

# ACADEMIC FREEDOM AND POST-TENURE REVIEW: ECONOMIC MOTIVATION

David A. Dilts, Indiana - Purdue University - Fort Wayne  
Hedayeh Samavati, Indiana - Purdue University - Fort Wayne

## INTRODUCTION

Tenure is the first quest of neophyte professors. Tenure is typically bestowed on a new faculty member after some defined demonstration of excellence in teaching and research over some specified period of time, normally seven years. Committees of peers at several levels (the department, the college, and the university) generally make recommendations concerning the candidates' case for tenure to relevant administrators, who, in turn, make a recommendation to some governing body, i.e., Board of Regents, Trustees or Supervisors (depending on the institution) which has the authority to bestow tenure.

Tenure is defined as:<sup>1</sup>

A status afforded to a teacher or professor as a protection against summary dismissal without sufficient cause; this status has long been considered a cornerstone of academic freedom.

Notice that this definition of tenure has as its foundation the protection of academic freedom. No discussion of tenure occurs without some mention of academic freedom. In Western Traditions, tenure evolved from the need to protect scholarship, hence faculty members, from arbitrary and capricious exercises of

that were the patrons of universities.<sup>2</sup> The fact that governments and churches have agenda that differ from free and independent scholarship often creates tension. Academic authority, if in the hands of authorities other than scholars, may result in the abuse of professors simply for publishing "unpopular" results – hence the need for tenure to protect the independence of scholars from extraneous authority. The driving force behind the tenure system, therefore, may be seen by political authorities and church officials as a limitation on their discretion to operate the university.

When the academic institution is a public university, complications arise that are not present for private schools. Richard Posner describes the practical, legal effects of tenure in public institutions:<sup>3</sup>

The next line of cases, which also proceeds from the unexceptionable premise that the Constitution forbids government to deprive a person of property without due process of law, holds that teachers and other public employees with tenure contracts – contracts that forbid arbitrary discharge – have a property right in their jobs so that if they are fired without a hearing their constitutional rights have been violated. The use of the term "property right" in these cases is not conventional. Tenure

authority from the governments and churches

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1. Bryan A. Garner, ed., *Blacks Law Dictionary, pocket edition*, St. Paul, Minn: West Publishing Group, 1996, p. 622.

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2. See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, originally published 1776, reprinted New York: Modern Library, Cannan Edition, 1937, pp. 715-735.

3. Richard Posner, *Economic Analysis of Law*. Boston: Little Brown and Company, 1986, p. 597.

is a contract right, not a property right. The opposite of tenure is not an employment contract but employment at will – employment with no contractually guaranteed and legally enforceable safeguards against termination.

The purpose of this paper is to examine the recent phenomenon of “post tenure review” in universities in the United States. There are economic motivations for post-tenure review which are of significance and these motivations will be examined before proceeding to an investigation of the adoption and the nature of post tenure review processes currently in evidence in the United States.

## ECONOMIC MOTIVATION FOR POST-TENURE REVIEW

Richard Posner offers an analysis of what one might expect the effects of tenure to be on compensation levels for those individuals who hold positions which specify some sort of tenure arrangement. Posner observes:<sup>4</sup>

.. If a public employee who has tenure is fired, he can sue the state under the state contract law. And if the state does not give a fired public employee decent legal remedies for breach of the tenure term of the employment contract, then wages for public employee will be higher than they would be if there were such remedies. If the remedies would cost less than the wage premium that must be paid to compensate for their absence, the state will have an incentive to create such remedies....

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4. Posner, p. 597.

In other words, Posner postulates that there is a negative wage differential between jobs having tenure and those not having tenure. In other words, tenure has a pecuniary value. Further, that states would have to pay a higher wage in the absence of tenure, therefore they have an incentive to enact statutes that provide for remedies should the faculty members' tenure rights be denied – hence creating value for tenure. If Posner's postulates are correct then there very well could be an economic incentive for public authorities (i.e., states) to create post-tenure review and other methods to avoid such employment rights.

Gone are the heady days of the 1960s and 1970s when there was a shortage of Ph.D.s in virtually all fields, and the rapidly expanding enrollments in colleges and universities that were being driven by draft deferments and an expanding middle class with the financial ability and aspirations to send their children to college. This changing market for academics may easily provide an avenue to avoid the remedies / tenure-non-tenure wage differential comparison of which Posner writes. Why hire persons on in a tenure track position, if there is an excess supply of qualified instructors or professors in the academic labor market? One can avoid the legal remedies for violation of tenure contracts, by simply taking advantage of what consumer surplus may exist in the academic labor market and hire as many professors as possible without offering tenure.

There are several strategies available to avoid the costs of tenure. The hiring of instructors in positions which are not tenure eligible is just one of these strategies, if there is an excess supply of professorial labor. The American Federation of Teachers complain that tenure track positions are disappearing in the United States:<sup>5</sup>

These are the facts.

