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# Due Process in Decisions Relating to Tenure in Higher Education

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# Due Process in Decisions Relating to Tenure in Higher Education

By THE SPECIAL COMMITTEE ON EDUCATION AND THE LAW

The Special Committee on Education and the Law first interested itself in tenure procedures when a subcommittee looked into recent cases that challenged the confidentiality of votes in tenure decisions.<sup>1</sup> That inquiry led to a broader examination of the processes that are or should be used when universities decide whether to confer tenure, or (less frequently) move to terminate a tenured appointment. This report is the outcome of that study.<sup>2</sup>

The institution of academic tenure also came under review. Well above ninety percent of four-year colleges and universities recognize tenure,<sup>3</sup> meaning that faculty members who are retained after a substantial probationary period, may not be removed before retirement except for cause. The burden of establishing cause rests on the institution.

Tenure is not found uniquely in higher education. Statutory tenure is prevalent in elementary and secondary teaching and other public employment; its equivalent is often assured through collective bargaining contracts in both the public and private sectors that protect seniority and require cause for dismissal. Counterparts to tenure, it is said, exist in many walks of life; for example, partners in large law firms only yesterday had a status not unlike tenure, earned, like professors', after an unusually extended and rigorous probationary period. Even if this instance of professional security is suffering erosion, there is widespread support for the position that a stable enterprise ought to provide stability of employment; this is one of the asserted grounds for the success of Japanese companies.<sup>4</sup>

The Committee inclines to the view, however, that the personnel practices of neither big business nor big government provide a compelling model for higher education. In flourish-

ing parts of the business world heavy outlays of managerial time are devoted to appraising and selecting other managers who will climb the corporate ladder. There are far fewer rungs on the academic ladder. Once one has gained a secure place, professional autonomy is the norm; there is no tradition of unremitting scrutiny, and it would be unwelcome. Civil service tenure, for its part, has roots both in professionalism and in aversion to the spoils system. These roots have nourished a thicket of defenses against removal that are even more impenetrable than the protections of academic tenure.<sup>5</sup> No doubt civil service reform is itself in need of reform; it does not tell us much about good standards in academe.

Academic tenure has a special justification, aside from security of employment: it exists to protect academic freedom, a vital concept in higher education. Tenure protects the scholar of unorthodox or unpopular views from suppression by the state, by university authorities, or by colleagues.<sup>6</sup> The tenured scholar who is fired does not bear the burden of demonstrating a violation of his academic freedom; those who moved against him have to show valid grounds for their action.

It is the declared difficulty of removing a tenured professor that appears to prompt most criticism of tenure. A familiar complaint of administrators is that "deadwood" cannot be pruned, so that both efficiency and imagination suffer. Criticism also comes from within the ranks. Junior scholars who in times of stringency cannot get teaching jobs at all, or who do not attain tenure, view those who do have it as standing in their way.

The Special Committee, after taking note of these perennial concerns, observed that two blue-ribbon commissions, one in 1973,<sup>7</sup> the other a decade later, affirmed, in the words of the 1983 report, "the continuing importance of faculty tenure as an essential instrument to protect academic freedom, and thereby ensure the highest quality of teaching and research".<sup>8</sup> Both commissions accompanied their endorsements with earnest

proposals for improvement and refinement. It is in that spirit that the Special Committee moved forward to see if it could make any contribution to the well-being of tenure, and hence of academic freedom and excellence, from the lawyer's vantage-point.

There turned out to be a lot of ground that should be covered. In the interest of keeping this report within reasonable compass, it will fall short in perhaps many respects. Notably, it will pay scant attention to the great variety of size and missions of the 3250 institutions of higher education in the United States.<sup>9</sup> A major state university campus is a hundred times the size of the tiny liberal arts college whose extinction is often but—thus far—mistakenly heralded. The mission of a community college is remote from that of a research university. But they all have boards, administrators, faculties, students, and tenure problems. Many lawyers, as board members or in other capacities, encounter such problems. This report will speak in general terms of what the Committee believes to be sound law and sound practice, addressing five topics.

First, fair procedures in reappointment and tenure decisions.<sup>10</sup> Here it is recognized that the probationer does have to prove himself. If he or she is turned down by a decision process that appears arbitrary, little support can be drawn from the Supreme Court's interpretation of the due process clause. But state law or institutional regulations at least should afford a rejected probationer a statement of reasons, and some kind of a hearing.

Second, fair procedures when termination of tenure is proposed. Here the faculty member is entitled to full adjudicatory due process, with some substantial modification when bona fide financial exigency or discontinuance of programs require multiple separations.

Third, how claims of unlawful discrimination should be handled. If relief is sought under Title VII of the Civil Rights Act of 1964,<sup>11</sup> as is routinely the case, colleges have the same

obligations as other comparable employers, enforceable in the courts. Good procedures, however, will mitigate the likelihood of judicial intervention.

Fourth, confidentiality claims in tenure decisions. These have been successfully challenged, especially in discrimination cases. The Committee endorses recognition of a qualified privilege, which can be overborne if the process appears to be tainted by bias.

Fifth, the scope of judicial intervention in tenure decisions. Here we review the delicate balance that the courts must maintain in order to respect both the autonomy of higher education (in the interest of academic freedom) and the individual teacher's right to fair treatment.

### I. *Fair Procedures in Reappointment and Tenure Decisions*

A candidate for tenure at most institutions proceeds through a series of annual appointments, at any of which non-renewal may occur. If the probationary period is seven years,<sup>12</sup> standard practice requires a decision by the end of the sixth year, in order to afford a year's notice to a rejected candidate. Preferable practice in universities provides for term probationary appointments, of two or three years each. These provide greater stability than annual appointments for the candidate to develop substantial research and teaching programs. Whatever the interval between decisions, it is unlikely that a federal constitutional right to formal procedures in the reappointment process can be made out, unless such a right has a foundation in state law. This is a consequence of *Board of Regents v. Roth*,<sup>13</sup> which developed the doctrine that, before one can invoke the protection of 14th Amendment due process for a deprivation of property in public employment, the property interest to be protected must be found primarily in state law. Roth had an initial one-year appointment in the University of Wisconsin-Oshkosh. The Court found nothing in Wisconsin law to give

him any assurance of continuance, and accordingly held that he had no entitlement to the renewal of his appointment that would invoke, by way of §1983, the protection of the due process clause. However, in a companion case, *Perry v. Sindermann*,<sup>14</sup> the Court said that a faculty member who was dismissed after ten years' service at a college that had no regular tenure system should have an opportunity to show that he had tenure *de facto*.

