

Should Tenure Be Tenuous?

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When Jack Fiorito asked me to address “Should Tenure Be Tenuous?” he accompanied the request—or marching order—with a copy of a statement, *What’s Wrong About Planned FSU Faculty Layoffs?*, prepared by the UFF-FSU Chapter. So the question, I took it, is of the relationship of tenure to institutional finances, programs, enrollment, and the often invoked overarching need to maintain institutional flexibility. I will return to the UFF-FSU critique at the close. But let me open by noting that the subject is not only one of professional interest but of some personal involvement as well.

As a young AAUP lawyer more than thirty years ago I had a hand, albeit at the margin, in the litigation of the landmark Bloomfield College case which resulted, in 1974, in an emphatic judicial endorsement of the importance of tenure in a time of financial distress. Shortly thereafter I served on the AAUP’s committee of investigation into the manner in which the City University of New York handled its financial meltdown in “the year the big apple went bust,” to use the title of a popular book of the time, which resulted in the summary termination of over one thousand lecturers but in which, notably, no tenured faculty were terminated. I was to serve on two more such investigations—at San Diego State in 1992, where notice of termination was given to almost 300 tenured faculty, later rescinded, and at the New Orleans universities in the wake of Hurricane Katrina in 2004, which resulted in the imposition of AAUP censure on several administrations, notably Tulane and Loyola of New Orleans. On the legal front, I testified on the relationship of tenure to a faculty layoff in a federal court in California in the

wake of the retrenchment of Sonoma State University in 1982, for which the institution was censured by the AAUP, and I wrote “friend of the court” briefs on behalf of the AAUP in several financial exigency/program discontinuance. I have followed the development of the law, albeit more from afar, since then, although I did testify more recently in a Colorado case about which I will have more to say later on.

From this as background, I would like to address four questions: (1) what the common understanding of the significance of tenure in a time of financial retrenchment is; (2) what the policy reasons requiring respect of tenure are; (3) how the weight accorded tenure is to be given practical effect; and, (4) how realistic these standards are today.

The Common Understanding

In 1915, when the academic profession crystallized its demand for tenure, the overwhelming majority of institutions of higher education were small, many were under denominational or local control, and most were penurious. Even in the prosperous 1920s, five to ten colleges a year disappeared or merged.

In an effort to achieve a national consensus on institutional practice the American Council on Education hosted a multi-lateral conference in 1925 which produced a *Statement* that dealt among other issue with the relationship of tenure to finances. It introduced the wonderfully vague concept of “financial exigency” and it did so in this way:

Termination of permanent or long-term appointments because of financial exigencies should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution. Situations which make drastic retrenchment of this sort necessary should preclude expansions of the staff at other points at the same time, except in extraordinary circumstances.

In 1937, negotiations began between the AAUP and the Association of American Colleges on a successor document, a compact, necessitating tradeoffs between the professorial and presidential negotiators. It retained “financial exigency” as a permissible ground of termination, but it did not attempt to define it. Instead, Henry Wriston, President of Brown University, offered a qualification providing that in order to be a ground of termination a financial exigency had to be “demonstrably bona fide,” which became part of the 1940 *Statement*. Wriston expanded on this in presenting the compact to the AAC in 1939:

The plain fact is that dismissals directly due to financial emergency are really very rare. Speaking now as an administrative officer, it is much easier for me to say “no” to a man by pleading the exigencies of the budget than by denying a request on the merits. The displacement of a teacher on continuous appointment should not be merely an “economy move” but should be done only because of a genuine emergency involving serious general retrenchment. . . . It is a reminder that purity of purpose is no defense in the public eye, unless the purity is demonstrable. The provision is a protection to the administrative officer because it reminds him to establish the record so clearly that the exigency is as obvious to the public as it is to him.

Two features of the otherwise amorphous notion of “financial exigency” emerge from the history of the text: first, whatever it is, the termination of tenured faculty in consequence of it must be a genuine last resort. Thus, in principle, non-tenured faculty should not be retained—and assuredly not those in even more contingent status—nor new faculty appointed while tenured faculty are being terminated. Second, the basis for the termination must be financial. This implies that any notion of comparative professional performance as a basis of termination is a dismissal for cause which should be treated as such and not under the guise of responding to a financial exigency.

The Policy Bases of Protection

In the words of the 1940 *Statement*: “Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability.” Freedom and security. Each should be taken in turn.

1. academic freedom

The role of the first should be obvious. Without adequate safeguards the outspoken, the controversial, those who have exercised independence of mind to the consternation of important groups in the community, to the administration, even to some of their colleagues could be subject to termination covertly for that reason if the decision maker could point piously to the balance sheet and the need to make an “economy move.” This becomes an even greater concern when faculty members are engaged in or are criticizing the very process of retrenchment.

