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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 Of The American Council On Education, The American Association Of State Colleges And Universities, The Association Of American Colleges, The National Association Of State Universities And Land-Grant Colleges, The Board Of Governors Of State Colleges And Universities Of Illinois, The Board Of Trustees Of The University Of Illinois, The Board Of Regents Of Regency Universities Of Illinois, And The Board Of Trustees Of Southern Illinois University, As Amici Curiae.

INTEREST OF THE AMICI CURIAE

The *amici curiae* are national associations whose members constitute almost all of the colleges and universities in the nation, public and private, and boards administering all public 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, 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 288 state colleges and universities enrolling approximately two 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 Trustees of the University of Illinois, the Board of Regents of Regency Universities of Illinois, and the Board of Trustees of Southern Illinois University.

The *amici curiae* have submitted this brief because they believe that the decision below, while intending to protect the academic freedom of probationary instructors, unwittingly threatens academic freedom and academic excellence.

The petitioners and respondent have consented to the filing of this brief.

ISSUE PRESENTED FOR REVIEW

Does the Constitution require a public college having a tenure system to give a statement of reasons and a hearing upon demand to every probationary college instructor whose teaching contract is not renewed beyond its expiration when no such right is provided by statute, regulation, contract or academic custom or practice, or rather should public colleges be left free from federal court intervention in fashioning changes in the tenure system?

STATEMENT OF THE CASE

The *amici curiae* rely on the statement of the case contained in the brief for the petitioners.

SUMMARY OF ARGUMENT

A public college cannot refuse to renew a probationary instructor's contract in violation of his First Amendment or other substantive constitutional rights. Concern for the protection of substantive constitutional rights prompted the courts below to require public colleges to afford a hearing with prior notice upon request to any probationary instructor whose teaching contract is not renewed.

The tenure system, which has evolved over several decades and exists at almost all public colleges, has included a probationary or testing period during which the contract of a probationary instructor has customarily been permitted to expire without a hearing and notice of reasons. The decision below endangers the interdependent objectives of the tenure system: academic excellence and academic freedom.

The hearing conceived by the courts below would be ineffective in protecting substantive constitutional rights. Whether or not effective, a hearing would burden college faculty and administrators and would interfere with their duty to strive for quality education. Any hearing which is effective would obliterate the distinction between tenured and probationary faculty. The ultimate effect of providing the hearing may well be to diminish the significance of the award of tenure, to the detriment of academic freedom.

This Court has stated that the Constitution "does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy,* 367 U.S. 886, 894 (1961). The courts below recognized the need in cases such as the present one to balance the public and private interests involved. The courts struck an improper balance.

The courts below sought to substitute their judgment for that of legislatures, governing boards and college administrators and faculty bodies across this nation to provide an unprecedented modification of the tenure system. This exercise in constitutional fiat lacks the benefit of years of trial and experience that went into the evolution of the present tenure system. In view of the central position of higher education in the scheme of our fundamental liberties of thought, inquiry and expression, it was error, and an insidious danger surely not contemplated by the courts below, so to exercise jurisdiction in the absence of a clear constitutional mandate.

ARGUMENT

Introduction

This case presents two questions of paramount importance to public higher education. The immediate question is whether the Constitution requires abandonment of the long-established practice that the decision not to retain a probationary faculty member need not be accompanied by a formal statement of reasons and a hearing. The other, and perhaps more worrisome, question is whether in the absence of clear constitutional violations federal courts should become involved in setting policy for the day-to-day conduct of affairs of public colleges and universities.*

One may think it ironical that in the view of the *amici curiae* a decision attempting to frame means for protecting First Amendment rights of college instructors would be seen as posing a threat to academic freedom.

The importance of academic freedom cannot be disputed. Colleges in this country cannot properly function unless they are havens of unfettered discussion. Free discussion and quality education are not mutually exclusive. Integral to quality education is the free presentation of competing ideas and controversial viewpoints. Quality education, in turn, invigorates public debate. Furthermore, colleges should provide a refuge where new concepts can be discussed and developed free from the social constraints which often inhibit discussion in the world of business and government.

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* As used hereinafter, the term "college" includes both colleges and universities.

To protect free discussion and quality education, a system of tenure has evolved over several decades. The *amici curiae* believe that the decision below is a serious threat to the tenure system which has been the repository of these important values.

