Colleges Must Not Be Above the Law

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Colleges Must Not Be Above the Law by Peter Berkowitz

Nobody has a right to tenure. But every candidate for tenure has a contractual right to a process consistent with his or her institution's rules and regulations. Cast aside this fundamental principle, and you turn colleges into islands of lawlessness and render them uniquely inhospitable to free inquiry.

The courts of Massachusetts, however, have just decided that Harvard University doesn't have to follow its own rules --- that it can, in effect, review candidates for tenure and conduct faculty grievance procedures as it pleases.

In September, the Supreme Judicial Court of Massachusetts denied my request for further appellate review, ending a breach-of-contract lawsuit that I filed in March 2000 against Harvard for its handling of the grievance I filed with the university concerning its review of my tenure. Throughout the three-and-a-half-year legal battle, Harvard contended that, to preserve academic freedom, the courts of Massachusetts should stay out of disputes in which faculty members claim that a college has violated its rules and regulations in tenure reviews and grievance procedures. A three-judge panel of the intermediate Massachusetts Appellate Court agreed in June, and the state's highest court has now refused to disturb that decision.

Contrary, however, to the views of Harvard and the Supreme Judicial Court --- of which four of seven justices boast Harvard degrees and the chief justice is also a former general counsel to the university --- it is the shielding of colleges from the ordinary requirements of contract law that poses the real threat to academic freedom. For when courts abdicate their responsibility to enforce contracts, the established powers can be counted on to impose their will by rooting out dissenting opinions, rewarding friends and allies, and rigging decisions about who gets what. It is because college administrators and professors are no more virtuous than other people that the enforcement of contracts is crucial to the liberty of thought and discussion on a campus.

Let me be clear: Who deserves tenure is an academic decision that courts properly leave to colleges, particularly where the ostensible standard for a lifetime appointment is that the candidate be, or display the promise to become, equal to the best in the world. Of course, politics and personalities will always intrude upon such decisions. Of course, colleges will sometimes grant tenure to the undeserving and deny tenure to the deserving. But colleges must be free to make decisions about academic excellence free of court intervention.

That does not mean, however, that colleges should be allowed to infringe on the civil rights of their professors or breach their contracts. In a free society, no institution or individual should be above the law.

It was the grievance process, provided contractually by Harvard and laid out in its faculty appointment handbook, that I sought after Neil L. Rudenstine, then president of Harvard, rejected the department of government's recommendation and denied my bid for tenure in 1997. I sought that process first inside Harvard and, when I had exhausted the internal means for the redress of my grievances, in the courts of Massachusetts. Yet, astonishingly, it was that contractually provided process that the courts of Massachusetts have effectively declared that Harvard has no obligation to provide.

The process by which Harvard reviewed my tenure bid was rife with crude conflicts of interest in violation of the university's rules and regulations. But the heart of my lawsuit concerned Harvard's handling of the grievance procedure --- in particular, the role of the so-called Docket Committee.

The Harvard Docket Committee is an obscure administrative body, chaired ex officio by the dean of the arts-and-sciences faculty and composed of three faculty members essentially handpicked by the dean. Their main job is to schedule topics for business at faculty meetings, but Harvard procedures require anyone with a grievance to submit it formally to that committee --- even if that is in plain conflict with elemental rules of due process, as in my case when the grievance concerned the failure of the office of the dean to ensure that rules in the tenure process had been observed. According to the "Guidelines for Faculty Grievances" in the Harvard appointment handbook, the committee has the responsibility to conduct a "preliminary screening" and, unless the grievance is "clearly without merit," to pass it along to a "grievance panel" for a "full and fair" investigation governed by a number of procedural protections for the grievant.

My grievance, submitted in early January 1999, never received that "full and fair" investigation. After almost five months, in late May, after the campus had emptied for summer, the Docket Committee dismissed it as "clearly without merit." As part of its "preliminary screening," the Docket Committee secretly retained legal counsel (which I discovered inadvertently during the process) and interviewed witnesses concerning the merits of the grievance (as I learned several years later), and expressly prohibited me from having legal assistance during a meeting in which it questioned me intensively.

In my lawsuit, I contended that the committee had violated Harvard rules and regulations in two ways: by misapplying the "clearly without merit" standard specified in the appointment handbook, and by going well beyond the "preliminary screening" to which it is limited by the handbook and usurping the function that the handbook assigned to the grievance panel. And I asked that Harvard be ordered to provide me with the grievance process to which I was contractually entitled.

Whether those complaints formed the basis for a valid legal action was not a hard question; the trial-court judge answered it twice by denying motions by Harvard to have the lawsuit dismissed. Whether the Docket Committee had misapplied Harvard's contractually prescribed standard and overstepped its legal authority was just the sort of question that juries in contract disputes are called on to resolve all the time.

But in an extraordinary development, in February 2001, Harvard persuaded the trial-court judge to let the Appeals Court of Massachusetts, even before pretrial discovery was completed, review his decision to allow the case to go forward. And then, arguing that the Docket Committee's decision was an "academic decision," and that to interfere with it would threaten academic freedom, Harvard persuaded the appeals court --- two of whose three judges graduated from Harvard College and Harvard Law School --- to dismiss the lawsuit.

The appeals court acted contrary to the dictates of the law. Whether the Docket Committee violated Harvard rules and regulations was no more an academic decision than whether ExxonMobil's violating provisions of an employee contract would be an oil decision, or whether Verizon's violating provisions of an employee contract would be a telecommunications decision.

The appeals court also acted contrary to the best interests of colleges and universities. Far from subverting academic freedom, court enforcement of basic contractual rights is crucial to the life of a college --- in part, for the same reason that it is crucial to freedom outside of the institution. Where there is no settled and standing law, or no impartial tribunal to adjudicate disputes that arise under the law, victory goes to the strongest and most ruthless, whose customary and well-documented inclination is to impose behavioral and ideological conformity.

Once a college sets down its rules and regulations in the form of a contract --- and proceeds to reap the benefits of a reputation for honoring transparency, accountability, and fair process --- courts should compel it to keep its side of the bargain. Yet how can colleges be said to be bound by their faculty contracts if courts authorize those institutions, under the cover of academic freedom, to act as the final interpreters of what the contracts require?

That colleges serve as both party to and judge of their contractual disputes is anathema to the rule of law, for the reasons that James Madison classically expounded in the Federalist Papers: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time. ... "

It should be anathema to colleges.

Yet the attitude apparent in Harvard's legal maneuvering, aided and abetted by the courts of Massachusetts, is that the rules that apply to the rest of society don't apply to Harvard. That attitude corrupts the mission of the university. It fosters arrogance and complacency on the

part of administrators. It encourages a culture of intellectual timidity and moral hypocrisy among faculty members. It invokes the language of fair process in order to undermine the reality of it. It wraps itself in the mantle of academic freedom, only to chill speech by exposing faculty members to arbitrary and unaccountable power. It is a recipe for maintaining the status quo, silencing unpopular voices, and ensuring the party line.

Harvard is a great university. The courts of Massachusetts would do better in safeguarding what is most estimable in it, and in discharging their duty to apply the law impartially, by refusing to encourage, indeed give legal sanction to, the illiberal conceit that Harvard is above the law.

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