Building on both *Roth* and *Sindermann*, one can argue that although a new one-year appointee can be summarily let go at the end of that year, a tenure candidate who has served for the whole probationary period does have an entitlement to a non-arbitrary procedure. But that entitlement would still have to find its roots in state law;<sup>15</sup> so it seems more realistic to work through state sources of law—legislative, judicial, or administrative—for the recognition of a right to participate in at least one thorough ventilation of any claims the candidate may have of arbitrary or inadequate consideration of his or her record and potential.

If the candidate asserts that infringement of academic freedom occurred in the selection process, here there is a federal right, for a public employee, provided that the nexus between the academic freedom claim and the First Amendment can be established. This is the consequence of *Pickering v. Board of Education*<sup>16</sup> which, as recently constricted in *Connick v. Myers*,<sup>17</sup> balances the free speech rights of the employee against the disruption of the employment relationship that may result from intemperate criticism. *Pickering* is further qualified by *Mt. Healthy School District v. Doyle*.<sup>18</sup> Often there are mixed motives for a non-reappointment. Even if the teacher can establish that First Amendment violations were a substantial factor in the decision, under *Mt. Healthy* the employer can rebut by showing that it acted also upon other and legitimate grounds—a reverse “but for” test. This application of old tort rules has been criticised,<sup>19</sup> but it stands as another obstacle to constitutional relief.

Thus, even in the heartland of academic freedom, a rejected probationer will have hard going in the federal courts. Again, good state laws and institutional regulations are needed. A great many colleges accept as the ground-norm the classic 1940 Statement of Principles on Academic Freedom and Tenure, jointly promulgated by the American Association of University Professors and the Association of American Colleges.<sup>20</sup> Over the years the AAUP has developed model regulations that are also influential.<sup>21</sup> But they recognize that a probationer who charges that a decision not to reappoint “was based significantly on considerations violative of academic freedom” bears the burden of proof.<sup>22</sup>

The probationer who raises claims of discrimination on account of race or sex has other advantages—and disadvantages: these will be discussed in Part III.

It must be emphasized that everything that we have said so far about the availability of federal constitutional protection through the 14th Amendment requires a finding of “state action”, and generally affords no protection to faculty in private colleges and universities.<sup>23</sup> These, though they are a declining portion, still amount to over one-fourth of all faculty. State constitutional guarantees can and do reach private institutions.<sup>24</sup> They are, however, still slumbering giants.<sup>25</sup>

We wish in any case to urge the point that sharp constitutional imperatives, which are often reluctantly invoked, by no means measure the limits of good practice. Good practice, embodied in regulations, may establish enforceable contractual rights.<sup>26</sup> It is accordingly in the interest both of administrations and faculty representatives to think through what is desirable for the health of the institution and of the teaching profession before regulations are promulgated.

Another avenue for achieving satisfactory practices, and one of growing importance in higher education, is the collective bargaining agreement. Faculty collective bargaining came late

to higher education. In public institutions, it had to await the recognition of public employees' unions. In the private sector, it was not until 1970 that the National Labor Relations Board extended the protection of federal laws to colleges.<sup>27</sup> Then in 1980 the Supreme Court in the *Yeshiva* case effectively scuttled faculty bargaining at "mature" private institutions, when it held that their faculties had managerial roles that were incompatible with employee status under the NLRA. Nevertheless, as more states authorize public employee bargaining,<sup>29</sup> and as shrinking employment and other dissatisfactions accumulate, unions gain adherents, and represent approximately 25% of faculties in four-year and graduate institutions and 60% in two-year systems.<sup>30</sup> Especially in initial contracts, negotiators may have more urgent priorities than procedures for probationers. In an established relationship, like that between the City University of New York and the Professional Staff Congress, whose current contract was made available to the Committee, reappointment and tenure denials are addressed.<sup>31</sup>

With these possible avenues in mind, we turn to the main elements of equitable treatment for probationers to and through the tenure decision.

The goals to be sought, in the apt words of a consultant to the Committee,<sup>32</sup> are clarity, consistency, and fairness. Clarity is approached, if not attained, by stating in advance, both in general regulations and in writing to each probationer, what the procedures and standards are. Total clarity is unachievable because it is so difficult to define expectations of performance without resorting to banalities and hyperbole. But if the leaders of an institution think realistically about its mission they can say something helpful about the mix and quality of teaching skill, research productivity, and service to the community (inside and outside) that the probationer must attain. In a community college, teaching will be paramount. In an elite research university, original research will be highly prized. In a comprehensive public university, service to many constituencies will be expected.



Even if it is difficult to define specific standards for retention or tenure that embrace the entire institution, we submit that the search for clarity can be carried farther at the divisional or departmental level than is often done. It is a plausible surmise that many academic decision-makers prefer ambiguity, and have not tried hard to define expectations within a discipline for their probationers in the discipline. They should try harder. Then, criteria for retention and advancement should be insistently communicated, preferably by periodic review and evaluation which will tell the probationer straightforwardly how performance is matching expectations.

Consistency will be aided by an internal review process that oversees the recommendations of the appointing department. This Committee has no reservations about the primacy of peer evaluation.<sup>33</sup> But both error and slackness can be minimized if the initial recommendation to retain or not to retain is reviewed by an experienced faculty committee, and by appropriate senior academic officers. These reviews should not replicate professional judgments of professional worth; but they may properly require the primary peer group to establish the rationality of its verdict.

Fairness, to lawyers, reflexively implies a trial-type proceeding. But we were admonished to understand that most retention decisions are not controversial, and that, even when they are, a full-dress confrontation is not the only way to a fair outcome. Even after all possible clarity is distilled, the judgment to be made looks ahead as best it can from evaluated achievement to a prediction of lasting performance. That judgment also includes the prospect of a long-lasting association. To some extent, which we have no competence fully to expound, collegial capacities are also relevant to the tenure decision; this is an element of judgment that can be inflated and abused. The question should not ask whether the candidate is a boon companion, but only whether he or she can perform with adequate civility. These are all concerns that are not well resolved in a

setting of record evidence, confrontation, and findings of fact.

A middle ground between full process and no process that the majority of the Committee endorses has two prominent features. First, the probationer who is not reappointed or granted tenure is entitled upon request to a written statement of reasons for the decision. Second, he or she should be afforded "some kind of a hearing".<sup>34</sup> We are quite aware that assigned reasons can be perfunctory and even duplicitous. The hearing, which is a type of grievance procedure, can respond among other issues to a grievant's complaint that the reasons given are defective. The grievance committee, whose members should be colleagues who were not involved in the decision complained of, can also determine whether a *prima facie* case of discrimination or of academic freedom infringement has been made out. Finally, it can respond to a claim of "inadequate consideration." This is an AAUP formulation that permits the grievance committee to shake up a department that has not done its homework; but that committee "should not substitute its judgment on the merits for that of the faculty body" with primary expertness and responsibility.<sup>35</sup> The grievance committee can remand, but it should not decide. It should in any event route its report to an officer who can see to it that the department does not bury or mismanage the matter.

