CONFIDENTIALITY OF TENURE REVIEW AND DISCOVER OF PEER REVIEW MATERIALS

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I. Introduction

The debate over the importance of protecting the confidentiality of faculty peer review materials has intensified\(^1\) since the U.S. Fifth Circuit Court of Appeals' decision in In re Dinnan.\(^2\) The controversy pits faculty members against each other, university officials against faculty, and academicians against the Equal Employment Opportunities Commission (EEOC). Faculty plaintiffs who feel they were wrongfully denied tenure, promotions, or appointments\(^3\) have demanded access to confidential peer review files in order to establish employment discrimination cases.\(^4\) These files not only include the plaintiffs' own records but often those of other faculty in the plaintiffs' academic department or college.

College officials and some faculty members, on the other hand, have argued that the concept of academic freedom protects faculty peer review information from public scrutiny. They say that release of such information, even to the plaintiff, would "chill" tenure debate and promote "blandness" in the review process.\(^5\) College officials conclude that as a result, academic standards of excellence would suffer and underqualified individuals would almost automatically be granted tenure.\(^6\)
Ann H. Franke, associate counsel for the American Association of University Professors (AAUP) believes that, "the issue is not going to go away, and it's probably going to get worse. Discrimination litigation in higher education will continue," she says, "and every time, we're going to face the question of access to records." 7

One primary reason for the continuation of this debate is that federal courts have differed in their determination of whether colleges have a qualified privilege to withhold tenure review information from discovery or subpoena. While some courts have adopted a balancing approach to disclosure by weighing the competing interests involved, 8 others recognize no privilege and require release of virtually all information sought. 9 The U.S. Supreme Court has yet to grant certiorari to any case dealing with this matter.

The debate, therefore, centers on whether some type of privilege does, or should, exist to protect the confidentiality of the faculty promotion or tenure decision-making process. Privileges, which are founded upon public policy, have been established by the common law to protect confidential communications such as those between attorney and client and between husband and wife. 10 In order for confidential communication to be protected, or privileged, certain criteria must be met. Wigmore has specifically enumerated four conditions necessary to establish a privilege. 11 States have also codified additional privileges such as those pertaining to communications
with physicians, clergymen or priests. Finally, Federal Rule of Evidence 501 allows federal courts to create a privilege by interpreting the U.S. Constitution and Supreme Court rules.

Most federal courts that have dealt with confidential peer review materials have relied upon constitutional requirements to decide whether to grant privilege. The constitutionally based privilege will, therefore, be the basis of this analysis. Because any confidential communication is not necessarily a privileged communication, it is necessary to examine whether or not a constitutionally based privilege exists to protect the confidentiality of the faculty peer review process. Privileges constituting exceptions to the demand for evidence are not lightly created nor expansively construed, since they are in derogation of the search for truth. Therefore, if courts are to establish a qualified privilege, the justification for establishing the privilege must be compelling.

Competing Interests

Often when promotion or tenure is at stake in faculty litigation, competing interests are equally strong between the individual being considered and the academic institution. The faculty member wants a fair execution of the review process, free from bias and a decision based upon quantifiable and qualifiable criteria. If the result of the process seems unfair, the plaintiff may want to examine individual reviews for evidence of bias. Concurrently, the institution wants to preserve
academic excellence in the faculty that it retains or promotes and believes that confidential peer review is the best way to achieve this goal.\textsuperscript{16}

The primary purpose of tenure is to protect a faculty member's academic freedom against arbitrary termination of employment based upon retaliation for holding or espousing unpopular ideas.\textsuperscript{17} It also has become a method of ensuring job security, since the only way to terminate a tenured faculty member's position is to show bona fide cause, financial exigency, or program discontinuance.\textsuperscript{18} In both the public and the private setting the faculty contract or handbook usually defines a faculty member's legal rights in the tenure process. In public institutions, the legal basis for tenure may also be found in either the state or federal constitution or in state statutes.\textsuperscript{19}

The process of tenure review usually involves an evaluation by one's departmental colleagues and a review by the college-wide faculty tenure review committee, administration, and governing board.\textsuperscript{20} At all levels, the evaluation criteria should consist of the candidate's performance in scholarship, teaching, and service to the college and the community.\textsuperscript{21} Yet, it is equally possible that personality, collegiality, and extramural activities are determinative to the outcome of a tenure decision; it is under the guise of these criteria that discrimination charges have foundation.\textsuperscript{22} Indeed some studies have found discrimination to be a "major hindrance to the career development of professional women in academia precisely because [women] were routinely denied
tenure and promotion." Therefore it is quite important that when a person's academic future is at stake, a college must abide strictly by non-discriminatory methods of evaluating performance.

