

DOCUMENT RESUME

ED 054 391

AA 000 726

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TITLE

The Tenure Debate.

INSTITUTION

ERIC Clearinghouse on Higher Education, Washington,  
D.C.

PUB DATE

Oct 71

NOTE

4p.

EDRS PRICE

MF-\$0.65 HC-\$3.29

DESCRIPTORS

Academic Freedom; Court Litigation; \*Faculty;  
\*Faculty Promotion; \*Higher Education; \*Teacher  
Employment; Teacher Welfare; \*Tenure

ABSTRACT

This review examines recent economic, political, and legal developments that have created pressure for reform of the academic tenure system, codified in 1940 by the American Association of University Professors and the Association of American Colleges. At issue are problems of academic freedom, "deadwood" faculty, institutional finances, and the nonrenewal of probationary teachers' contracts. The present tenure system allows college faculty a 7-year probationary period after which they must receive life employment or be dismissed by their institution. Arguments for and against this system as well as alternative tenure systems in effect at several institutions are given. A list of 29 references is included. (CHS)

# RESEARCH *Currents*

October 1, 1971

HIGHER EDUCATION

## The Tenure Debate by Carol Herrstadt Shulman

Newspaper headlines in the spring of 1971 indicated that college and university faculty were facing a new source of unrest: criticism of the system of academic tenure as codified by the American Association of University Professors (AAUP) and the Association of American Colleges (AAC) in 1940. Administrators, legislators, and nontenured faculty were finding that new economic and political pressures demanded a re-examination of tenure policies originally conceived to protect academic freedom and provide job security to those faculty members completing their probationary period of employment.

This review examines the attitudes of the supporters and critics of academic tenure; describes a number of attempts to modify or reform the tenure system; and considers new developments in the law on nontenured, probationary teachers that may significantly change the tenure concept.

### Financial pressures

Financial difficulties besetting many colleges and universities have had their impact on faculty employment. The decline in the rate of growth of financial and research support has inhibited both the maintenance and expansion of college affairs, while sluggish student enrollment growth has directly reduced the potential need for faculty (Garbarino 1971). Since faculty salaries account for 60 to 80 percent of the cost of running a university (Martin 1971), administrators in economically troubled institutions must at the same time deal with both decreased resources and sizeable salary expenses.

A significant part of this salary expense is permanently fixed because of tenured positions on the faculty. A survey of 60 state universities and land-grant colleges shows that 54.8 percent of the faculty are tenured teachers (Shaw 1970). This percentage indicates that the university has assumed a substantial financial burden:

[Assuming] that the average salary of a nontenured faculty member is about half that of a tenured faculty member, the consequence of appointing one tenured member, is not to appoint two nontenured faculty. (Miller 1970)

Miller also suggests that since the average tenured position extends over 35 years and the nontenured faculty member stays only for seven years, an administration may choose between one tenured position or 10 nontenured positions over a 35-year period. Aware of these choices, one departmental chairman discharged three qualified teachers while retaining several less able ones because the better teachers were due for tenure while the others were not (Martin 1971).

This conflict between financial difficulties and the tenure system is related in part to the AAUP-AAC 1940 Statement of Principles on Academic Freedom and Tenure. One aspect of this tenure policy was designed to provide the very economic security and stability that administrators are now finding elusive. The proponents of this policy justify it by

pointing out that tenure corresponds to merit and job security plans found in other fields. They believe that job security is necessary to attract a significant number of the potential college faculty (Machlup 1964; Utah 1971). Administrators used this job security aspect of tenure as an inducement in retaining faculty when college teachers were in great demand and highly mobile (Lane 1967). At the same time, critics of tenure were suggesting that, from the faculty's viewpoint, the historical lack of job opportunities and subservience to administrators had ended, and that job security was unnecessary (Mitchell 1968; Nisbet 1967).

The current oversupply of teachers upsets the critics' arguments against the need for job security. While the tenure system may now fill this need for some faculty, it can pose problems for new PhDs. An "up-or-out" policy after seven years of nontenured service may hurt a young college teacher in a tight job market. Job opportunities are also limited when older, tenured faculty hold the only available positions at an institution. Recognizing this, Allan M. Cartter argues that tenure practices should be modified. He recommends a system of 6 years' experience, followed by "an intermediate arrangement of, perhaps, 3-year moving tenure, with a permanent commitment made by the end of the 12 years." Job openings would also be increased by 15 percent each year if the retirement age were 64 and these other changes in tenure policies were made (Cartter 1974).