The success of a program of retrenchment turns on achieving the fullest transparency which allows—even requires—the probing of assumptions, budgetary and programmatic, the proposal of alternatives, the testing of consequences. This, by the way, was foreclosed in the way the Tulane administration dealt with its claimed financial exigency. And the faculty’s strenuous effort to do just that at Loyola of New Orleans was rebuffed, bluntly, by the Loyola administration contrary to the institution’s own rules. Both administrations were placed on the AAUP’s censure list.

The implications for academic freedom are illustrated in the SDSU case. The committee of investigation observed:

The disregard of tenure has placed the administration under a cloud of suspicion which, by the very methods it employed, cannot be dispelled; and that fact has contributed significantly to the atmosphere of distrust on the campus. We are concerned in consequence that it will be difficult to involve members of the

faculty, in committees or in the Senate—to get the benefit of their candid views—when they sit with and are expected critically to analyze the positions advanced by an administration which claims and has exercised a largely unconstrained discretion to eliminate their positions.

The connection between tenure and academic freedom has been questioned, however. Critics point out that the First Amendment applies to faculty in state institutions of higher education; and, inasmuch as the constitutional right of free expression extends to speech on matters of economic, social, or political concern to the larger community any faculty member sanctioned because of her outspokenness on institutional retrenchment policy or its manner of administration would have a strong first amendment claim.

There are two errors in this argument. First, the process of effecting a sensible policy to respond to a financial crisis is scarcely bolstered by allowing those faculty involved to have a lawsuit—to be litigated months later, at best—on whether they were sanctioned for their outspokenness. Second, the U.S. Supreme Court’s *Garcetti* decision bids fair to deny even that protection to those faculty retaliated against for being outspoken in their “official” capacities, *i.e.*, as department chairs, senate or faculty committee members. In sum, insofar as protecting the faculty’s role in institutional governance is concerned there is no substitute for tenure.

2. economic security

This is a more vexed question: insofar as tenured and by definition more senior faculty are ordinarily to be preferred over the non-tenured, the consequence of a tenure preference accorded in a retrenchment will potentially exacerbate intergenerational conflict. The conflict can be made even sharper where, as at SDSU, the administration believes that some, even many, in the junior faculty to be academically more promising than their seniors; and that the institution’s teaching and research mission will be hindered more in the longer run by retaining

the senior over the junior. This argument turns the 1940 *Statement* on its head: how can the profession be made attractive to men and women of ability when, having been attracted, they face displacement while those who achieved tenure, arguably under less rigorous standards than the junior faculty face today, are retained.

The doctrinal answer is that the difference between a tenured faculty member and a probationer is that the former *has* been subject to review and evaluation in what one should expect to have been an exacting process. The probationer does not enjoy the presumption of continuing competence that tenure accords. But I suspect this doctrinal response may not be persuasive especially where comparison can be made between a probationer so obviously on a fast track and a more senior colleague with a far less prepossessing record of achievement, whose promise of excellence, so obviously manifested by his junior colleague, has not been fulfilled.

So there is more. First, as Judge Jack B. Weinstein pointed out during the last major financial crisis to descend on higher education, academic freedom becomes particularly perilous if all an administration need do is point to the bottom line—the point made by Henry Wriston thirty years before. A cohort of tenured faculty may be a necessary if not sufficient condition of protection for the faculty as a whole including its non-tenured complement. Second, the class of current junior academics cannot benefit in the longer run from a system that would treat their tenure, once attained, as meaningless in some future recession. Finally, even under the AAUP's interpretation of the financial exigency clause, a “serious distortion” of the academic program resulting from a too rigid an adherence to tenure would allow the retention of the non-tenured over tenured colleagues, subject to an obligation to exhaust the availability of other suitable positions in the institution for those who would be displaced. *I.e.*, there is adequate “play in the

joints” of the tenure system to accommodate demonstrable supervening institutional need, so long as that need *is* demonstrable and so long as a “serious distortion” can be proved.

The Manner of Executing a Financial Retrenchment

Three general questions are presented here: (1) is the institution’s situation such that tenure (and the contracts of probationers as well) can be terminated; (2) by what metric and by what means should it be decided what positions shall be terminated—or “laid off” to use industrial parlance; and, (3) subject to what procedural safeguards.