Tenure should not be awarded casually, however, nor should the tenure process be subverted by external pressures. A 1973 report of the American Association of University Professors (AAUP) and Association of American Colleges (AAC) concluded that "the weaknesses that have brought academic tenure under needed scrutiny are not imperfections in the concept itself, but serious deficiencies in its application and administration ..." The weaknesses in the process allow less than qualified individuals to be granted tenure and once granted, because of lack of periodic performance review, faculty members are often assured employment until retirement. Peer evaluation is the cornerstone of the tenure review process. If academic excellence is to be maintained, tenure decisions must be made deliberately and carefully by peer experts who are free from the undue external pressure that open review files could create.

Concept of Academic Freedom

Proponents of confidentiality claim that the legal concept of academic freedom protects peer review material from disclosure. Fuchs states that academic freedom rests mainly on three foundations:
(1) The philosophy of intellectual freedom, which originated in Greece, arose again in Europe, especially under the impact of the Renaissance, and came to maturity in the Age of Reason;

(2) the idea of autonomy for communities of scholars, which arose in the universities of Europe; and

(3) the freedoms guaranteed by the Bill of Rights of the federal constitution as elaborated by the courts.²⁸

The U.S. Supreme Court, in Keyishian v. Board of Regents,²⁹ recognized academic freedom as a constitutionally protected right. Justice Frankfurter had earlier defined the four essential freedoms of an academic institution as its right to determine on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."³⁰ The "who may teach" freedom includes the right of a faculty to determine, without arbitrary interference from the administration, who may teach, and the right of the institution to determine, without undo interference from outside entities, who may teach.³¹

Academic freedom does not give the faculty or institution absolute autonomy. Indeed, in Bakke v. Board of Regents, Justice Powell, recognized that an institution had the freedom to determine "who will be taught", but also stated that institutions may not adopt admissions policies that prohibit admission based upon racial classification.³² It is equally true that faculty personnel decisions may not be made for discriminatory reasons. In 1976, the AAUP issued a statement pledging that it would take
measures against "colleges and universities practicing illegal or unconstitutional discrimination, or discrimination on a basis not demonstrably related to the job function involved . . . ." 33 And in 1972, Congress extended Title VII of the Civil Rights Act of 1964 (Title VII) to include academic institutions 34 precisely because "discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment." 35

The confidentiality issue in peer evaluations, therefore, involves the competing interests described above. Some faculty and academic institutions argue that because of the importance of tenure and its relation to preserving academic excellence, peer discussions must be conducted in secrecy to prevent the chilling effect of outside interference. 36 They argue further that academic freedom is fundamental to achieving academic excellence and can only flourish if faculty peers and academic institutions are allowed the autonomy in decision making that confidentiality provides. 37 On the other hand, faculty plaintiffs and the EEOC believe that unless information critical to the tenure decision-making process is released, proof of illegal discrimination is impossible to establish. 38

Federal district courts have attempted to resolve the confidentiality controversy by giving a mixture of recommendations to college and university administrators and faculty. More significantly, each of four federal appeals courts have decided the issue differently. In In re Dinnan, 39 the U.S. Fifth
Circuit Court of Appeals decided that an academic freedom privilege not to disclose tenure votes had not been considered previously or recognized by any court "on the basis of fundamental principles of law and sound public policy." The court concluded that since no privilege existed, Professor Dinnan, a member of the tenure committee, had to disclose his tenure vote or be held in contempt of court.

In Gray v. Board of Higher Education, the U.S. Second Circuit Court of Appeals rejected the no-privilege approach of the court in Dinnan. It opted instead for a balancing approach between "academic freedom and educational excellence on one hand and individual rights to fair consideration on the other." Although the court gave credence to the college's concern that compelled disclosure of tenure committee votes would chill candid peer evaluations, disturb faculty relationships, and thereby threaten academic freedom, it adopted the compromise proposed in AAUP's amicus brief. The court ordered, absent a written statement of reasons for a decision against reappointment, the college to release individual tenure votes.