Faculty's current need for job security is reflected in the growth of collective bargaining on college campuses. Van Alstyne (1971) believes tenure to be a nonnegotiable demand in bargaining exchanges, but fears that faculty members inexperienced in collective bargaining might be indifferent to this concept. On the other hand, Joseph Garbarino (1971) feels that academic tenure is too strong a tradition to be bargained away by a faculty. The City University of New York's collective bargaining agreement, for example, has a clause prohibiting arbitration on matters related to academic judgment, including tenure (Finkin 1971).

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### *The "deadwood" problem*

Since faculty salaries and the university's financial problems are closely related, critics of the tenure system point out that the university supports faculty it may not want or need. This situation—the "deadwood" problem—involves either an unproductive faculty member who is protected from dismissal by the tenure system, or a teacher whose subject area is no longer in demand by students. In these instances, a college may find that its support of underutilized, tenured faculty causes it to spend money where it might save (Martin 1971; Miller 1970).

Although there are procedures acceptable to the AAUP for terminating a tenured professor ("Statement on Procedural Standards in Faculty Dismissal Proceedings"), administrators generally are reluctant to employ them. This lack of administrative forcefulness is suggested by a survey of tenure practices at state universities and land-grant colleges. In the 10 years preceding the academic year 1968-69, only 14 out of 60 responding institutions had held a total of 27 termination proceedings for tenured faculty. The author of the study concluded that "the number of dismissals is [not] significant in view of the large number of teachers employed at these institutions" (Shaw 1970). This finding is supported by the Commission to Study Tenure at the University of Utah (1971). The Commission found that informal methods—discussion, withholding of salary increases, and threat of formal charges—were used to effect the voluntary resignation of tenured professors, and that formal dismissal procedures were not employed often enough. Advocates of tenure recognize the deadwood situation that has developed, but fault the administration of the system rather than the tenure policy itself (University of Utah 1971). Fritz Machlup (1964) argues that institutions that carefully evaluate college teachers during their probationary period and are selective in granting tenure are less likely to have mediocre faculty. Machlup finds that good faculty may sometimes deteriorate because of the lack of a stimulating academic atmosphere, or may be dulled by the security of tenure. On the other hand, he finds that security encourages improved performance in some college professors.

### *Academic freedom*

Proponents of tenure acknowledge that the system has resulted in some problems. They argue, however, that it must be retained to preserve academic freedom, which is "essential" to the purposes of higher education (1940 Statement). The tenure system outlined by the 1940 Statement of Principles on Academic Freedom and Tenure provides for limited probation before tenure is granted, and for specific dismissal proceedings for nontenured faculty before contract expiration and for tenured faculty at all times. The Statement holds that the teacher and the administration should agree in writing to the terms and conditions of employment before an appointment begins. The 1940 Statement also provides that probationary teachers share the right to academic freedom with tenured faculty, and the AAUP has recently outlined procedures reinforcing this policy by which a nontenured teacher may seek redress when his appointment is not renewed for any reason (Procedural Standards in the Renewal or Non-renewal of Faculty Appointments). The Statement is now endorsed by 82 educational organizations and has been widely adopted by colleges and universities (see Texas 1967; California 1971).

Critics of the tenure system do not dispute the need for academic freedom, but they contend that the two concepts can be separated and that academic freedom can be protected by other means (Nisbet 1965; Jackson 1970; von der Lippe 1971). Taking this position, Robert Nisbet argues that unlike academic freedom, tenure is not essential to the idea of the university, but rather is an individual privilege. This point is supported by the recognized need for academic freedom for nontenured faculty (Nisbet 1965; Mitchell 1968; 1940 Statement). These writers also state that the special intellectual protection afforded to academicians is usually denied to those who work in the commercial world (Mitchell 1968). Robert A. Nisbet argues that tenure as protection for academic freedom is at odds with the academic emphasis on meritocracy:

How . . . do we legitimately rationalize a system of privilege which can . . . exempt a person . . . for the rest of his life from the competitive pressures and insecurities to which the rest of the intellectual world is subject?

Despite Professor Nisbet's belief that college faculty are overly concerned about their academic freedom, there is evidence that academic freedom is subject to special attacks foreign to the rest of the intellectual world. Criticism of the tenure system may constitute one form of these attacks (Brown 1971). Robert O'Neil (1971) has examined some of the state legislation that was proposed after campus disorders.