Exceptionally, when the local faculty is compromised or deadlocked, it may be appropriate for a dean or president to create an *ad hoc* committee of outside scholars, and to act on the recommendation of that committee.

The extent to which records and proceedings are or should be open to the probationer, or on the other hand be cloaked in confidentiality, will be discussed in Part IV. At this point it can be observed that an on-the-record hearing would offer practically no tolerance for confidentiality. A grievance procedure, although limited in scope, can be empowered to call for confidential material—departmental minutes, outside appraisals—and can look at them as a surrogate for the candidate. But it is

an imperfect surrogate, because the committee cannot fully possess the candidate's insights (or his paranoia).

## II. *Fair Procedures in Terminating Tenure*

Fairness to probationers, we have seen, is not sharply defined. In contrast, once a professor has tenure, there is consensus that it cannot be abrogated without full due process. From a legal standpoint, that is what tenure is: a presumption of fitness, with the burden on the institutional authorities to establish cause for dismissal, in a proceeding with such usual safeguards as specified charges, a record, assistance of counsel, etc.<sup>36</sup>

In one respect academic process is different. The conventional requirement of an unbiased tribunal, it may be argued, is not well met by the conventional academic process, because of its preference for peer judgment, and thus for a hearing tribunal composed of faculty members. In a small college it may be difficult to find disinterested colleagues. Here also (as in disputed tenure-conferral decisions) it may be advisable to seek help from members of other faculties.

Another departure from strict separation of functions lurks in the dual role of the President. Usually the President or a designee initiates a removal proceeding; and an administrative officer serves in effect as prosecutor. These officers, especially the President, are linked to the governing board, which, the AAUP joins in recognizing, has the ultimate legal power and responsibility to review and effect a proposed dismissal.<sup>37</sup> These imperfections however are not dramatically unlike the dual administrative and adjudicative roles of many regulatory tribunals, which are kept in check by the courts.<sup>38</sup> In higher education, a process that is internally generated and dispositive is justified by the desirability of professional judgment and of institutional autonomy.

Under collective bargaining regimes, resort to outside arbi-

tration is emerging. If a governing board will accede to such a curtailment of its powers, (and it may welcome relief from such a weighty, albeit infrequent, responsibility) this is an attractive alternative, especially in cases where feelings run high on the campus. The drawback to arbitration is said to be the possible obtuseness to academic customs of arbitrators trained in the industrial arena; but this can be alleviated by finding arbitrators who are appropriately sensitized by academic careers.<sup>39</sup>

There are four situations where terminations do not require painful judgments of an individual's professional fitness. First, retirement for age, uniformly applied. Second, retirement for medical reasons (which to be sure should have its own safeguards against error or abuse).<sup>40</sup> The third and fourth flow from financial exigency, or from abandonment of a program of instruction on academic grounds. This report will do no more than suggest some of the problems that may attend terminations in these categories. A declaration of financial exigency is bound to affect groups of faculty members,<sup>41</sup> but the composition of those groups is a matter of selection, and the process can be manipulated so as to penalize academic freedom or to undercut tenure. It is therefore important that faculty members have a voice in the necessary decisions, and an opportunity to challenge the good faith and the factual foundations of a declaration of exigency. "Exigency", it is said, should not be asserted because of either a temporary crises or a continuing stringency that do not threaten the institution's survival.<sup>42</sup> However, the courts have generally been deferential to declarations of exigency by governing boards, even if they arise from short-run problems.<sup>43</sup>

To return to the hardest cases, individual dismissals for cause, it is frequently asserted that it is simply too difficult to fire a tenured faculty member.<sup>44</sup> What is "adequate cause" for dismissal? As in other employment relationships where "cause" must be shown, precise definition is probably unachievable.<sup>45</sup>

But the difficulty, critics say, lies not in definition but in

application. Faculty hearing committees, it is said, are unwilling to be severe with colleagues (faculty spokesmen rejoin that presidents don't have the fortitude to bring charges). Anyway, the problem, say the same critics, is not demonstrable incompetence or neglect of duty: it is obsolescence and laziness. "Deadwood" is the perennial pejorative. Again there are rejoinders: lagging faculty can, by sticks and carrots, be stimulated to perform better; others can be persuaded to go away quietly.<sup>46</sup>

At the bottom of many complaints, no doubt, is hostility to tenure itself; the security it provides is a major obstacle to rapid change in an institution. This Committee, mindful of its circumscribed mission, refrains from judgment on these attitudes. It did look into alternatives to tenure that have been tried in reputable institutions, specifically renewable terms of two to ten years duration. Hampshire College in Massachusetts is an exemplar: its President was one of our helpful guest-consultants. To guard against invasions of their academic freedom, faculty members at Hampshire can invoke procedures that are unusually elaborate. The review of competence that precedes the decision whether to offer a new contract was described as painstaking and supportive in offering time and opportunity for improvement where improvement seems called for.<sup>47</sup> Hampshire, however, is a young college, founded in 1970; so it has not yet had to face the decision to let go someone approaching 60 who has had 30 years of service.

A recent monograph, *Beyond Traditional Tenure*,<sup>48</sup> recited all the shortcomings of tenure, and set out to find a better way. But, in the words of one of its authors, "We concluded that most of the modifications and alternatives were not compellingly attractive, and in addition were not practical. The tenure system operates pretty well."<sup>49</sup>

### III. *Claims of Unlawful Discrimination*

National policy clearly condemns discrimination in employment on account of race or sex. The most effective legislative

mandate is Title VII of the Civil Rights Act of 1964, made applicable to higher education in 1972.<sup>50</sup> The Supreme Court has addressed the order of proof in discrimination cases in a half-dozen opinions,<sup>51</sup> so that it is now established that after a plaintiff, who as usual bears the ultimate burden of persuasion, has made out a prima facie case (which the Court says "is not onerous")<sup>52</sup>, the defendant must produce evidence of a "legitimate nondiscriminatory"<sup>53</sup> reason for not retaining or promoting the plaintiff. Then the plaintiff has the more difficult task of establishing that the claimed reason is pretextual, and that he or she is the victim of wrongly motivated disparate treatment. The "disparate impact" approach that permits statistical inferences and requires low thresholds for job qualification has not been successfully invoked in higher education, because the numbers in a department or campus are usually too small to establish statistical significance, and because the qualifications for retention depend on judgments of merit that, it is argued, cannot be specified.<sup>54</sup>

Consequently, plaintiffs (who are predominantly women in higher education cases) infrequently succeed in litigation, despite solid evidence that, in university teaching as in other professions, discrimination has been rife, and has not vanished.

