

## Testimony in Opposition to HB 1446

March 10, 2023

My name is Keith E. Whittington, and I am the William Nelson Cromwell Professor of Politics at Princeton University, a visiting fellow at the Hoover Institution, and the founding chair of the Academic Freedom Alliance. The Academic Freedom Alliance is a cross-ideological coalition of university faculty concerned with defending academic freedom and free speech. I write today in my individual capacity, and the views expressed here are my own.

I write to express my concerns with HB 1446.

Although I appreciate the legislature's interest in ensuring that faculty employed at state universities remain productive over the course of their careers, the provisions of the current bill would significantly undercut an effective tenure system that is essential to promoting free inquiry on college campus. I call to your attention Section 2(1) which authorizes the university president to initiate the review of any tenured faculty member at any time and Section 2(3) which empowers the university president to "not renew the contract of the tenured faculty member." Despite faculty members being awarded tenure after a suitable probationary status and systematic evaluation of their performance, these two provisions would empower the university president to act on his own initiative and with his own discretion to immediately terminate tenured members of the faculty.

Post-tenure reviews of the performance of members of the faculty can be entirely compatible with the maintenance of a meaningful system of tenure protection. There are many ways that such a system of post-tenure review can be designed, but this bill would entrust university presidents with essentially unconstrained discretion to terminate tenured members of the faculty. Such sweeping discretion to revoke tenure and terminate a faculty member would effectively subvert the very purpose of granting tenure protections in the first place. Of particular concern in this regard are Sections 2(4)-2(6).

Section 2(4) provides

The president of an institution may enlist the assistance of an administrator at the institution to conduct a review but may not delegate responsibility for the review to a faculty member who is not an administrator.

Section 2(6) provides

A review under this section is not reviewable by a faculty member or faculty committee.

Sections 2(4) and 2(6) specifically cut out members of the faculty from this post-tenure review process. Faculty involvement in systems to hire, promote, and terminate members of the university faculty are essential to preserving the quality and independence of the scholars and instructors at an institution of higher education. In the specific context of termination decisions, the body of the faculty provide critical checks and balances against the abuse of discretion by any single administrator. Shared faculty governance over such critical academic decisions helps ensure that such judgments are made on the basis of careful evaluation and appropriate professional considerations. Even if one were inclined to trust the temperament and judgment of a particular university president, long experience has amply demonstrated that the ability to terminate members of the faculty can be abused if left in the hands of a

single individual. It is a long and laborious process to hire and promote qualified members of a university faculty. The process for removing individuals from the faculty should mirror that deliberative process and not be impetuous.

The members of the faculty are also best positioned to evaluate whether a tenured member of the faculty has satisfactorily performed his or her duties. While some basic metrics of job performance are readily accessible to the senior administration of the university, the job responsibilities of instructors and scholars are not appropriately reduced to such readily transparent metrics. Whether a faculty member is carrying their weight in an academic department and whether a faculty member adds value over time to a department are judgments best made by that faculty member's immediate peers. Moreover, these are judgments that are most appropriately made based on extended observation of the workings of a department and not on a brief snapshot of a professor's activities. A tenured faculty member's immediate peers in a collegial environment know whether he or she adds value to a department or whether a faculty member is shirking his or her responsibilities and imposing burdens on colleagues. University presidents are not well positioned independently to make those judgments, and as a consequence presidents are likely to render such judgments based on either poor information or extrinsic factors, or both.

Moreover, Section 2(5) provides

When conducting a review under this section, the president of an institution may assess and review other factors relevant to the faculty member's employment and the interests of the institution and the institution's students.

This provision of HB 1446 would effectively undo any limitations on presidential discretion that might be found in Section 1 or Section 2(2) of the bill. The ability to fire tenured members of the faculty based on nothing more than a university president's individual judgment that doing so would be conducive to the "interests of the institution and the institution's students" would effectively do away with tenure protections entirely. Transitory changes in student preferences as to courses of study and momentary political firestorms could easily be used to justify removing a professor from the faculty. Individual members of the faculty who become objects of controversy or find themselves out of favor with senior university officials, prominent donors or alumni, or influential politicians could find themselves dismissed in the name of protecting the "interests of the institution." Professors who challenge or offend the sensibilities of the current cohort of students could find themselves out of a job because of a president's judgment about "other factors" that might be relevant to the interests of the institution's students. Tenure is supposed to protect the ability of professors to dissent from majority opinion and pursue arguments and evidence in directions that might be discomfiting. Section 2(5) would instead allow heterodox opinions to become the basis for firing tenured professors.

Section 2(5) also raises the specter of university presidents terminating faculty *en masse* with a view to advancing the president's own preferred plans for the university. Shared faculty governance allows a university to benefit from the scholarly expertise of the faculty when making decisions regarding core academic features of the institution. Section 2(5) would allow a university president to circumvent the faculty entirely in reorganizing its academic program. Not only could a president fire individual members of the faculty who might object to a president's plans, but a president could terminate the entire faculty of an academic department on the grounds that the existence of the department itself is no longer in the best interest of the university as the president alone understands it. The academic programming of

the university would depend entirely on the whim of an individual university president and whatever short-term incentives and concerns might motivate such a president.

Universities across the country, including those in North Dakota, have policies and procedures in place to sanction and even terminate members of the tenured faculty when they fail to perform their duties in a competent fashion or engage in misconduct. A policy such as the one embodied in HB 1446 is unnecessary to accomplish that objective.

HB 1446 in its present form is instead a dagger aimed at the heart of free inquiry at the state's universities. Just in the past few years we have seen many instances of university faculty threatened with termination or in fact fired for disagreeing with university presidents on their management of the university or on the future of an academic program, for engaging in classroom discussions that are professionally competent and germane to the subject matter but controversial to the students or members of the larger community, and for expressing scholarly or political views that are politically controversial. Serious universities should be places where professors can argue over the design of the academic program, challenge their students, and express unconventional views and advocate for controversial ideas. The enactment of HB 1446 in its present form would chill the intellectual environment of the university and enforce a rigid conformity on the faculty.

HB 1446 is incompatible with meaningful protections for academic freedom and should not be enacted in anything resembling its current form.