The U.S. Seventh Circuit Court of Appeals, relying on the discussion in Gray, applied a similar balancing test in Equal Employment Opportunity Commission v. University of Notre Dame Du Lac. In part because the university had offered to release to the EEOC all personnel information requested with identifying information deleted, the court found the university had a qualified privilege in keeping identities of reviewers
confidential. The court stated that the EEOC had to show a "particularized need" before it would order disclosure of the names and identities of the participants in the tenure review process.

In Equal Employment Opportunity Commission v. Franklin and Marshall College, the U.S. Third Circuit Court of Appeals reverted to the reasoning used by the Dinnan court. Relying upon the language of the legislative history of Title VII, the court required that extensive tenure review information be released. Although admitting that permitting disclosure of confidential peer review materials "may perhaps burden the tenure review process in our nation's universities and colleges," in the face of a clear mandate from Congress, the court concluded that it had no choice but compel release of all material that the EEOC considered relevant to its investigation.

In deciding whether to apply a balancing approach or to require complete disclosure of relevant information each court has been influenced by its own understanding of the breadth of academic freedom, the compelling need for the release of peer evaluations, the initiatives colleges have taken in voluntarily releasing confidential information, and Congress' intent in extending Title VII to educational institutions. Since judicial opinions vary as courts assess each of these variables, colleges officials often have been confused about the continued viability of confidential peer review.
Although a number of commentaries were published after Dinnan and Gray were decided, few specific solutions have been proposed that also consider Notre Dame, Franklin & Marshall, and numerous lower court decisions. This article will discuss in detail the four major federal circuit court decisions rendered as well as explore other court decisions rendered before and after Dinnan was decided. The arguments supporting the maintenance of confidential peer evaluations will be analyzed as well as the arguments presented by the EEOC and plaintiffs compelling release of peer evaluations. Finally, a course of action to guide courts and faculty in future tenure cases will be explored that will recommend a consistent case-by-case analysis to preserve the integrity of the tenure review process while ensuring adherence to the true principles of academic freedom and non-discrimination.
II. Review of the Major Cases

In re Dinnan

The case that sparked the confidentiality controversy in 1981 was In re Dinnan. In that case, Maija Blaubergs, a faculty member at the University of Georgia, brought a sex discrimination suit against the University alleging that she had been unlawfully denied promotion to the rank of associate professor and that her employment was terminated unconstitutionally. In the course of discovery, the deposition of Professor Dinnan, a member of the Promotion Review Committee, was taken. When asked how he voted on Professor Blaubergs' application for promotion, Dinnan refused to answer, claiming an academic freedom privilege not to testify. Blaubergs then filed a motion for an order compelling discovery and the trial court ordered Dinnan to testify.

The U.S. Fifth Circuit Court of Appeals affirmed the order, stating that "no privilege exists that would enable Professor Dinnan to withhold information regarding his vote." The court described the various privileges protecting confidentiality that exist, such as the privilege against self-incrimination, the attorney-client privilege, the privilege of one spouse to not testify against the other, the physician-patient privilege, and the work-product privilege. The court stated that societal goals were promoted in establishing these privileges. It concluded, however, that if the court construed academic freedom to include
withholding tenure votes, then other important societal goals, such as the elimination of discrimination in employment decisions, would be frustrated.\textsuperscript{62}

Although the Fifth Circuit conceded that academic freedom had long been viewed by the U.S. Supreme Court as a special concern of the first amendment,\textsuperscript{63} the university's freedom to determine "who may teach" had to be based solely on academic grounds. The plaintiff alleged that the University of Georgia decided a tenure application on other than academic grounds and therefore the court reasoned that the deliberations were outside of constitutional protection.\textsuperscript{64}

Professor Dinnan further claimed that there was a common law privilege designed to protect the secret ballot, and since his vote was made by secret ballot it was protected.\textsuperscript{65} The court dismissed this argument by saying that the reason ballots were kept secret was to encourage individuals to vote in political elections without fear of reprisal and that society had "no strong interest in encouraging timid faculty members to serve on tenure committees."\textsuperscript{66} The court was also unconvinced that any applicant who was denied tenure could retaliate against tenured faculty members.\textsuperscript{67}

