

Tenure: A Summary, Explanation, and "Defense"

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I. Introduction

In the wake of student unrest and in the presence of strong competition for the diversion of funds to other national priorities, severe demands are now being made for greater professional accountability and for greater efficiency in higher education. Unsurprisingly, tenure has been singled out as an obstacle to both of these goals and, consequently, as a blockade to educational progress. Simultaneously, the felt dissatisfaction with the general adequacy of teaching has renewed the common suspicion that tenure is a professional masquerade: that it lingers as a sophisticated phrase obscuring the dark reality of uniquely selfish claims of a right to lifetime employment for the incompetent and irresponsible.

Older members of the profession may well be inclined to shrug off these critical suggestions, having heard them more than once before and remembering the careful answers that ably replied to them. (It is in fact quite true that the issue has been joined many times, *i.e.*, that the concept of tenure has never been allowed to pass unexamined, simply as part of the conventional wisdom.) Nevertheless, even if it is true that little new can possibly be said on the subject, some brief reconsideration may serve at least to rekindle a livelier understanding of a vital concept which has tended of late to suffer from a hardening of the categories.

In this small essay, I mean hardly to offer a "defense" of tenure at all. Rather, given the presuppositional character of criticism so recently heaped upon it, tenure's best defense may well inhere simply in a clear statement of what it is—and what it is not. In what follows, I believe that the statements about tenure are fully responsive to the applicable principles and standards supported by AAUP, although there is certainly nothing more authoritative about my views in this regard than those of others to whom the *Bulletin* freely extends the courtesy of its pages.

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II. A Summary, Explanation, and "Defense"

Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed *without adequate cause*. Moreover, the particular standards of "adequate cause" to which the tenured faculty is accountable are themselves wholly within the prerogative of each university to determine through its own published rules, save only that those rules not be applied in a manner which violates the academic freedom or the ordinary personal civil liberties of the individual. An institution may provide for dismissal for "adequate cause" arising from failure to meet a specified norm of performance or productivity, as well as from specified acts of affirmative misconduct. In short, there is not now and never has been a claim that tenure insulates any faculty member from a fair accounting of his professional responsibilities within the institution which counts upon his service.

In a practical sense, tenure is translatable principally as a statement of formal assurance that thereafter the individual's professional security and academic freedom will not be placed in question without the observance of full academic due process. This accompanying complement of academic due process merely establishes that a fairly rigorous procedure will be observed whenever formal complaint is made that dismissal is justified on some stated ground of professional irresponsibility, to insure the fair determination of three facts:

1. that the stated cause is the authentic cause for dismissal, rather than a pretense or makeweight for considerations invading the academic freedom or ordinary personal civil liberties of the individual;
2. that the stated cause exists in fact;
3. that the degree of demonstrated professional irresponsibility warrants outright termination of the individual's appointment rather than some lesser sanction, even after taking into account the balance of his entire service and the personal consequences of dismissal.

In all of these respects, the procedural protections of tenure are analogous to fair hearing requirements even now evolving in the federal courts for the protection of various kinds of status in the public sector (including employment), to the statutory procedural protection of civil servants, and to the grievance procedures conventional in collective bargaining agreements. It has long since ceased to be true that even relatively unskilled workers in an industrial firm may be summarily fired by unilateral decision of management; statutory law limits the grounds for dismissal, recourse to the National Labor Relations Board is available for reinstatement and back pay under appropriate circumstances, and the contract itself ordinarily provides for a grievance procedure for review and arbitration of the proposed discharge. (Tenure—through its reference to more specific and rigorous forms of academic due process—usually does provide, however, a larger measure of procedural protection than is provided in the *ex post facto* review of the factory worker's grievance.)

