

ACADEMIC DUE PROCESS

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INTRODUCTION

Academic due process is brand new as a term, young as an idea having formal dimensions, but of venerable antiquity in some elements of its practice. The difference in age among these aspects is obvious when one considers the sparse use which has thus far been made of the chief approaches commonly applied to the study of a socially operative principle:

1. The concept of academic due process does not appear as yet to have received preliminary attention by writers on the history of ideas.

2. In the growing literature of academic freedom, reference is customarily made to academic due process as a chief instrument, but there is little critical analysis.

3. Studies of the college or university as an institution sometimes refer to the procedures which constitute due process, but these are not subjected to much scrutiny. Social studies of a more general kind, such as those dealing with the major forces at work in human arrangements, do not deal especially with academic due process.

4. Due process in law offers a conspicuously available analogue. The kinship is often noted, but there seems to be no sibling study.

5. Fortunately, there is a solid body of case history in the record of controversies between administrations and faculty members. Most of the record is in an academic context, but there is some legal material.

6. Happily, there are five more or less explicit and detailed policy statements. Of the four by the American Association of University Professors (AAUP), that of 1915 has single sponsorship, while those of 1925, 1940, and 1958 have been jointly promulgated by the AAUP and the Association of American Colleges (AAC). The fifth statement, *Academic Due Process*, first gave the thing a name in a document designed for wide circulation; it was published by the American Civil Liberties Union (ACLU) in 1954.

The present article is mainly a systematic analysis bringing together the elements of recent case history and the elements noticed in the policy statements just referred to. However, the unexplored approaches just remarked upon are not lost sight of; from time to time there is introduced an observation, a suggestion, or even an *obiter dictum*.

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In this article the writer speaks only for himself; the Association is in no way responsible for the views expressed. References to AAUP materials are limited to published documents.

There exists one further introductory obligation. The policy statements involved are due their own brief history as entities before they are dismembered and their parts distributed for purposes of comparative study.

In 1915, the newly-formed American Association of University Professors received from its Committee on Academic Freedom and Tenure a *Declaration of Principles*¹ which based its discussion of academic freedom upon consideration of: "(1) the scope and basis of the power exercised by those bodies having ultimate legal authority in academic affairs; (2) the nature of the academic calling; (3) the function of the academic institution or university." The document, it should be noted, gives much attention to academic responsibility, as well as to academic freedom. The final section of the *Declaration of Principles* is entitled "Practical Proposals," and discusses briefly the "formulation of grounds for dismissal" and "judicial hearings before dismissal." It is here that the AAUP first lists procedures: (1) charges should be in writing and "formulated with reasonable definiteness"; (2) there should be a fair trial before a "special or permanent judicial committee chosen by the faculty senate or council, or by the faculty at large"; (3) the teacher should have "full opportunity to present evidence" with adequate provision for expert testimony if his competence is at issue.

In effect the 1915 *Declaration of Principles* proposed that a responsible profession police itself, and practical suggestions about procedure are offered. From the vantage point of fifty years' experience, it is significant that the procedures mentioned are not given a name, and that there is no indication whether they are considered minimal, reasonably complete, or actual good practice. There is, of course, much implication of due process in such phrases as "suitable judicial bodies" and "fair trial." And it should not be forgotten that the *Declaration of Principles* was drafted during the first year of life of the Association, a year during which no less than eleven specific cases alleging infringement of academic freedom were brought to the new organization. Even though the document has little to say about procedures, a great deal of attention to some kind of due process must have been going on because of the case situation.

In 1925, the American Council on Education called a conference to discuss the principles of academic freedom, and the AAUP was largely involved. Emphasis fell upon the restatement of "good academic customs and usage" rather than upon

¹ The Committee members preparing the report were: Edwin R. A. Seligman (Economics), Columbia University, *Chairman*; Charles E. Bennett (Latin), Cornell University; James Q. Dealey (Political Science), Brown University; Edward C. Elliott (Education), University of Wisconsin; Richard T. Ely (Economics), University of Wisconsin; Henry W. Farnam (Political Science), Yale University; Frank A. Fetter (Economics), Princeton University; Guy Stanton Ford (History), University of Minnesota; Charles A. Kofoid (Zoology), University of California; James P. Lichtenberger (Sociology), University of Pennsylvania; Arthur O. Lovejoy (Philosophy), The Johns Hopkins University; Frederick W. Padelford (English), University of Washington; Roscoe Pound (Law), Harvard University; Howard C. Warren (Psychology), Princeton University; Ulysses G. Weatherly (Sociology), Indiana University. The report was received by the first president of the Association, John Dewey. Of the signers, only Professor Roscoe Pound survives. Professors Elliott, Ford, and Lichtenberger became disassociated before the report was signed.

the development of new principles.² In any event, the 1925 *Conference Statement* was within a year endorsed by the AAUP and the Association of American Colleges.

The 1925 *Conference Statement* is a much shorter document than that of 1915. With respect to due process, it emphasizes the principles of confrontation, as its predecessor had not done; but it yields ground in suggesting that the limit of faculty strength is to present a useful expert opinion on a case, in contrast to 1915 when it had been strongly indicated that the judgment of a faculty hearing committee should be essentially conclusive. The due process section is short, and only a few specifics are noted.

In 1940, after a quarter of a century of experience in the handling of numerous cases, the Association again addressed itself to the problem—in few words but with enlarged import—and published the 1940 *Statement of Principles*. Dismissal for cause is frankly made the issue, but there is a sharp line drawn between the teacher on tenure and the teacher on term appointment. For the tenure professor, the burden of proof rests upon the administration; for the teacher on limited appointment, the situation is reversed and it is he who must make a prima facie case of violation of academic freedom. As to specific safeguards, some are emphasized, some are less certainly present, but the sum total of recommended procedural protection is unquestionably larger. Furthermore, as Metzger says: “The tendency . . . is clear: it is to make the faculty hearing as much as possible like a criminal court room and to protect, by legal rule, the rights of the teacher at the bar.”³

Then, in 1958, stimulated by the apparent need for more detailed guidance, and perhaps spurred by the friendly competition offered by the 1954 *Academic Due Process* of the ACLU, the AAUP and the AAC, working together, produced a *Statement on Procedural Standards in Faculty Dismissal Proceedings*. The foreword notes that the *Statement* is a supplement to the 1940 *Statement of Principles* providing a “formulation of the ‘academic due process’ that should be observed in dismissal proceedings.” The standards, however, are a “guide” and “not intended to establish a norm.”

Meanwhile, in 1954, the American Civil Liberties Union had published *Academic Due Process*, prepared by its Academic Freedom Committee. This document appears to be the first comprehensive statement of the elements of the subject, and, as has been noted, brings the term into common use.⁴ The subtitle reads “A statement

² This brief history of the development of the AAUP policy statements rests upon the occasional editorial notes which have accompanied their printings in the AAUP *Bulletin*; independent historical research has not been undertaken by the writer. In addition to the classic apologies about lack of space and time, it is necessary to take into account the fact that a comprehensive history of the AAUP is presently being written by Professor Walter P. Metzger of the History Department of Columbia University; the Metzger study will provide ample context and guidance for further study.

³ Letter from Professor Walter P. Metzger to the author, Feb. 14, 1963. The Metzger letter presents an analysis of the controlling forces which over the years have shaped the due process aspects of the AAUP policy statements. It is impossible to indicate the degree to which these pages are indebted to Mr. Metzger, who wrote at length and most thoughtfully to a colleague at the very time he himself was deeply engaged in his own research and writing.

⁴ When opportunity permits, the present writer hopes to explore, as a matter of semantic interest, the

of desirable procedures applicable within educational institutions in cases involving academic freedom." This restriction to academic freedom cases was quite in keeping with the limitation the ACLU imposes upon itself as a civil liberties organization. But there is certainly nothing in *Academic Due Process* which makes it inapplicable to the trial of issues other than academic freedom.

I

THE RATIONALE OF ACADEMIC DUE PROCESS

Basically, academic due process is a system of procedures designed to produce the best possible judgments in those personnel problems of higher education which may yield a serious adverse decision about a teacher. What is sought after is a "clear, orderly, fair" way of making a decision; it is desirable to provide the individual with "procedural safeguards" or "procedural guarantees"; more pallidly, there should be "normal dismissal proceedings"; or going back to earlier usage, the need is for "due process." But the matter is somewhat more complicated than these phrases suggest.

For example, the immediate institutional context, or the broader general social context, can change in ways that will affect procedure. If the main principles being applied, those of academic freedom, are distorted by pressures from without, let us say pressures resulting from fear about national security, then the procedural instrument is likely to bend under stress. For example, the ebb and flow of American devotion to the principles of democracy is bound to affect a procedure which in so many ways depends upon fair application of the power of the people. For example, mere excitement and resulting publicity, *i.e.*, the psychological milieu, the mob spirit, may limit the use of academic due process—a system of procedures which cannot return even a single "be damned to you" without contradicting its own principle.

