

January 23, 1979

TO: Margaret Wilson, President
Faculty Senate

FROM: ad hoc Committee to Study Faculty Employment Contracts

RE: Prefiled bill by Gaston

We have examined the Gaston bill. Its effect is the same as that of the two bills we examined previously: the abrogation of tenure. We find it also unacceptable.

November 21, 1978

The ad hoc Committee to Study Faculty Contracts, consisting of William Cain, Jacquelin Collins, Rodric Schoen, Ruth Voltz, and Ruth Wright, met on October 26, November 6, and November 15. It herewith submits its report.

Respectfully,

Ruth Wright

Ruth Wright
Chairperson

REPORT OF THE AD HOC COMMITTEE TO STUDY FACULTY CONTRACTS

The effect of the two bills "relating to employment contracts for faculty members at institutions of higher education; adding Subchapter I to Chapter 51, Texas Education Code, as amended," is to abolish tenure. Although there is no existing law that provides for tenure in Texas public colleges and universities, a system of tenure has been established by many governing boards and is in keeping with the tradition and practice of the best public and private colleges and universities across the country.

Under the terms of these bills faculty members at Texas institutions of higher education will be placed under a contract of limited duration. While under contract any faculty member may be removed by the governing board of his or her institution, after notification and hearing, for failure to develop professionally, incompetent performance, neglect of duties, physical or mental incapacity, excessive use of drugs or alcohol, felony conviction, or necessary reduction in personnel. Upon expiration of his or her contract any faculty member may be denied reappointment by the governing board without hearing and for any reason or no reason at all.

One of the proposed bills would abrogate tenure retroactively. Retroactive abrogation of tenure already acquired by contract probably violates the United States Constitution. In Indiana ex rel. Anderson v. Brand, 303 U. S. 95 (1938), the Supreme Court held that a legislative abrogation of contractual tenure already acquired by the employee violated the constitutional prohibition that no state shall impair the obligation of a preexisting contract, U. S. Constitution, Article I, Section 10. For those employees now holding tenure, exchanging tenure for a "renewable contract" is plainly not an equivalent exchange.

Historically, a crucial difference between probationary and tenure status is that the university must initiate proceedings to dismiss a tenured employee and must additionally bear the burden of proof in such proceedings that the tenured employee is not fit to be continued in employment. The proposed bills destroy this traditional safeguard for academic freedom, for there is no difference of substance between "probationary" and "renewed" employees. Although the bills provide a maximum term of years for renewable contracts, no minimum term of years is provided. Therefore, all employees, whether probationary or "renewed," could be employed on a one-year contract, year after year which would then subject the "renewed" employee to annual review, and more important, subject the "renewed" employee to termination at the end of each yearly contract.

The "peer review" provided in the bills is wholly advisory; it is not binding on the governing board. The decision to terminate or continue employment at the end of each contract period is in the sole and unreviewable discretion of the governing board. Hence abrogation of tenure by these bills effectively relieves the employing institution of any burden to establish a legitimate reason for terminating either a probationary or "renewed" employee upon expiration of the contract.

Academic freedom will cease to exist, for no employee can be expected to confront or assert controversial or unorthodox positions when employment may be terminated in the unreviewable and unexplained judgment of the governing board upon expiration of the employee's yearly contract. Conversely, those employees whose performance is safe and orthodox will, in practice, enjoy what amounts to tenure -- at least as long as their views do not offend the governing board of "bother" the board, administrators, alumni, citizens, or legislators.

Tenure is not a guarantee of lifetime employment. Tenured employees may -- and should -- be dismissed when their professional performance is deficient. If the reason for these bills is the belief that many tenured employees throughout the state are "dead wood" or not otherwise deserving of continued employment, tenure itself is not to blame. If there is an accumulation of tenured "deadwood," the fault for such a situation must be placed where it belongs -- upon the governing boards and administrators who fail or refuse to exercise their responsibilities to remove unfit tenured employees through established

procedures." Abrogation of tenure seems a drastic remedy for a situation caused by the default of governing boards and administrators.

