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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

Brief In Support Of Petition For A Writ Of Certiorari Of The Board Of Governors Of State Colleges And Universities Of Illinois, The Board Of Regents Of Regency Universities Of Illinois, The Board Of Trustees Of Southern Illinois University, The American Association Of State Colleges And Universities, The American Council On Education, The Association Of American Colleges And The National Association Of State Universities And Land-Grant Colleges As Amici Curiae.

INTEREST OF THE AMICI CURIAE

The amici are national associations whose members constitute almost all of the colleges and universities in the nation, public and private, and public boards administering colleges and universities in Illinois.

The American Council on Education is the nation's largest association of colleges and universities. Its membership includes 1,343 institutions of higher education and 213 national and regional associations and 83 affiliated institutions and organizations concerned with higher education in the United States. The American Association of State Colleges and Universities has a membership of 275 state colleges and universities enrolling approximately 1.8 million students. The Association of American Colleges has a membership of 893 colleges which includes all private liberal arts colleges in the United States as well as several public liberal arts colleges. The National Association of State Universities and Land-Grant Colleges has a membership of 114 public colleges and universities. The public boards are the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, and the Board of Trustees of Southern Illinois University.

Because this case questions customary practices at approximately 1080 public colleges and universities in the United States, with almost 300,000 faculty members and 6,000,000 students, the *amici* have submitted this brief in support of the petition for a writ of certiorari. The petitioners and respondent have consented to the filing of this brief.

The opinions of the courts below, jurisdictional statement, statement of the question presented, statutes involved, and statement of the case are contained in the petition.

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Court Of Appeals Disturbs The Operation Of The Tenure System In Effect At Almost All State Colleges And Universities.

The court of appeals held that, whenever a probationary faculty member is not tendered a contract for a forthcoming academic year, he is constitutionally entitled to a statement of reasons and a hearing to establish that the true reasons for not tendering the contract were improper or that the stated reasons were arbitrary.

For many decades, almost all American colleges and universities* have operated under a tenure system which provides that notice and a hearing be afforded only to those faculty members who have been granted tenure. *Developments In the Law-Academic Freedom,* 81 Harv. L. Rev. 1045, 1100-01 (1968). As in the instant case, many of the state college tenure systems are created by statute. In most states, tenure systems exist pursuant to rules and regulations duly adopted by the college's governing board.

Prior to achieving tenure, a college instructor serves in a probationary status, usually pursuant to an annual contract, for a limited number of years, during which a college customarily may fail to renew his contract without affording him a statement of reasons and a hearing. 81 Harv. L. Rev. at 1090-91, 1101. In contrast, once an instructor gains tenure, he may be removed only for cause

* Hereinafter, "college" shall be used to refer to both colleges and universities.

upon written charges and after a hearing. 1 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States* 971 (3rd Ed. 1967).

The tenure system is intended to protect the instructor's academic freedom by preventing punitive discharges and requiring that proper cause be shown prior to discharge. At the same time, the tenure system recognizes the objective of high-quality education by permitting the college to observe and evaluate the instructor in the probationary period before he receives the security afforded by tenure. The tenure system protects academic freedom as well as academic excellence and strikes a balance between both these important goals.

Although the court of appeals purported to preserve the distinction between probationary and tenured faculty members, it awarded to probationary faculty members notice and hearing rights customarily reserved to tenured faculty. Whether the "prophylactic" procedures contemplated by the court of appeals would help to protect probationary instructors' rights is doubtful. (See dissenting opinion of Judge Duffy, App. 211). Even so, the need for hearings would burden college faculty and administrators and would thus interfere with a college's ability to assure quality education to its students.

The men and women who must make contract renewal and tenure decisions may be inclined to grant tenure by default rather than face the added administrative burdens imposed by the court of appeals' decision. This is no idle fear. Most colleges place initial responsibility for these personnel decisions in the hands of committees composed of the instructor's academic colleagues. These academicians by and large are preoccupied with their own teaching and research and are not inclined to relish the handling of

dossiers, preparation of administrative memoranda, and attendance at numerous hearings and business meetings. Abrogation by college personnel of their traditional evaluative functions would result in the grant of tenure to many otherwise inappropriate instructors. Sooner or later an intolerable strain would be placed on the tenure system, as pressure mounted to rid the faculty of instructors who should not have been granted tenure in the first instance. The protection to academic freedom once afforded by tenure will have been weakened.

Therefore, the issue in this case is not whether academic freedom should be protected, but whether the means adopted by the court of appeals will protect or harm that freedom. The tenure system involves compromises that have emerged over time amidst the realities of college life. It cannot be assumed that the system will cease to evolve. The state authorities who have responsibility for higher education should be left free as they have been in the past to develop techniques for maximum protection of faculty freedoms, while insuring academic excellence. The increased federal authority over the day-to-day affairs of state colleges which is countenanced by the court of appeals promises to harm, not enhance, academic freedom.

The decision below upsets the delicate balance which the tenure system has maintained between protecting academic freedom and assuring academic excellence.

