Book Review. Byse, C., and Joughin, L., Tenure in American Higher Education

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http://www.repository.law.indiana.edu/facpub/1629
It might be supposed by the uninitiated that the academic community, since presumably it is composed largely of highly intelligent and competent persons, would long since have provided itself with definite institutional arrangements in colleges and universities to insure, so far as formal arrangements can, sound solutions to the more difficult problems of academic administration. The actual state of affairs is quite different. The distribution of authority among trustees, administration, and faculty is often quite poorly defined. As the book under review shows, this condition of indefiniteness extends at most institutions to provisions for the tenure of faculty members. No subject is more important to sound educational processes, because freedom of teaching and research depend on security against threats to the livelihood of faculty members. The authors justly emphasize that:

Academic freedom and tenure do not exist because of a peculiar solicitude for the human beings who staff our academic institutions. They exist, instead, in order that society may have the benefit of honest judgment and independent criticism which otherwise might be withheld because of fear of offending a dominant social group or transient social attitude.¹

The reasons for poor institutional arrangements surrounding tenure lie to some extent in pure neglect, similar to that which some lawyers are charged with displaying in relation to their personal legal affairs, and to some extent in the reluctance of many boards of trustees to share their authority with faculties. Also operative, however, is the fact, to which Messrs. Byse and Joughin perceptively point, that there are “customs of fraternal association” and a “sense of community of scholarship” that “are present in some degree on every campus” and cause faculty members to “feel themselves well protected even in the absence” of formal protections to tenure.²

The authors, who are respectively Professor of Law at Harvard University and Staff Associate of the American Association of University Professors, are well qualified by present position and past experience to appraise tenure conditions on college and university campuses. Their book is a pioneering effort; for academicians, beside neglecting to construct adequate organizational arrangements in their institutions, have, along with others, omitted to conduct research into the tenure problem. This book records the results of a survey of tenure regulations and practices in the colleges and

¹. P. 4.
². P. 52.
universities of Pennsylvania, Illinois, and California. The sampling in this study, relative to the country as a whole, is small; but there is no reason to believe that the data are not typical of circumstances throughout the nation. To their summary of the situation thus disclosed the authors add discriminating critical judgments, a chapter on tenure and law, and a set of conclusions and recommendations. Appendices set forth the questionnaire that was used, give basic information about the institutions studied, and reproduce some of the principal documents in which national standards for academic freedom and tenure have been stated.

After starting with a larger number of institutions, the authors narrowed their tabulation and analysis to eighty universities and standard four-year colleges, including "most of the institutions which would generally be regarded as of major stature." Among these, recognition in some manner of academic tenure for faculty members (i.e., permanent tenure, subject only to dismissal for cause and possible reduction of force in a financial emergency) is all but universal. Tenure is typically conferred after an evaluation of qualifications, upon completion of some years of probationary service and, in some institutions, attainment of a given rank (typically associate professor). One-fourth of the institutions studied maintain no definite procedure for the bestowal of tenure, and two-thirds of them make no specific provision for invoking faculty, as distinguished from administrative or trustee, judgment in the process. Less than one-half of the institutions provide any means for a faculty member to seek review of a decision not to confer tenure, a decision ordinarily involving termination of services. For the most part, the probationary faculty member is assured of no more than some kind of action at a stated time by administrative superiors.

When it comes to termination of tenure for cause, fifty of the institutions studied maintain some kind of specified procedure; but in most instances many of the elements of due process in the legal sense, such as adequate notice of charges, right to counsel, confrontation and cross-examination of adverse witnesses, and right to a record of the proceedings, are not specified. Forty-six of the colleges and universities provide opportunity for a hearing by some kind of group before a dismissal becomes final. In twenty-one institutions faculty committees conduct the initial hearing; but in thirteen the right of participation by professional colleagues in dismissal proceedings is not secured. In twelve others faculty members are included on mixed hearing committees. The authors advocate independent faculty determinations in such cases, leading to final trustee action. As the authors recognize, dismissal cases arise rather infrequently. When they do arise, practice may be better than the published regulations indicate; but over the years there have been shortcomings, to which

the American Association of University Professors has felt compelled to give publicity, in a considerable number of instances. 4