This Committee did not make any independent study of the discrimination problem.<sup>55</sup> We did ask whether, in view of its importance, the kinds of procedures that we have considered need to be re-examined. A majority of the Committee inclines to the view that the possibility of discrimination, and of legal action to correct discrimination, do not call for procedures that are more elaborate than those we have endorsed. The posited goals of clarity, consistency, and fairness can guide the decision-making process. That process must, if the quality of higher education is to be enhanced, reach beyond minimum qualifications. It intrinsically calls for exercises of judgment in assessing capacity and predicting performance.

Sometimes these judgments are distorted, either consciously

or unconsciously, by the legacy of white male dominance that haunts the academy, as it does our society. The question is whether procedures that are otherwise serviceable should be distorted, in an attempt to make the application of those procedures more objective. We are not persuaded of the feasibility of such an effort.<sup>56</sup>

Another question is whether it will help to detect discrimination if the process becomes more open. That we will presently address.

A third question goes to the extent to which courts should defer to university process and judgments, when the law is invoked to remedy perceived discrimination. This we will attempt to put in context in Part V.

Cases arising from discrimination claims have been the principal testing-ground for the topics of the rest of this report.

#### *IV. Confidentiality Claims in Tenure Decisions*

An open setting for teaching and research, like the American university, should be one where open decision-making is also prized. Good personnel administration, especially in public institutions, in recent years has come to allow faculty members to have access to much of their files, including systematic evaluations of teaching performance from students and colleagues. Yet there remain areas where confidentiality is the norm. The deliberations and votes of committees and boards charged with decisions to reappoint and to confer tenure; the sources and content of solicited appraisals of the candidate and her work; these are still zealously safeguarded. The rationale is that confidentiality promotes candor. Selection based on merit depends absolutely on honest expressions of opinion. It is widely believed that critical judgments will be inhibited if they will be made known to the candidate who is a colleague either on a campus or within a discipline. Furthermore, it is not unthinkable that a referee will be haled into court and called

upon to defend his opinion and his freedom from prejudice. This prospect must have a chilling effect on many people.

These are, in quickest outline, policy arguments that are endlessly debated and balanced. When a faculty member goes to court, pleading that due process has been denied or discrimination practiced, a heavy thumb is laid on the scale: the law's ancient demand for every man's testimony, made more weighty nowadays by the voracious reach of compelled discovery. Confidentiality crumbles if the information sought is plausibly relevant, unless a privilege to withhold can be interposed. Is there such a privilege?

Three recent cases neatly bracket the range of response. *In Re Dinnan*<sup>57</sup> was the dramatic episode of the University of Georgia professor who, in an alleged sex discrimination case, served time for contempt of court rather than reveal his vote in a tenure committee. Compulsion to do so, he said, would infringe his and the University's academic freedom. The Fifth Circuit Court of Appeals coldly rejected any claim of privilege if tenure evaluation "can be shown to have been used as a mechanism to obscure discrimination."<sup>58</sup>

In the next case, *Gray v. Board of Higher Education*,<sup>59</sup> a plaintiff charging race discrimination also called for the votes in a tenure committee. The Second Circuit Court of Appeals recognized the arguments for confidentiality, but found them wanting, as against the plaintiff's need to know, when Gray had not been given any reasons for the denial. Then, endorsing the AAUP's advocacy of a statement of reasons and an appeal channel (the latter was available), the Court said, "Future decisions supported by a detailed statement of reasons given to the faculty member on request will be shielded from routine discovery."<sup>60</sup>

In the third case<sup>61</sup> the federal Equal Employment Opportunity Commission (EEOC) was seeking to enforce a subpoena, on the complaint of a black economist denied tenure at Notre Dame. The EEOC demanded not only the complainant's per-



sonnel file, but also those of the entire economics department. The University sought protection in deleting all identifying references in appraisals of the candidate and his colleagues. The Seventh Circuit Court of Appeals, in allowing extensive protective orders, declared that, "It is clear that the peer review process is essential to the very lifeblood and heartbeat of academic excellence . . . Moreover, it is evident that confidentiality is absolutely essential to the proper functioning of the faculty tenure review process."<sup>62</sup> It directed the District Court, which would have access to the complete files and to "redacted" ones, to disclose identities of participants in the process only on a showing of "particularized need", and added, "We foresee that the identities of the scholars would be released only under the most limited circumstances."<sup>63</sup>

This Committee believes that a qualified privilege of confidentiality should be recognized with respect to some aspects of the tenure review process (and also for decisions whether to renew probationary appointments). In general, the approach taken by the Second Circuit commends itself.<sup>64</sup> We offer the following summary recommendations:

1. Evaluations of teaching performance, and evaluations of service to the university or to other relevant constituencies, should ordinarily be available to the candidate.

2. The substantive deliberations of tenure committees (of other faculty bodies), and the identification of votes, should ordinarily be privileged<sup>65</sup> unless (a) an adequate statement of reasons has been requested and denied,<sup>66</sup> or (b) the candidate has otherwise established a prima facie case of discrimination, proof of which the court finds will be assisted by specified information. We note that the requirement of reasons parallels the obligation of a defendant in a discrimination action to respond to a prima facie case with articulated reasons.

3. Reasons for non-retention should initially be disclosed only to the requesting candidate, who may choose not to pursue the matter further.

4. Evaluations of candidates' research and publications, if solicited under an expectation of confidentiality (which of course the referee may waive), should ordinarily be privileged. The court should administer this privilege by having *in camera* access to the documents. Sometimes disclosure of the substance of the evaluations, without disclosing their source, will be sufficient.<sup>67</sup> The court may order further disclosure if the plaintiff makes a showing that (a) the referee was biased and (b) the person soliciting the reference knew or should have known of the referee's bias.

5. When the subpoena or discovery reaches beyond the candidate to his colleagues' files, as in *EEOC v. Notre Dame*, the potential breaches of confidentiality are magnified. They may be avoided by considerations of relevancy. In *Lieberman v. Gant*<sup>68</sup> the Second Circuit, in a comprehensive opinion by Judge Friendly, held that the University of Connecticut had made a strong case that it acted fairly in denying tenure. Accordingly, the trial court properly refused to embark upon comparisons with the qualifications of others who had been granted tenure in the English Department.<sup>69</sup>

6. External referees are entitled to special consideration. Especially in research universities where the candidate's standing in the scholarly discipline, not just among his local colleagues, needs to be established, these opinions are essential. But responding to them is, for senior professors, an arduous responsibility. It should not be unnecessarily burdened with the risk of involvement in litigation. If that happens the referee may be impelled to seek independent legal advice. Both the requesting university and the referee's own institution ought to offer assistance and indemnification, unless the referee's own conduct was gravely derelict.