Dinnan contended that faculty would be inhibited in making tenure decisions if there was a possibility that committee members would be required to reveal their votes.\textsuperscript{68} With a strong
admonishment, the court responded that if a tenure committee was acting in good faith, "disclosure should not adversely affect the decision-making process." 69

No one compelled Professor Dinnan to take part in the tenure decision process. Persons occupying positions of responsibility, like Dinnan, often must make difficult decisions. The consequence of such responsibility is that occasionally the decisionmaker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the decision-maker has acted for legitimate reasons, he has nothing to fear. We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions. If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them. 70

The court, therefore, found no compelling justification for establishing a new privilege, and ordered Dinan to testify stating that "the vital truth-seeking function of our judicial system must carry the day." 71

Gray v. Board of Higher Education, City of New York

One year after the Dinnan decision, the U.S. Second Circuit Court of Appeals, in Gray v. Board of Higher Education, City of New York, 72 chose not to accept the Dinnan court requirement of "compelling justification;" instead it adopted a balancing
approach, weighing societal interest in a full and fair adjudication against "societal interest in protecting the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social values."\textsuperscript{73} The Gray court also gave credence to the argument that constitutionally protected academic freedom included the right of faculty to keep tenure votes confidential.

In this case, Dr. S. Simpson Gray brought a civil rights action under 42 U.S.C. § 1981, 1983, and 1985 alleging racial discrimination when he was denied reappointment with tenure after five years of teaching in the City University of New York system.\textsuperscript{74} In the course of the discovery process, Gray sought to discover the tenure votes of two of the named defendants, Dr. Martin Moed and Dr. Randall C. Miller.\textsuperscript{75} In deciding the case, the trial court applied a test considering four specific criteria: (1) whether the desired information was available from other sources; (2) whether the desired information went to the heart of the issue; (3) the degree of harm that would be caused by disclosure; and (4) the type of controversy before the court.\textsuperscript{76}

For the first criterion, the trial court said that discovery of individual faculty votes was not the only avenue by which Gray could obtain evidence to support his claim. He had already been given the number of votes cast for and against his reappointment and promotion and he also had the reports and evaluations upon which the tenure decision presumably rested. In addition, Gray had access to some statistical and historical data which might
have shown disparate treatment of minority group persons in
faculty hiring, promotion, or grants of tenure. Next, in
applying the second criterion of whether the desired information
went to the heart of the issue, the court stated that "it was
unclear in what way knowledge of specifically who voted for or
against Gray would clarify the motivation for the committee
vote." 78

As to the third criterion, the degree of harm that would be
caused by disclosure, the trial court began by saying that the
tenure system was an essential "linchpin" in the commitment to
safeguard the academic freedom of individual teachers. 79 It
further stated that the peer review system of decision-making with
regard to the granting or withholding of tenure was "intended to
ensure that academic considerations [would] be of primary concern
in the decision whether or not to grant tenure," and that peer
review had been said to embody 'the essence of academic
freedom.' 80 The trial court took issue with the Dinnan court
and determined that disclosure of tenure votes would have a major
chilling effect on future tenure deliberations, thus limiting
academic freedom.

While it is certainly true that generally those
voting on tenure decisions are not concerned
about reprisals from those about whom they must
make judgments, the maintenance of secrecy in
the voting process is nevertheless of great
value. It is not difficult to perceive that the
failure to maintain the confidentiality of votes
on tenure decisions would tend to promote
divisiveness among faculty members, and could
well lead to Department Chairmen and those with
greater influence exerting a disproportionate
impact on such decisions. 81
Lastly, the court weighed the type of controversy before it and concluded that the matter was neither a criminal investigation nor a grand jury proceeding in which the courts "will most vigorously enforce society's need for information despite assertion of a qualified right to confidentiality which does not fall readily into one of the traditionally recognized privileges against disclosure." 82

Consequently, the trial court found that the scales tipped "decidedly" toward the protection of confidentiality stating that

this action is also not an isolated one, but is of a type that is brought frequently in this Court. A decision by this Court to the effect that defendants' individual votes with regard to plaintiff's application for reappointment, promotion, and tenure are subject to discovery, could therefore have a substantial impact on expectations of confidentiality and, consequently, on the decision making process which relates to granting or withholding tenure. 83