One of the particular merits of the tenure system is that it requires a formal and very searching evaluation of a faculty member at the time when he or she does acquire tenure. It is a characteristic of systems without tenure that marginal faculty members are continued from year to year. A tenure system is the guarantee that weak and marginal faculty will be weeded out early in their employment rather than being continued indefinitely.

Abrogation of tenure throughout the state will, of course, place Texas public institutions of higher education at a serious competitive disadvantage in attracting and retaining highly qualified employees. Even assuming that salaries are comparable, why would a person accept a no-tenure scheme, with its manifest opportunities for abuse, when a sister institution offers comparable compensation with tenure?

Employees in certain disciplines often forsake the more lucrative rewards of non-academic employment. It seems unlikely that highly qualified persons will forsake private employment for the lesser economic rewards of academic employment without tenure.

Finally, statewide abrogation of tenure will surely precipitate extensive self-protective efforts by present employees to organize themselves into a unitary bargaining position. The unique relationship presently existing between faculty, administrators, and governing boards will vanish, to be replaced by a formalized "labor-management" relationship like that already existing in the private sector.

The foregoing comments on the bills are wholly negative. Without some explanation of the reason(s) for proposing these bills, nothing positive can be said in their defense. Because the bills totally abrogate tenure and offer no equivalent protection for academic freedom, nor equivalent incentive for highly qualified persons to choose academic employment over non-academic employment, the only apparent purpose of the bills is to do exactly what they do -- totally abrogate tenure. Why tenure should be totally abrogated is not explained in the bills and is thus a matter of speculation.

If removal of "tenured deadwood" is the object of the bills, procedures already exist for removing tenured employees whose performance is deficient. The bills are unnecessary and impose disproportionate harm upon higher education to achieve a less important objective that can be achieved readily through present procedures.

If the bills reflect concern that there are, or will be, "too many" tenured employees, certainly total abrogation of tenure is not required to achieve an appropriate balance between tenured and non-tenured employees. Similarly, if the bills reflect concern that tenure forecloses opportunities for younger employees and thus inhibits the infusion of "new blood and ideas," again total abrogation of tenure is not required to achieve an appropriate academic balance between "new ideas" and "mature experience."

If the bills are proposed merely to simplify the procedure for dismissing any employee by relieving the employing institution of any "unpleasant" burden to justify the dismissal, the obvious dangers to academic freedom must surely outweigh the "benefits" of summary dismissals. If the bills are proposed merely to simplify the dismissal of "academic troublemakers" by concealing vindictive or retaliatory dismissals, or are designed to force all employees into a safe and orthodox pattern of behavior and scholarship, then such reasons are palpably indefensible.

If the reason for the bills is to destroy the atmosphere of free inquiry prevailing in state institutions of higher education, passage of these bills will surely do that.

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ad hoc Committee to Study Faculty Contracts

The Committee met at 2:30 p.m. Monday, November 6, 1978 in the Faculty Senate Office, Holden Hall. Present were Mr. Cain, Mr. Collins, Mr. Schoen, and Ms. Wright. Ms. Voltz was necessarily absent on official business.

Presiding was Mr. Cain.

The committee proceeded immediately to the election of a permanent chairman. Ms. Wright was so elected.

Written comments on the Clayton bills were distributed by Mr. Schoen. With the Schoen comments serving as a working paper, the committee had extended discussion on the Clayton proposals and possible response to them.

It was agreed that members of the committee would reflect further individually and attempt to write a report at the committee's next meeting.

The committee will next meet on Wednesday, November 15, 1978, at 3:00 p.m. in the Faculty Senate Office, Holden Hall.