Consequently, the rationale of academic due process must take into account more than the central fact of its intrinsic nature. At least this much:

1. Academic due process, hopefully and in its best moments, is a system which controls positive as well as negative academic action. Twenty years ago, Professor E. C. Kirkland, writing soon after the adoption of the 1940 *Statement of Principles*, indicated the fullness of the coverage:⁵ "The work of everyone would be eased if only due process became an integral part of academic procedures and standards relating to faculty personnel." More recently, a study of tenure in American higher educa-

origin of the term "academic due process." He knows that at some time between his first Academic Freedom Committee work with the ACLU in 1946 and his becoming the executive officer of the ACLU Academic Freedom Committee in 1951, he began to use the term; he was certainly responsible for the title of the 1954 document. But among the distinguished persons at work on academic freedom in the ACLU from 1946 to 1954 were such figures as Karl Llewellyn, Walter Gellhorn, and Alonzo F. Myers; it would be well to study the record of the exchanges heard on Olympus before jumping to conclusions. The first reference to "academic due process" in AAUP literature appears to be in the *Report of Committee A, 1956-57*, signed by Professor H. Bentley Glass as chairman, 43 A.A.U.P. BULL. 515, 519 (1957).

⁵ Kirkland, *Annual Report for Committee A*, 29 A.A.U.P. BULL. 64 (1943).

tion, in describing the desirable procedures for this important area of decisions, gives as much attention to those which are affirmative in nature and award tenure as to the painful, negative decisions which involve dismissal.⁶

2. Academic due process is analogous to legal due process, but only that and often different. Authorities in the field are careful to point out that identity of the two cannot be maintained, and that it is also incorrect to think of the academic as a variant of the legal type. As Professor John M. Maguire says:⁷

For many years the AAUP has labored . . . to establish the propositions that there ought to be an accepted uniform academic law of customary nature . . . and that this law can be best administered without the often heated publicity of ordinary court trials before tribunals cognizant of the presuppositions of our vast American educational enterprise. . . . The judicial tendency is to squeeze education into a common mold with other working relationships.

Likewise, Professor Robert K. Carr notes that⁸ "The Association has been properly reluctant to see the development and enforcement of standards of academic freedom and tenure tied too closely to the law-making and law-enforcement processes." Professor Carr does go on to say that there is a duty to "try to acquaint judges and courts with the principles in these areas that the academic profession views as correct," but that is quite a different approach. And the 1958 *Statement on Procedural Standards*, in commenting on the vital matter of procedure in a hearing, notes that "Unless special circumstances warrant, it should not be necessary to follow formal rules of court procedure."⁹

It would probably be correct to say that academic due process has evolved its own recognizable optimum—less of the certainty which derives from constitutional, statutory, or other legal guarantees, and more of the flexibility in approach which leads to a desired academic solution. As Walter Gellhorn notes:¹⁰ "I prefer a much freer approach to what is in the end a search for the best possible procedures to be utilized in the academic world. 'Due process' always speaks in terms of the minimum necessities, whereas our concern is with the best."

3. Academic due process shares with its master, academic freedom, the special capacity of making an important contribution to all who are involved. By its fairness, it seeks to protect not only the career of the individual but also the reputation of the institution. It offers the public some assurance that hasty or unprincipled action will not find it easy to wash down the drain the heavy investment by society in the powers of a costly expert.

4. Lastly, academic due process is able to teach something important about the nature of learning itself, because its action is so much like that which created the

⁶ CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* (1959). The sections on the law, understandably, are more concerned with dismissal actions.

⁷ Maguire, book review, 47 *A.A.U.P. BULL.* 270 (1961).

⁸ Carr, *Report of Committee A*, 1958-59, 45 *id.* 392 (1959).

⁹ 44 *id.* 270, 273 (1958).

¹⁰ Letter from Professor Walter Gellhorn to the author, Feb. 21, 1963.

educational treasury it guards. Academic due process is a precision instrument; it has a specific applicability or jurisdiction; it operates by established rules; it concerns itself with testable facts, and tests them. It is a demonstration of the human intellect at work, submitting tentative conclusions to comparison with controls (through the consideration of evidence) and, while moving forward with a particular proceeding, it tests its own working hypotheses by constant reference to the burden of proof. A full-scale application of academic due process demonstrates powerfully the nature and use of the scholarly mind.

II

SYSTEMATIC ANALYSIS

In the pages that follow, the analysis will move forward from point to point in the procedural management of a disputed decision by the administration of a college or university to dismiss a teacher from his post for cause. At each point there will be brought together the main contributions of the five policy statements¹¹ which have been referred to, and a variety of related case material. Of course, no single actual controversy would be likely to involve every procedural matter here discussed.

1. *Informal Conciliation.* This first phase of a situation which may become a "case" is likely to bring a startled or unprepared faculty member face to face with the more or less firm determination of an administration to carry out a decision to dismiss him. There is present an ill-defined mixture of information, fear, inclination, resolution and opposition; in short, all the jumbled ingredients of a human dispute at that early stage where the adversary positions have not been occupied or even clearly perceived. In one case, a teacher may reasonably expect, and in fact discover, that his administration is willing to talk with him in a fair way, or that the administration is even willing to be convinced that it has seen things in the wrong light. Here lies the opportunity for genuine informal conciliation. But in another case, it is possible that the same early external aspects of the matter will in fact conceal an irreversible determination to achieve dismissal at any cost; here lies the danger for the possibly ignorant defendant.

But the effort at informal conciliation should be made; even a victim whose sacrifice has been determined upon may achieve a favorable tactical position by the very fact of his demonstrated early innocence. And certainly society is due the effort.

It is therefore especially desirable that the administrative authorities and the teacher (accompanied by an adviser) sit down together in a conciliatory session, confronting the charges and the evidence squarely, and sincerely attempting a solution of their common problems. A statement of the facts may clarify the situation; exposition of the teacher's

¹¹ Among the AAUP documents, the 1915 and 1925 statements have only historical status, having been superseded as policy by the 1940 *Statement of Principles*. The 1958 *Procedural Standards* are "presented . . . as a guide" but "are not intended to establish a norm in the same manner as the 1940 *Statement of Principles*." The 1954 ACLU *Academic Due Process* is an official policy statement of that organization.

point of view may persuade an administration not to review his competence and integrity; exposition of the administration's point of view may persuade a teacher to recognize his duty to cooperate with his institution, and to indicate how he may do so without sacrifice of principle. Any one of these developments, or all of them together, may yield a solution if the participants in the discussion are moved by genuine good will.¹²

When reason arises to question the fitness of a college or university faculty member who has tenure or whose term appointment has not expired, the appropriate administrative officers should ordinarily discuss the matter with him in personal conference. The matter may be terminated by mutual consent at this point. . . .¹³

Such a conference must, of course, be in good faith. In the University of Nevada-Richardson case, five professors were charged with being members of "a small dissatisfied group"; a request for clarification brought from the president only this:¹⁴ "My letter of March 31 states all I have to say on the matter. The [half-hour] period [before the governing board] from — to — is granted to you to explain your position." A peremptory notice of this kind is hardly suggestive of conciliation.

In the recent George Washington University-Reichard case, seven members of the department and two deans met with the teacher in an extended session where an attempt was made to determine his opinion on certain matters. It is possible to regard this meeting as in some degree aimed at conciliation, even though the occasion was formalized by the making of a stenographic record. But procedural problems of a more serious nature almost at once developed and conciliation was clearly no longer a main interest.¹⁵

Even though the lines of opposition may not yet be clearly drawn in this conciliatory phase, and consequently controlling procedures are likely to be minimal, two special cautions should be remembered.

First, care should be taken lest the exploration of conciliation yield information or argument which will be embodied in later formal charges against the faculty member. In an actual case of the mid-fifties, conversation regarding possible past communist involvement disclosed the teacher to be a religious agnostic; that fact then became fixed in the mind of the governing board as an element of disqualification. One is tempted to recommend that nothing disclosed in a conciliatory session should be introduced in a disciplinary proceeding. But what if the revelation concerns the very heart of the educational process—let us say, attempted indoctrination of students by the teacher. Can an institution of higher learning ignore evidence clearly raising grave doubts about fitness to teach students? One possible principle would be to limit the use of the new knowledge to serve as an indicator of the direction in which the administration could seek independent evidence, but not to allow the disclosures of the conciliatory session to be used as evidence.

The second caution relates to suspension. The American Association of Univer-

¹² ACADEMIC DUE PROCESS 4-5 (1954).

¹³ *Statement on Procedural Standards in Faculty Dismissal Proceedings*, 44 A.A.U.P. BULL. 272 (1958) [hereinafter cited as *Statement on Procedural Standards*].

¹⁴ 42 *id.* 534 (1956).

¹⁵ 48 *id.* 240, 242 (1962).

sity Professors states that suspension "is justified only if immediate harm to himself or others is threatened by his continuance."¹⁶ This is an important point because the entire later proceedings may be colored by implications of the act of suspension, or by the language used. That was certainly true in the New York University-Burgum case,¹⁷ and in the very recent University of Illinois-Koch case.¹⁸ Perhaps an extreme of impropriety and denial of academic due process occurred in the Dickinson College-LaVallee case where suspension was first announced in open faculty meeting.¹⁹ The AAUP position cannot be emphasized too strongly: suspension as an act necessary to prevent harm must surely seldom be unavoidable; suspension for any other reason profoundly affects, at least in the public mind, the placing of the burden of proof.

