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Tenure and Due Process

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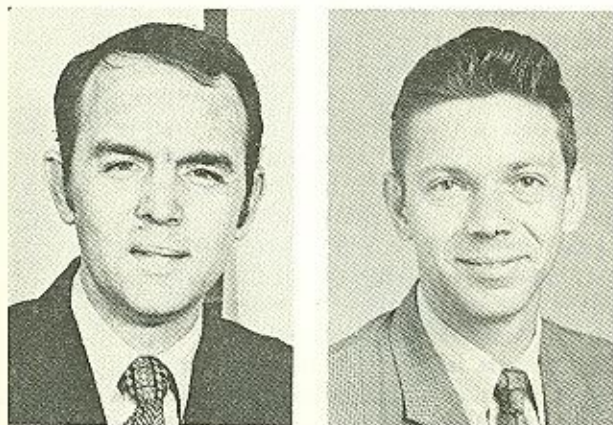
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The legal significance of tenure is reviewed in this article as it relates to the new and developing laws of due process. The authors suggest that "expectancy of re-employment" may become a new form of property right.

tenure and due process

by Joseph L. Mills and A. Bruce Hartung



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The concept of "tenure" as we know it today has roots that are centuries old. Similar privileges, such as tax relief and personal protection, were extended to scholars as early as the Middle Ages. For example, the Holy Roman Emperor Frederick I decreed in 1158 that scholars in his domain should have safe conduct, protection from attack, and compensation for unlawful injuries. Various kings and church leaders also bestowed favors upon those of the academic community for centuries. Thus, over the centuries, tenure has come to denote an employment security device under which faculty members attain permanent status within the institution.

In recent years, tenure systems have been re-examined and more thought has been given to the concept of due process. Any institution concerned with its tenure policy would be ill-advised not to give equal attention to its due process procedures. Although the two concepts are closely tied, the significance of the concept of tenure reaches beyond the status itself and accrues to the procedures under which the status is granted and/or removed.

Virtually all of the recent cases of dismissal or nonrenewal of contracts which the Supreme Court has considered have been founded on the First and Fourteenth Amendments to the Constitution. These read, in part, as follows:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,—

Amendment XIV

—No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,—

Before reviewing several of the suits which have been adjudicated recently, certain aspects of these Amendments should be examined. Certainly, the freedom of speech clause of the First Amendment has been critical, but requires no explanation. However, the concepts of "liberty" and "property" mentioned in the Fourteenth Amendment should be investigated. The late Justice Felix Frankfurter once wrote that liberty and property are two great constitutional concepts left to gain meaning from experience. Certainly, "liberty" means more than just freedom from bodily restraint. Freedom to enter into contracts, freedom to choose one's occupation, freedom of movement, and freedom to worship

are all denoted by the term "liberty." Likewise, the concept of "property" extends to more than just real estate, money or material goods—even to the expectancy of re-employment.

Distinction must be made between the judicial approaches to tenure in public and private institutions. In the private realm, tenure plans are considered to be contractual. In cases where the courts decree that tenure contracts have been breached and financial awards are made, these awards will not ordinarily be accompanied by reinstatement orders because in the private realm, courts do not decree specific performance of personal service contracts. However, tenure plans adopted by governing boards of public institutions are adjudged to be a form of sublegislation and have the effect of law. Hence, the finding that a tenure plan has been breached will usually be accompanied by an order to reinstate the affected instructor since the discharge would have been considered in violation of statutes.

In reviewing the logic of the Court, two landmark cases must be considered. In one, David Roth was hired in 1968 for his first teaching job at the University of Wisconsin—Oshkosh. Roth was given no formal contract although his notice of appointment was the equivalent of a contract. Regulations adopted by the Board of Regents required that non-tenured faculty be notified on or before February 1 of retention or nonretention for the coming year. Prior to February 1, 1969, Roth was notified that his contract would not be renewed. He was given no reason for the decision nor was he given an opportunity to challenge it.