Respectfully submitted,

Ruth Wright

29 August 1978

Mr. Bill Clayton
Speaker of the House of Representatives
The Capitol
Austin, Texas 78701

Dear Mr. Clayton:

A front page article of the Lubbock Avalanche Journal, Friday, 25 August, stating that you are interested in bringing the abolition of tenure at Texas universities and colleges to the floor of the 1979 legislature, is of grave concern to the faculty at Texas Tech University. Raising such a controversy at this time may, in our opinion, divert attention away from the legitimate questions which the Coordinating Board is currently studying.

With regard to the issue of academic tenure, tenure is an almost universally-adopted aspect of faculty service within the American educational system. In the 1940 Statement on Academic Freedom and Tenure, developed by the Association of American Colleges and the American Association of University Professors, tenure is held to be "a means of ensuring academic freedom and of providing sufficient economic security to make the academic profession attractive to men and women of ability--both objectives being indispensable to the successful fulfillment of the purposes of higher education." (Faculty Tenure, A Report and Recommendations by the Commission on Academic Tenure in Higher Education, San Francisco, 1973)

The 1940 Report establishes principles and does not contain prescriptions for the application of tenure at every institution. It is further recognized that a good tenure system does not and should not protect the incompetent. Although the Report has been subjected to frequent reexamination and clarification, the 1940 view on tenure has been maintained as valid and necessary with each new study.

Values of tenure may be summarized by the following points:

1. Tenure is a means of assuring academic freedom. A tenured teacher is free from outside pressures in making statements concerning his professional findings. His position is not subject to administrative or political whim. The public has no need to wonder if his judgments have been conditioned by a fear of losing his job.
2. A tenured faculty provides, through their vigilance and power to act without apprehension, an academic atmosphere in which non-tenured faculty may also enjoy academic freedom.
3. Tenure creates a body of faculty members who may, if they wish, build long term commitments to an institution. This creates a necessary continuity in the development of a university or college. Such a relation "promotes collegiality," stability, and dedication to the long range goals of

institutions of higher education.

4. Tenure is an essential way of attracting men and women of outstanding abilities into the teaching profession. When insecurity is minimized, teachers are better able to concentrate on teaching and upon the acquisition of knowledge, necessary to continuing vitality in the classroom and to meaningful research.
5. Tenure offers security which helps to compensate for the lower monetary rewards offered teachers. Tenure enables colleges and universities to compete for professional and scholarly talents eagerly sought in other fields.

In a consideration of the values of the tenure system, statements quoted in the Avalanche Journal should be reviewed. According to the newspaper, Ms. Cartwright, research assistant, in an interview suggested that the elimination of tenure "could improve accountability and could conceivably improve higher education as a whole." She is further reported to have said that "faculty under contract are more motivated" and "will be more vital and diversified." The validity of "diversification" could be questioned, but the more important issue is that of the contract system versus tenure.

Under a contract system, the probationary period of the faculty is permanent. Under tenure, it is limited to no more than seven years. It would be naive to believe that the uncertainties of contract renewal, year after year, could be anything but damaging to faculty morale. To abolish tenure would make it increasingly hard to attract the best teachers and scholars to Texas universities and colleges. There is no reason to believe that contracts provided on a yearly basis would stimulate better teaching. Little incentive is provided for institutional loyalty to develop. Students would bear the brunt of the constant threat of dislocation.

If tenure were replaced by the contract system in view of the job hazards to which teachers would be subjected, it is possible that men and women who now reject unions as unwelcome in academic life, would turn to unionization as a solution. In many states, college and university teachers are choosing this course of action. It would be unrealistic to assume that in Texas, faculties faced with the uncertainties of yearly contract renewal would not opt for the protection of collective bargaining.

Last, and perhaps most important, the assumption that academic freedom would remain untouched under due process within a contract system has not been proven. Protecting this essential right is an excellent reason why the cause of tenure is worth championing.

Sincerely,

Neale J. Pearson, Associate Professor
Political Science, Legislative Representative,
Texas Tech Chapter T.A.C.T.

Elizabeth S. Sasser, Professor
Division of Architecture
President, Texas Tech Chapter A.A.U.P.