– While the total number of full-time faculty grew marginally and slowly – 49

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5. American Federation of Teachers, *The Vanishing Professor* [www.aft.org/pubs-reports/higher](http://www.aft.org/pubs-reports/higher), 1999, p.2

percent between 1970 and 1995 (2 percent per year) – the number of part-time faculty has increased dramatically, 226 percent (10.6 percent per year) over the same period. At this rate, part-time faculty will outnumber full-time by the academic year 2001.

In support of the AAUP's observation is the fact that many academic labor markets seem to have increasingly large segments which focus on temporary or non-tenure positions. For example, the American Economics Association publishes Job Openings for Economists, for the four months (November and December 2004 and February and March 2005) which constitute the heart of the academic job market for economists, three hundred jobs were available for academic economists. Rather than the nearly one-hundred percent of those jobs being tenure track jobs as was the case in the 1960s and 70s, fifty-four, or 18 percent of the 2004-05 available jobs were non-tenure track.<sup>6</sup> This is not as dramatic a development as the AAUP claims, but clearly this large percentage of non-tenure positions is something new.

It is also interesting to note that there is a monetary incentive for institutions to substitute non-tenure track personnel for tenure track faculty. The Association to Advance Collegiate Schools of Business publishes an Annual Salary Survey.<sup>7</sup> This Survey reports that the percentage of non-tenure track instructors has remained essentially constant from 2001 to 2004 at approximately 81 percent of all instructors being non tenure track. For Professors this percentage has edged up slightly from 1.9 percent in 2001 to 2.1 percent in 2004. For Associate Professors this percentage of non-tenure track positions has gone from 2.6 percent in 2001 to 3.7 percent in 2004. For Assistant Professors it was 9.1 percent in 2001 and increased to 9.3 non tenure track in

2004. This data suggests that the percentages of non-tenure track faculty is increasing over time recently.

Table 1 presents salary information for each of the academic ranks for 2004 and the percentage change from 2003.<sup>8</sup> These data show that instructors make salaries that are approximately half of what Professors make, which is a powerful pecuniary incentive to substitute instructors for professors, if the generation of credit hours is all that constrains the administration. It is also interesting to note that there is considerable salary compression between the Associate Professor and Assistant Professor ranks, which is not in evidence elsewhere in the salary structure.

The next question is whether there exists the wage differential between tenure and non-tenure employment as postulated by Posner. Seigfried and Stock updated their 1999 study of the labor market for economists,<sup>9</sup> for the American Economics Association in 2002.<sup>10</sup> The evidence reported by Seigfried and Stock that suggests there is not a large wage differential between academic positions (with tenure contracts) and business, government, and research organizations (without tenure contracts).

They report that 12 month contracts in academe averaged approximately \$91,300, whereas in business the average salary was \$97,000; but in government and research organizations the wage differential favored academic economists, where the average salaries were only about \$82,300.

If Posner's postulate is correct, then the remedy imposed by the courts for the violation of a professor's tenure contract is rather small. The remedy would need to be sufficient to cover approximately \$5,700 per year over the remaining life the professor's career discounted back to present value. This suggests that tenure has little

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6. *Job Openings for Economists*, New York: AEA, 2004, 2005, for the months of November and December 2004 and February and March 2005.

7. *2004-2005 Salary Survey Executive Summary*. St. Louis, Missouri: AACSB, December 2004.

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8. Ibid.

9. John J. Seigfried and Wendy A. Stock. "The Labor Market for New Ph.D. Economists." *Journal of Economic Perspective*, Summer 1999 Vol. 13, No. 3, pp. 115-34.

10. John J. Seigfried and Wendy A. Stock. "The Labor Market for New Ph.D. Economists in 2002." [www.aeaweb.org/joe/articles2004](http://www.aeaweb.org/joe/articles2004)

value in a court of law – tenure for a twenty year career being valued someplace in the order of \$90,000. Therefore, tenure does not appear to have much of a pecuniary barrier to states passing tenure review statutes and private institutions imposing such processes on their employees.

## POST TENURE REVIEW

There is a substantial debate about the value of post-tenure review. As would be expected, post tenure review is a controversial issue. There are those who perceive any move towards any type of evaluation is potentially a limitation on academic freedom. On the other hand, there are those who are highly critical of the performance of colleges and universities in the United States, and wish to have greater professorial accountability.

The AAUP has been an outspoken critic of Post Tenure Review in U.S. colleges and universities. The AAUP's position is:<sup>11</sup>

The Association believes that periodic formal institutional evaluation of each postprobationary faculty member would bring scant benefit, would incur unacceptable costs, not only in money and time but also in dampening of creativity and of collegial relationships, and would threaten academic freedom.

On the other hand, an organization which represents the administration of universities has a little different perspective. The Association of American Universities has take the position that:<sup>12</sup>

In contrast to the reservations about Post Tenure Review expressed by AAUP, a number of universities believe that their Post Tenure Review procedures have produced clear benefits ranging from improving the quality of faculty

performance to building support with the governing boards for the tenure system.