#### V. *Judicial Review of Tenure Decisions*

We have now surveyed four major aspects of tenure decisions, with major emphasis on appropriate procedures. On the

critical decisions to continue a teacher through the probationary period, and near its close to confer tenure or not, the current state of federal constitutional law imposes few due process imperatives; but there are other sources of state law that can be invoked to advance the goals of clarity, consistency, and fairness. On the successive topics of tenure termination, discrimination, and confidentiality, we have observed a rapidly developing texture of statute and decisional law, all of which brings a growing number of cases to the courts. It remains to comment on the attitudes that courts, especially federal courts, bring to disputes about tenure.

For a long time the courts had little to say about such matters. On the one hand, tenure itself was viewed as a rather hazy academic custom.<sup>70</sup> On the other, courts were reluctant to intervene in the internal affairs of the private colleges that once were predominant.<sup>71</sup> As claims of public employment rights forced themselves to attention, and were then vastly accelerated by the civil rights legislation, courts backed off in another direction, one of deference to academic freedom and academic autonomy. These are admirable icons to which to defer, but they were of little solace to suitors who could not get relief from what they asserted were arbitrary or discriminatory decisions.

The deferential attitude is exemplified by a Second Circuit decision of 1974, *Faro v. New York University*. Rejecting a Title VII claim, the court declared: "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."<sup>72</sup> But only four years later *Faro* was essentially repudiated. In *Powell v. Syracuse University*, the court said that "the commonsense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964 . . . we do not rely on any such policy of self-abnegation where colleges are concerned."<sup>73</sup>

The *Powell* opinion, with its concern for limits of competence and for civil rights, represents what is now the dominant pattern, into which concern for academic freedom is also woven.

Commentators who are dismayed because most discrimination plaintiffs still lose contend that the courts should be still more aggressive in penetrating the ivory tower, which they think would be revealed as more like Bluebeard's castle. They say that regard for academic freedom, a proper object of judicial solicitude, is misplaced when, for example, courts thwart complainants by protecting confidentiality.<sup>74</sup>

It is true that the core of academic freedom lies elsewhere. When Chief Justice Warren described it so eloquently—"Teachers and students must always remain free to inquire, to study and to evaluate, to gain maturity and understanding; otherwise our civilization will stagnate and die"<sup>75</sup>—he probably was not thinking of committee votes. To be sure, Justice Frankfurter in another famous dictum included the right to determine "who may teach", as one of the four essential freedoms of the university. But the right was "to determine for itself *on academic grounds*".<sup>76</sup> If the grounds are not academic, they can hardly be shielded from scrutiny.

The matters this report has been discussing are better viewed, we suggest, as lying among the layers of autonomy that protect the core of academic freedom.<sup>77</sup> These layers are tough, but they are not impenetrable. We suggest these precepts with respect to the reach of the judicial role:

1. When a rejected probationer complains that he (or she) was let go arbitrarily, his opportunity to make use of his own academic freedom is diminished, and it is especially within the competence of courts to come to his assistance by promoting fair procedures.

2. When a tenured faculty member is threatened with dismissal, fair procedures mean full adversarial due process; courts are surely competent to decree that.

3. When a woman or a minority faculty member invokes the federal or state laws against discrimination, the courts are obliged to hear the case. They should and do employ modes of proof and standards of review that are used in other professional settings. At the same time, recognition of a layer of autonomy in academic cases includes recognition of the right to be wrong—provided that what may appear to be a wrong decision is made for honest reasons free of discrimination. These reasons may be compelled by constrained resources, or flow from the pursuit of excellence.

4. Even when the decision is legally suspect, the layer of autonomy should also include some deference to academic processes. A successful complainant of course is entitled to damages, and if it is feasible to reinstatement; but a few decisions have gone further and have commanded that the complainant be given tenure.<sup>78</sup> Unless it is objectively clear that the probationer is entitled to tenure<sup>79</sup> this comes close to usurping the college's function. A complainant is entitled to a decision that is free of bias and that is not arbitrary, but that purified decision may not inevitably lead to a conferral of tenure. We suggest that ordinarily a remand, with directions to empanel an *ad hoc* committee if need be, should suffice to cure the defective process.

In conclusion, we urge upon the higher education community the simple truth that it can heal itself. Its members are supposed to be a cut above the society at large in their training, their commitment to rational discourse, their ethical obligations. Administrators and faculty pursue similar goals. Notwithstanding, in the tenure process, differences are bound to arise. As Judge Friendly observed, "Denial of tenure, after six years of employment in a university department, is necessarily a traumatic experience."<sup>80</sup> But it need not (and ordinarily does not) become a litigious one. The academy has in its own hands the tools to achieve clarity, consistency, and fairness.

## Special Committee On Education and the Law

James J. Fishman *Chair*\*

Martin C. Barell	Alan Levine*
John C. Bender	Fritz Mosher
Edward J. Bloustein	Michael A. Rebell
Leon Botstein	David B. Rigney
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Linda G. Howard	Hon. Jack B. Weinstein
William Josephson*	David M. Wirtz

Charles E. Heming—abstains

\* Members of the Subcommittee on Due Process Relating to Tenure in Higher Education

† *Chair of Subcommittee*

## FOOTNOTES

<sup>1</sup> See Part IV, *infra*.

<sup>2</sup> The subcommittee held an uncounted number of meetings, and the full Committee met seven times on this study, including four meetings in 1983 with guest-consultants, to whom we are greatly obliged for stimulating information and insights. They were:

(April 6) Walter Gellhorn, University Professor Emeritus, Columbia Law School; Nancy Weiss, Professor of History, Princeton University (also attended May 10 and Sept. 14).

(May 10) Leon Botstein, President, Bard College and Simon's Rock; David Rigney, General Counsel, City University of New York (President Botstein is an adjunct member of the Committee, and Mr. Rigney joined the Committee in September 1983).

(June 13) Alan K. Campbell, former chairman, U.S. Civil Service Commission; Executive Vice President, ARA Services, Inc.; Oscar M. Ruebhausen, former President of the Association; Frederick A.O. Schwarz, Jr., Corp. Counsel of New York City.

(Sept. 14) Professor Irwin Polishook, President, Professional Staff Congress, City University of New York; Adele Simmons, President, Hampshire College.

