

**Academic Freedom and Responsibility Symposium**

**\*565 SHOULD UNTENURED AS WELL AS TENURED FACULTY BE GUARANTEED ACADEMIC FREEDOM? A FEW OBSERVATIONS**

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When asked to draft sample faculty code language intended to protect academic freedom at a hypothetical institution that elected not to tenure at least some of its senior faculty, I hesitated. Would such an effort be tantamount to opposition to tenure itself? Given their attachment to unitary tenure systems, could senior faculty review the work-product in a fair-minded way? Should universities be free to explore new employment arrangements for future long-serving faculty or will any such exploration, regardless of how careful, be thought faithless to the hard-won gains of academic freedom? Is it possible to keep healthy the one leg of tenure, academic freedom, without simultaneously exercising the other, permanent economic security?

Not surprisingly, the powerful and often persuasive arguments for tenure have been broadcast far more extensively than has the case against it. Among the points in its favor that seem most forceful are these: The tenured American professoriate is the most accomplished in the world; tenure, like democracy, although an imperfect system is the best in wide use; tenure fosters the ambiguity of control of American universities that perhaps has been their principal genius; tenure is a bulwark between insistent pressures in our society for immediate yield, and the more valuable and lasting contributions of a contemplative, independent, and superior mind.

Some anti-tenure theses seem far less compelling or lack developed evidence. For example, it is obviously fallacious to infer that tenure is bad from the fact that some tenured faculty have been known to display bad manners, disrespect or even intellectual dishonesty. Nor is the unproductivity of some tenured faculty a strong reason to abolish the status wholesale. Nor has it been proven that eliminating tenure would result in faculties that are responsive to the nation's needs 20, 50, or 100 years from now.

Yet more than at other times in recent history, college, and university governors, the very people least likely to tamper intentionally with proven success, are expressing doubt that tenure as we know it is still vital to or consistent with institutional missions. Examination and implementation of alternatives are underway at some institutions and almost certainly will continue. Some surveys suggest that junior faculty increasingly question the soundness of entrenched approaches to tenure. Tenure may conceivably choke institutions' ability to cope with fast-paced market-driven changes in educational needs. And in a competitive nation in which among the professions **\*566** only some judges have a corresponding degree of job security, the public increasingly wonders whether professors, to do competent teaching and research, actually require lifetime contracts.

It may be asserted that the public interest is disserved by discussion of the possibility of guaranteeing academic freedom to those who lack tenure. Of course,

while the two concepts have been closely linked they were not conceived, in Europe or the United States, as co-extensive. Tenure was and its many proponents believe is an arrangement intended to secure and promote academic freedom. Some go so far as to contend that tenure is necessary and perhaps even sufficient to the occurrence of academic freedom.

It may be argued that the mere presence of tenured faculty on campus guarantees the academic freedom of their untenured colleagues. That claim seems at least debatable, however, and reasons that untenured faculty should not be assured academic freedom independent of tenure are not easy to identify. An effort to specify processes for the protection of the academic freedom of all faculty, regardless of their status, seems consistent with principles that animated the tenure idea in the first place. In addition, many who believe that academic freedom is a transcendent value of American higher education are likely to believe its preservation to be a paramount goal, particularly at institutions predisposed to examine alternatives to conventional tenure.

The following draft, although specific, is merely an illustration of a general approach. The exact terms suitable at a given institution should depend on circumstances particular to that institution. For example, some institutions may find more prudent excluding financial need and program discontinuance provisions (Sections 8 and 9 of the draft), or departing from this proposal in other ways.

I do not claim by any means that this draft is the best that could be written to guarantee academic freedom to all faculty. The draft is incomplete, somewhat cumbersome, written by a lawyer, a burden on a university that adopts it, and nothing just like it has been tested anywhere as far as I know. It is intended only to engender the kind of serious conversation for which nearly all experienced professors should be qualified.

Although the draft has been in circulation (albeit limited) for several years, it attracted little attention until this Journal expressed interest. To its editors, and to the several scholars whose essays follow, thank you.

#### \*567 ACADEMIC FREEDOM POLICY AND PROCEDURES [FN1]

The following provisions related to the authority and governance of the faculty of the University were adopted by resolution of the Trustees on \_\_\_ \_\_, 19\_\_:

1. The University's ability to perform its mission depends on the vigorous and unimpeded exercise of the faculty's academic freedom. The University assures the academic freedom of the faculty, consonant with these views from the 1940 Statement of the American Association of University Professors and the Association of American Colleges:

(a) Teachers are entitled to full freedom in research and in publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Any limitations of academic freedom because of aims of the institution shall be clearly stated in writing at the time of the appointment.

(c) University teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they shall be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and

should make every effort to indicate that they are not speaking for the institution.