Tenure may also be stated in the following way more clearly to indicate its basis and meaning. The conferral of tenure means that the institution, after utilizing a probationary period of as long as six years in which it has had ample opportunity to determine the professional competence and responsibility of its appointees, has rendered a favorable judgment establishing a rebuttable presumption of the individual's professional excellence. As the lengthy term of probationary service will have provided the institution with sufficient experience to determine whether the faculty member is worthy of a presumption of professional fitness, it has not seemed unreasonable to shift to the individual the benefit of doubt when the institution thereafter extends his service beyond the period of probation and, correspondingly, to shift to the institution the obligation fairly to show why, if at all, that faculty member should nonetheless be fired. The presumption of the tenured faculty member's professional excellence thus remains rebuttable, exactly to the extent that when it can be shown that the individual possessing tenure has nonetheless fallen short or has otherwise misconducted himself as determined according to full academic due process, the presumption is lost and the individual is subject to dismissal.

There are, moreover, certain circumstances in which tenure will not provide even this degree of professional security for faculty members of unquestioned excellence. Two of these circumstances may appropriately be specified to indicate further how utterly false is the claim that tenure would rather suffer hardship to an entire institution than hardship to any of its tenured staff. As many faculty members are painfully aware, declining student enrollments in certain academic departments not only have occurred with such suddenness as to raise a serious question of whether the decline is really a healthy turning away from less worthwhile subjects (rather than a simple turn of fashion), but have also precipitously reduced the demand for the services of some faculty members with particular skills in those departments. Nevertheless, assum-

ing that each of the affected faculty members, even though he possesses tenure, is either unable or unwilling to retrain and equip himself to be professionally competent in some other area of the academic program with sufficient demand to sustain his employment within the institution, his services may be terminated simply by the cessation of the program itself. While the faculty appropriately must participate in any decision concerning the reduction or elimination of a given program for the same reason that it must do so when the enlargement or addition of a program may be contemplated, *viz.*, to provide some informed judgment about the educational wisdom of the proposed programmatic change, tenure provides no guarantee against becoming a casualty to institutional change.

Again, the termination of particular academic programs, not from failure of interest by students but from unavoidable conditions of financial stringency, carries with it no suggestion that the released members of the faculty have either fallen short in their duties or otherwise misconducted themselves in a manner warranting termination. Nonetheless, if there is an authentic financial emergency confronting the university, and if decisions concerning what programs must be terminated and in what order, what particular faculty members must be released and in what sequence—if these decisions are made in a nonarbitrary and reasonable way with appropriate faculty participation, then nothing at all will insulate adversely affected individuals from the hard prospect of unemployment.

Tenure, then, neither buttons up the process of institutional change nor binds the ways which each institution must consider as it copes with authentic financial distress. It is but a limited statement that each faculty member possessing it, receiving it only after a stipulated period of probationary service, is thought worthy of a rebuttable presumption of professional excellence in continuing service to the institution. Thereafter, when termination of his services is sought for any reason inconsistent with that presumption, it requires only that the burden of justification be fairly discharged under conditions of academic due process by those with whom it properly rests.

To the extent that tenure protections of full academic due process possess a marked resemblance to the procedural rights of others not involved in higher education, it is clear that tenure does contemplate an interest in professional security quite apart from its central objective to safeguard academic freedom. There is, moreover, every good reason that it should do so entirely aside from an intelligent concern to render higher education competitive with other employment opportunities by assuring that it provides at least as much job security. The more fundamental reason for the requirement of due process here as elsewhere is the desire to do justice and to avoid errors in the making of critical judgments. Even supposing that in many instances a particular charge of professional irresponsibility is neither stated in terms which anyone would claim to raise a question of academic freedom (*e.g.*, a charge that a faculty member has accepted bribes in the award of grades) nor that the charge is

otherwise suspected of having been brought forward solely from an ulterior reason which itself relates to academic freedom, still the need would remain to protect the individual from unreasonable risks of error and prejudice in the resolution of that charge. The power to fire a person without a fair hearing—in this instance a hearing according to academic due process—deserves to be called "arbitrary" and to be despised, not so much on its own account as on account of its greater tendency to result in error—to yield a result utterly at odds with what we would have desired had the actual facts been known. On such a basis, we find no difficulty in understanding why an individual may not be made even to pay a fine for drunk driving in the absence of a right to fair trial which yields a civilized assurance that he did in fact violate the law. Protection of a professor from the unjust forfeiture of his position after a long period of service to the institution is surely as simple a thing to understand, and thus the appropriateness of furnishing that protection through the assurance of academic due process without regard to the nature of the charge.