<sup>3</sup> Only two-thirds of two-year colleges have tenure plans. Nevertheless, about 95% of all faculty are in institutions that confer tenure. See Commission on Academic Tenure in Higher Education, *Faculty Tenure* 1 (1973) [hereinafter cited as *Faculty Tenure*].

<sup>4</sup> *But cf.* R. Clark, *The Japanese Company* 174 (1979) ("lifetime employment . . . is enjoyed only by male full employees of large companies.") It is commonly asserted that about 60% of employment in the United States is still considered "at will." But the "at will" concept is being widely eroded by statutes and by decisions redressing "wrongful discharge". See *Novosel v. Nationwide Insurance Co.*, 721 F. 2d 894 (3d Cir. 1983); note 16, *infra*.

<sup>5</sup> *Cf.* Civil Service Reform Act of 1978, 92 Stat. 1119, amending 5 U.S.C. §1101 (1978). See J. Fesler, *Public Administration: Theory and Practice* 106 (1980).

<sup>6</sup> See F. Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 AAUP Bull. 753 (1955); W. Metzger, *Academic Tenure in America: A Historical Essay*, in *Faculty Tenure*, *supra* note 3 at 93.

<sup>7</sup> *Faculty Tenure*, *supra* note 3, at 23.

<sup>8</sup> National Commission on Higher Education Issues, *To Strengthen Quality in Higher Education* 9 (1983).

<sup>9</sup> As of 1982-3, there were 402,413 full-time instructional faculty members in 1975 four-year colleges and universities (not counting medical schools), and 91, 868 in 1275 two-year institutions. U.S. Office of Education, National Center for Education Statistics, supplied by Maryse Eymonerie Associates, McLean, Va. Eymonerie reports that about two-thirds of this total are tenured.

<sup>10</sup> This report does not address promotions in rank. In a leading sex discrimination case, delays in promotion to full professor justified damages for lost salary at that rank. *Sweeney v. Board of Trustees of Keene State College*, 569 F. 2d 169 (1st Cir.), *vacated and remanded per curiam*, 439 U.S. 24 (1978), *on remand*, 604 F. 2d 106 (1979), *cert. denied*, 444 U.S. 1045 (1980).

<sup>11</sup> 42 U.S.C. §§2000e to 2000e-17 (1976 and Supp IV 1980).

<sup>12</sup> The normal maximum established by the *1940 Statement of Principles on Academic Freedom and Tenure* (hereinafter cited as *1940 Statement*) prepared jointly by the American Association of University Professors and the Association of American Colleges and endorsed by more than 100 educational organizations and learned societies. See *AAUP, Policy Documents and Reports* 1 (1977). Many institutions have shorter probationary periods. See *Faculty Tenure*, *supra* note 3, at 5. A few major research universities have probationary periods of up to twelve years.

<sup>13</sup> 408 U.S. 564 (1972).

<sup>14</sup> 408 U.S. 593 (1972). Commentary on *Roth* and *Sindermann* has been extensive. See, e.g. P. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Calif. L. Rev. 146 (1983); L. Tribe, *American Constitutional Law* 501 (1978); W. Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445 (1977).

<sup>15</sup> *Cf.* *McLendon v. Mortin*, 249 S.E. 2d 919 (W. Va 1978) (apparently unique decision finding a *Roth* entitlement to due process in tenure decision). The legislature extended this to all higher education non-reappointments, but with the burden on probationer, apparently, to show that an adverse decision is arbitrary. W. Va. Code §18-26-8C (Cum. Supp. 1984); see W. Hanna, *McLendon v. Mortin and the Legislative Response*, 7 Jour. Coll. & Univ. Law 111 (1980-81). *Goodisman v. Lytle*, 724 F. 2d 818 (9th Cir. 1984), held that the university's own procedures and guidelines did not create any constitutionally protected interest.

<sup>16</sup> 391 U.S. 563 (1968). In the private sector, faculty members who claim that their dismissals are violative of academic freedom may be assisted by the increasing recognition that policies reflected in the First Amendment are central to the concept of "wrongful discharge" (see note 4 *supra*). Although "upper level" and professional employees are said to be the prime beneficiaries of this movement, see Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy*

Exception, 96 Harv. L. Rev. 1931, 1940 (1983), there do not yet appear to be any such cases in a higher education setting.

<sup>17</sup> 103 S. Ct. 1684 (1983).

<sup>18</sup> 429 U.S. 274 (1977).

<sup>19</sup> E.g., Note, *Free Speech and Impermissible Motive in the Discharge of Public Employees*, 89 Yale L.J. 376 (1979). An instance where plaintiff won reinstatement, after a non-reappointment motivated by his communist affiliations, is *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979). Cf. *Ollman v. Toll*, 518 F. Supp. 1196 (D. Md. 1981), *aff'd per curiam*, 704 F. 2d 139 (4th Cir. 1983) (legitimate reasons found for not approving appointment of Marxist as professor and department chairman).

<sup>20</sup> 1940 Statement, *Supra* note 12.

<sup>21</sup> 1982 Recommended Institutional Regulations on Academic Freedom and Tenure, 69 (No. 1.) Academe: Bull. of the AAUP 15a (1983) [hereinafter cited as 1982 Recommended Institutional Regulations]. See R. Brown and M. Finkin, *The Usefulness of AAUP Policy Statements*, 64 AAUP Bull. 5 (1978).

<sup>22</sup> 1982 Recommended Institutional Regulations, *supra* note 21 at 19a.

<sup>23</sup> R. Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 Jour. of Law & Educ. 171 (1982): Anno., 37 ALR Fed 601 (1978).

<sup>24</sup> *State v. Schmid*, 84 N.J. 535, 423 A. 2d 615 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (private university violated state constitutional rights of defendant by evicting him and securing his arrest for distributing political literature on campus).

<sup>25</sup> See W. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

<sup>26</sup> See M. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 Iowa L. Rev. 1119 (1980); M. Malin and R. Ladenson, *University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection*, 16 U.C.D. L. Rev. 933 (1983).

<sup>27</sup> Cornell University, 183 N.L.R.B. 329 (1970).

<sup>28</sup> NLRB v. Yeshiva University, 444 U.S. 672 (1980).

<sup>29</sup> Thirty states now do so for higher education (most recently, Illinois and Ohio). See IX J. Douglas, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education* 60 (1983).

<sup>30</sup> X J. Douglas and L. DeBona, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, Table VII (1984).

<sup>31</sup> *Agreement between the City University of New York and the Professional Staff Congress . . . Sept. 1, 1982-Aug. 31, 1984*, Art. 9.9-11 (provides for statement of reasons, from a President, not from the faculty committee, and for an appeal). See generally, R. Johnstone, *The Scope of Faculty Collective Bargaining* 33-38 (1981).