Other evidence that academic freedom is under attack includes the reports published quarterly in the *AAUP Bulletin* describing academic freedom and tenure cases the AAUP has investigated, and a recent survey that found that faculty believe attacks on academic freedom are frequent (Utah 1971). Both the AAUP and the American Association of State Colleges and Universities (AASCU) have recently developed positions that attempt to deal with criticisms of faculty irresponsibility. In October 1970, the AAUP Council issued its statement on "Freedom and Responsibility." Prefacing its recommendations, the Council declared:

[Attacks on the university's integrity and on academic freedom], marked by tactics of intimidation and harassment and by political interference with the autonomy of colleges and universities, provoke harsh responses and counterresponses. Especially in a repressive atmosphere, the faculty's responsibility to defend its freedoms cannot be separated from its responsibility to uphold those freedoms by its own actions.

The Council advised (1) that faculty should initiate plans to insure compliance with academic norms that would be preventive as well as disciplinary; (2) that sanctions other than dismissal should be instituted; and (3) that faculty should protect their academic values against attacks from their colleagues.

### *Modifications and reforms.*

Recently, educators have proposed reforms and modifications of the tenure system promulgated by the 1940 Statement and have participated in systems that do not conform to these 1940 guidelines. Working within the current tenure system, several writers recommend ways of encouraging the continued growth of tenured faculty while changing the faculty mix. One reform suggested is a career development program for tenured faculty that would include practices such as systematic, periodic review of academic performance, evaluation of departmental effectiveness, and changes in the system of incentives for faculty excellence (University of Utah 1971). Another writer has proposed that tenured professors should be

encouraged to retire early and to transfer to other roles within the university. He also suggests that privileges should be reduced over a period of time: voting rights within a department and on faculty committees or senates, should be withdrawn between the ages of 63 to 70, and teaching should be reduced to half time between ages 68 and 70 (Miller 1970).

More radical reforms of tenure include variations on the concept of a contract system of employment. At Hampshire College, there are no appointments without time limits—generally from three to seven years. The first group of contracts are now up for renewal amid debate over the length of reappointment and method of evaluation. (von der Lippe 1971). At St. John's College (Annapolis and Santa Fe campuses), age plays a major role in the tenure/contract process. And at Franklin Pierce College, a "rolling appointments" system instituted in 1968 is aimed at providing due process and security while not "(encouraging) faculty to become smug and indifferent to the needs of both the college and students" (Sinclair 1971). A plan similar to this system would use an "incremental" tenure structure (Jackson and Wilson 1971).

The Commission to Study Tenure at the University of Utah (1971) rejected the concept of a renewable contract system in lieu of life insurance in view of the difficulties in deciding whether a faculty member or the administration should bear the burden of proof in determining reappointment. They noted several practical problems based on the size of the institution. For example, a large number of faculty contracts terminating at the same time would require either an expanded administrative staff or faculty groups to decide who should be reappointed. The first alternative would be too expensive and the second would provoke conflicts of interest, since the professors doing the evaluation would themselves be subject to evaluation at a later date.

### *Probationary teachers.*

Recently, litigation has focused attention on probationary college teachers' rights to academic freedom and due process. Initiated by probationary teachers whose contracts were not renewed, these cases have demonstrated a conflict between a teacher's constitutional rights and a college administration's right to select instructors whom it considers will most benefit the institution. If resolved for the teachers, these cases may eliminate the distinction between tenured and probationary teachers.

In *Sindermann v. Perry* (U.S. Ct. App., 5th Cir., 1970) and *Roth v. The Board of Regents of State Colleges* (U.S. Ct. App., 7th Cir., 1971) the plaintiff teachers alleged their teaching contracts were not renewed because of positions they had taken publicly on certain issues. In the *Sindermann* case, the U.S. Fifth Circuit Court of Appeals sent the case back to the lower court to decide if *Sindermann's* contract was not renewed in violation of his constitutional rights of free speech and association. Odessa College had refused *Sindermann's* request for leave to testify before state legislative committees, but he did not recognize the order. Instead, he testified in his capacity as president of the Texas Junior College Teachers Association and as a spokesman for a campus organization that wanted to make Odessa College a 4-year institution—a development opposed by the Board of Regents. Although the Regents claimed *Sindermann* was not rehired because of his insubordination rather than exercise of his constitutional rights, Appeals Court noted:

We reject the sophistry which would recognize that the college could not withhold renewal of *Sindermann's* contract because of his association with the [campus organization] or because of his exercise of a reasonable right to petition the legislature by attending committee hearings, but, at the same time, recognize a right in the college administration to direct him not to exercise these rights then refuse to renew his contract for disobedience of their orders.

