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TENURE

A Conscientious Objective

BY WILLIAM W. VAN ALSTYNE

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Attacks on academic tenure systems are not new, but they have taken on a special intensity lately, as the often predicted steady state has become a reality on many campuses. James O'Toole's... "Tenure: A Conscientious Objection" is without doubt the most strident piece published in recent times. Despite my aversion to certain jejune gimcracks that disfigure the article, O'Toole raises two principal issues that warrant a serious reply.

The first of these is O'Toole's suggestion that academic tenure systems are wholly unnecessary; that the protections they were originally designed to provide against arbitrary dismissals and violations of academic freedom have been so thoroughly absorbed into our legal system that tenure is now an extravagant redundancy....

His other point is that tenure systems frustrate a healthy rate of faculty turnover by making it unduly difficult for an administration to displace faculty members mismatched in their current posts but possibly quite suitable for a job elsewhere. The argument is a marketplace variation on the "tenure encourages deadwood" argument....

To begin with, the "need for turnover" argument is not entirely congruent with O'Toole's first point. If, as O'Toole claims, an elaborate due process system has already been sufficiently locked into place so as to make a tenure system gratuitous, it is difficult to see how the elimination of tenure itself would ensure a healthier rate of turnover. Presumably, every college or university oper-

ating without a tenure system would still be obliged to satisfy the stiff requirements of the courts or their own intramural "grievance procedures and evaluations." If, as O'Toole insists, such procedures yield protection equivalent to a tenure system, turnover may no more readily be increased. If, on the other hand, turnover can in fact be more readily achieved notwithstanding these elaborate legal substitutes, it follows that these safeguards are far easier for an administration to satisfy than those supplied by a tenure system. In that case, we surely need to take a much closer look at the adequacy of these allegedly just as good safeguards....

Only by omitting to say what a tenure system is in the first place does O'Toole manage to develop a mildly convincing argument that its functions have been usurped by other safeguards. Because a number of individuals may be under the same misapprehension as O'Toole, the matter warrants fairly close attention.

It is the tenure system itself that establishes the procedural safeguards that O'Toole confuses as having an independent source. Institutions disallowed tenure operate under an indefinite series of term contracts. Irrespective of length or excellence of service, each faculty member is put at complete risk by the terminus of his or her current contract. Whether another is to be issued is wholly without prejudice: All that the faculty member is entitled to is a succinct, unexplained, and wholly unreviewable notice of nonrenewal.

A tenure system differs fundamentally from this scheme by providing that, after six years of on-the-job performance, the institution will put an end to the fac-

ulty member's indefinite probation. If, given this extended probationary period (far longer than industrial workers serve pursuant to negotiated collective-bargaining contracts and far longer also than is required of professional employees in state or in federal service), the university is satisfied that the individual has earned an entitlement to a presumption of continuing suitability, it so declares upon the express approval of its president and board of trustees. Only thereafter, while the faculty member remains subject to termination for cause, that cause must be shown in a fair, intramural hearing inclusive of peer evaluation and academic due process. In brief, when O'Toole declares that "almost all universities now provide elaborate due process... for faculties," he is correct only because almost all universities maintain a tenure system....

I reserve for the last the most serious misstatements of the O'Toole article. These are the several arguments that suppose that external law has buttressed the academic freedom of faculty members and supplied due process safeguards sufficient to dispense with a tenure system. Again, O'Toole is mistaken. Rather, courts are generally available (to those with the money and leisure time to wait) only to ensure that institution shall in fact do what it has specified. Even at the highest level of law, constitutional law, this is the situation.

Thus only when an institution operates a tenure system—when its faculty is not subject to the revolving door of term contracts, each of which is wholly new—can effective judicial recourse be secured if the institution reneges on its promise. Where no rebuttable presumption of fitness has been established regardless of the length or excellence of faculty service, when no promise has been made to terminate the faculty only for such cause as may be shown in a fair intramural hearing, there is perforce nothing to hope for from the courts. In brief, what you see is, in general, what you get. Courts may enforce the procedural safeguards of tenure; they do not, however, invent them. O'Toole is seriously mistaken in supposing otherwise....

William W. Van Alstyne is professor of law at Duke University, the position he held when he wrote this article. He is also a former president of the American Association of University Professors.