<sup>32</sup> Professor Weiss, *supra* note 2.

<sup>33</sup> Subject to the ultimate authority of the governing board. See *Ranyard v. Board of Regents*, 708 F. 2d 1235 (7th Cir. 1983).

<sup>34</sup> *Wolff v. Mc Donnell*, 418 U.S. 539, 557-8 (1974).

<sup>35</sup> Statement on *Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* (1971), reprinted AAUP Policy Documents and Reports 8, 12 (1977).

<sup>36</sup> See W. Van Alstyne, *Tenure: A Summary, Explanation, and "Defense"*, 57 AAUP Bull. 328 (1971). Termination of an appointment during a contractual term also calls for a due process hearing. *Vail v. Board of Education of Paris Union School District*, 706 F. 2d 1435 (7th Cir. 1983), *aff'd* by an equally divided court (52 U.S. L.W. April 23, 1984) Cf. K. Katz, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U.C.D. L. Rev. 857 (1983)



(institutional protection of academic freedom and tenure superior to First Amendment's).

<sup>37</sup> 1982 *Recommended Institutional Regulations*, *supra* note 21, at 19a.

<sup>38</sup> *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n.*, 426 U.S. 482 (1976) (dismissal of striking teachers; Board's involvement not disqualifying where no evidence of personal animus).

<sup>39</sup> See *Arbitration in Cases of Dismissal: A Report of a Joint Subcommittee*, 69 (No. 5) *Academe: Bulletin of the AAUP* 15a (1983); M. Finkin, *The Arbitration of Faculty Status Disputes in Higher Education*, 30 *SW. L.J.* 389 (1976).

<sup>40</sup> See 1982 *Recommended Institutional Regulations*, *supra* note 21, at 17a.

<sup>41</sup> According to a preliminary report of a survey by Professor K.P. Mortimer of Pennsylvania State University, "4,000 faculty members, 1,200 of them with tenure, have been laid off for financial reasons at four-year colleges and universities in the United States in the last five years." *Chron. of Higher Educ.*, Oct. 26, 1983, at 21.

<sup>42</sup> 1982 *Recommended Institutional Regulations*, *supra* note 21. 16a: R. Brown, *Financial Exigency*, 62 *AAUP Bull.* 5 (1976).

Attempts to construct quantified guidelines for the recognition of financial exigency have not been successful. Consult R. Meisinger and L. Dubeck, *College and University Budgeting: An Introduction for Faculty and Academic Administrators*, ch. VI (1984).

Discontinuation of programs, which is often spurred by financial strains, raises related issues. There are two useful decisions on rights of faculty members displaced by program abandonments: *Browzin v. Catholic Univ. of America*, 527 F. 2d 843 (D.C. Cir. 1975); *Jimenez v. Valmodovar*, 650 F. 2d 363 (1st Cir. 1981).

<sup>43</sup> *E.g.*, *Krotkoff v. Goucher College*, 585 F. 2d 675 (4th Cir. 1978); *but see* *AAUP v. Bloomfield College*, 136 N.J. Super. 442, 346 A. 2d 615 (Appl Div. 1975) (college had burden of proving financial exigency and failed to meet that burden). See J. Gray, *Higher Education Litigation: Financial Exigency*, 14 *U.S.F. L. Rev.* 375 (1980).

<sup>44</sup> *But see* *Chung v. Park*, 514 F. 2d 382 (3d Cir. 1975); (deficient teaching); *Korf v. Ball State Univ.*, 726 Fed 1222 (7th Cir. 1984) [sexual exploitation of students].

<sup>45</sup> Regulations of New York University, recently revised, offer this typical formulation:

Adequate cause includes (but is not limited to) one or more of the following: incompetent or inefficient service; neglect of duty; repeated and willful disregard of the rules of academic freedom as set forth in this statement; physical or mental incapacity; or any other conduct of a character seriously prejudicial to his or her teaching or research or to the welfare of the University.

New York University, *Faculty Handbook* 47 (1982).

<sup>46</sup> These issues are canvassed by contributors to *The Tenure Debate*, ed. B. Smith (1973).

The endorsement of tenure by the National Commission on Higher Education Issues, *supra* note 8, was accompanied by a call for "a system of post-tenure evaluation. The process should provide for periodic peer-group reviews to assure that the tenured faculty has maintained the appropriate level of competence and is performing at a satisfactory level". *Id.* at 10. Participants in a conference called by the American Council on Education and the AAUP to consider this recommendation were skeptical about the value of or need for systematic evaluations, beyond the evaluations that are already made for such purposes as promotions and pay increases. See papers in 69 (No. 6) *Academe: Bull. of the AAUP* 1a (1983).

<sup>47</sup> A concise account of "Hampshire's Experience with the Employment of

Faculty by Term Contracts" is Part Two of Hampshire College, *Report of the President to the Board of Trustees*, 1979-81.

<sup>48</sup> R. Chait and A. Ford, *Beyond Traditional Tenure* (1982).

<sup>49</sup> Associate Provost Richard Chait, Pennsylvania State University, in L. Lloyd, *Hard Times for Tenure: Universities Further Test Often-Challenged System*, Philadelphia Inquirer, Nov. 27, 1983, at DO, 3.

Inroads on tenure may flow less from its ill-wishers than from the end of expansion of higher education. Faculty growth substantially ended a decade ago, long before the decline in the numbers of people reaching eighteen (a trough that will persist for another decade) gave occasion for great caution in hiring and promotion. A recent forecast by the U.S. Bureau of Labor Statistics projects a decline of 15% in the number of faculty members from 1982 through 1995. Chronicle of Higher Education, Jan. 18, 1984, at 20. One consequence has been the burgeoning of "off tenure-track" appointments. Report, On Full-Time Non-Tenure-Track Appointments, 64 AAUP Bull. 267 (1978). Until recently, a regular full-time appointee was assumed to be eligible to be considered for tenure. Especially in elite institutions, many were passed over and went elsewhere; other places routinely tenured most appointees in due course. But all—in theory—had a chance. Now many positions are announced as off-track. Another device is to increase the proportion of part-time appointees who ordinarily are not eligible for tenure. Report, *The Status of Part-Time Faculty*, 67 (No. 1), Academe: Bull. of the AAUP 29 (1981). Still another is to impose fixed tenure quotas that bar even the outstanding probationer. *On the Imposition of Tenure Quotas*, reprinted in AAUP, *Policy Documents and Reports* 23 (1977).

<sup>50</sup> 42 U.S.C. §§2000e to 2000e-17 (1976 and Supp. IV 1980).