The United States Supreme Court will review the *Sindermann* decision in its 1971-72 session.

The academic freedom issue in the Roth case is still pending in the U.S. District Court (Wisc., Western District). Issues of fact concerning this substantive question have not yet been decided. Roth contends that he was not rehired because he was critical of the university administration and the other defendants in the case (the Wisconsin Board of Regents), during a campus controversy. He was one of four teachers (out of a total of 442) whose contracts were not renewed. Roth's brief before the Seventh Circuit Court of Appeals argues:

... the source of protection of non-tenured teachers rests in the constitution and not in either the teaching contract or the normal employment practices of the institution.

In a similar allegation that his free speech rights were violated by nonrenewal, one professor has charged that his public criticism of textbooks used and his support of an independent sociopolitical publication were the reasons for his nonreappointment. The U.S. 10th Circuit Court of Appeals in 1969 did not discuss this argument in its decision and upheld the institution's right to not renew his appointment (*Jones v. Hopper*). The Supreme Court has declined to review this decision.

The pending cases are addressed to the concept of procedural due process for probationary teachers. The Roth case is particularly noteworthy, since the Circuit Court of Appeals upheld the District Court's finding that Roth is entitled to the "minimal due process" before a re-employment decision is made—a list of reasons for his dismissal and an impartial hearing.

This order for procedural due process was contested in an amicus curiae brief filed against Roth by several state boards and the American Association of State Colleges and Universities, the American Council on Education, and the Association of American Colleges. These organizations argued that the hearing offered the probationary teacher is an "illusory remedy" because the reasons cited for dismissal need not be as tangible as those required for a tenured professor; that the burden of proof would fall upon the instructor; and that it is difficult to demonstrate that the reasons given by an administration in fact are a mask for a dismissal that violates exercise of a teacher's constitutional rights. The amici also contend that the hearing available to the thousands of instructors not retained each year would be costly and inconvenient to the college. In addition, the instructor's option of requesting reasons for nonreappointment may serve as an obstacle when he needs to find new employment. Since a prospective employer may draw an "adverse inference" from an instructor's failure to request reasons for nonreappointment, the instructor will find himself under pressure to request reasons and to report them to prospective employers.

### *Implications of probationary teachers cases.*

Presently, there is considerable conflict among Circuit Courts over rights and procedures for nontenured teachers whose

contracts are not renewed. Since the Sindermann case is already scheduled for argument before the Supreme Court, and certiorari is being sought in the Roth case, there is an expectation that the Supreme Court will resolve the issue in a group decision. At least one legal authority (Van Alstyne 1970) has suggested that the Supreme Court will uphold the proposition that both tenured and probationary public school teachers are "entitled to [a] degree of constitutionally compelled pretermination due process."

A decision upholding the majority view in the Roth case would change the concept of tenure, while a finding favoring the administrations would leave the tenure system unimpaired.

As a solution to the problem, the Supreme Court might look to the compromise ordered by the First Circuit Court of Appeals (*Drown v. Portsmouth School District* 1970). The Court found that the plaintiff, a public school teacher, was entitled to a detailed statement of reasons for nonretention and access to evaluation reports in her personnel file, but the school board would not have to grant her a hearing even though it dismissed her.

Whatever the Supreme Court holds, its decisions will not provide answers to many of the issues affecting tenure: institutional financial problems and the burden of tenured faculty salaries; effective protection of academic freedom; and perpetuation of quality teaching and scholarship. Educators themselves will have to develop solutions to these problems in ways that will satisfy individual faculty and university needs, as discussed in the 1940 AAUP Statement.

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Three major study efforts focusing on tenure are presently in progress. Carleton College Dean Bardwell Smith is editing a series of essays on tenure for spring 1972 publication by Harvard University Press; William R. Keast, recently retired Wayne State University president, is directing a Ford Foundation-funded national Commission on Academic Tenure jointly sponsored by AAC and AAUP; and Robert Carr and Daniel vanEyck are including considerable material on academic freedom and tenure in their two-year project on the academic profession sponsored by the American Council on Education and funded by the Ford Foundation.