2. *Procedure Preliminary to a Hearing or Preliminary Proceedings Concerning the Fitness of a Faculty Member; Commencement of Formal Proceedings.* The differences between the treatment of this phase by the ACLU and the AAUP are significant and merit attention.

Academic Due Process asks the administration to present the teacher with "a statement meeting the demands of the principle of confrontation." It should embody:

- a. Relevant legislation, board or trustee by-laws and rulings, administrative rulings, faculty legislation, and so forth.
- b. The charges in the particular case.
- c. A summary of the evidence upon which the charges are based, and a first list of witnesses to be called.
- d. The procedure to be followed, including a statement of the nature of the hearing body.
- e. A formal invitation to attend with adviser or counsel.²⁰

The ACLU statement then goes on to suggest that the teacher also bears responsibility at this stage of the proceedings. He may supplement the statement of governing rules applicable to the situation, or suggest modifications in the charges or proposed procedure. He should indicate the evidence by which he expects to refute the charges and should furnish a first list of witnesses he desires to call. Then, finally, administration and teacher "should, as completely as possible . . . arrive at agreement on formulation of charges, governing rules, and procedure." Such agreement "will clarify the issues and make unnecessary at the hearing, or upon appeal, argument as to the *form* of the controversy, thereby permitting full attention to be given to matters of *substance*."²¹

The Statement on Procedural Standards in Faculty Dismissal Proceedings calls

¹⁶ *Statement on Procedural Standards* 272.

¹⁷ 44 A.A.U.P. BULL. 38 (1958).

¹⁸ 49 *id.* 28 (1963).

¹⁹ 44 *id.* 140 (1958).

²⁰ ACADEMIC DUE PROCESS 5.

²¹ *Ibid.*

for the teacher's being informed of the applicable procedural regulations, but does not require the providing of other relevant regulations and governing principles and standards; it calls for written charges, and for formal invitation to attend. The Association document does not refer to a summary of the evidence to be presented, or the first list of witnesses, which obligations in the ACLU statement rest upon both administration and teacher.

A most significant element in the Association *Statement* reads as follows:²²

. . . if an adjustment does not result, a standing or *ad hoc* committee elected by the faculty and charged with the function of rendering confidential advice in such situations should informally inquire into the situation, to effect an adjustment if possible and, if none is effected, to determine whether in its view formal proceedings to consider his dismissal should be instituted.

A doubt arises whether a committee so charged may not have dual functions which are essentially incompatible. "To effect an adjustment, if possible" calls for a mediative and conciliatory spirit; incidentally, the committee so acting may receive confidences and explore compromises. So far so good. But this same committee, failing in mediation or conciliation, also finds itself charged with the duty of a grand jury—to determine whether a hearing on dismissal should occur. In one unreported case (where, however, this aspect of the situation became public knowledge), a committee so dually charged in a forced retirement situation strongly protested to the administration against the nature of its mixed duty; in fact, it felt uncertain whether it was on one side or the other, or in the middle. It would seem desirable to clarify this matter as soon as possible, perhaps by recommending the separation of functions and their assignment to different groups. Mediation and indictment do not belong together.

The 1940 *Statement of Principles* does not touch on these preliminary matters, but the silence may accurately be characterized as one of economy, and the procedural requirements listed for the actual hearing clearly assume good procedure in the preliminary stages. The 1915 *Declaration of Principles*, interestingly, twice mentions the standard of "grounds . . . formulated with reasonable definiteness" and "charges . . . in specific terms."²³ This standard was "lost" until the 1954 *Academic Due Process* where it is loosely embodied and the 1958 *Statement on Procedural Standards* where it emerges clearly as "a statement with reasonable particularity of the grounds proposed for the dismissal."

In the Catawba College cases of 1952, orderly development of the administration's view that one or more dismissals were required was adversely affected by the self-constitution and meetings of an alumni "Fact-Finding Committee" to examine the causes of student unrest. At the time institutional controversy was going on, this committee came up with a report to the Board of Trustees which included the view that "a few disgruntled professors, who had personal grievances against the college

²² *Statement on Procedural Standards* 272.

²³ 1915 *Declaration of Principles*, 40 A.A.U.P. BULL. III (1954).

. . . took advantage of this confused situation in an attempt to discredit the administration and the trustees."²⁴ Such an intrusion, and it was given weight, proved most harmful to the professors involved in the Catawba College cases.

3. *An Interim Matter; the Psychological Bridge.* Somewhere in the two phases so far examined, the period of informal conciliation and the period of preliminary proceedings, one discovers that the usual academic case has developed the recognizable characteristics of an adversary proceeding. The customary benevolent and fraternal exchanges of campus life become infrequent or terminate abruptly; conversation with those not on one's side becomes guarded, lest advantage be lost or vulnerability disclosed; in talking with one's supporters thought tends to be given to tactics and strategy. The teacher is advised that:²⁵

Communications, as a general rule, should be in writing, with copies retained. Oral discussion should be followed by an exchange of memoranda indicating the understanding which each party has of the conversation.

Unusual problems may arise. In the Fisk University-Lorch case, the probable cause which had so deeply disturbed the president as to result in confused and unwise action on his part, was thrust aside when the teacher appeared before the board—and a new cause of action was announced by that body.²⁶ In the Princeton Theological Seminary-Theron case, it was difficult to establish the nature of some of the points to be examined because the teacher had never received any kind of written appointment during his ten years of service.²⁷ By contrast, in the Allen University cases, the teachers in due course discovered that the administration had in its possession, and may even have assembled, elaborate dossiers on non-academic aspects of their lives.²⁸

The faculty member, in the whole time before the receiving of formal charges, is subject to hazards known and unknown. Therefore, not the least difficult of his choices will be that of a psychology for the situation; (1) friendly, freely communicative, and open to adjustment, or (2) advisedly self-protective, communicative only in formalities fit for a record, and rejective of overtures which have not been approved by counsel.

4. *Counsel.* It is of considerable historical import that neither the 1915 *Declaration of Principles* nor the 1925 *Conference Statement* states that a teacher may be assisted by counsel. It is not until 1940 that the Association says:²⁹ "He should be permitted to have with him an adviser of his own choosing who may act as counsel." Eighteen years later, in the 1958 *Statement on Procedural Standards*, it is said that the functions of this counsel should be similar to those of a representative of the president

²⁴ 43 *id.* 210, 214-15 (1957).

²⁵ ACADEMIC DUE PROCESS 5-6.

²⁶ 45 A.A.U.P. BULL. 27, 36-37 (1959).

²⁷ 45 *id.* 50-51 (1959).

²⁸ 46 *id.* 89 (1960).

²⁹ 1940 *Statement of Principles* 100.

who will "assist in developing the case."³⁰ These provisions cover the ground, at least by implication. However, the ACLU *Academic Due Process* takes into account two other kinds of unfortunate situations: (1) those where academic advice proved insufficient, and the lack of legal counsel permitted injury to the teacher, and (2) those unhappy cases where the ignorance of a lawyer adviser about academic procedures led to failure in seizing upon possible academic solutions to the case. Consequently, the ACLU statement recommends:³¹

The teacher should select from among his colleagues a person of established position, wisdom, and judicial temper, who will act as his official academic adviser, or should select counsel to advise him on legal matters. He may, in his discretion, be assisted by both an academic adviser and a legal counselor. The teacher should inform the administration of the identity of his adviser or counsel and should obtain written agreement to his appearance on the teacher's behalf.

Generally speaking, institutions have permitted a teacher to have counsel, although some faculty members have had to go outside their own institutions for help, and a few have failed to provide themselves through ignorance of their own need. Generally, counsel has been helpful, although there have been instances of a legalistic attitude (chiefly by nonlawyer counsel) which has irritated a hearing committee.

However, two main problems raised by the presence of counsel are of a broader nature than the question of choice or the degree of receptivity of the administration. First of all, it is undeniable that the presence of some kind of counsel means that now, for sure, there are adversaries present, and this may affect the further development of the situation. Significantly, in terms of its experience, the ACLU, on balance, recommends that the adviser be present even in the period of informal conciliation. In short, anyone, from the start, is in danger.

The second problem results from the extremely limited supply of adequate legal counsel. Many practicing attorneys confronted by a dismissal case will find themselves for the first time dealing professionally with the customs and principles of academic life. Conversely, few academic advisers will feel themselves competent to assist the faculty member, when there is likelihood that legal issues will develop, and the president or board is assisted by the college or university legal adviser. These deficiencies suggest why law professors, who know both law and Academia, are often drawn into academic trials. If this demand is unavoidable, possibly the Association of American Law Schools could at least contribute to a solution of the supply problem by developing and organizing a pool of legal professorial talent, so that the maximum of help might be had without allowing too heavy a burden to fall upon those law professors who have become known for their willingness to help and, consequently, are sought out more often than is fair to them.