On appeal, the Second Circuit, although accepting the balancing approach of the district trial court, decided to compel disclosure. 84 The court first relied heavily on the type of claim criterion discussed by the trial court. The type of claim before the court, 42 U.S.C. § 1981, required the plaintiff to prove discriminatory intent on the part of the tenure committee. Furthermore, in order to establish a Fourteenth Amendment claim that his civil rights were denied (the basis of his 42 U.S.C. 1983 claim), the plaintiff had to show that the discrimination he suffered was intentional. 85
According to the court, however,

Dr. Gray has not been told defendants' votes, much less been given reasons for the committee's decision. In order to establish the University's intent to discriminate, he would have to know the votes. Or, he could establish that the reasons given by the committee for its actions were pretexts for its refusal to rehire and tenure him—if the committee had given reasons. 86

The Second Circuit concluded that by merely being furnished an after-the-fact statement of reasons, Gray could not prove intent, and without proof of intent there was no case. 87 The court went on to say that had the college provided a written statement of reasons for tenure denial, the need for individual votes would have been greatly reduced. 88 It wholeheartedly adopted the AAUP's suggestion in its amicus brief that if an unsuccessful candidate for reappointment or tenure receives a "meaningful written statement of reasons" from the peer review committee and is afforded proper intramural grievance procedures, disclosure of individual votes should be protected by qualified privilege. 89 The court concluded that,

[the AAUP statement] strikes an appropriate balance between academic freedom and educational excellence on the one hand and individual rights to fair consideration on the other, so that courts may steer the 'careful course between excessive intervention in the affairs of the University and the unwarranted tolerance of unlawful behavior.' 90
E.E.O.C. v. University of Notre Dame Du Lac

In E.E.O.C. v. University of Notre Dame Du Lac, the Seventh Circuit used a balancing approach when approving the release of confidential information with all identifying information deleted. In this case, Oscar T. Brookins, a former faculty member at the University of Notre Dame, filed a Title VII charge with the EEOC alleging that the university had unlawfully discriminated against him on the basis of race in denying him tenure. As part of its investigation, the EEOC issued an administrative subpoena duces tecum which required the university to produce the personnel files, with all names included, of certain faculty members (including Brookins) in the Department of Economics.

The university objected to the EEOC subpoena on the basis that the personnel files in question contained peer review evaluations "which were made with the assurance and expectation that the evaluations would remain confidential," and therefore the evaluations were protected by qualified academic privilege. The university contended that it should be permitted to delete the names and all identifying information of the academicians participating in the evaluations. It also argued that the EEOC should be required to execute a non-disclosure agreement as a precedent condition to the university's release of any of the faculty personnel files in question.
The district court declined to protect the information subpoenaed by the EEOC. 96 In response to the university's contention that it should be allowed to withhold the names and identifying information from the files, the court stated that, "if this court permits the deletion of the names and identifying characteristics of the reviewers, the EEOC investigation would essentially be terminated upon review of the written evaluation of the reviewers, without giving the EEOC the opportunity to investigate the motives and reasons behind the evaluations if the EEOC deemed it necessary." 97 The court further stated that the EEOC was prohibited from disclosing information at the early stages of investigation and that disclosure of the file to Brookins at the conclusion of the investigation was protected under Rule 26(c) of the Federal Rules of Civil Procedure. 98 In response to the university's contention that the EEOC sign a non-disclosure agreement, the court stated that the EEOC procedures provided the protection requested by the university and that a non-disclosure agreement was unnecessary. 99

The Seventh Circuit reversed the district court. The appeals court asserted that "the Supreme Court in EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 101 S.Ct. 817, 66 L.Ed.2d 762 (1981) held that the EEOC [was] not prohibited from disclosing the contents of its investigatory files to the charging party during the investigation of the discrimination charge." 100 Also, the Seventh Circuit believed the district
court "ignored the chilling effect that even disclosure to the EEOC itself would have on academician's willingness to provide candid and frank peer evaluations." ¹⁰¹

The court of appeals devised a relatively elaborate procedure which required the district court to parcel out unredacted or identifying information as the "particularized need" arose.¹⁰² In conjunction with requiring further disclosure after the need was determined, the appeals court stated that the district court could issue any protective orders it deemed necessary. By following this procedure, the court reasoned, "judicial and administrative intrusions into the affairs of the college will be minimized."¹⁰³ In response to the university's request that the EEOC sign a non-disclosure agreement, the court of appeals felt that a preferred method was to have the district court issue a protective order "which assumes that the privileged materials are not disclosed to persons not directly involved in this action up to and including the time any private action is filed by the charging party."¹⁰⁴

The court concluded with a strong statement showing support for the sensitivity of the faculty's position in the tenure review process.

