Rappaport to be inimical to principles of academic freedom and tenure. These are: (a) applying new standards of expected performance to a teacher after more than two decades on the faculty; (b) including “collegiality” as an additional criterion for assessing satisfactory performance; (c) shifting the burden of proof regarding retention from the institution to the faculty member; and (d) setting the threshold for dismissal of a presumptively tenured faculty member so low that an evenly divided review committee’s recommendation led, without a full adjudication proceeding, to his dismissal.

In 1994, after the reversal of his first dismissal, Mr. Rappaport was reinstated with a continuation of his presumptive tenure, which had been first granted to him more than a decade earlier. While the Association does not condone a policy of presumptive tenure, if the concept means anything, it must be that a subsequent review cannot be another *de novo* presumptive tenure review substituting different or more stringent criteria. Rather, any review must be constrained by the presumptions that applied to the granting of presumptive tenure. The Faculty Review Committee, acting under the board-mandated policies of 1994, recognized no such constraint. It treated Mr. Rappaport like a probationary faculty member. To be continued on the faculty he was required to demonstrate to the satisfaction of the FRC and the administration that he met currently applied standards of expected performance. If a faculty member’s presumptive tenure, granted on the basis of an assessment of the faculty member’s professional competence, can be revoked at any time after a review that employs changed criteria unilaterally imposed, there is no effective presumption and no meaningful tenure. The protections of academic freedom that tenure is expected to afford are likewise absent. This we find to have been the case in the 1996 review of Mr. Rappaport.

A newly invoked standard for evaluation at Bennington, one that is central to the Rappaport case, is that of “collegiality.” Quite apart from its being a new and undefined criterion, it is troublesome *per se*. As a dimension of faculty performance used to provide constructive feedback to a faculty member about how to enhance his or her effectiveness, evaluation of collegiality can be benign, but as a basis for revocation of tenure it is deeply troublesome. While seriously disruptive behavior is a relevant element of performance, there needs to be a very high threshold of “non-collegiality”—high enough to distinguish between behavior that disrupts the effective functioning of the institution and behavior that is merely unpopular. Moreover, there would need to be well-defined procedures to evaluate the serious charge of significantly disruptive behavior. Mr. Rappaport was deemed “not collegial”

by some members of the FRC. While he is quite clearly outspoken, even adamant in articulating his views, no evidence was presented to show that he ever hindered any of his colleagues from discharging their professional responsibilities. Or students from completing their studies. There are, instead, many examples of Mr. Rappaport’s communicating his ideas widely and welcoming discussion.

The criterion of noncollegiality without careful and circumscribed definition is, in the investigating committee’s judgment, too vague. It can too easily be a cloak behind which those who want to silence, or get rid of, a dissenting faculty member can hide. Protection of the right to dissent is surely a vital element of academic freedom. Absent any evidence that Mr. Rappaport’s views or the manner in which he expressed those views prevented others from discharging their professional responsibilities, non-collegiality as applied in the evaluation of Mr. Rappaport’s suitability for serving on the faculty seems to us unmistakably a violation of academic freedom. It is not merely Mr. Rappaport’s academic freedom, it is that of the entire faculty of Bennington College that is at stake.

Another standard for performance first introduced in 1994 is that of professional visibility. We do not find this criterion necessarily unacceptable as an element of satisfactory performance, although its newly invoked application to evaluate a long-term faculty member whose performance has been repeatedly judged satisfactory is again troublesome. In Mr. Rappaport’s review, lack of such visibility, along with deficient collegiality, was the stated basis for the decision to dismiss him.

We find this aspect of the case puzzling. In 1994, after the adoption of the board’s plan, Mr. Rappaport was notified of his release on grounds that he failed to meet one of the new requirements for continued service: that he be a “professionally active visual artist with work which is ongoing and professionally exhibited or commissioned.” Mr. Rappaport appealed his dismissal and was reinstated. The reinstatement, presumably based on the evidence available, implied that his professional work completed between 1991 (the time of his previous postpresumptive tenure review) and 1994, as well as the work projected for the immediate future, was deemed sufficient to satisfy the new criterion. Between 1994 and 1996 Mr. Rappaport continued this professional work, yet in 1996 members of the Faculty Review Committee concluded that Mr. Rappaport’s work “remains largely invisible” (emphasis added). There was no attempt to make explicit how, without a marked change in behavior, Mr. Rappaport, who had met the requirements for a professionally active visual artist in 1994, had failed to do so by 1996.

The FRC was not required to provide an explanation because, under present procedures at Bennington, the burden of proof for dismissal is not on the institution but on the faculty member under review. Affected faculty, even those with presumptive tenure, must provide evidence that they meet the criteria and should be retained. This shifting of the burden of proof from the

institution, to show cause for why the faculty member should be dismissed, to the faculty member, to show why he should be retained, is in fundamental violation of the 1940 *Statement of Principles*, and certainly vitiates any presumption of tenure.

The locus of the burden of proof is an especially important issue because, at Bennington, both the procedures and the present environment do not inhibit arbitrary dismissals by the president and the board. The administration can dismiss a faculty member independently of the views of the FRC, or, as in the Rappaport case, can do so on the basis of a divided recommendation from the review committee.