One further caution is necessary about the influence which the presence of legal

³⁰ *Statement on Procedural Standards* 273.

³¹ *ACADEMIC DUE PROCESS* 5.

counsel may have on a hearing. Probably, the University of Vermont-Novikoff case became involved in legal tangles mainly because of complicated and confusing procedures. But an important contributory cause was the participation of an attorney, for the administration, who is reported to have played "the role of a determined prosecutor"; it is difficult to imagine how to meet such a challenge except by response of the same partisan sort.³²

5. *The Constitution and Creation of the Hearing Committee.* The demand of the 1915 *Declaration of Principles* for "suitable judicial bodies," i.e., "a special or permanent judicial committee chosen by the faculty senate or council, or by the faculty at large," established the idea of the hearing by expert colleagues at the outset. The demand has been repeated with varying degrees of clarity and force by the succeeding Association statements. The 1940 *Statement of Principles*, like the 1925 *Conference Statement*, merely requires that the issue should "be considered by both a faculty committee and the governing board of the institution"; nothing is said of the formal relationship or cooperative practice of these two groups, or the manner of selection of the faculty committee. This curious gap in statement of fundamental procedure is partly filled by the language found in the *Statement on Procedural Standards*, which calls for:³³

. . . an elected standing committee not previously concerned with the case or a committee established as soon as possible after the president's letter to the faculty member has been sent. The choice of members of the hearing committee should be on the basis of their objectivity and competence and of the regard in which they are held in the academic community.

The ACLU statement reads:³⁴

The hearing committee should be a standing or special group of full-time teaching colleagues, democratically chosen by and representative of the teaching staff, and selected by pre-established rules. The administration should dissociate itself from those performing a judicial function at the hearing.

The difficulty is simple and ominous; plainly many institutions do not grant a hearing before a faculty committee. Of the forty-six cases reported in the *AAUP Bulletin* since 1948,³⁵ only fourteen have been adjudicated by a committee wholly or substantially faculty in composition; of the fourteen cases reported since 1958, only one has witnessed a faculty committee hearing with genuine judicial authority for the group—and in that one case the governing board set aside the unanimous faculty judgment calling for reprimand, and dismissed the teacher. The picture is not totally black: some board committees or administrative hearing bodies have rendered verdicts which appear to be just, and, of course, there have been cases in

³² 44 A.A.U.P. BULL. 11-21 (1958).

³³ *Statement on Procedural Standards* 273.

³⁴ ACADEMIC DUE PROCESS 6.

³⁵ Three reports are not considered; two because they relate to investigations in which there was no trial of an individual; the other report was based on a hearing which, procedurally, concerned charges brought by a teacher against a defendant institution.

which faculty committees have judged, and been sustained, and which are unreported. But the general scene is certainly somber; there is only weak indication that the run-of-the-mill dismissal action will have in its history the one absolute essential for assurance that the faculty of an institution is charged with governing its own status and membership. Those who will admit subjective impressions may take consolation in the fact that the "better" institutions usually come through, and that the failure to use the faculty hearing committee procedure is more prevalent at places which are undeveloped or are under despotic rule.

A main question has always been the makeup of the faculty hearing committee. Ideally it should be all-faculty, and faculty-elected; not because of the greater wisdom of the faculty but because a faculty point of view and judgment is needed, by itself and untinted by the proper but different context and value system which the governing board may, in its wisdom, apply. At Catawba College the committee was made up of five trustees and five faculty members appointed by the president of the Board.³⁶ At the University of Kansas City the committee included five board members, the president, three deans, and five elected faculty members.³⁷ At North Dakota Agricultural College the committee consisted of eleven administrative officers, and two elected faculty members—one a division chief and the other a candidate for a deanship.³⁸ Such weird combinations tell us nothing conclusive about a particular judgment or the judicial capacity of the persons serving on these committees. They do, however, suggest that some one, some time, was afraid to hear a straight faculty opinion.

On the question of closed or private hearings, the AAUP statements of 1915, 1925, and 1940, and the ACLU statement of 1954 are silent. The 1958 *Statement on Procedural Standards* advises that the hearing committee, "in consultation with the president and the faculty member, should exercise its judgment as to whether the hearing should be public or private."³⁹ Another view is that the hearing should be private unless the faculty member requests otherwise.⁴⁰

A strong argument can be made for placing the decision about an open or closed hearing in the hands of the faculty member. His professional life, perhaps the whole future for himself and his family, may be at stake; these are great concerns and outweigh any consideration of possible embarrassment or pain to a witness.

Should the committee be standing or *ad hoc*? The specially selected committee may make it possible to bring into play the judgment of particularly qualified persons for a particular situation; the standing committee has the advantage of being chosen by a sober assessment of the judicial disposition of its members, not in a time of crisis. Should the committee be appointed or elected? Either may do quite well, provided that it is the faculty or its agent which acts. No one can regard as fair the

³⁶ 43 A.A.U.P. BULL. 217-18 (1957).

³⁷ 43 *id.* 185 (1957).

³⁸ 42 *id.* 145-46 (1956).

³⁹ *Statement on Procedural Standards* 273.

⁴⁰ CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* 148-49 (1959).

appointment of a faculty hearing committee by the administration which is to present the charges; it is essential that "the administration . . . dissociate itself from those performing a judicial function at the hearing."⁴¹

One procedural question is raised rather often, by obvious analogy with the law: What about challenges? Challenges for cause should certainly be permitted at any appropriate point, even at the end; the judgment in the New York University-Burgum case would have been better based if a member of the committee had not missed eleven of the eleven hearing sessions and two of the four deliberative sessions; this person did not disqualify himself and probably could not be challenged.⁴² Challenge for known involvement or prejudice needs no discussion. With respect to peremptory challenges, the difficulty is that they may raise procedural problems regarding replacement, especially in a small institution. Perhaps the best working rule is to permit a wide latitude of challenge, without too much specificity as to criteria of unsuitability, and then to leave the decision, and the consequences of the decision, to the hearing committee itself.⁴³

In any event, the members of the hearing committee should be "individuals of known independence and objectivity," and in support of these qualifications it is desirable that they have tenure.⁴⁴

6. *The Charges.* Charges are so generally important for all human controversy and so essential to any judicial proceeding that one can well understand why it has not seemed necessary to provide an elaborate analysis of their function or nature in the several formulations of academic due process. The 1915 AAUP statement refers to "grounds which will be regarded as justifying . . . dismissal . . . [and they] should be formulated with reasonable definiteness . . . stated in writing in specific terms."⁴⁵ The silence of 1925 is succeeded by the 1940 requirement that "the accused teacher should have been informed before the hearing in writing of the charges against him."⁴⁶ In the AAUP series 1958 returns full circle to 1915 and asks for written, particular charges.⁴⁷

Academic Due Process of the ACLU calls for a good deal more. In addition to the charges themselves, there is to be an accompanying summary of the evidence upon which the charges are based and a first list of witnesses to be called. To make possible the best kind of defense the charges are to be accompanied by a full statement of the regulations pertinent to the issue and a description of the procedures to be followed.⁴⁸ These further related elements to the central fact of charges were not brought in by the ACLU to increase resort to something like legal forms.

⁴¹ ACADEMIC DUE PROCESS 6.

⁴² 44 A.A.U.P. BULL. 41-42 (1958).

⁴³ A thoughtful and suggestive consideration of the question of challenges is found in letter No. 3 of a new series of "Advisory Letters from the Washington Office," 49 *id.* 78-79 (1963).

⁴⁴ CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* 148 (1959).

⁴⁵ 1915 *Declaration of Principles* 111.

⁴⁶ 1940 *Statement of Principles* 109.

⁴⁷ *Statement on Procedural Standards* 272.

⁴⁸ ACADEMIC DUE PROCESS 5.

On the contrary, it was felt that this full display of "the case" might lessen the game of attack and defense and help prepare for unimpassioned consideration the main points in dispute.

In the face of a principle so simple and fundamental as that which calls for charges, it is something of a shock to observe the frequent and gross failure of American administrations in higher education to provide this elementary device for achieving justice. In the Rutgers University-Fifth Amendment cases a Board of Review undertook to examine the matter in great detail, even though there were no charges before it, and even though agreement had been reached with the administration that charges would be made after the Board of Review report. But this apparently seemed slow business for an impatient governing board; the professors were given short notice to answer a congressional committee or be dismissed.⁴⁹ At Rutgers, dismissal preceded the promised charges, and that would seem to be as anticipatory as it is possible to be.

At Fisk University there were no charges until the faculty member faced his governing board, and then, vague as they were, they did not clearly relate to the objections the administration had been raising.⁵⁰ Charges were absent in the Southern California-Deinum case, and the AAUP investigating committee succinctly remarked that "there cannot be a determination that the facts are not in dispute unless there is first a determination of charges that enables the faculty member to determine what facts are alleged."⁵¹ At the University of Nevada all five teachers received blanket charges of a very general nature; only the supreme court of the state rescued the men, by an order for a bill of particulars—and rescued them a second time when it threw out new charges not mentioned in the bill of particulars.⁵² In the recent Arkansas State Teachers College-Higgins case, repeated requests for charges met no response;⁵³ and the report of the investigating committee makes clear that only three likely interpretations seem possible in such situations: (1) there are no charges which can be made, (2) charges if made would be irrelevant to the academic context, or (3) the charges if made would be proved false.