If we, as EEOC would have it, allowed unrestricted intrusions into the confidentiality of the peer review process absent the most compelling reasons for disclosure, we would effectively strangle faculty tenure selection procedures by destroying any expectation of
privacy held by those participating in the faculty peer review process and thereby discourage honest and candid appraisals of tenure applicants. . . . Secret voting without discussion and reason would be encouraged and lawsuits could conceivably be filed by every unsuccessful tenure applicant in an effort to pierce the qualified academic privilege. Our decision assists in safe-guarding academic freedom which is of 'transcendent value to all of us and not merely to the [educators] concerned.' Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967).105

The Notre Dame case dealt exclusively with identifying information. The university had voluntarily given the EEOC all of the information it requested with the provision that names, addresses, and like information be withheld. The court, however, said that, "clearly, there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available. . . . Given a different set of facts we might require exhaustive discovery first."106

E.E.O.C. v. Franklin & Marshall College

In E.E.O.C. v. Franklin & Marshall College,107 Professor Montbertrand filed a Title VII charge of discrimination with the EEOC against Franklin & Marshall College. He alleged that he was denied tenure in the French Department because of his national origin.108

In the course of its investigation the EEOC issued a subpoena duces tecum requiring the college to provide among other items, records and documents on all individuals granted or denied
tenure during the period that Professor Montbertrand was employed. The EEOC agreed to accept the files with names and other identifying information removed.\textsuperscript{109}

The college agreed to comply with the EEOC subpoena to the extent that the college would provide data regarding the performance of each tenure candidate considered during the period in question as well as the disposition of each case and a corresponding statement of reasons from the Professional Standards (tenure) Committee. The college also agreed to provide information not considered confidential.\textsuperscript{110}

At issue was the college's refusal to provide the bulk of the material sought, which included tenure recommendation forms prepared by faculty members, annual evaluations (except those prepared by the Dean), letters of reference, evaluations of publications by outside experts, and all notes, letters, memoranda or other documents considered during each tenure decision.\textsuperscript{111}

The college's argument against disclosure was based upon the contention that "the quality of a college, and in a broader sense, academic freedom, which has a constitutional dimension, is inexorably intertwined with a confidential peer review process."\textsuperscript{112} For this reason, disclosure of peer review material should be compelled "only when facts and circumstances give rise to a sufficient inference that some impermissible consideration played a role in the tenure decision."\textsuperscript{113} The college also argued that the importance of confidentiality
increased as the size of the teaching staff decreased. Embarrassment, confrontational situations and the fear of less than honest evaluations were likely results of a lack of confidentiality.\textsuperscript{114}

While agreeing in principle "that the issue of confidential tenure review did reach constitutional proportions," the U.S. Third Circuit Court of Appeals refused to adopt the balancing approach used by the courts in \textit{Notre Dame} and \textit{Gray}. Rather, it adopted the philosophy used in \textit{Dinnan} but for somewhat different reasons.\textsuperscript{115} The court assumed that during the 1972 Title VII amendment hearings Congress would have addressed the problem of confidentiality had it wished special treatment be accorded academic institutions under investigation. The court concluded that "in the face of the clear mandate from Congress which identified and recognized the threat of unchecked discrimination in education, we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluating decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality."\textsuperscript{116}

The court determined that the EEOC was entitled to all information that it considered relevant to the investigation.\textsuperscript{117} The term "relevant" was to be construed broadly to include "virtually any material that might cast light on the allegations against the employer."\textsuperscript{118} The \textit{Franklin & Marshall} court believed the Second Circuit's balancing approach in \textit{Gray} permitted colleges and universities to avoid a thorough
investigation by withholding confidential information and allowed academic institutions to "hide evidence of discrimination behind a wall of secrecy."\textsuperscript{119} It did, however, tacitly approve withholding names and identifying information from the material given to the EEOC.\textsuperscript{120}