1. the financial situation

The threshold question is whether the institution’s financial condition is such as to justify the termination of tenured faculty. The 1940 *Statement* uses the phrase “financial exigency” otherwise undefined. Obviously, it is a condition short of bankruptcy. But how short? The gloss placed on the phrase by Committee A spoke in terms of a looming threat to the institution’s viability; that no doubt driven by the fact that the AAUP’s bargaining partners in 1940 were primarily private colleges where a shortfall in funds could indeed threaten the institution’s existence. This text is unresponsive to a large public university that experiences a significant reduction in its appropriated funds but whose continuing existence as such is not threatened. The City University of New York’s situation in 1974 is a prime example. In this situation the definition may have to be operational, echoing the 1925 *Conference Statement*: a financial exigency is a condition that cannot be alleviated whilst maintaining the integrity of the academic

program by means less drastic than the termination of tenured faculty as a genuine—a bona fide—last resort.

This is a difficult posture to maintain in an economy that has shifted from the non-contractual but nonetheless shared middle class assumption of long term careers with an employer to a labor market characterized by rising contingency: where labor is often treated as a factor of production to be delivered “just in time” and laid off with equal alacrity as companies adjust rapidly to momentary shifts in demand. Institutions cannot be impervious to disciplinary trends and student interest, especially, in the latter, where institutional finances are heavily tuition dependent. But if a professor’s tenure is secure only for so long as her courses are in immediate demand she has no tenure at all and might as well be retained from semester to semester contingent upon some minimum level of enrollment. The challenge for institutions is to adjust responsibility to long term trends, not to capitulate to momentary and possibly evanescent shifts. Whence the compact made in 1940.

Interestingly, some courts have refused to accept the academic community’s compact. In 1977 the Supreme Court of Nebraska held that a “financial exigency” could be limited to the loss of income to a single school even though the university’s rules expressly required that an exigency be “on the part of the institution as a whole.” The Nebraska Supreme Court explained that acceptance of this definition of a financial exigency would require the university to continue to incur large deficits in some areas as long as the institution as a whole had financial resources available. Thus the court conceived of tenure as an obligation to retain professors only so long as their schools, departments, or programs are self-supporting, even though their institutions are incurring no substantial deficits. In this way tenure would be made to turn not even on the popularity of a professor’s own offerings, but on the momentary financial “success” of the

administrative component to which the professor is attached as determined by whatever accounting practice the institution has adopted. As Judge Harry Edwards and Professor Virginia Nordin observed, this decision “seemingly gives the university a free hand to release tenured faculty. This is so because most university programs run at a deficit and if a deficit is all that is required, tenured faculty will have very little protection.”

Twenty years later, the Maryland Court of Special Appeals took an analogous approach where a community college, in response to reduced appropriations, terminated tenured faculty while eschewing any declaration of financial exigency which, interestingly, the court defined as a genuine “last resort.” It is enough, in the court’s opinion, that “declining enrollment . . . alleviates the need for programs.” It went on: “[I]f tenured teachers could force schools to maintain programs, courses, and positions, the teachers would, themselves, be the policymakers—rather than the administrative bodies of the college.” Never mind the policy decision the college made by adopting a system of tenure or the purposes it serves.

What is noteworthy is how indifferent these courts are, not to professorial special pleading, but to a compact struck between presidents and professors, to the shared view of faculty *and* administrations of how the balance between flexibility and security should best be struck. Should tenure be tenuous? As a legal matter, the answer in these jurisdictions would appear to be yes.

Resonating strongly against this judicial retreat from the protection of tenure is a recent decision of a Colorado trial court concerning a public four-year college with over twenty thousand students. The question was neither what a financial exigency is nor whether it is consistent with tenure to terminate tenured faculty to reallocate resources in response to shifts in enrollment but whether the incidents of tenure—the primacy given it in reductions in staffing and

the requirement to place the displaced in a suitable position if one could be found—could be terminated unilaterally. In Colorado that question is a matter of public policy and, as we saw, Maryland’s public policy is to favor flexibility above tenure. The Colorado court held to the contrary

By its very nature, tenure promotes a system in which academic freedom is protected. . . . Further, by definition . . . inherent in a tenure system is inflexibility in firing decisions; if the College wanted a more flexible system of employment, the College should not have utilized a tenure-based system. This weighs the public interest strongly in factor of academic freedom. The Court recognizes that the public interest is served by a public college with flexible hiring and firing policies. However, such policies are in direct conflict with the fundamental tenets of a tenure system. Indeed, a tenure system that allows flexibility in firing is oxymoronic. Accordingly, the Court finds that the public interest is advanced more by a tenure system that favors the academic freedom of faculty than a tenure system that promotes flexibility in the hiring or firing of tenured faculty.

It is a resounding victory for tenure that resonates strongly with the Bloomfield College decision thirty years previous. But a question that calls for address nevertheless is of whether these rules can be observed to the letter whilst the process is manipulated in such a way as to render the protection of academic freedom tenuous.