Other variations include the Catawba College type of broadside, so ample as to fail in particularity: disloyalty to the administration, incitement of unrest and suspicion, and failure to support the administration and the objectives of the college.⁵⁴

At New York University in the Bradley case, a clear enough charge derived from conviction of contempt of Congress, but as the institutional proceedings went on the charge became the different matter of identification with the Communist Party.⁵⁵

⁴⁹ 42 A.A.U.P. BULL. 77-78 (1956).

⁵⁰ 45 *id.* 36, 42 (1959).

⁵¹ 44 *id.* 156 (1958).

⁵² 42 *id.* 553-54 (1956). State *ex rel.* Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953), 70 Nev. 347, 269 P.2d 265 (1954).

⁵³ 49 *id.* 12 (1963).

⁵⁴ 43 *id.* 218 (1957).

⁵⁵ 44 *id.* 33-35 (1957).

In the University of Michigan-Nickerson and Davis cases, a faculty hearing committee did all its work with witnesses and defendants and documents without making any real effort to extract from the material before it charges "set forth with reasonable particularity." Then, in its report, it made an "Analysis of Charges."⁵⁶

An amorphous but genuine problem arises from the 1958 *Statement on Procedural Standards* recommendation that the faculty member, after receiving from the administration the charges and relevant regulations, "should answer in writing, not less than one week before the date set for the hearing, the statements in the president's letter [which presents the charges]."⁵⁷ If this requirement means no more than (1) a duty to acknowledge the receiving of the charges, or (2) acceptance of those charges which are true, or (3) response by a general denial, or (4) response by a demurrer, or (5) a summarizing of the defense evidence to be presented, or (6) a presenting of a first list of witnesses—then no harm should come. But the faculty member must not, under any circumstances, feel constrained to state, in advance of his formal hearing, any part of his reasoned defense if he feels that by doing so he might prejudice his position at the hearing itself.

In the dangerously undefinable proceedings of the George Washington University-Reichard case, counsel for the teacher asked for charges and standards; he was told he might submit a memorandum. Later the administration asserted that the teacher involved knew full well the nature of the University's concern; but the professor involved said he did not know. As the investigating committee said in its report:⁵⁸ "It appears . . . unsatisfactory that a man should be tried for shortcomings (a) which are alleged by the University authorities to be understood by all parties, and (b) which the University authorities are unwilling to state."

In the light of the record, it may correctly be said that the single most prevalent defection from academic due process is in the absence of charges, or charges of such distorted, vague, or shifting quality that no proper defense can be made. The answer, of course, is not far to seek. Not many cases involve failures in professional responsibility or gross misbehavior of the kind which permit specific charges. The usual offense is to arouse the sensitivities and angers of the community and the fears of the administration; and in such a situation a formulation of specific charges would also disclose the standards which administrations apply to such dismissal cases.

7. *Governing Standards and Procedures.* There is great variation in the fullness and precision of the statements under which different institutions conduct their dismissal proceedings. Some colleges and universities which offer little by way of stated fair rules and genuine academic standards are deficient in this area of academic law simply because no case has arisen to require statement of principles and machinery. However, in other institutions the standards and procedures are weak or non-existent because of unwillingness to confront the possibility of an unpleasant

⁵⁶ 44 *id.* 68 (1958).

⁵⁷ *Statement on Procedural Standards* 272.

⁵⁸ 48 A.A.U.P. BULL. 243 (1962).

affair. It is in such institutions that the AAUP discovers a most difficult task; it is not easy to persuade an angry and determined institution to take pause to discover whether it has proper criteria and procedure for the hot business in hand. At these colleges and universities lies a strong challenge to the fraternal sense of faculty members; they are perhaps the only group which at a point of crisis can with much hope press for a well-grounded and well-ordered trial of a professor.

An interesting way of handling the rules was established by the Board of Trustees of the Lowell Institute of Technology when in the Snitzer and Fine cases it ruled at the outset that⁵⁹

. . . all questions relating to the propriety of any interrogation or argument shall be determined by the Chairman or, at his request, by an Assistant Attorney General [who was conducting the case against the teachers], and any such determination shall be final unless the Trustees vote otherwise. . . . Any of the foregoing rules may be modified, or waived during the session, by vote of the Trustees.

8. *The Evidence.* The unusual fact that an academic controversy has developed into an adversary hearing requires at least these general warnings:

First, even if the institution is very large, the quarrel is a kind of family affair; and most of those participating will have to live with each other in the near and distant future. For this reason one may at times discover a tendency to substitute for academic due process a way of handling matters which might be called "domestic due process"—a kinder or a harsher system, but of doubtful appropriateness.

Second, the infrequency of cases at most institutions means that when a dismissal question arises there will come into play seldom-used machinery which may creak noticeably. The innumerable safeguards which the law daily applies to the handling of evidence in courts are hardly matched by academic due process which is "occasional" in application and infinitely less comprehensive in detail. Nevertheless, "the law protects," and since a dismissal proceeding is likely to call for all the protection available, some borrowing from the law's way of doing things is both likely and desirable.

Parenthetically, one may note that there is a transcendent principle which can solve many procedural problems, even for the inexperienced. The principle is that of fairness. Under that aegis, difficult questions of procedural management may disappear or at least assume determinable form.

(a) *Presence.* All the policy statements imply, and several state, that the person involved shall be at the hearing during the presentation of evidence. (It appears to be common practice for the parties to withdraw when the hearing committee goes into executive session for purposes of deliberation and judgment.) There have not been many cases raising the issue of the right to be present at one's own trial, but there is at least one extraordinary example. In the 1958 South Dakota State College-Worzella case the governing board considered the report of an administrator

⁵⁹ 45 *id.* 561 (1959).

who, in resigning, attacked a number of persons, including Professor Worzella; the teacher was not asked to comment on the report, and did not know that it would be considered as a basis for a determination regarding his dismissal. He was not present and was not heard, nor was the president of the institution; there was, of course, no opportunity to cross-examine or to submit testimony.⁶⁰

(b) *Confrontation*. "The principle embodied in the legal concept of confrontation should govern academic due process. The teacher should be informed of all the charges and all the evidence against him; he should have full opportunity to deny, to refute, and to rebut."⁶¹ The AAUP statements display a puzzling oscillation: that of 1915 does not mention confrontation, although the spirit of the principle is present; 1925 holds that the teacher has the right to "face his accusers"; 1940 says nothing on this point; and 1958 reads: "The faculty member should have the opportunity to be confronted by all witnesses adverse to him."⁶² The issue arises at times in specific instances. The Catawba College cases disclose the teachers appearing for their hearing before the board and confronting for the first time a report by a self-constituted alumni committee which was hostile to them; the faculty members were in a seriously handicapped position because they had no way of challenging their accusers.⁶³ In the Lowell Technological Institute case, one part of the over-all denial of due process was the ruling made at the outset that neither the president nor any member of the faculty would be available for questioning.⁶⁴

(c) *Witnesses for the Defense*. The 1915, 1925, and 1940 AAUP statements do not specifically state the right of the faculty member generally to present witnesses in support of his position; but they do state his right to do so in a designated way on the particular issue of competence—and there is no indication that this right in a limited area is not part of a harmonious whole. The statements are deficient in letter but not in spirit. The ACLU 1954 *Academic Due Process* says: "Both the teacher and the administration should have the right to present and examine witnesses and to cross-examine witnesses. The administration should make available to the teacher such authority as it may possess to require the presence of witnesses." The 1958 *Statement on Procedural Standards* says nothing about the larger problem of presenting witnesses, but proceeds to the next step—subpoena power—which permits our assuming existence of the main right.⁶⁵

The Reed College-Moore case reveals a member of the faculty being examined in a dismissal proceeding, who was denied the aid of the college when he sought to have appear as witnesses the president and a former college official in order that he might question them about their knowledge of him at the time he was appointed, and later. The AAUP investigating committee regarded this denial as vital to the

⁶⁰ 47 *id.* 253 (1961).

⁶¹ ACADEMIC DUE PROCESS 4.

⁶² *Statement on Procedural Standards* 273.

⁶³ 43 A.A.U.P. BULL. 220 (1957).

⁶⁴ 45 *id.* 563 (1959).

⁶⁵ ACADEMIC DUE PROCESS 6; *Statement on Procedural Standards* 273.

determination of facts and a violation of academic due process, but also came to the conclusion that the evidence which would have been obtained would have been merely cumulative and that the denial did not therefore fatally affect the proceedings.⁶⁶ This view can be challenged. It is one thing to hold that a particular element of evidence which has been submitted is in fact cumulative; but there is an element of unauthorized prophecy in a conclusion that what would have been heard would have been of such and such a character or weight.