2. The foregoing principles shall apply to all personnel of the University to the extent that they function in a faculty capacity, and shall apply no less to the least experienced faculty member of the University than the most experienced, no less to the most junior than the most senior, and no less to part-time than full-time faculty.

3. The University shall not discipline, terminate, dismiss, non-renew, or otherwise disadvantage in faculty perquisites or faculty status, by reason of his or her exercise of the academic freedom assured by Section 1, any member of the faculty.

4. Cognizant of the expertise of the faculty in the customs and usages of academic freedom, the University vests substantial and extensive responsibility in the faculty, pursuant to the processes identified in Section 5, for the application of the academic freedom principles set forth in Section 1.

5. (a) Concerns related to perceived infringement of academic freedom, like other kinds of concerns, sometimes best can be addressed and resolved \*568 through informal communication and conciliation. Should such methods, in the judgment of a faculty member who has such concerns, be unsuccessful, infeasible, or undesirable, the following recourse is available: A faculty member who believes that his or her academic freedom assured by Section 1 has been detrimentally infringed by the University may refer the matter by written complaint not later than 60 days after the asserted infringement (unless compelling reason is shown for a longer period, not to exceed one year) to a Committee ("Committee I") of five members, conjointly appointed by the President and the Chair of the Faculty Senate, at least four of whom shall be full-time members of the faculty.

(b) The term of a member of Committee I shall not exceed participation in more than six cases before the Committee, nor shall any member be appointed to a maximum term of more than three years. No member of Committee I shall serve consecutive terms. Upon initiation of Committee I, one member shall be appointed to a maximum term of one year, and two members shall be appointed to a maximum term of two years. The President and the Chair of the Faculty Senate shall conjointly fill vacancies as they occur. No member of Committee I who holds appointment in the grievant's academic department shall participate in consideration of the case by Committee I, in which event a substitute member to serve for the case shall be appointed by the President and the Chair of the Faculty Senate conjointly. Upon agreement of the President, and a majority of the Faculty Senate present at a meeting at which there is a quorum, the terms of future members of Committee I and the size of the Committee in future cases may be modified in light of judgment and experience.

(c) A grievant may withdraw his or her complaint at any time before, or with the consent of Committee I after, the grievance has been fully submitted to Committee I for decision.

(d) Committee I shall conduct its review of the matter in accordance with such fair and efficient procedures as the Committee may from time to time adopt in consultation with the University Office of General Counsel. Committee I shall elicit stipulated facts from the parties whenever in its judgment doing so will tend to expedite its review; shall not be bound to follow formal rules of evidence that might otherwise obtain in a court of law; and may determine to review a given matter on the basis of written submissions of the parties, or may hold a hearing, or may both elicit written submissions and hold a hearing.

(e) If Committee I finds the grievant's complaint to be insubstantial, it shall report that finding summarily to the President, and shall issue no other report on the matter. In all other cases that proceed to disposition Committee I, within 60 days after its receipt of the complaint or such minimally longer time as is essential, shall make and convey to the President or the President's designee written findings of fact (which may be summary in form) and shall also state in writing whether and in what respects Committee I believes that the grievant's

academic freedom assured by Section 1 was infringed by the University in the matter.

**\*569** (f) The President or the President's designee shall adopt the findings and conclusion of Committee I unless the President or designee determines, with or without further review as the President or designee may elect, that the findings and/or conclusion are clearly and materially erroneous. The President or designee shall report his or her view of the matter in writing to the grievant, and shall specify in good faith and cause to be implemented steps to remedy, in accordance with Section 3, infringement by the University of the academic freedom assured by Section 1.

(g) If Committee I concludes that the President's past conduct is directly at issue, the matter shall be reviewed by the Trustees or their designee, in lieu of review by the President or the President's designee. The Trustees or their designee shall adopt the findings and conclusion of Committee I unless the Trustees or designee determine, with or without further review as the Trustees or designee may elect, that the findings and/or conclusion are clearly and materially erroneous. The Trustees or designee shall report their view of the matter in writing to the grievant, and shall specify in good faith and cause to be implemented steps to remedy, in accordance with Section 3, infringement by the University of the academic freedom assured by Section 1.

6. Nothing in Section 5 shall derogate from the right of a faculty member who claims detrimental infringement by the University of his or her academic freedom assured by Section 1 to assert against the University the claim or the underlying facts in any external forum of competent jurisdiction. In the event of such assertion made before Committee I, the President, Trustees or designee, as the case may be, have concluded their review of the matter, or in the event of the grievant's resignation, acceptance of full-time employment elsewhere, or death, Committee I, the President, Trustees or designee, as the case may be, may elect to suspend or terminate their review of the matter without a finding.