<sup>51</sup> The starting-point is McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); a recent exposition is Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

<sup>52</sup> Burdine, 450 U.S. at 253. "Given the elusive nature of tenure decisions, we believe that a prima facie case that a member of a protected class is qualified for tenure is made out by a showing that some significant portion of the departmental faculty, referees or other scholars in the particular field hold a favorable view on the question." *Zahorik v. Cornell University*, 729 F. 2d 85, 93-4 (2d Cir. 1984).

<sup>53</sup> Burdine, 450 U.S. at 254.

<sup>54</sup> A disparate impact claim was recently rejected in *Zahorik v. Cornell University*, 729 F. 2d 85 (2d Cir. 1984) (lower tenure conferral rate for women than for men did not show systematic exclusion). Statistical data relating plaintiff's qualifications to those of others were admitted as relevant to the establishment of the prima facie case in *Lynn v. Regents of the University of California*, 656 F. 2d 1337 (9th Cir. 1981), cert. denied, 103 S. Ct. 53 (1982). The necessity to show disparate treatment has been criticised, e.g., E. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947 (1982); C. Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C.D. L. Rev. (1983).

<sup>55</sup> The commentary is, understandably, voluminous. References are collected in Cooper, *supra* note 54.

Nor did the committee consider discrimination on account of age, forbidden by the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. See *Leftwich v. Harris-Stowe State College*, 702 F. 2d 686 (8th Cir. 1983) (reorganization of college intended to reduce number of tenured faculty violated ADEA). Note that the court considered disparate impact analysis appropriate in an age discrimination case.

<sup>56</sup> See *Zahorik v. Cornell University*, 729 F. 2d 85, 96 (2d Cir. 1984), where the

court (*per Winter, C.J.*) sustained an award of summary judgment against four women who were denied tenure, concluding that:

A decentralized decision-making structure founded largely on peer judgment is based on generations of almost universal tradition stemming from considerations as to the stake of an academic department in such decisions and its superior knowledge of the academic field and the work of the individual candidate. It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review.

<sup>57</sup> 661 F. 2d 426 (5th Cir. 1981), *cert. denied sub nom.* Dinnan v. Blaubergs, 457 U.S. 1106 (1982).

<sup>58</sup> *Id.* at 431 [quoting Kunda v. Muhlenberg College, 621 F. 2d 532, 547-548 (3d Cir. 1980).]

<sup>59</sup> 692 F. 2d 901 (2d Cir. 1982).

<sup>60</sup> *Id.* at 908.

<sup>61</sup> Equal Employment Opportunity Commission v. University of Notre Dame, 715 F. 2d 331 (7th Cir. 1983).

<sup>62</sup> *Id.* at 336.

<sup>63</sup> *Id.* at 339.

<sup>64</sup> Compare J. Gregory, *Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom*, 16 U.C.D. L. Rev. 1023 (1983) (opposes confidentiality), with Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Calif. L. Rev. 1538 (1981).

<sup>65</sup> State "sunshine" laws are rapidly encroaching on privacy of meetings in public institutions. *University of Alaska v. Geistauts*, 666 P. 2d 424 (Alaska 1983) (tenure committee meetings must be open on professor's request; related cases collected at 427, fn. 3); *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) *reversing* 425 So. 2d 582 (Fla. Dist. Ct. App. 1982) (meetings of search committee for law school dean must be open). At Indiana University, faculty members will now have access to evaluative material in their files, with sources disclosed. *Chron. Higher Educ.*, Jan. 18, 1984, at 3.

<sup>66</sup> If final decision-makers (provosts, presidents, governing boards) reject a final recommendation by faculty peer groups, reasons should follow that judgment, both in the candidate's interest and in recognition that the faculty peer group is owed an explanation for the contrary outcome.

<sup>67</sup> This is apparently the practice at the University of California. *Lynn v. Regents*, 656 F.2d 1337, 1348 n. 16 (9th Cir. 1981). The *Lynn* case is helpful in warning that *in camera* submissions cannot be used as evidence. It generally tilts against confidentiality, but is complicated by the fact that confidentiality had already been breached by the disclosure to plaintiff of a minority report from the tenure committee.

*Quaere*, how does plaintiff reach the referee's bias without knowing his identity? Perhaps one can have a choice: identity or summary, but not both at the same time.

<sup>68</sup> 630 F. 2d 60 (2d Cir. 1980).

<sup>69</sup> *Cf.* *Jepsen v. Florida Board of Regents*, 610 F. 2d 1379 (5th Cir. 1980) (evaluation forms of colleagues to be disclosed to plaintiff, but with protective orders).

<sup>70</sup> "Its vaporous objectives, purposes, and procedures are lost in a fog of nebulous verbiage." *Worzella v. Board of Regents*, 77 S.D. 447, 449 93 NW. 2d 411, 412 (1958).

<sup>71</sup> Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

<sup>72</sup> 502 F. 2d 1229, 1231-32 (2d Cir. 1974).

<sup>73</sup> 580 F. 2d 1150, 1153 (2d Cir. 1978), *cert. denied* 439 U.S. 984 (1978).

<sup>74</sup> *E.g.*, Cooper, *supra* note 54; Gregory, *supra* note 64. *Cf.* H. Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C.D. L. Rev. 1047 (1983).

<sup>75</sup> Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

<sup>76</sup> 354 U.S. at 263 (emphasis added) (concurring).

<sup>77</sup> *See Note, Title VII on Campus: Judicial Review of University Employment Decisions*, 82 Colum. L. Rev. 1206 (1982); M. Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817 (1983).

<sup>78</sup> Ford v. Nicks, No. 77-3202 (unreported, E.D. Tenn. May 11, 1982), appeal pending, Sixth Circuit Court of Appeals; Claim of DeBeau-Melting, Special Master's Report, Jan. 30, 1984 (pending before the District Court); an episode in the complex proceedings under the consent decree in Rajender v. Univ. of Minnesota (D.Minn. 1982) 546 F. Supp. 158 (\$2,000,000 fees and costs to plaintiff's attorneys). *Cf. Note, Tenure and Partnership as Title VII Remedies*, 94 Harv. L. Rev. 457 (1980).

<sup>79</sup> As may have been the situation in Kunda v. Muhlenberg College, 621 F. 2d 532 (3d Cir. 1980) (tenure to be conferred if plaintiff got Master's degree).

<sup>80</sup> Leiberman v. Gant, 639 F. 2d 60, 70 (2d Cir. 1980). He continued, "But it is a simple fact of university life that not every appointee . . . can be given tenure . . . To award tenure to marginally qualified candidates would block the road to advancement for more highly qualified prospects who may be coming down the tenure track in the future and seriously impair a university's quest for excellence as distinguished from mere competence."