(d) *Expert Witnesses*. In 1915 the writers of the *Declaration of Principles* must have assumed that charges of incompetence would be the issue from time to time. They wrote:⁶⁷

. . . if the charge is one of professional incompetency, a formal report upon his work should be first made in writing by the teachers of his own department and of cognate departments in the university, and, if the teacher concerned so desires, by a committee of his fellow-specialists from other institutions, appointed by some competent authority.

As a matter of fact, the issue of competence has seldom been in dispute in reported cases, although it may be suspected to have existed in a number of situations which were resolved one way or another without public notice. In the very recent Grove City College-Gara case, the administration alleged incompetence; but since nothing remotely resembling a trial of the issue ever took place, the AAUP investigating committee felt obliged to report on this matter in a statement supplementary to their main report on the denial of academic due process.⁶⁸

(e) *Cross-Examination*. The earliest AAUP statement, in 1915, refers to a "fair trial"; this may carry with it the idea of cross-examination. The 1925 *Conference Statement* states that the teacher "should always have the opportunity to face his accusers." 1940 is weaker and requires that cross-examination be read into the phrase "heard in his own defense," if it is to be found at all. 1958 reads: "The faculty member or his counsel and the representative designated by the president should have the right, within reasonable limits, to question all witnesses who testify orally."⁶⁹ *Academic Due Process* plainly sets forth, for both parties, the right to "present," to "examine," and to "cross-examine."

The cases which raise a question of the right to cross-examine are not numerous, but the importance of the issue may be seen in those at North Dakota Agricultural College where cross-examination revealed the nature of much unsatisfactory evidence; evidence so poor in quality that the AAUP investigating committee characterized it as "in large measure hearsay, rumor, opinion, innuendo, and irrelevancies, most of which would not have been admitted over objection in a properly conducted court of law."⁷⁰

⁶⁶ 44 A.A.U.P. BULL. 123-24 (1958).

⁶⁷ 1915 *Declaration of Principles* III.

⁶⁸ 49 A.A.U.P. BULL. 21-23 (1963).

⁶⁹ *Statement on Procedural Standards* 273.

⁷⁰ 42 A.A.U.P. BULL. 146-47 (1956).

It would be interesting to determine, if any standards existed for an opinion, whether the placing of witnesses under oath could be regarded as a kind of protection, akin to the right of cross-examination. The case record on this point is thin, but one can probably assume that sworn testimony will occur more frequently where public boards are concerned.⁷¹

(f) *The Hearing Committee Acting on Its Own Authority.* The 1958 *Statement on Procedural Standards* explicitly states what may have been understood for a long time but is here first set down—the power of the committee to control the proceedings in the interest of justice: “The committee should determine the order of proof, should normally conduct the questioning of witnesses, and, if necessary, should secure the presentation of evidence important to the case.”⁷² This injunction is new to the scene, but has great potentiality for strengthening the administration of justice in academic proceedings. A courageous, intelligent hearing committee could, in many situations, seek out and hear useful evidence which has not been offered by the parties. In short, here lies the opportunity for the faculty authority to offer constructive leadership. For instance, there is always the question whether a fault has been viewed in the light of all the teacher has been and done, for good or bad. The investigating committee of the AAUP in the Reed College-Moore case observed:⁷³

At a minimum, academic due process seems to us to require that a faculty member with tenure is entitled to consideration of factors which might conceivably offset his possible misconduct of non-cooperation. These factors should include (1) his record of performance in service in the College, and (2) his motives or reasons for the act of non-cooperation.

The failure of a committee to control its hearing is unhappily a matter of record in two very recent cases. In the Arkansas State College-Higgins case, an administrator answered for a committee of all the full professors, stating that the function of the group was “to endorse or not to endorse the decision of the Board of Trustees.” In the George Washington University-Reichard case, the informal hearing committee appears to have done nothing to correct the failure of “university authorities . . . to follow the natural and reasonable course of attempting to find supporting evidence for their position, and . . . [to rely] instead merely upon speculation about motives.”⁷⁴

(g) *Evidence Exempt from Cross-Examination.* The 1958 *Statement on Procedural Standards* at one point states that cross-examination is a right “within reasonable limits”; and, even more fundamentally, confrontation may be denied the faculty member by the committee. “Where unusual and urgent reasons move the hearing committee to withhold this right, or where the witness cannot appear, the identity of the witness, as well as his statements, should nevertheless be disclosed to the faculty member.”⁷⁵ In sharp contrast the ACLU *Academic Due Process* states

⁷¹ 42 *id.* 552 (1956).

⁷² *Statement on Procedural Standards* 273.

⁷³ 44 A.A.U.P. BULL. 127 (1958).

⁷⁴ 48 *id.* 246 (1962).

⁷⁵ *Statement on Procedural Standards* 273.

that "The principle of confrontation should apply throughout the hearing."⁷⁶ In the opinion of the present writer, it is a serious error to permit the exceptions to the principle of confrontation which are set forth in the *Statement on Procedural Standards*. If the history of cases involving academic due process recounted only the occasional lapses of great institutions, and lapses of small degree, the issue might be hypothetical. But this is simply not the historical fact. Denials of academic due process constitute a record of unjust treatment of the worst sort by institutions who know or care nothing about the principles involved, or, at best, are the story of serious lapses from grace of institutions which ordinarily behave well. The analogy is irresistible; one should consider the restrictions placed upon confrontation by the security agencies of the national defense apparatus.⁷⁷ The only conceivable ground which can safely be yielded here would be with respect to depositions of distant witnesses under oath, introduced under strict and exact rules as to weight, openness to challenge, and every other safeguard needed to protect the teacher.

9. *Burden of Proof.* *Academic Due Process* states that "it is a fundamental principle of fairness that charges against a person are to be made the basis of action only when proven, and that the burden of proof rests upon those who bring them."⁷⁸ There cannot be much question about the operation of this principle in practice under the several AAUP statements, but for some reason, not apparent, it has never been written into this series of documents. It is only in the 1956 *Academic Freedom and Tenure in the Quest for National Security*, the report of a special committee, that one can read: "The burden of proof should rest upon the administrative officer bringing the charge, and should not be placed upon the faculty member. . . ."⁷⁹ The authors of *Tenure in American Higher Education* state that the appropriate ". . . administrative official should have the burden of proving the charges by a preponderance of the evidence."⁸⁰

The cases which present a question of burden of proof are numerous and serious. At the University of Nevada, in the Richardson case, the administration ordered the faculty member to "show cause" why he should be continued in his post.⁸¹ At New York University, in the Burgum case, the teacher was suspended and then allowed to appeal to a board of review the adverse action taken against him;⁸² this unjust procedure has fortunately been completely eliminated in a recent revision of the New York University regulations. The Board of Trustees of Lowell Technological Institute informed the teachers that the hearing to be given them was for "the purpose of reviewing the provisional appointment . . . [and whether they] should

⁷⁶ ACADEMIC DUE PROCESS 6.

⁷⁷ Joughin, *Scrutiny of Professors: Impact and Modification of Section 6-i (old 7-e) of the Industrial Security Manual*, 44 A.A.U.P. BULL. 199 (1958).

⁷⁸ ACADEMIC DUE PROCESS 4.

⁷⁹ 42 A.A.U.P. BULL. 60 (1956).

⁸⁰ CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* 149 (1959).

⁸¹ 42 A.A.U.P. BULL. 554 (1956).

⁸² 44 *id.* 50 (1958).

be dismissed."⁸³ The President of the Board of Regents of Texas State Teachers College in a recent so-called hearing said to the counsel for a teacher: "Our Board is concerned with what you as a representative might say and what [the teacher's] . . . reasons are for this Board to employ him."⁸⁴

One difficult problem with respect to burden of proof, which has not been really solved, is that of the teacher in probationary status—that is, not yet having achieved tenure—who claims that his notice of non-renewal of appointment involves an academic freedom issue. The AAUP offers as policy a statement that "during the probationary period a teacher should have the academic freedom that all other members of the faculty have."⁸⁵ The principle, of course, is obvious and good, but further guidance may be needed. In fact, it is only fair to the teacher in probationary status that he be told the burden of proof is upon him in most instances. The ACLU statement offers the following approach:⁸⁶

American educational practice permits great fluidity in the testing of teachers as to their permanent usefulness in a particular institution. This experimental phase of a teacher's career is wisely characterized by a minimum of formal judgment; teachers come and go without recorded praise or blame. Furthermore, non-tenure appointments often fall within the marginal area of an institution's educational and financial program; the dropping of a teacher may have no bearing whatsoever upon his professional capacity. But, although non-retention does not necessarily raise an academic freedom issue, such an issue may be present in non-retention. For example, improper consideration may have been given to non-academic matters, such as a teacher's race, or his religious or political beliefs and associations. Such improper consideration is a violation of academic freedom and the non-tenure teacher is entitled to all the protections of academic due process. . . .

Action in non-tenure academic freedom cases should take this general form:

1. If the non-tenure teacher believes that improper considerations have unmistakably affected the decision not to retain him, he should, with appropriate advice, determine whether he can assemble adequate proof in support of his contention.