Finally, in evaluating the Rappaport dismissal on the basis of the current record, we note that the essential procedural safeguards called for by the AAUP in dismissals for cause are absent.

Without more, these considerations would lead us to the conclusion that no meaningful tenure existed for Mr. Rappaport, nor for others of the Bennington faculty who were nominally allowed to retain their "presumptive tenure" after the 1994 changes were adopted by the board. But there is more. It would be naive to fail to recognize that Mr. Rappaport's faculty review and subsequent appeal occurred with the clear knowledge in the Bennington community that the president and the board of trustees disliked his strident objections to their plan and to the prior dismissals of faculty. He was assuredly *persona non grata* with the administration. Repeatedly, Mr. Rappaport brought to the attention of the faculty and the administration what he perceived as actions taken against him in retaliation for his opposition to the plan and its implementation. The message to other faculty members, including those on the FRC, of how individuals who criticized the administration, or failed to anticipate its approval, were treated cannot have gone unnoticed, even before the Rappaport dismissal.

The details of one such incident are illustrative. After the faculty dismissals in 1994, committees consisting of three faculty members were formed to work with each senior student to assist the student in coping with curricular difficulties brought about by the dismissals. Mr. Rappaport was specifically and deliberately excluded from these groups, an exclusion that he protested. In a memorandum to President Coleman, then-Dean Norman Derby explained the exclusion: "Neil was indeed excluded from the 'facilitating committees' in the fall. I did not deem it appropriate to have someone who was saying that the College acted illegally and against the interests of students on committees that were making decisions about what the institution's obligations to seniors would be."

We are aware of no evidence that Mr. Rappaport ever behaved unprofessionally toward any student. Presumably, the administration acted on the assumption that a faculty member could not speak out against the plan and the actions of the administration and still discharge his or her professional responsibilities.

This sanction against a faculty member's right to express opposition is a clear violation of academic freedom. (The decision to exclude Mr. Rappaport from the facilitating committees also, ironically, denied him the ability to carry out some of his relevant

academic responsibilities.) When the college administration reversed its decision to dismiss Mr. Rappaport in 1994, it had the obligation to treat him like every other faculty member and not to single him out because he had strongly criticized the administration and the plan. In singling him out for dismissal two years later, it did more than sanction Mr. Rappaport; it sent a clear message to all faculty members about what the administration considered acceptable behavior. It is in this environment that Mr. Rappaport's faculty review and appeal took place—hardly the environment for an unbiased, independent faculty decision about a long-term faculty member's professional competence.

In "Academic Freedom and Tenure: Bennington College," we concluded that "academic freedom is insecure and academic tenure is nonexistent today at Bennington College." The Rappaport case reaffirms that conclusion.

### III. Lessons about "Presumptive Tenure" at Bennington College

Tenure, as defined in the 1940 *Statement*, and as interpreted in the intervening decades, is never absolute. There are, and always have been, grounds for dismissal of those with tenure, and well-defined, acceptable procedures for considering such dismissals or terminations, whether for cause or because of institutional conditions such as financial exigency. Thus tenure is, in a sense, always presumptive, and the burden on the institution of rebutting the presumption is well understood both substantively and procedurally.

If Bennington's "presumptive tenure" is different from "tenure," it is in the nature of the presumptions and the procedures required to rebut the presumption. Before 1994, Bennington's use of presumptive tenure was seen by many, in and out of the institution, as a relatively minor modification of tenure, and one that might, by virtue of periodic post-tenure reviews, have positive, constructive value for the career of the faculty member. Indeed, *de facto*, the expectation at Bennington that a person with presumptive tenure would be reappointed was very strong; until 1992, no faculty members had had their presumptive tenure revoked. The board's plan was intended to change that—and did so.

The events of 1994 at Bennington and the Rappaport dismissal in 1996 make it plain that without a clear understanding of what is required to rebut the presumption of tenure, or of the procedures to be followed, tenure is eviscerated.

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*Investigating Committee*

Committee A on Academic Freedom and Tenure has by vote authorized publication of this report in *Academe: Bulletin of the AAUP*.

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## *Institutions Sanctioned for Infringement of Governance Standards*

Reports of an Association investigation at the institutions listed below have revealed serious infringements of generally accepted standards of college and university government endorsed by this Association, as set forth in the *Statement on Government of Colleges and Universities* and derivative governance documents. Institutions are placed on or removed from this sanction list by vote of the Association's annual meeting.

The publication of these sanctions is for the purpose of informing Association members, the profession at large, and the public that unsatisfactory conditions of academic government exist at the institutions in question.

The sanctioned institutions and the date of sanctioning are listed, along with the citation of the report which formed the basis for the sanction.

Lindenwood College (Missouri) ( <i>Academe</i> , May–June 1994, 60–69) .....	1994
Elmira College (New York) ( <i>Academe</i> , September–October 1993, 42–52) .....	1995
Francis Marion University (South Carolina) ( <i>Academe</i> , May–June 1997, 72–84) .....	1997