7. Each faculty member shall enter into a contract of employment with the University on such terms, including terms of employment of definite or indefinite duration, as are mutually agreeable, and such contract may be terminated in accordance with the contract, or mutually amended from time to time, provided that

(a) Sections 1 through 6 are deemed a part of the employment contract of the University and the faculty member;

(b) the grounds for termination or dismissal, other than for term expiration, of any faculty member who has served continuously on the University full-time faculty for at least eight years shall be no less advantageous to the faculty member than are these grounds individually and collectively: grave misconduct, neglect of duty, program discontinuance, and financial need; and

(c) the rights of review provided by Section 5 shall, without limitation of Section 5, be available to a faculty member who claims that non-renewal of his or her employment contract is attributable to detrimental infringement by the University of the academic freedom assured by Section 1.

8. (a) Program discontinuance and financial need shall be grounds for termination of a faculty member (other than a faculty member terminated upon **\*570** term expiration), absent express terms to the contrary in the faculty member's employment contract, only if preceded by the written report of a committee ("Committee II") as to whether the University's educational mission (in the case of program discontinuance), or the pertinent academic unit's long-term financial soundness (in the case of financial need), clearly justify termination on that ground. The University shall not terminate a faculty member on either ground unless the President and at least 75 percent of trustees then in office conclude in accordance with Section 8(c) that the University's educational mission (in the case of program discontinuance) or the academic unit's long-term financial soundness (in the case of financial need) clearly justify the termination in the light of compelling evidence.

(b) Committee II shall be a standing committee of 11 members, including five full-time members of the faculty (each of whom has at least ten years full-time faculty experience in higher education) who are not deans or department chairs of the University, five deans and department chairs of the University, and one former member of the University community, or other distinguished person not then employed by the University, who has at least 15 years experience in higher education as a faculty member and/or administrator. The President shall appoint the members of the committee to serve staggered three-year terms. To that end, initial members of Committee II may be appointed to appropriately shorter terms. The President shall fill vacancies as they occur. Committee II shall issue its report within 45 days after a request by the President that it do so or within such shorter or longer time as the President and Committee II agree. No member of Committee II shall participate in the Committee's review of a matter that involves an academic unit for which that member is responsible.

(c) No faculty member (other than a faculty member terminated upon term expiration) shall be terminated on the ground of program discontinuance or financial need if Committee II recommends against the termination, unless (i) the President first issues a written report that addresses with particularity the report of Committee II and that demonstrates that potential alternatives to termination, including reassignment and other alternatives, have been thoroughly considered and found unsound, and (ii) at least 75 percent of trustees then in office ratify the President's report or issue a written report of the Trustees that addresses with particularity the report of Committee II and the unsoundness of potential alternatives to termination, including reassignment and other alternatives.

9. A faculty member (other than a faculty member not renewed upon term expiration) terminated by reason of program discontinuance or financial need shall receive severance compensation equivalent to not less than \_\_\_ months' compensation, at the faculty member's current rate, for every year of faculty service by the faculty member at the University, not to exceed \_\_\_ years' compensation.

10. (a) No faculty member who has served full-time on the faculty at least eight continuous years shall be terminated or dismissed on the ground of grave misconduct or neglect of duty, and (b) no faculty member shall be disciplined, \*571 terminated, dismissed or otherwise disadvantaged in faculty perquisites or faculty status, on the ground of misconduct or deficient performance, (c) without recourse at the election of the faculty member to the pertinent review process specified in this Section, which process shall be alternative to the process specified in Section 5, (d) provided that this Section 10 shall not pertain to a faculty member not renewed upon term expiration. [Specify here extensive review process available in cases of alleged grave misconduct and neglect of duty by covered "eight-year faculty"; and specify separate review process in other cases of alleged faculty misconduct and deficient performance.]

11. Sections 1 through 10 are intended to express fundamental policies of the University and shall not be amended unless (a) a majority of the Faculty Senate present at a meeting at which there is a quorum so recommends and the recommendation is accepted by the President and Trustees, or (b) at least 75 percent of the trustees then in office, following extensive consultation of the faculty by the Trustees or their designee, agree to do so. No amendment to Section 11(b) shall be applied to affect adversely the employment contract rights then in effect of a faculty member, nor shall any such amendment be effective until at least one year following adoption.

[FNa1]. Partner, Hogan & Hartson LLP, Washington D.C. The author acknowledges support of the Pew Charitable Trusts for the project of which this is a very small part.

[FN1]. Draft September 3, 1997. This proposal was initially published in RICHARD CHAIT, IDEAS IN INCUBATION: THREE POSSIBLE MODIFICATIONS TO TRADITIONAL TENURE POLICIES (1998).

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