This Court should grant the petition for a writ of certiorari and review a decision which tampers with a successfull and ongoing system at the cornerstone of First Amendment freedoms.

II.

The Decision Of The Court Of Appeals Conflicts With The Decisions Of All Other Circuits Which Have Considered The Constitutionl Rights Of Probationary Instructors.

The Seventh Circuit is the only circuit to grant the right to a statement of reasons and a hearing to a probationary instructor in every case in which the instructor alleges improper or arbitrary non-retention. Furthermore, the other circuits which have considered the question are not completely in agreement.

The Fourth, Sixth, Eighth and Tenth Circuits have held that non-tenured instructors are not entitled either to a statement of reasons or to a hearing. *Parker* v. *Board of Education of Prince George's County, Md.*, 237 F.Supp. 222 (D. Md. 1965), *aff'd per curiam*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966); *Orr* v. *Trinter*, No. 20721 (6th Cir., June 16, 1971); *Freeman* v. *Gould Special School Dist. of Lincoln County, Ark.*, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969); *Jones* v. *Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1969), followed in *Schultz* v. *Palmberg*, 317 F.Supp. 659 (D.Wyo. 1970).

The Fifth Circuit has held that, at institutions lacking a tenure system where all instructors are indefinitely employed pursuant to annual contracts, the instructor has the right to a hearing with a prior statement of reasons if he has an *expectancy* of reemployment. *Ferguson* v. *Thomas*, 430 F.2d 852 (5th Cir. 1970); *Lucas* v. *Chapman*, 430 F.2d 945 (5th Cir. 1970); *Sindermann* v. *Perry*, 430 F.2d 939 (5th Cir. 1970), *cert. granted*, 39 U.S. L.W. 3548 (June 14, 1971). However, at institutions having a tenure system, a non-tenured, *probationary* instructor, such as respondent, is not considered by the Fifth

Circuit to have an expectancy of reemployment and is not routinely entitled to a hearing upon request if his contract is not renewed. *Thaw* v. *Board of Public Instruction of Dade County, Fla.,* 432 F.2d 98 (5th Cir. 1970).

The First Circuit has held that, although a non-tenured, probationary instructor has a right to a statement of reasons, he is not entitled to a hearing. *Drown* v. *Portsmouth School District,* 435 F.2d 1182 (1st Cir. 1970), *cert. denied,* 39 U.S.L.W. 3511 (May 17, 1971).

Therefore, to date, decisions in these seven circuits have led to at least four inconsistent rules of law governing the procedural due process rights of non-tenured instructors. The *amici,* which include among them four national associations of institutions of higher learning, urge this Court to grant the petition for a writ of certiorari to put an end to this harmful conflict of authority.*

III.

This Court Has Granted Certiorari In The Case Of Perry v. Sindermann, Which Poses A Related But Distinct Question, And The Perry Case Should Be Considered Together With This Case.

On June 14, 1971, this Court granted certiorari in the case of *Perry* v. *Sindermann,* No. 70-36. Respondent in-

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* Contrary to the First, Fifth and Seventh Circuits, and in agreement with the Fourth, Sixth, Eighth and Tenth Circuits, the highest courts of the states of Missouri and Massachusetts have recently held that a non-tenured instructor does not have a constitutional right either to a statement of reasons for the non-renewal of his contract or to a hearing to respond to those reasons. *De Canio* v. *School Committee of Boston,* 260 N.E. 2d 676, 681 (Mass. 1970), *cert. denied,* 91 S.Ct. 925 (1971); *Williams* v. *School Dist. of Springfield R-12,* 447 S.W. 2d 256, 270 (Mo. 1969).

structor in the *Perry* case was employed at a junior college which did *not* have a tenure system. Instead, instructors at that institution were non-tenured, non-probationary instructors, indefinitely employed pursuant to annual teaching contracts, who could never obtain the security of tenure. The Fifth Circuit held that, if non-tenured, non-probationary instructors can show that they have an expectancy of reemployment, they are entitled to a hearing with a prior statement of reasons. *Sindermann* v. *Perry*, 430 F.2d 939 (5th Cir. 1970).

However, respondent Roth, like most college instructors in the United States, was employed at a college with a tenure system. His annual contract was not renewed past his first year of employment. The Fifth Circuit has held that a probationary instructor at a school with a tenure system, such as respondent, is not routinely entitled to the procedural rights which it granted in *Perry* to instructors at schools without tenure systems. *Thaw* v. *Board of Public Instruction of Dade Co., Fla.*, 432 F.2d 98 (5th Cir. 1970).

The *amici* respectfully suggest that this Court grant the petition for a writ of certiorari and consider the instant case together with *Perry* v. *Sindermann*. If this Court were to consider the *Perry* case alone, dealing with a junior college which lacks a tenure system, confusion might persist among the overwhelming majority of colleges which have tenure systems. Even if this Court were inclined to require colleges without tenure systems to provide reasons and a hearing, the *amici* suggest that colleges with tenure systems should not be required to do so. The procedural rights of probationary instructors should be finally determined by this Court so that all colleges can fashion personnel practices within the same constitutional rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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