2. The teacher should decide whether he is willing to hazard the possible disclosure of professional weaknesses he may have displayed at an early point in his career.

3. If his decisions under "1" and "2" are positive, he should request an opportunity for informal conciliation as set forth . . . above.

4. If such informal conciliation is denied, or unsuccessful, he should then request a formal hearing, and submit a written waiver of the traditional right of non-tenure teachers to non-disclosure of the grounds upon which they have been released.

5. The administration should then grant to the teacher the entire procedure for adjudication [available to tenure teachers.]

The advantage of this approach is that, in addition to being offered procedural guidance, the teacher is himself given the responsibility of making his case and abiding by the results. This would seem to be the only kind of a rule which, in the last analysis, can offer full opportunity for adjudication.

⁸³ 45 *id.* 561 (1959).

⁸⁴ 49 *id.* 46 (1963). Note also *supra* at 592, where the function of a faculty hearing committee was described as an endorsement or non-endorsement of the governing board decision.

⁸⁵ 1940 *Statement of Principles* 109.

⁸⁶ ACADEMIC DUE PROCESS 7-8.

10. *Findings and Conclusions.* For unexplored reasons, the 1915, 1925, and 1940 AAUP statements say nothing about the findings and conclusions which the hearing committee should offer. The 1954 ACLU statement says that "the full text of the findings and conclusions of the hearing committee should be made available in identical form and at the same time to the administration and the teacher."⁸⁷ A much stronger rule is that of the 1958 *Statement on Procedural Standards* which asks that the hearing committee "make explicit findings with respect to each of the grounds of removal presented, and a reasoned opinion may be desirable."⁸⁸ Here, it seems the American Association of University Professors is moving toward a norm much like that established by the practice of the courts to render a decision on the facts and a statement on the law when present and future justice will be served thereby. The need for the norm is understandable when one considers the cases.

In one of the University of Michigan cases, where communism was the issue, the AAUP investigating committee noted that "no finding of Communist Party membership, innocent or otherwise, or of illegal or immoral activities, was supported by substantial evidence in the record."⁸⁹ In the South Dakota State College-Worzella case, the 1958 judgment of the governing board included a statement that the teacher had been found to be "the main controversial issue" in events of 1948 to 1951, and "prior thereto"; these findings were on issues of great complexity, long past, in which the teacher would by some students of the matter be thought to have been vindicated, and in any event the issues had long since been disposed of officially as closed.⁹⁰ The governing board of Dickinson College, with twelve items of complaint before it, did not indicate which of these it regarded as proved.⁹¹ The faculty committee at New York University in the Burgum case submitted several memoranda to the trustees; on one main charge, a committee member said the teacher had lied, a second member said that the teacher's connection with the Communist Party was proved, and the third member said the teacher was guilty of academic turpitude.⁹² Professor Novikoff, in his vicissitudes at the University of Vermont, confronted three charges; in the decision by the Board of Trustees the first charge was dismissed, the second charge was disregarded, and nothing was said about the third charge.⁹³ In the North Dakota Agricultural College cases, the Advisory Committee sent no written report to the governing board, and consequently a decision was made only upon a decision.⁹⁴ And one of the teachers involved in the Lowell Technological cases has complained that the adverse verdict of the governing board,

⁸⁷ *Id.* at 6.

⁸⁸ *Statement on Procedural Standards* 274.

⁸⁹ 44 A.A.U.P. BULL. 82 (1958).

⁹⁰ 47 *id.* 250 (1961).

⁹¹ 44 *id.* 142 (1958).

⁹² 44 *id.* 47 (1958).

⁹³ 44 *id.* 12 (1958).

⁹⁴ 42 *id.* 147 (1956).

embodying no judgment on the evidence and a dismissal without stated reason, has been harmful to him in his efforts to continue in the profession.⁹⁵

The speed with which a hearing committee should act should certainly be as great as possible, and it should render judgment as quickly as possible.⁹⁶ But surely neither expedition nor delay are in themselves issues of justice; the answer must always be that the best speed is that which serves justice best in each case.

11. *The Record.* Until 1940 the AAUP statements said nothing about the record; then the injunction is given that a "full stenographic record of the hearing [should be made available] to the parties concerned."⁹⁷ The 1958 statement, which, of course, carries with it all of the 1940 statement, adds that "all of the evidence should be duly recorded" and the president and the faculty member should be "given a copy of the record of the hearing."⁹⁸ The ACLU *Academic Due Process* notes:⁹⁹ "A full record should be taken at the hearing; it should be made available in identical form and at the same time to the hearing group, the administration, and the teacher. The cost should be met by the institution." Here the requirement of simultaneous presentation would seem to rule out the 1958 AAUP provision for a judgment in advance of the completion of the record if such speed is fair.

12. *Two Special Questions: Time to Prepare, and Waiver of Rights.* For all practical purposes none of the policy statements offer any detailed rules or guidance with respect to the time that should be allowed for preparation, for study of the record, and for other chronological questions which might arise; this would seem to be a wise silence in the light of the great variety of academic situations which occur in very different kinds of institutions. But some notorious cases exhibit the need at least for the rule of fairness. Not the worst but perhaps the most conspicuous cases were those at the University of Michigan where the findings and conclusions of a kind of hearing committee were not placed before the faculty members involved until immediately before the next and conclusive hearing.¹⁰⁰

Waiver is said to present difficult problems even for a fully developed legal system. The few instances which have occurred in academic controversy have generally led to the view that a teacher cannot waive rights which have been published as accruing to the whole profession. An individual may not waive a right for himself when by so doing he affects the rights of other members of the profession. In the Long Island University-Post College-Sittler case, where there was prior agreement to resign, the judgment of the AAUP was that "unless the administration removes the compulsion which is a necessary consequence of an agreement to resign upon

⁹⁵ 45 *id.* 553, 564 (1959).

⁹⁶ ACADEMIC DUE PROCESS 6 reads: "The hearing committee should promptly and forth-rightly adjudicate the issues." *Statement on Procedural Standards* 274 reads: "The committee may proceed to decision promptly, without having a record of the hearing transcribed, if its decision would be aided thereby."

⁹⁷ 1940 *Statement of Principles* 109.

⁹⁸ *Statement on Procedural Standards* 273-74.

⁹⁹ ACADEMIC DUE PROCESS 6.

¹⁰⁰ 44 A.A.U.P. BULL. 46 (1958).

request, failure to seek a hearing is not the result of an informed and uncoerced decision to waive the protections of academic due process."¹⁰¹

13. *Appellate Procedure*. It should be understood at the outset that in almost every academic institution the final authority lies in the hands of the governing board, either under a charter issued by the state to a private college or university, or by statutory or constitutional authorization and delegation of power to a public institution. No statistical count exists to indicate the frequency of appeal by a dissatisfied teacher or a dissatisfied administration; but it is known that one or the other party, when ruled against by the hearing committee, rather frequently concludes the matter without appeal.

The 1915, 1925, and 1940 statements by the AAUP indicate with increasing clarity the obvious fact that the ultimate authority in a college or university can be involved on appeal, and, perhaps, by original jurisdiction. *Academic Due Process* indicates that the findings of the faculty hearing committee should be final on matters of professional competence and integrity.¹⁰²

The 1958 *Statement on Procedural Standards* at this point makes a major contribution to the principles which govern academic due process. It states that:¹⁰³

If the governing body chooses to review the case, its review should be based on the record of the previous hearing, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or their representatives. The decision of the hearing committee should either be sustained or the proceeding be returned to the committee with objections specified. In such a case the committee should reconsider, taking account of the stated objections and receiving new evidence if necessary. It should frame its decision and communicate it in the same manner as before. Only after study of the committee's reconsideration should the governing body make a final decision overruling the committee.

If this rule were to be applied in full force and faith to the adjudication of an academic controversy such as dismissal action, one might almost be warranted in regarding academic due process as in effect genuinely established. One would hope seldom to meet a hearing committee judgment which was a poor or careless job, since the members of the group would know that, in addition to possible rejection, it might be referred back with the detailed judgment of a responsible governing board; conversely, it is difficult to conceive of a governing board indulging in peremptory or arbitrary decision when it knew that its adverse view would be subjected to the detailed study and comment of an articulate faculty committee. Two powerful voices responsible to each other's judgment for both a first and second time would offer a strong likelihood of justice in most academic cases.

¹⁰¹ 48 *id.* 9 (1962).

¹⁰² ACADEMIC DUE PROCESS 7.

¹⁰³ *Statement on Procedural Standards* 274. At the beginning of this study it was noted that the 1925, 1940, and 1958 statements were jointly promulgated by the AAUP and the Association of American Colleges. Here, near the end of the systematic analysis, it is well to remember that in these three instances there were partners in the enterprise.