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A BILL TO BE ENTITLED

AN ACT

1
2 relating to employment contracts for faculty members at
3 institutions of higher education.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Chapter 51, Texas Education Code, as amended, is
6 amended by adding Subchapter I to read as follows:

7 SUBCHAPTER I. FACULTY EMPLOYMENT CONTRACTS

8 Sec. 51.501. DEFINITIONS. In this subchapter:

9 (1) "Institution of higher education" has the meaning
10 assigned it in Section 61.003 of this code, except that Texas State
11 Technical Institute is included and the Rodent and Predatory Animal
12 Control Service is excluded.

13 (2) "Faculty member" means a person who is employed by
14 an institution of higher education on a full-time basis as a member
15 of the faculty or staff and whose duties include teaching,
16 research, administration, or the performance of other professional
17 services. The term includes professional librarians. The term
18 does not include a person employed in a position in an
19 institution's classified personnel system or in a similar position.

20 Sec. 51.502. WRITTEN CONTRACTS. Each employment contract
21 between a faculty member and an institution of higher education
22 must be in writing and contain the terms of employment, including
23 special conditions, responsibilities, or perquisites. The contract
24 must specify rank, salary, whether the position is full-time or

1 part-time, length of the contract, and inclusive dates of the term
2 of service.

3 Sec. 51.503. RENEWABLE CONTRACTS. (a) On accepting
4 employment with an institution of higher education, each faculty
5 member shall enter into a renewable contract with the institution.
6 The term of the contract shall be either five, six, or seven years.
7 The institution is not required to adopt a uniform term for all
8 faculty members.

9 (b) During the year preceding the final year of a renewable
10 contract, the institution shall review the performance of the
11 faculty member and give that faculty member notice of its intention
12 to either renew or terminate the contract.

13 Sec. 51.504. FACULTY REVIEW. (a) Before assuming duties
14 under an initial or renewed contract, the faculty member and his or
15 her immediate supervisor shall meet and prepare a written statement
16 of goals that the faculty member expects to attain during the term
17 of the contract. At the same time, the supervisor shall give
18 notice in writing to a new faculty member of the criteria for
19 renewal of a contract in that department or program and of the
20 timing and methods of evaluations that will be used in determining
21 whether the faculty member will be recommended for contract
22 renewal. The governing board of each institution shall adopt rules
23 concerning the types of goals that are to be set by each faculty
24 member.

25 (b) At least once each year during the term of a renewable
26 contract, the immediate supervisor of the faculty member shall
27 review the performance of that faculty member based on the faculty

1 member's success or failure in attaining the agreed goals. No
2 later than the end of the 18th month preceding the final month of
3 the contract, the supervisor shall recommend to the chief executive
4 officer of the institution in writing whether the contract of the
5 faculty member should be renewed or terminated. The faculty member
6 is entitled to immediate notice of that recommendation.

7 (c). If the supervisor recommends that the contract of a
8 faculty member be terminated, the faculty member may appeal that
9 recommendation to a faculty hearing committee. The faculty member
10 must give written notice of appeal to the chairman of the
11 department in which he or she is employed no later than the 10th
12 day following the date of receipt of notice of the supervisor's
13 recommendation.

14 (d) The chief executive officer of each institution of
15 higher education shall establish a faculty hearing committee in
16 each department composed of the chairman and other faculty members
17 of the department. On appeal from a faculty member, the committee
18 of the department in which the faculty member under review is
19 employed shall review the faculty member's performance and the
20 reasons for the supervisor's decision. Hearing committee
21 procedures must be consistent with due process. Following that
22 review, it shall recommend to the chief executive officer in
23 writing whether the contract of the faculty member should be
24 renewed or terminated. The faculty member is entitled to immediate
25 notice of the committee's recommendation. This recommendation must
26 be made at least 14 months prior to the month of expiration of the
27 contract.