I. THE TENURE SYSTEM PROTECTS ACADEMIC FREEDOM AND ACADEMIC EXCELLENCE.

A. The Present Tenure System.

Almost all institutions of higher education in the United States confer some measure of tenure, either under a formal plan or by established practice. C. Byse and L. Joughin, *Tenure in American Higher Education: Plans, Practices, and the Law* 9 (1959). The tenure system in effect at Wisconsin State University, Oshkosh, is typical of college tenure systems in the United States. See *Developments in the Law-Academic Freedom,* 81 Harv. L. Rev. 1045, 1086-1101 (1968). Affirmance of the decision below would appear to render unconstitutional practices presently followed by almost all colleges in the United States.*

Prior to achieving tenure, the instructor is in a probationary status, serving pursuant to a fixed-term contract. 81 Harv. L. Rev. at 1090. The college may not discharge the instructor during the contract term without a statement of reasons and a full hearing analogous to that afforded tenured faculty members. 81 Harv. L. Rev. at 1090-91,

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* Practices followed by public secondary and elementary schools would also be affected. Also, most state and federal civil service employees are hired initially in a probationary status and, while probationers, their employment may be terminated without reasons and a hearing. Presumably, the constitutionality of these civil service systems would be affected.

1101. However, a college may decide not to renew his contract without giving a statement of reasons or a hearing. 81 Harv. L. Rev. at 1090. Nonrenewal decisions are made by the faculty members of the instructor's department and by administrative officers. Notice of the nonrenewal decision is required well in advance of the expiration of the contract to permit the instructor to secure a new position with minimum personal inconvenience.

The probationary period is of limited length, and normally does not exceed seven years. *1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors and Association of American Colleges* in Academic Freedom and Tenure 33, 37 (L. Joughin ed. 1969, hereinafter referred to as Joughin). Prior to the end of the probationary period, the college must decide whether or not the instructor should be granted tenure. 81 Harv. L. Rev. at 1091. A decision not to grant tenure is ordinarily embodied in a notice of contract nonrenewal.

After achieving tenure, the faculty member may be removed only for cause. 1 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* 971 (3d ed. 1967). The tenured faculty member is entitled to a hearing with prior notice of the reasons which allegedly constitute cause. *1958 Statement on Procedural Standards in Faculty Dismissal Proceedings of the American Association of University Professors and Association of American Colleges* in Joughin 40. Only serious breaches of duty justify dismissal for cause.*

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* For examples of what constitutes adequate cause, see 1 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States,* 963 (3d ed. 1967) and *Developments in the Law-Academic Freedom,* 81 Harv. L. Rev. 1045, 1094-95 (1968).

In summary, a tenured member may be dismissed only for cause with a statement of reasons and a hearing, whereas a probationary member's contract may be permitted to expire, with adequate notice thereof, without cause and its attendant procedural requirements.

B. The Goals Of The Evolving Tenure System Are Academic Freedom and Academic Excellence.

Since tenure first appeared in American public schools in the 1880's, its objective has been "to protect the teachers against unjust removal after having undergone an adequate probationary period." *McSherry* v. *City of St. Paul,* 277 N.W. 541, 544 (Minn. 1938).

The protection afforded by tenure has several purposes, among them: (1) to prevent political control of schools; (2) to provide academic freedom for teachers; and (3) to prevent discharge of teachers for political, religious or other unjust personal reasons. *Teacher Tenure,* Journal of the National Education Association 194 (1934).

However, the academic community was concerned that tenure had the potential for breeding mediocrity since the award of tenure relieves the tenured member of competitive incentives. F. Machlup, *In Defense of Academic Tenure* in Joughin 306, 316-18. To remedy this problem, the tenure system has always included a probationary period, which usually does not exceed seven years. The seven-year period is longer than that generally found in tenure systems at lower levels of education and in civil service systems because at the college level it is both more exacting and more important to judge accurately the capabilities of the young teacher-scholar.*

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* For a discussion of the reasons for the length of the probationary period, see H. Wriston, *Academic Tenure,* 9 American Scholar 339, 344 (1940).