Nevertheless, beyond the consideration of justice itself, it is still extremely important to understand the special relationship of tenure to academic freedom in particular. An understanding of this relationship would be worthwhile in any case, given the fact that the vast majority of contested dismissals continue to involve disputes over whether what the individual may have done is part of his academic freedom (*e.g.*, how he discharges his duties, what he has said about the college, whether his extramural utterances are defensible within his discipline), and many others have arisen under circumstances involving the suspicion of ulterior purpose in bringing the charge—a purpose itself believed to violate academic freedom. Essentially, however, the connection of tenure with academic freedom is important to understand so as to account for the particular *form* of due process to which tenure creates an entitlement, namely, full academic due process with its emphasis upon professional peer-group participation in the first instance.

The function of tenure is not only to encourage the development of specialized learning and professional expertise by providing a reasonable assurance against the dispiriting risk of summary termination; it is to maximize the freedom of the professional scholar and teacher to benefit society through the innovation and dissemination of perspectives and discoveries aided by his investigations, without fear that he must accommodate his honest perspectives to the conventional wisdom. The point is as old as Galileo and, indeed, as new as Arthur Jensen. An individual who is subject to termination without showing of professional irresponsibility, irrespective of the long term of his service within his discipline, will to that extent hesitate publicly to expose his own perspectives and take from all of us that which we might more usefully confront and consider. Exactly as his skill and understanding advance to a point making it more likely than before that he will contribute something to the legacy of past endeavors, exactly as he will have made

an extended commitment in one given discipline diminishing his opportunities to do something else with his life or to start all over again in a wholly different kind of career, so the larger society will tend to be deprived of whatever he would have had to offer it by the very degree of chilling inhibition which it would impose through upholding institutional authority to dismiss him without full academic due process. It is the most vital function of tenure to avoid this contingency by shifting the benefit of doubt to the individual, entitling him then to full academic due process.

The shift does, indeed, do more than to provide a fair hearing in the usual sense, *i.e.*, a full hearing before disinterested parties, preceded by a statement of specific charges based upon reasonably clear standards. Rather, full academic due process locates the fulcrum of responsibility to determine in the first instance whether the tenured professor's work is professionally defensible in those with whom the risk of abuse may least dangerously be placed, namely, his professional peers.

The matter can be fairly expressed only in this way (*i.e.*, "with whom the risk of abuse may *least* dangerously be placed"), for it is true of course that there are degrees of intolerance and convention regarding the methodology and premises of "professionally responsible" utterances within academic peer groups as outside of them. Faculty committees are doubtless capable of reacting against a colleague when others would not have done so, or of favoring him when others would not have done so, and either of these may be accomplished on occasion by means against which no system can be 100 per cent fool-proof. Given the necessary decision that there must be accountability somewhere, according to some standard, as initially reviewed by some group of human beings, however, the alternatives to initial peer-group hearing all seem worse where academic freedom tends so frequently to be at stake. At the same time, the entitlement of tenure to full academic due process with its emphasis upon initial peer-group hearing is not without significant checks and balances and by no means reposes final adjudicative authority within the faculty. Rather, it is characteristically hedged about by the reserved authority of the university president and trustees to reverse a judgment or to modify a sanction either favoring or disfavoring the individual, for compelling reasons and following fair review with him and with the faculty committee which initially considered the case.¹

The sense and system of tenure, in summary, come down to this. After completing the full profile of professional preparation, an individual appointed to the faculty of an institution for the first time is neither assured of

¹ A better alternative to this system is by no means obvious. Indeed, a number of alternatives were canvassed again early this year, in a comprehensive report at the University of Utah, by a Commission including among its members students and citizens from outside the institution. Two-thirds through that Commission's Report (the text of which appears elsewhere in this issue), the first recommendation appears:

RECOMMENDATION NO. 1: The tenure system at the University of Utah should be maintained.

lifetime employment, nor is he assured of employment beyond the initial term on some general condition of good behavior, nor is he even presumed to be professionally excellent according to the institution's own standards of faculty excellence. Rather, the immediate premise of his appointment is extremely limited, *i.e.*, that he is appointed because he appears to be attractive and to meet certain needs better than others at the time, with only the assurance that he will not be fired without cause during the specified term of his initial appointment and that he will be given a fair chance to establish his excellence over a period of six years assuming, further, that the institution does not in the meantime find others whom it thinks may show greater promise or otherwise better meet its needs than he. If the institution so resolves its policy clearly, to "play the field" and to displace a nontenured appointee by appointing someone else it subsequently finds has become available and whom it regards as more attractive, it is free to do so at least if it has fairly articulated this prerogative and provides notice of and intention to exercise it, reasonably in advance of the end of a given probationary term.

Even assuming the necessity of this sort of rugged competition arrangement to assure each institution of flexibility of choice and an opportunity to resolve the excellence of its newer staff, however, it is surely clear that six years of experience with the faculty member's full-time professional service will provide the institution with ample opportunity to judge his fitness according to the standards and means of review it has established. The institution thus may not further postpone resolving whether that faculty member is now worthy of a conditional statement of continuing confidence, given the intrinsic unfairness of an ever-increasing degree of specialization and dependence on his part under circumstances where a qualified judgment respecting his fitness is clearly feasible and where a failure to resolve that judgment must continue to trammel both his personal security and his academic freedom.

Indeed, throughout his probationary terms of service the academic freedom of the appointee will necessarily have been more constrained than that of others, given the fact that he has continued to face the prospect of non-renewal without a demonstration of adequate cause pursuant to full academic due process. The degree of dampening effect upon his academic and personal freedom has been justifiable during this time, moreover, solely on the basis that an initial appointment with "instant tenure" would have been premature and reckless, *i.e.*, it would have expressed a statement of confidence in the *demonstrated* excellence of the appointee when no such statement could intelligently be made in the absence of a reasonable opportunity to determine whether it is warranted.

Temporizing beyond six years of experience can scarcely be rationalized on such a basis, however, and thus the institution is fairly called upon carefully to decide by that time whether a conditional statement of continuing confidence is warranted—a statement of tenure. If,

upon adequate consideration, the conclusion is reached that no such statement is in fact warranted, the institution must so advise him and put an end to uncertainty by making the seventh year terminal. Otherwise, it must extend to him the benefit of the doubt for the first time, equally ending the uncertain cycle of term appointments. Thereafter, while never assured that he will not fall casualty to some contingency of programmatic change in the institution or to some hard decision reflecting a financial crisis without available alternatives, he at least need not fear that he may be dispossessed of his position in the absence of demonstrated adequate cause pursuant to a hearing by his peers and the forms of fair review by the administration of his institution. So very far is this arrangement from being well calculated to establish lifetime employment, to protect the incompetent, or to conceal the irresponsible, and so mild are its features in the encouragement of professional excellence and the protection of academic freedom, I cannot think it needs defending at all. To the extent that it may, however, a defense was well and succinctly stated in the following resolution adopted by the 1971 Annual Meeting of the AAUP:

Misconceptions of tenure are commonplace. For many groups and individuals tenure has become a conveniently simple explanation for what they perceive as a variety of educational ills. Tenure is not the cause of these ills, nor is it an incidental and self-serving privilege of the academic profession which may be casually dismissed. It is the foundation of intellectual freedom in American colleges and universities and has important but frequently overlooked benefits for society at large.

Basically tenure insures that faculty members will not be dismissed without adequate cause and without due process. From the long list of academic freedom and tenure cases with which the Association has been confronted, it is evident that many good teachers and scholars have been arbitrarily dismissed, and that many more would have been dismissed without the protection of tenure. In the absence of a manifestly more effective means for safeguarding intellectual freedom, attacks on tenure are irresponsible. Therefore, the Fifty-seventh Annual Meeting of the American Association of University Professors reaffirms the Association's commitment to tenure and insists upon its centrality as an enabling principle of American higher education.