2. “reasonable standards reasonably applied”

Because tenure confers a right to continuance in the position, in the public sector tenure creates an interest protected by the due process clause of the 14th Amendment. In a dismissal for cause the faculty member is entitled to is a hearing on whether cause was presented. But insofar as we are concerned here with impersonal, financially driven decisions what is there to hear? The United States Court of Appeals for the First Circuit said, in passing, that the terminated faculty member should be able to contest “the authenticity of the reasons” given for termination and the “reasonableness of the standards employed to single out his position for elimination.”

The latter is something of a conundrum. Insofar as any termination (or lay off) reduces the institution's expenditure it can be said to be responsive to the need to reduce. Obviously, more is required, *i.e.*, a metric to evaluate the decisions; and, because the academic program is so tightly intertwined with the selection of areas for reduction, the active engagement of the faculty in the decision-making process is critical.

The SDSU experience is instructive. In that case, the president decided, without faculty consultation let alone concurrence, to reduce the budget in each budgeted area—itsself an artificial construct—in proportion to the antecedent share accorded it in the budget. In other words, if 75% of the budget went to “academic affairs” (in SDSU's budget construct) it would receive 75% of the reductions even as, for example, athletics and the university's public television station would be reduced in proportion to their antecedent budgetary shares. There was a *sort* of logic in this, but insofar as the result was to retain certain non-critical non-academic functions whilst significantly reducing the academic program it was quite at odds with the idea of a genuine last resort that assigns the highest priority to the maintenance of the academic program.

The SDSU faculty had proposed a five point metric to guide program abandonment and reduction: (1) quality; (2) centrality; (3) curricular and community need; (4) diversity; (5) program size; and (6) cost (and resource generation) when all else is equal. But, truncating the faculty's operational role, the president took it upon himself to designate departments for abolition. The AAUP's committee of investigation observed:

These criteria have provided an adequate framework for a rigorous, systematic process of programmatic review by the San Diego State faculty. Their all-embracing character, however allowed the freest play to justify almost any departmental termination decision. That is, unless one could find departments that fall afoul of virtually all of them—small, peripheral, unneeded, of poor quality, cost-ineffective, and composed of senior white male faculty members—

any one criterion could be pointed to as justifying a decision, the others to the contrary notwithstanding, even as the same factor is discounted in a determination in another case.

It was, as the economist Peter O. Steiner, former Dean of the College of Arts and Sciences at the University of Michigan, pointed out to me as we served on the Katrina Committee, a “calculus of variable weight.” Absent a coherent rationale the resulting pattern of ad hoc decisions lacked any rationale. The decisions taken at Tulane and Loyola of New Orleans lacked even the claim of being guided by any criteria at all. In these cases, the administrators—in the former case relying upon vote of a poorly informed faculty committee to declare a financial exigency, in the latter not seeking even that fig leaf of legitimacy—took the situation as allowing them to act with a free hand, arbitrarily. In sum, there is no substitute for significant faculty involvement in every step of the process.

Can Tenure Be Respected and Rendered Tenuous Simultaneously?

In the SDSU case the committee of investigation documented how the rules respecting tenure in order of layoff can be observed whilst the policy protecting the protection of tenure can be flouted, by the manipulation of the rules. Some departments, the units of retrenchment, were heavily tenured: reaching deeply into those departments would earmark a large number of tenured faculty for termination even as junior faculty in other departments would be preserved. An even more cynical form of manipulation was documented at Sonoma State where the administration of President Peter Diamandopoulos established “teaching service areas” (TSA) as silos for retrenchment within departments. *E.g.*, a professor of biology could be assigned to biology, or to “microbiology,” or to “molecular biology” as TSAs within the department. This

allowed for even more finely tuned manipulation—preferring those supportive of the administration or at least remaining docile over those outspoken in defense of faculty rights.

Jack has brought to my attention the award of an arbitration in a layoff effected at the University of Florida where the administration—or “management” as the arbitrator put it, there appearing to have been no faculty involvement—decided to eliminate instruction in Vietnamese, not for educational but for financial reasons, and laid off the sole professor of Vietnamese on the ground of program abandonment. Such a reading of the word “program,” the arbitrator opined, “would give management complete and unfettered control over layoff,” and he sustained the grievance. Bully for him.

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Should tenure be tenuous? Obviously not. Despite the siren call of “flexibility” that so resonates in the economy today, to disregard tenure—or, worse, cynically to manipulate it—threatens not only academic freedom but the fundamental value of shared governance. And so I applaud the UFF-FSU Chapter: It is asking the right questions; it is demanding the transparency and accountability that the academic community settled upon seventy years ago. Bully for you.