The tenure system has evolved over many years and has been adopted by the vast majority of colleges. R. Hofstadter and W. Metzger, *The Development of Academic Freedom in the United States* 480-90 (1956). However, experimentation continues among colleges in the United States. For instance, a few state colleges at present provide hearing rights to probationary faculty members whose contracts are not renewed. See *Toney* v. *Reagan,* 326 F.Supp. 1093, 1096 (N.D. Cal. 1971). The consequences of tenure for innovation and achievement among senior instructors is a subject of current, serious discussion. See *On Academic Tenure,* Harvard Today (Dec., 1971). Therefore, it would be erroneous to assume that the tenure system has ceased to evolve and is now static. Colleges have practical incentives for experimentation and for the adoption of modifications to the tenure system preferred by college instructors. Most important, colleges today are free to engage in this experimentation. However, if the decision below is affirmed, a uniform rule will be imposed on all colleges, and freedom to experiment will be limited by judicial fiat.

II. THE PROCEDURES ORDERED BELOW WILL NOT PROTECT FIRST AMENDMENT RIGHTS, BUT WILL BURDEN COLLEGE PERSONNEL.

The *in terrorem* argument has been advanced that hearing rights should be awarded to nonrenewed probationary instructors because there exists in this country a history of wholesale reprisals against teachers who have exercised their constitutional rights. See Brief of the National Education Association as Amicus Curiae in Support of the Respondent, *Perry* v. *Sindermann,* Supreme Court of the United States, No. 70-36 at 4-13. If indeed there are wholesale violations of

First Amendment rights in the academic community, then this country is in a deplorable condition that no hearing procedure ordered by this Court can possibly correct. In fact, in making nonrenewal decisions the vast majority of college administrators abide by the sound traditions of free discourse in the academic community. This Court must decide whether, in those few instances in which probationary instructors' rights were allegedly violated, the hearing ordered below would have served as a prophylactic and whether, on balance, it is wise for this Court to require every public college to afford a hearing upon demand to every probationary instructor whose contract is not renewed.

A. The Relief Ordered Below Is An Illusory Remedy.

"The heart of the tenure system is the requirement of specified cause for dismissal." *Developments in the Law-Academic Freedom,* 81 Harv. L. Rev. 1045, 1094 (1968); see *Freeman* v. *Gould Special School Dist.*, 405 F.2d 1153, 1159-60 (8th Cir. 1969), *cert. denied* 396 U.S. 843 (1969). In the instant case, the instructor contended that due process required the nonrenewal decision likewise to be based on definite and ascertainable standards. 310 F. Supp. at 982. The district court disagreed and admitted: "To accept the plaintiff's contention would be to erect a constitutional requirement even more severe than the showing of 'cause' now required by Wisconsin law in the case of tenured professors." 310 F. Supp. at 983.

The district court held that in reviewing the nonrenewal decision (as would not be true in the case of a tenured professor):

> ". . . the court will be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons." 310 F. Supp. at 979.

At the hearing ordered by the district court:

> "The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are *wholly inappropriate* as a basis for decision or that they are *wholly without basis in fact* would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact." (Emphasis added.) 310 F. Supp. at 980.

The district court was clearly correct in perceiving that the factors involved in evaluating an instructor are difficult to define with precision. This was recognized in a recent case which concerned an alleged improper denial of promotion:

> "A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards." *Lewis* v. *Chicago State College,* 299 F. Supp. 1357, 1359 (N.D. Ill. 1969).

The necessary imprecision of standards governing nonrenewal decisions and other similar personnel decisions is in sharp contrast to standards governing dismissal of a tenured faculty member for cause:

> "We do not entertain illusions concerning the effectiveness of machinery designed to strengthen the principles of academic freedom in matters not related to tenure. Even under ideal conditions, the standards applied to the selection of a scholar for a new appointment must be different from the standards applied in the termination of tenure. To be sure, competency and integrity ought to be the paramount criteria in either case. But there is no reliable way of separating a judgment of *comparative* competence and integrity

> from judgments of many other personal traits, social graces, congeniality, professional likemindedness; and undoubtedly, *comparative* evaluation is the basis of decisions on new appointments and promotions. This is not so, however, with regard to the termination of the tenure of a college or university teacher. In this situation the problem is no longer one of comparing different qualities of achievements, but of finding that certain *minimum* standards have not been met—that is, of finding that the incumbent is *incompetent* or *dishonest.* Such a finding can and should be subjected to certain procedural tests and these tests are the essence of tenure rules. *It would hardly be practicable or desirable to devise strict procedural tests for all the other possible questions in respect to which academic freedom may be violated.''* (Last emphasis added.) F. Machlup, *On Some Misconceptions Concerning Academic Freedom* in Joughin 177, 185-86.