III. A Lengthy Postscript: Academic Freedom and the Nontenured Faculty

While the need to enter a defense of tenure against the criticism that it is a shield for the incompetent and irresponsible may melt away once the actual conditions and terms of tenure have again been clarified, it may nonetheless be appropriate to add a postscript in acknowledgment of a very different kind of criticism, a criticism which finds serious fault with what is apparently the anomaly of tenure and the equal protection of academic freedom. In essence, the criticism is that insofar as the case for tenure stands or falls according to the measure of protection it yields for academic freedom, either it must be extended equally to all faculty members irrespective of their length of service, or withdrawn equally from all, (possibly then to be replaced by a uniform standard of academic due process for all, but without the invidious

distinction implied by the term of "tenure" itself). If it is said that academic freedom is realistically secure for each person only to the extent that his professional status may not be placed in question without the observance of full academic due process, and if it is acknowledged that only those with tenure are entitled to full academic due process, then it necessarily follows that only those with tenure do in fact have academic freedom. On the other hand, if it is claimed that all members of a faculty are equally entitled to the free exercise of academic freedom, then it must be acknowledged either that tenure itself is not truly regarded as indispensable to the protection of that freedom or, if it is regarded as indispensable, that it must be provided for all alike. In short, the alleged equation that academic freedom = no termination without full academic due process = tenure, proves too much or too little. The anomalous combination of mutually exclusive assertions, "equal academic freedom for all, but tenure only for some," displays all the unseemliness of a motto from *Animal Farm*: all teachers are equal in their academic freedom, but some teachers are more equal than others (*viz.*, those with tenure)!

It will not do, as a response to this criticism, merely to point out that nontenured faculty members are equally entitled to full academic due process if sought to be dismissed within the specified term of their appointment. *I.e.*, it is not enough that newer appointees do in fact have "tenure" within their particular one-, two-, or three-year terms, and that any action to dismiss them within that term must be taken solely on the basis of adequate cause as demonstrated pursuant to full academic due process. The fact remains that the anxiety of prospective *nonrenewal* may be seen to chill the appointee's academic freedom in a manner unequalled for those members of the faculty with tenure.

Nor will it do quixotically to deny on second thought that tenure is really wholly unconcerned with academic freedom and that it is, rather, defended solely on the basis that it provides an appropriate degree of professional security for those of *demonstrated* excellence, *i.e.*, those who weathered an uncertain career (and kept their mouths shut) as probationary appointees for as long as six years and were found on the basis of experience to warrant a conditional expression of institutional confidence in their continuing excellence. Other kinds of incentives than tenure might satisfy the need for perquisites for the senior faculty, although possibly not so cheaply.

Rather, it may help to dissolve the dilemma first to note that while there is a difference in the *degree* of academic due process which tenure provides as compared with that to which a person lacking tenure is entitled when confronted with the prospect that his term appointment may not be renewed, the difference is not at all one of "full" academic due process *vis-à-vis* "no" academic due process. Indeed, recent developments in the federal courts as well as the AAUP's *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* provide for substantial due process in cases of proposed nonrenewal. The differences of degree between the two

forms of academic due process are, in fact, essentially these:

1. Proceedings to dismiss one with tenure must be initiated by the employing institution, whereas proceedings to avoid termination of one lacking tenure who has received notice that nonrenewal is contemplated must be initiated by him;
2. The burden of proving the existence of adequate cause is upon the institution in proceedings to dismiss one with tenure, whereas the burden is upon the individual contesting notice of nonrenewal to establish at least a *prima facie* case either that reasons violative of academic freedom contributed to the proposed decision or that adequate consideration was not given to the merits of his reappointment;
3. The degree of formality in the total procedure is somewhat heavier in the case of one with tenure faced with dismissal than one without tenure faced with nonrenewal.