The review of legal authorities contained in the book discloses that academic tenure at present has only a precarious foothold in the law. Hence a legal remedy for a wrongful dismissal may not be available. The power of boards of trustees to limit the authority bestowed upon them by statute or corporate charter, by making defined procedures and proof of stated causes a prerequisite to dismissals, has been denied in a number of leading decisions. Other decisions have sustained the validity of by-law provisions that declare that safeguards to tenure, contained elsewhere in the by-laws, shall not have legal force. Some decisions, on the other hand, have held by-law protections of tenure to be binding on public institutions that have adopted them, or to be valid provisions of employment contracts in private institutions. The authors advocate the view taken in the latter decisions. They further argue that decisions to dismiss, following observance of prescribed procedures, should be subject to a judicial check in contract actions or proceedings to review administrative decisions, and that this judicial check embrace a determination of whether conclusions of fact are sustained by the weight of the evidence. They concede, however, that the “need for substantially independent judicial review will be diminished in proportion to the extent to which the tenure plan [in an institution] vests final decisional power in termination cases in members of the faculty having tenure and provides for full procedural safeguards.” 5 Since “final” power can hardly be vested in faculty members, the concession may be a minor one; but if the meaning is that judicial review may properly be limited when a board of trustees has accepted a faculty determination, it gives adequate recognition to desirable institutional autonomy in such matters.

The final chapter of the book contains important conclusions and recommendations with regard to tenure policies. Most of these are eminently sound and accord with the practice recommended by such organizations as the American Association of University Professors and the Association of American Colleges. 6 Only minor ones are subject to disagreement by persons who subscribe to the values of academic tenure. The essential point is that stated criteria for acquisition of tenure and for dismissal, coupled with prescribed safeguarded procedures in making both sets of determinations, are necessary to healthy academic institutions. It is high time that the by-laws of colleges and universities embody this policy universally.

In developing the current facts and articulating the need that is demonstrated, the authors have performed a signal service, as the book's foreword

5. P. 110.
by Robert K. Carr emphatically states. One might take exception to a few of the detailed conclusions and even to the fact that the book depicts the individual faculty member as weaker vis-à-vis his institution than he sometimes is; but the value of the authors' work is not significantly affected by these aspects of it. For lawyers the work has the added merit of setting forth beautifully the interrelation of institutional and legal factors in an important area of human affairs.

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This substantial volume, not prescribed for light reading, is a by-product of the Columbia University Research Project on Joint International Business Ventures. The director of the Project, Professor Wolfgang G. Friedmann, with the assistance of Mr. Pugh, has gathered together these original studies summarizing the legal conditions of foreign investment in forty countries, all of them except Yugoslavia drawn from the non-communist world. The studies are written by distinguished authorities, most of them residents or citizens of the countries concerned. Generally speaking, the studies are similar in form and subject matter, presumably because the editor wisely urged his authors to confine themselves to matters of real practical interest. For each country included the reader will find a concise discussion of such items as the status of foreign persons and legal entities, exchange control, taxation, labor regulations, forms of business organization, classification of shares and loans, and protection of minority interests. The studies provide tentative answers to the basic legal questions that must be resolved at the outset by a business enterprise or financial institution considering an investment abroad: Is the particular economic activity open to foreigners, and if so is local participation legally required? Is government consent necessary to the entry of foreign capital?

7. P. 54. The teacher, who is here described as "without power," may in some instances possess the weapon of threatened publicity, which the administration of the institution may be concerned to avoid.

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2. Member of the New York Bar.

3. Argentina, Australia, Austria, Belgium, Brazil, Burma, Canada, Chile, Republic of China, Colombia, Cuba, Denmark, Finland, France, Greece, India, Indonesia, Iran, Israel, Italy, Japan, Korea, Mexico, Netherlands, Norway, Pakistan, Philippines, Portugal, Union of South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, United Arab Republic, United Kingdom, United States, Venezuela, West Germany, Yugoslavia.