Since comparative evaluation is frequently the basis of a decision not to renew an instructor's contract, which embodies a decision not to grant tenure, the already imprecise standards for nonrenewal become even more elusive. Although the nonrenewed instructor may be quite competent, the number of tenured slots may be limited, particularly in times of budgetary cutbacks, and another probationary instructor may be preferred. If the nonrenewed instructor were entitled to a hearing, the successful instructor would be his true adversary. Would the adversary be allowed to appear at the hearing to show that he is, in fact, better? His own job, after all, may be at stake. Likewise, the nonrenewed instructor may be evaluated in comparison to a prospective instructor from outside the college who may replace him. Is the job applicant entitled to a hearing if the offer to him is withdrawn? These are not hypothetical illustrations, but are day-to-day occurrences on college campuses.

This Court should not be under the illusion that the procedures ordered below will ferret out violations of First Amendment rights. An authoritative commentator has observed:

> "The difficulty of distinguishing between different reasons for 'noncontinuance' is well attested to by the experience with nonrenewals of contracts of nontenured teachers. It is rarely possible to prove that the decision not to renew a contract was influenced, let alone determined, by some offensive or embarrassing publications or utterances of the teacher concerned. As a matter of fact, the persons who make the decision may themselves not know what motivates them: do they judge him to be a poor teacher, do they dislike him as a person, or do they dislike what he wrote or said?" F. Machlup, *In Defense of Academic Tenure* in Joughin 306, 329-30.

The courts below, despite these impediments, forged ahead to impose a crazy-quilt procedure quite unprecedented in Anglo-American jurisprudence: a hearing conducted by an agency in which there are no "ascertainable standards" against which to weigh the evidence and in which the agency will prevail unless it has acted "wholly without basis in fact," the factual basis to include subjective animadversions of members of the agency. The hearing would be a mockery of due process.

B. This Illusory Remedy Will Divert College Time And Attention From The Needs of Education.

Every year scores of thousands of probationary instructors at public colleges throughout the country are evaluated and a significant number are notified of nonretention. The hearing ordered below will be available to each such instructor, at great inconvenience to the college. See *Schirck* v. *Thomas,* 447 F.2d 1025 (7th Cir.

1971). A hearing requirement will impair the ability of a college to withhold contract renewal from less suitable instructors but it will not afford meaningful protection of First Amendment rights.

The courts below recognized that more protective procedures would obliterate the distinction between tenured and probationary instructors and impose, without legislative or administrative sanction, a system of instant tenure. 310 F. Supp. at 979, 446 F. 2d at 808; see also *Rhine* v. *International Y.M.C.A. College,* 162 N.E. 2d 56, 60 (Mass. 1959). This undesired result may nevertheless prove inevitable. The imprecise and unworkable standards contemplated by the courts below may well evolve into some more definite mold drawn from prior judicial experience in reviewing decisions of administrative agencies, *e.g.*, was the agency's action reasonable or supported by substantial evidence? See K. Davis, *Administrative Law Text* 523-25 (1959). The decision whether to modify the probationary period of the tenure system is for legislatures, governing boards and colleges to make, having the benefits of trial and error and close monitoring of the results.

In any event, college personnel conscientiously attempting to comply with the procedure ordered below may be so baffled by its ineffable requirements that tenure may be granted by default. This problem could be particularly acute if those making the decisions were required to articulate the "subtle reasons" which the district court stated will suffice.

Nonrenewal decisions are not normally made by one man, but result from evaluations by a number of departmental

colleagues and appropriate college officers. Customarily, the first step in deciding whether to renew a contract is a vote among the faculty members of the probationary instructor's department. If a statement of reasons is required, 1) Professor A who voted for nonretention of Instructor X because he preferred another instructor may refuse to subscribe to a statement of reasons reflecting 2) Professor B's doubts about the quality of Instructor X's publications and 3) both professors may refuse to subscribe to the chairman's reason that the department is overloaded with tenured members in Instructor X's field of expertise. Many precious hours might be demanded simply to agree upon a statement of reasons.