In suit, Roth charged that the true reason for nonretention was to punish him for statements made by him which were critical of the university administration—an alleged violation of freedom of speech—and that failure to give him notice of the reasons and an opportunity for a hearing violated his right to procedural due process. Overturning the lower court decisions, the Supreme Court ruled that Roth had no such rights. The Court pointed out that no charges were made against Roth which might have damaged his standing and/or associations in the community. Neither had Roth demonstrated that the decision not to rehire him was due to his exercise of free speech. The terms of his contract of employment through June 30, 1969, were met and no state statute or university rule provided him any "property interest" in his position past that date. Thus, there were no rights to due process.

A similar, yet technically different, case (1972) involved Robert Sindermann, an instructor at Odessa (Texas) Junior College. Sindermann had taught for two years at the University of Texas and for four years at San Antonio Junior College. In 1965, he joined the faculty of Odessa College and taught for four years under a series of one-year contracts. During the 1968-69 school year, he was President of the Texas Junior College Teachers' Association and in that capacity openly disagreed with policies of his Board of Regents. In May, 1969, the Board voted not to renew his contract and issued a press release covering his alleged insubordination. Sindermann was provided no official statement of reasons nor was he provided a hearing.

Action was brought in federal district court charging that the decision not to rehire him was based on his public criticism of policies and thus was an infringement of his

freedom of speech rights and that failure to provide a hearing was a violation of his right to procedural due process. Although the district court upheld the Board, the Court of Appeals reversed the decision. The Supreme Court, on a writ of *certiorari*, held that Sindermann's lack of tenure did not defeat his claims. It was pointed out that he had not yet shown that his nonretention was in retaliation for his free speech activities—for the district court had not made a proper investigation of this issue. However, his lack of formal tenure was highly relevant to his due process claim. He alleged that the college had a *de facto* tenure system and that he had tenure under that system. Whereas an expectancy of tenure is not protected, the alleged *de facto* tenure policy did entitle Sindermann to an opportunity to prove the legitimacy of his claim. His claim was based on his reliance on the Odessa Faculty Guide which stated, in part, that:

Odessa College has no tenure system. The administration of the college wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory, and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

It was judged that Sindermann should have been given a hearing to challenge the reasons for his nonretention owing to his "property interest" in his position. The Supreme Court upheld the Appeals Court's remand of the case to the district court for a full hearing on the issues.

Considering the Roth and Sindermann cases together, one may conclude that in the nonrenewal of a contract of a nontenured faculty member, due process requirements do not apply unless the individual demonstrates that the decision not to rehire him was based on his exercise of Constitutional rights. Regarding "property interests," the Fourteenth Amendment's due process provisions do not apply unless the instructor demonstrates that he has already acquired interests in specific benefits—e.g. tenure. The Sindermann case established that these interests may be in the form of a formal tenure policy or implied from words and conduct, i.e. a *de facto* tenure policy.

Certainly, dismissal of a nontenured faculty member during the course of his contract (not simply nonrenewal) would fall into the same category as termination of a tenured faculty member. In either case, procedural due process must be adhered to. Specifically, this means that the faculty member should have the following rights: (1) the right to a fair and written notice, delivered in person or by certified mail; (2) the right to a fair hearing, during which the instructor has an opportunity to testify and present evidence in his behalf; (3) the right to a fair tribunal, not including those who have brought charges; (4) the right to legal counsel; (5) the right to confront and cross-examine witnesses; (6) the right to remain silent; (7) the right to a record of the hearing; (8) the right of appeal to the institution's president and then to the board of trustees; and (9) the right of appeal to a civil court.

Current trends in educational law indicate that the status of tenure can no longer be viewed unilaterally, since courts are currently focusing greater concern on the due process procedures under which tenure is removed and/or contracts

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regardless of its quality, will be greatly diminished.

If research management results in even minimal improvements in the quality of research, while at the same time reducing the volume of research publications, the effect on the research and development effort in our society will be startling. Suppose (case 1), for instance, that 20 percent of the research articles which are currently published contain a significant fact. Suppose further, that an individual in some given discipline reads, on the average, 40 percent of the total publications for his discipline. On the assumption that he will encounter informative articles with the same frequency that they are represented in the population of articles, we can expect a given individual to encounter eight significant articles per one hundred available.