There is precious little information published concerning exactly how many universities have adopted or are considering post-tenure review procedures. The Association of American Universities concludes:

“That Post Tenure Review is so dominantly a phenomenon of public universities may suggest that in many case Post Tenure Review policies are developed in response to pressure from state legislators or publicly appointed or elected governing boards.”<sup>13</sup>

This situation seems to be consistent with the prescriptions found in the writings of Richard Posner, cited above, that suggests that there is an economic motivation for post tenure review, and those incentives are most often found in the public sector.

It appears that the most comprehensive survey of academic institutions concerning their post-tenure review policies was conducted by the University of North Carolina, in conjunction with the development of their own post tenure review process.<sup>14</sup> This report reviews the literature and reports that post tenure review is not universally required in colleges and universities in the United States:

Although faculty undergo evaluation for many purposes, it is nevertheless true that systematic, regular post-tenure review of cumulative faculty performance across a number of years is not universally required by universities.

Three recent studies show evidence that such reviews are being widely considered nationally. The first showed that 69 percent of 280 responding institutions were in the process of changing traditional tenure (Trower, 1996).<sup>15</sup> Of

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11. Post Tenure Review: An AAUP Response. Report endorsed by AAUP membership at their 1999 Annual Meeting.

12. AAU Report on Post Tenure Review, April 10, 2001, Association of American Universities.

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13. Ibid.

14. University of North Carolina, Post Tenure Review Report, March 3, 1999.

15. C.A. Trower, “Tenure Snapshot.” American Association of Higher Education, Washington, D.C.:

those, twenty-nine percent were implementing post-tenure review procedures. A second study of 680 public and private institutions showed that 61 percent of those responding reported that they had post-tenure review procedures in place, while another 9 percent reported that they had a policy under development (Harris, 1996).<sup>16</sup> A third inquiry found that post-tenure review is either in the discussion or implementation stage in public institutions in 28 states (Licata, 1996).<sup>17</sup>

The available evidence also shows that the nature of these post-tenure review policies varies widely.<sup>18</sup> These processes generally fall into one of two categories: (1) summative post tenure review, and (2) formative post tenure review. The summative processes, generally involve assessment of performance for the purposes of taking some personnel action, i.e., salary adjustment to loss of employment. The formative process, according to Goodman:<sup>19</sup>

Few studies compare the models of post-tenure evaluation adopted across the country. Bernard Reisman of Brandeis surveyed twenty-six colleges and universities, none of which had a program of post-tenure review. In three of the nine, Earlham, Franklin and Marshall and U.C.L.A., the evaluation was of the "formative" type, not tied to salary review. The responses from the faculty and administrators surveyed indicated that these reviews were about twice as effective in improving tenured faculty performance in teaching, research

and service than in the six institutions where the review was focused on salary adjustment.

The purpose of formative post tenure review is to provide input into ongoing faculty development. However, summative post tenure review is a much more threatening process with real implications for salary adjustments, and the continuation of a faculty member's tenure. It is clear that there has been very little research concerning the effectiveness of the post-tenure review processes that have been adopted and whether formative or summative post tenure review is more effective in assuring quality of educational and research activities.

## CONCLUSIONS

Within the law and economics paradigm Richard Posner suggests that there is a theoretical relationship that exists between compensation levels and tenure contracts. The available evidence shows that where there is a negative salary differential between jobs with tenure and without tenure, the differential does not suggest that tenure will be highly valued in the courts.

The available evidence suggests that tenure review processes occur most commonly in state supported universities. This suggests that the public universities may suffer more from the tensions between academic freedom and politics than private institutions. There is also a paucity of research concerning the characteristics, location, and union status of the institutions that have adopted post tenure review processes.

The record also shows that there are two different types of post tenure review processes. These two types of post tenure review processes are formative and summative reviews. The formative reviews focus on faculty development, while the summative reviews are used for personnel action purposes, including salary adjustments and tenure continuation decisions. There are few reported studies concerning the efficacy of these processes, but what evidence exists suggests that formative post tenure review

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New Pathways Project, Working Paper No. 2 (1996).

16. B.J. Harris, "The Relationship between and Among Policy Variables, Type of Institution, and Perceptions of Academic Administrators with Regard to Post-Tenure Review" Unpublished doctoral dissertation, West Virginia University, Morgantown, West Virginia, 1996.

17. C. Licata and J. Morreale, "Post-tenure Review: Policies, Practices, Precautions" American Association of Higher Education, Washington, D.C.: New Pathways Project, Working Paper No. 12 (1996).

18. Madeleine J. Goodman, "The Review of Tenured Faculty: A Collegial Model," *Journal of Higher Education*. Vol 61, No. 4 (July/August 1990), pp. 408-24.

19. Goodman, p. 410.

has been effective in improving faculty performance.

As should be evident from the research reported here, considerably more research needs to be done concerning the various aspects of post tenure review, including the economic motivations for the adoption of such processes.

Table 1: Salary by Rank from AACSB Survey

Economists	Mean 2004	Percentage Change from 2003
Professor	\$104,200	4.6
Associate Professor	76,000	4.3
Assistant Professor	71,500	4.4
Instructor	50,500	4.8
All Fields in Business		
Professor	\$113,700	4.4
Associate Professor	90,100	4.5
Assistant Professor	87,900	4.1
Instructor	53,700	5.3