The *amici curiae* strongly urge this Court to consider the practical effect these procedures would have on the men and women who must make renewal decisions. Most of them are not administrators. These academic personnel are not inclined to relish the handling of dossiers, the preparation of administrative memoranda, and attendance at innumerable hearings and meetings. There is a danger that the decision below, if affirmed, will lead in some cases to an abrogation by college personnel of their traditional evaluative functions. Tenure by default will harm the educational program by depriving students of the best judgment of college faculty and administrators in deciding who merits tenure. Sooner or later an intolerable strain would be placed on the tenure system as pressure mounted to purge the faculty of instructors who should not have been granted tenure in the first instance. Tenure —often described as the cornerstone of academic freedom—would no longer afford meaningful protection.

The court of appeals recognized that, in deciding questions of the sort presented here for review, a balancing test is appropriate. *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy,* 367 U.S. 886 (1961).

The *amici curiae* suggest that the courts below, after conscientiously struggling with the problem, struck an improper balance. The hearing ordered, if literally complied with, would provide little protection to the complaining instructor, but would handicap colleges in deciding which instructors merit tenure. A hearing which did provide more than an illusory procedural safeguard to the probationary instructor would obliterate the time-tested distinction between tenured and probationary faculty members.

The existing tenure system strikes the proper balance since it allows for merit selection of tenured faculty members while protecting academic freedom to the fullest practicable extent. Not every harm or possible arbitrariness to the citizen can be prevented by the Constitution.

One academician, expressing approval of the tenure system with its probationary period, wisely stated:

> "We gain nothing by protecting the incompetent; we lose everything by favoring the arbitrary. We have a very delicate task on our hands and we must be just to all parties concerned. No compromise ever appeals to all concerned. But in general only compromises will work." G. Boas, *The Professor's Obligations And Immunities,* 9 American Scholar 429, 432 (1940).

The probationary instructor who sincerely believes his First Amendment rights were violated may seek redress in federal or state courts for violations of his civil rights* and have full benefit of discovery processes to unearth evidence and prove his charges. That forum is available without significant interference with the functioning of public colleges.**

III. THE DECISIONS OF THIS COURT SUPPORT THE POSITION OF THE AMICI CURIAE THAT THE TENURE SYSTEM IS NOT UNCONSTITUTIONAL.

This Court, in defining the limits of procedural due process, has stated:

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy,* 367 U.S. 886, 894 (1961).

In the *Cafeteria Workers* case, this Court held that the summary dismissal of a short-order cook who worked in a cafeteria located on the premises of a defense facility did not violate due process. The cook was dismissed from employment at the instance of military authorities in charge

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* Indeed, the complaint in this case contains such a count.

** Undoubtedly, many instructors who are unsuccessful at a college-level hearing will seek *de novo* consideration of their cases by the federal courts. See dissenting opinion of Judge Duffy, *Roth* v. *Board of Regents,* 446 F.2d 806, 811-12 (7th Cir. 1971). In cases in which First Amendment rights have been violated, it is unlikely that a minimal college-level hearing will be adequate because of institutional pressures on the hearing tribunal. See *Duke* v. *North Texas State University,* Civil No. 1977 (E.D. Tex., Sherman Div., Sept. 1, 1971). See also, *Schirck* v. *Thomas,* 447 F.2d 1025, 1027-28 (7th Cir. 1971).

of the defense facility. No reasons for termination had been specified or suggested by the military authorities.

More recent decisions of this Court have specified situations in which procedural due process requires a prior hearing accompanied by a statement of the reasons underlying governmental actions affecting private interests. First, a public employee may not be summarily dismissed for refusing to swear that he does not believe in the overthrow of the government by force or violence. *Connell* v. *Higginbotham,* 403 U.S. 207 (1971). Second, the income of a poor person may not be terminated, either by wage garnishment or by cutting off welfare benefits, without notice and a prior hearing. *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 341-42n.9 and accompanying text (1969); *Goldberg* v. *Kelly,* 397 U.S. 254, 264-65 (1970). Third, a state license may not be summarily revoked where the effect of license revocation might be to preclude a person from pursuing his livelihood. *Bell* v. *Burson,* 402 U.S. 535, 539 (1971). Fourth, an individual may not be subjected by the government to public disgrace and humiliation, such as being labeled an excessive drinker, without a prior hearing. *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971).