If now (case 2) the volume of publications could be reduced by 50 percent while the quality improved only to the point where 30 percent of published articles contained a significant fact, then, with the same reading rate, the average worker would cover 80 percent of the published literature. On the average, each worker would encounter, as a consequence, twelve significant articles. While in moving from case 1 to case 2 there is a 17 percent loss in significant articles within the total system, each worker, nevertheless, becomes acquainted with 50 percent more significant articles. At first glance, it would appear that we have enriched the individual worker at the expense of the total information wealth of the system. I shall contend that this is true only in the short run.

Few of us would dispute the assertion that verbal interaction with fellow researchers can contribute to productive research. Consider the nature of verbal interaction under cases 1 and 2: In case 1, and accepting its assumptions for the sake of example, the average worker will have in his possession information from eight significant articles out of a population of one hundred. Therefore, if two workers attempt to converse, the facts from a maximum of only 16 percent of significant articles available can be held in common. In case 2, 48 percent of significant facts will be held in common. Thus, we may conclude that the probabilities of fruitful interaction will be three times as great in the second case as in the first case. We might, therefore, expect that the increased incidence of fruitful researcher interaction and concomitant increase in research production would, in the long run, more than offset the initial loss in total system facts in going in case 1 to case 2.

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terminated. It would seem prudent for institutions to provide a due process hearing to any faculty member who requests one or who challenges the decision to terminate the status of tenure or a contract. Under the developing law of due process, the status of tenure and even continuing contracts has been given new legal significance in light of the fact that "expectancy of re-employment" now constitutes a new kind of property right that institutions cannot capriciously take away.

In closing, consider an incentive for research management of an entirely different order than those already described. If the institution of research management within a university should give that university a competitive edge, either real or apparent, over other universities; then, in order to survive, the other universities will have to conform. Furthermore, a competitive edge, once established, can be used to obtain an even greater competitive edge. Consequently, we can expect that those institutions which are first in the field will have every opportunity to remain first in the field.

FOOTNOTES

1. For example, see F. J. Roethlisberger and W. J. Dickson, *Management and the Worker* (Harvard University Press, 1939); and Peter Blau, *Exchange and Power in Social Life* (New York: John Wiley & Sons, 1964); also, *The Dynamics of Bureaucracy* (Chicago: The University of Chicago Press, 1955).

2. Robert Merton's distinction.

3. Paul A. Samuelson, *Economics*, Chap. 2 (New York: McGraw Hill, 1970).

4. This idea is developed in W. Ross Ashby's *Design for a Brain* (London: Chapman and Hall, 1966).

5. Herbert A. Simons' discussion of vertical and horizontal division of labor, control versus task efficiency is worth thinking about in this connection. See "The Proverbs of Administration," *Public Administration Review*, 1946.

in-service programs

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service programs, the specific details and guidelines of such a procedure should be formulated jointly by teachers and supervisors. A program as outlined requires considerable record keeping, but the advantages to be gained far outnumber the disadvantages to be encountered. In a given school district, the procedure could be handled at each building by a teacher committee operating under the guidelines of the district-wide policy. Such a local committee could decide, for example, that a 5th grade teacher who traveled in Yosemite National Park and took slides for use next year in a social studies unit had met his requirement of in-service credit. Each teacher's in-service record would eventually be submitted to the central administrative office.

Summary

The steps in providing a relevant in-service program for teachers involve 1) the assessment of areas in which teachers wish to receive help, 2) providing alternative ways for teachers to participate, 3) utilizing an in-service bulletin to announce the various programs, 4) utilization of teacher leaders to prepare and present in-service programs, 5) involvement of teachers in formulation of a policy of utilizing in-service credit for salary increments. These steps provide for an in-service program based on assessed needs rather than on outside prescribed topics.