1 Sec. 51.505. TERMINATION OF RENEWABLE CONTRACT. (a) At the
2 end of the term of a renewable contract and following the required
3 review, an institution of higher education may terminate the
4 employment of the faculty member if the chief executive officer of
5 the institution finds that the faculty member has failed to attain
6 the agreed goals and that termination will best serve the interests
7 of the institution.

8 (b) The chief executive officer of the institution of higher
9 education must notify the faculty member in writing of its
10 intention to terminate the employment of the faculty member at
11 least one year prior to the expiration date of the contract. If
12 the chief executive officer fails to give the required notice, the
13 faculty member is entitled to employment in the same capacity under
14 a renewable contract for the succeeding contract period.

15 Sec. 51.506. DISCHARGE WHILE UNDER CONTRACT. (a) A faculty
16 member may be discharged during the term of a probationary or
17 renewable contract for one of the following reasons:

- 18 (1) moral turpitude;
- 19 (2) failure to maintain competence in his or her field
20 of specialization;
- 21 (3) failure to exercise professional integrity;
- 22 (4) incompetent performance of duties;
- 23 (5) gross neglect of professional responsibilities;
- 24 (6) permanent mental or physical disability preventing
25 performance of duties; or
- 26 (7) bona fide financial emergency or phasing out of
27 institutional programs requiring reduction in personnel.

1 (b) A faculty member who is to be discharged during the term
2 of a contract is entitled to written notice of the proposed action
3 before the 90th day preceding the day on which the discharge is to
4 be effective.

5 (c) A faculty member may be suspended with or without pay
6 pending the effective date of the discharge.

7 Sec. 51.507. HEARING ON DISCHARGE. (a) A faculty member
8 who receives notice of discharge during the term of a contract is
9 entitled to request and receive a hearing on the action before the
10 governing board of the institution of higher education. The
11 request for a hearing must be in writing and received by the board
12 prior to the 10th day following the date of receipt of the notice
13 of discharge.

14 (b) Before the 10th day following the date of receipt of a
15 request for a hearing under this section, the governing board of
16 the institution shall set a time and place for the hearing. The
17 hearing must be held before the effective date of the discharge.

18 (c) At a hearing under this section, the faculty member is
19 entitled to be represented by counsel, to hear the evidence on
20 which the action is based, to cross-examine the adverse witnesses,
21 and to present evidence.

22 (d) If the faculty member so requests in writing, the
23 hearing held under this section shall be in private.

24 (e) Before the 10th day following the date of conclusion of
25 a hearing under this section, the governing board shall notify the
26 faculty member in writing of the board's decision on the action to
27 be taken.

1 Sec. 51.508. COORDINATING BOARD RULES. The Coordinating
2 Board, Texas College and University System, shall adopt rules
3 governing faculty employment contracts and procedures for review,
4 termination, and discharge of faculty members. The contracts and
5 procedures of each institution must conform to the rules of the
6 coordinating board.

7 Sec. 51.509. ACCESS TO EVALUATIONS. A faculty member is
8 entitled to a copy of each evaluation or other written memorandum
9 concerning his or her employment with the institution of higher
10 education.

11 Sec. 51.510. APPLICABILITY. Faculty members employed by an
12 institution of higher education on September 1, 1980, shall be
13 granted employment contracts on the following basis:

14 (1) faculty members who have not been granted tenure
15 or other permanent contract status are entitled to continued
16 employment under renewable contracts; and

17 (2) faculty members who have been granted tenure or
18 other permanent contract status are entitled to continued
19 employment in that status until August 31, 1990. After that date,
20 all faculty members shall be employed under renewable contracts,
21 regardless of prior tenure status.

22 SECTION 2. This Act takes effect on September 1, 1980.

23 SECTION 3. The importance of this legislation and the
24 crowded condition of the calendars in both houses create an
25 emergency and an imperative public necessity that the
26 constitutional rule requiring bills to be read on three several
27 days in each house be suspended, and this rule is hereby suspended.