The cases which involve appellate problems are not numerous if one looks only to the procedure involved, although there are numerous instances of arbitrary overriding of faculty judgment. At the University of Michigan a superior committee gave a hearing to a teacher involved, but "it based its hearing and its conclusions very largely upon the record of the hearing held by [an inferior committee] . . . which record had not been made available to the two teachers."¹⁰⁴ And, as noted above,¹⁰⁵ the teacher did not have adequate time to study the record of the first hearing. Even less happy is the recent University of Illinois-Koch case where the governing board unanimously overruled the recommendation regarding penalty offered by unanimous vote of the faculty hearing committee.¹⁰⁶

III

OVER-ALL DENIAL OF ACADEMIC DUE PROCESS

The reports which describe a general denial of academic due process to some unfortunate teacher are dramatic and even lurid, but it must be confessed that they may contribute less to the understanding of academic due process than to the annals of social pathology. In most cases the broad denial of procedural rights to a faculty member usually turns out to be a matter of ignorance or fear, or some amalgam of these two saddening aspects of institutional compulsiveness.

"Although the dismissal . . . was for stated cause, neither evidence nor argument was presented in a hearing before any faculty committee, or any Board committee, or the Board as a whole within the framework of any recognizable form of due process, academic or general."¹⁰⁷ The opinion of the investigating committee which examined the Grove City College situation for the American Association of University Professors led to the further conclusion that "the absence of due process in this case raises in the minds of the Investigating Committee grave doubts regarding the academic security of any persons who may hold appointment at Grove City College under existing administrative practice."¹⁰⁸ There have, of course, been other instances of blank denial.¹⁰⁹ The usual picture is a large composition which may include a denial of charges or the exploration of charges so general as to be irrefutable by ordinary means, absence of counsel, failure to make a record, no hearing before a faculty committee, no hearing before anyone, or plain dismissal as of the moment of notification.

Sometimes the denial of due process is mitigated by elements of confusion; in the University of Vermont-Novikoff case nobody was familiar with and called upon procedural safeguards which actually existed in the Articles of Organization of the

¹⁰⁴ 44 A.A.U.P. BULL. 61 (1958).

¹⁰⁵ *Supra* at 596.

¹⁰⁶ 49 A.A.U.P. BULL. 29-31 (1963).

¹⁰⁷ *Id.* at 16 (1963).

¹⁰⁸ *Ibid.*

¹⁰⁹ Eastern Washington College, 43 A.A.U.P. BULL. 235 (1957); Fisk University, 45 *id.* 36-37 (1959); Alcorn Agricultural and Mechanical College, 48 *id.* 251 (1962).

University.¹¹⁰ Or, as in the George Washington University-Reichard case, the denial seems to have come about from a mixture of dubious legalism, ill-defined function of the examining group, and short-sighted failure to seek out information which was needed and could be had.¹¹¹

Since institutions are no more exempt from fear than individual men, it is not surprising to find colleges and universities attempting to dispose of irritants by summary action, usually involving denial of established principles of academic due process. Thus, Benedict College first offered "normal academic procedures" to a faculty member with tenure, and then denied him a hearing.¹¹² At Alabama Polytechnic Institute (now Auburn University), long after the president's office had assumed a minor matter to have died down, the governing board met in executive session and denied reappointment to a teacher without even a semblance of a hearing.¹¹³ In the same commonwealth, the president of the Alabama State College wrote to a professor, saying, "Just a few minutes ago I had the telephone message through the State Superintendent of Education that the State Board of Education has directed this afternoon that your services be discontinued as of this afternoon."¹¹⁴ And, most recently, the Board of Regents of Texas State Teachers Colleges gave a faculty member notice of a hearing only at 2:00 P.M. of the preceding day, and also indicated that he would have his hearing only if he signed a waiver of a bill of particulars; the "hearing" took place and the teacher found himself conclusively dismissed.¹¹⁵

The annals of the Visigoths of American education soon pall, and, in any event, are not very instructive for any positive purpose. Consequently, this brief review of instances of virtually total denial of academic due process may conclude with one last example: a case which presents a few elements of academic due process but introduces other procedural distortions of a most extraordinary nature. The hearing took place before the Board of Trustees of the Lowell Technological Institute, an institution situated in Massachusetts about thirty miles distant from Harvard University and the Massachusetts Institute of Technology.

In the Lowell Technological Institute-Snitzer and Fine cases, there were no charges; unsworn evidence was introduced into a record where other evidence was under oath; there were no findings or judgments on the evidence. Counsel for the teachers was present; and carefully introduced at the beginning, and recapitulated at the end, the elements of academic due process. But the Board had its mind on another way of doing things. The Assistant Attorney General of the state of Massachusetts in charge of criminal investigations was asked by the Board to conduct the hearing; he acted as prosecutor and also ruled as judge on the admissibility of

¹¹⁰ 44 *id.* 13 (1959).

¹¹¹ 48 *id.* 240 (1962).

¹¹² 46 *id.* 101 (1960).

¹¹³ 44 *id.* 158 *et seq.* (1958).

¹¹⁴ 47 *id.* 306 (1961).

¹¹⁵ 49 *id.* 46 (1963).

objections. To complete the picture, the Assistant Attorney General then apparently went into executive session with the Board as a person in the jury room. The American Association of University Professors was denied the right to have an observer present; a lieutenant of the Massachusetts state police was in attendance throughout the hearing. And yet the Assistant Attorney General stipulated that no issue of criminal behavior had been raised; nor was any ever raised. In short, the whole record of the event over which the Board of Trustees presided probably constitutes the further limit to which any governing body has gone in outright disregard of the established principles and practices by which determinations of justice are made on the academic scene.¹¹⁶

IV

THE FUTURE OF ACADEMIC DUE PROCESS

The American college or university, like any living organism, is constantly changing, as current values and passions tangle with old traditions and inertias. And, in any particular institution, academic due process is likely to be particularly shaped by the interplay of the campus pattern for handling controversial matters and public opinion regarding the "sensitive question" of the moment. So fluid a scene, so delicate and mobile a balance, obviously means that academic due process will experience a good deal of change as life moves on. The prospects for such change merit brief notice.

First, there will be change in academic due process resulting from ordinary self-scrutiny. Procedures which have proved useful will receive a blessing as intelligent custom and become stronger; failures and archaisms will drop out. There will be fillings-in to take care of the obvious gaps revealed by logic or pain.

It may be possible to rely less upon analogy and more upon critical comparison with other kinds of systems for being fair. Useful exploration may suggest differences in the problems arising in public and private institutions. Academic due process for these two types of college or university may, of course, have to wait upon the discovery of the actual distinctions which exist between private and public college or university. In the private institution the supposed base is in the contract. But is an institution really private which receives tax exemption for itself, establishes tax deduction for its donors, and has ninety per cent of its operations in some of its chief departments paid for by government funds?

As for the unquestionably public institution, nonlawyers are unable to escape hearing of a few uncertainties. They know about the large body of administrative law which concerns itself with the delegated authority and responsibility of public agencies, constitutional or statutory in origin, and seek to discover how much of that law is relevant to an agency which is an institution of higher education. There

¹¹⁶ 45 *id.* 550-67 (1959).

is a suspicion abroad that the silences on this point are vast, and that the voices heard are sometimes not in harmony.¹¹⁷

Second, academic due process will develop as it confronts the threats always made against anything which is in any way connected with freedom. Chafee's great first chapter of *Free Speech in the United States* remains one of the wisest, and one of the saddest, commentaries ever written on human nature. He tells us that freedom rises and falls almost in exact relationship to our fears and insecurity. And there is no reason to believe that the particular kind of freedom which exists in the academy has any magic which will exempt it from the generic fate.

Third, academic due process will need to keep its integrity when it observes the seductive success of other kinds of systems which have proved effective in apparently like affairs. For instance, the civil service system offers some very attractive safeguards. But civil service is mainly intended to protect large groups of persons who are willing to accept a large measure of routinization in the personnel decisions which affect their lives. They are willing to move forward at a generally even pace, treated with generally even fairness, and—in time of trouble—to be judged by broadly applicable standards and procedures. There is no implication in this observation that civil service is a poorer kind of thing than academic due process. It is simply different, and not particularly suited to the judgments which may attend the adventurous journey of a professor who begins as a servant in the hall of Poison Bluff College and concludes his career ruling over a ducal seigniorship at a major university.

Fourth, it seems likely that the future of academic due process will in the main be dependent upon its close identification, as a necessary instrumentality, with the fundamental principle of intellectual freedom. It is intellectual freedom, in the college or university called academic freedom, which is the object of value. It is the principle that must be protected at all costs. This will sometimes require especially sensitive, peculiarly complicated, procedures for handling the problems of the men who work under the principle of freedom. Obviously, tried and good ideas should not be abandoned without thorough scrutiny and the widest possible experience; it is not likely that the idea of confrontation will depart from academic due process. On the other hand, the instrument must be flexible and subject to needed modification. In every instance, the process which best assists in the wise and just handling of people using free minds will be the best academic due process.

¹¹⁷ State *ex rel.* Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953), 70 Nev. 347, 269 P.2d 265 (1954). Posin v. State Board of Higher Education, 86 N.W.2d 31 (N.D. 1957). Worzella v. Board of Regents, 77 S.D. 447, 93 N.W.2d 411 (1958).