Recognizing, then, that those in probationary service are assured of *full* academic due process against the contingency of dismissal within any term of their appointment and that they are also assured of at least minimal due process against the contingency even of nonrenewal, the disparity which remains as between themselves and those with tenure is clearly not so great as first it may have appeared. To the extent that it is nonetheless an important difference, especially as it may weigh upon the exercise of academic freedom, an explanation may rest largely in the following considerations.

First, other things being even roughly equal, the degree of hardship to one threatened with dismissal after an extended commitment to a given discipline and a longer period of service in a particular institution is likely to be greater than to a younger person subject to nonrenewal after a more tentative commitment and a briefer period of service. To the extent that the degree of due process is appropriately graduated to the degree of hardship which may result from the decision in question, it is not difficult to understand on that basis alone why dismissal proceedings are accompanied by a fuller complement of academic due process than those concerning nonrenewal. Similarly, exactly to the extent that dismissal is more portentous than nonrenewal, the chilling effect on the individual's exercise of academic freedom may itself also be greater. Correspondingly, merely to insure that the same degree of academic freedom is assured equally to the individual faced with the threat of dismissal as to the one faced with the prospect of nonrenewal, a more deliberate form of academic due process may be required in the first case than in the second.

Second, there is simply no basis to hold that the fact of one's first or second short-term appointment in teaching necessarily manifests an institutional presumption of excellence which it would thereafter be the burden of the institution to overthrow when contemplating nonrenewal at the end of the term. Surely no institution ought to be held to have made a judgment about the long-term professional excellence of a first-time appointee to its faculty in view of the fact that frequently the appointment will represent the individual's first experience in teaching and there will have been no reasonable opportunity in fact

so to determine his professional fitness. It is precisely the purpose of having a probationary period to enable the institution to resolve the doubt not previously resolved by actions of the individual with whom the burden necessarily rests. To extend the presumption of professional fitness back to the point of initial appointment is to be unfair toward the institution's capacity to make a judgment on the matter so early, with all the deleterious consequences of granting "instant tenure." Similarly, to extend the assurance of full academic due process back to the time of renewal of the first appointment is functionally exactly that, *i.e.*, the establishment of instant tenure.

Third, as initial appointments are usually not made with an adequate basis for assessing the individual's long-term excellence, there is correspondingly less reason to suspect that a decision not to renew such an appointment is made on grounds unrelated to a reasonable belief about that excellence. The same obviously cannot be said of those who have been found by lengthy experience to be satisfactory, however, and correspondingly their proposed termination creates a greater suspicion that ulterior reasons (*i.e.*, reasons violative of academic freedom) are more likely to be operating, thereby providing an appropriate reason for requiring fuller academic due process as a prerequisite to their termination. Stated in another way, as between the two groups a higher rate of non-renewal is less suspicious with respect to the first group

than with respect to the second and, correspondingly, incurring the higher costs of more ponderous full academic due process is less warranted by the uniform concern for academic freedom.

Fourth, as it is normally to be expected that one may become more expert in his specialty the greater amount of time and experience he will have devoted to it, the more important it becomes not to permit the public value of his academic freedom to be circumscribed precisely as he becomes more likely to make an original contribution by what he proposes to do or to say. Correspondingly, the degree of full academic due process which protects his academic freedom is more nearly likely to be worth its cost than were it uniformly available to all irrespective of their length of experience. To this extent, the earlier suggestion that tenure does reflect an attitude that greater academic freedom is warranted for those with a longer commitment within their discipline than for those with a relatively new one, is not without a basis in fact. Some may well question whether the degree of difference is really justifiable on such a basis, of course, reasonably suggesting that what is lost to the younger teacher in lack of seasoning and familiarity with his subject is more than offset by his freshness, creativity, or lack of debilitating conventionality. Perhaps the debate may rest there, at least for the moment: not on *whether* tenure, with its assurance of full academic due process should exist at all, but rather on *when* it should appropriately be conferred!