The case of a probationary instructor whose contract is not renewed is not analogous to any of the above cases, and should be treated under the general rule stated in *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy,* 367 U.S. 886, 898 (1961), that public employment may ordinarily be terminated without a prior hearing.

The *Connell* case presents a unique situation since, by statute, guilt of subversive conduct was irrebuttably presumed by refusing to sign the oath. See *Slochower* v. *Board of Education,* 350 U.S. 551, 557 (1956). A

nonretained instructor does not fall within the category of the poor persons with whom the Court was concerned in the *Sniadach* and *Goldberg* cases. A probationary instructor is not by the mere fact of nonretention subjected to public humiliation and disgrace as was the petitioner in *Constantineau*. Nor does the reputation of a probationary instructor suffer so severely when his contract is not renewed that he may be deprived of his ability to pursue his profession, as was the petitioner in *Bell*.

There are so many reasons for nonretention beside professional incompetence that little inference can be drawn. For instance, not uncommonly, a college may prefer not to retain an instructor who received a degree from the college to avoid "inbreeding." Some colleges have a conscious policy of turn-over among probationary instructors. Also, college needs and emphases are constantly changing, requiring different faculty compositions. Budget cutbacks often compel colleges not to retain probationary instructors. Furthermore, since nonretention generally involves comparative evaluation, an instructor who may be deemed less than qualified at one college may be snapped up by another college who considers him well qualified indeed.

The reputations of college instructors, as of most professionals, are not so frail that the mere fact of contract nonrenewal will bar the instructor from the teaching profession or, indeed, will result in any lengthy unemployment. The American Civil Liberties Union, which favors hearing rights for probationary instructors, has stated:

> "This experimental phase [the probationary period] of a teacher's career is wisely characterized by a minimum of formal judgment; teachers come and go

without recorded praise or blame." *Academic Due Process,* A Statement of the American Civil Liberties Union in C. Byse and L. Joughin, *Tenure in American Higher Education: Plans, Practices, and the Law* 190, 196 (1959).*

In *Goldberg* v. *Kelly,* 397 U.S. 254, 261 (1970), this Court stated that, while the expense of a prior hearing must be considered, mere expense does not justify denying a hearing in appropriate situations. Although affirmance of the decision below will undoubtedly cause considerable additional expense to public colleges, the burden with which the *amici curiae* are primarily concerned is not that of expense.

The hearings ordered by this Court in the five decisions just discussed involve the determination of adjudicative facts susceptible to reasonably prompt and precise determination; e.g., did the employee engage in subversive acts? was the alleged debt owed? did the welfare recipient's income exceed the eligibility level? was there a reasonable possibility that the motorist would be found negligent? was the individual frequently intoxicated? However, as shown above, a hearing on contract nonrenewal involves the review of a decision arrived at through the exercise of discretion and judgment, and which often is based on a com-

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* A nonretained instructor is usually given notice of nonrenewal well in advance of the expiration of his contract. Not uncommonly, colleges give the instructor the opportunity to resign. It may be argued that this considerate procedure is an admission by colleges that nonrenewal has an adverse impact on reputation. In fact, the procedure is a common courtesy extended by many employers, public and private. Only in rare situations would the mere fact of nonretention, if known, be of determinative significance to a prospective employer.

parative evaluation or the consideration of factors unrelated to the affected instructor. Therefore, the burden of concern to the *amicus curiae* is that of requiring many thousands of hearings involving matters not readily capable of adjudication.

Under the decisions of this Court, it is clear that the court of appeals failed to give proper weight to the pertinent governmental and private interests.

CONCLUSION

Our nation's colleges are conscientiously attempting to provide quality education to students and to foster an atmosphere in which full freedom of discussion prevails. In pursuing these objectives, a tenure system has developed which undoubtedly will continue to evolve. Thus far the system has been shaped through discussion by, and compromise among, college professors of varying seniority and administrators. The decision below injects the courts into the evolution of that system, imposing federal supervision over common-place yet important details of college life without any clear constitutional mandate for doing so.

The present tenure system is not unconstitutional, and the judgment below should be reversed.

Respectfully submitted,

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