Although the four circuit court decisions differ in context, some common themes emerge. Both Blaubergs (\textit{In re Dinnan}) and Gray brought private suits against their institutions for discriminatorily denying them tenure. In the course of discovery, members of the tenure review committees refused to divulge their votes. The issue addressed in both cases dealt with the privilege of withholding testimony pertinent to trial. In both the \textit{Dinnan} and \textit{Gray} cases, the professors who sought to maintain the confidentiality of their votes were required to testify, although the \textit{Gray} court applied a balancing approach to evaluate if a qualified academic freedom privilege might exist while the \textit{Dinnan} court denied that any such privilege could exist.

Professors Brookins and Montbertrand filed discrimination charges with the EEOC against the University of Notre Dame and Franklin & Marshall College respectively. During its investigations the EEOC subpoenaed confidential peer review information. In both cases the institutions released large amounts of confidential information with names and identifying data withheld. Notre Dame voluntarily released all information requested by the EEOC while Franklin & Marshall was compelled to do so by the court.
The Notre Dame court, however, implied that the EEOC had the burden of showing that an exhaustive discovery of outside records had been conducted and that there was "substance" to the charging party's claim before even redacted files should be made available. The court did not define "substance."

Pre-Dinnan Decisions

The first case involving confidentiality of peer review materials arose not long after Title VII was amended in 1972 to include colleges and universities. In Equal Employment Opportunity Commission v. University of New Mexico, the EEOC, pursuant to a discrimination claim, subpoenaed personnel files of all faculty members in the University of New Mexico College of Engineering. The university agreed to supply copies of the plaintiff's file, but refused to supply the other faculty files. The university's reasons for non-compliance were that the information sought was not relevant to the charge and that the information sought was confidential. The university argued that the EEOC subpoena violated the fourth amendment of the U.S. Constitution since the EEOC did not have probable cause to believe that the university had in fact discriminated. The U.S. Tenth Circuit Court of Appeals held that the EEOC could subpoena material that it considered relevant to its investigation and that relevancy should be construed broadly when dealing with EEOC investigatory powers. It also stated that probable cause was not required in circumstances involving investigations by government agencies.
The first case in which a university raised an evidentiary privilege argument in federal district court was *McKillop v. Regents of the University of California*. Here, the university was successful in preserving the confidentiality of tenure documents. Although relying on a California statute, the court stated that parallels existed in Federal Rules of Procedure. With a strong statement supporting the role of confidential peer review in ensuring academic excellence, the court employed a balancing approach which resulted in tenure documents being protected by qualified privilege. The court concluded that release of this information could seriously erode the peer review process.

In weighing the plaintiff's need for information contained in the confidential records, the court concluded that the plaintiff had alternative means of discovery available to her. These alternative means of discovery included deposing university decision-makers involved in her tenure case and appointing an impartial academician to review the files to determine whether any implication of discrimination was contained in them.

Likewise the U.S. Fourth Circuit Court of Appeals recognized a qualified privilege in *Keyes v. Lenoir Rhyne College*. The Court decided that the plaintiff was not entitled to confidential peer evaluation documents since she had failed to establish a prima facie case of discrimination prior to discovery. Furthermore, the college had not used these evaluations as a basis
of defense against the discrimination charge. Therefore, the balance tipped toward the protection of the evaluation records in order to guarantee that the college could continue to "receive honest and candid appraisals of the faculty members by their peers". 132

Relying on the reasoning of the Fourth Circuit in the Keyes case, the U.S. Fifth Circuit Court of Appeals, in Jepsen v. Florida Board of Regents,133 compelled the release of the faculty evaluations used in the tenure denial of a plaintiff where the university defended a claim of discrimination on the basis of these faculty evaluations.134 The court determined that the plaintiff had no alternative means of discovery. Although the court discussed the appropriate burden of proof in this case, it failed to address whether the plaintiff had established a prima facie case prior to discovery or whether the establishment of a prima facie case was a necessary prerequisite to discovery of confidential information.135

In Lynn v. Regents of the University of California,136 the U.S. Ninth Circuit Court of Appeals determined that the plaintiff had a far greater need for peer evaluations than the university had for maintaining confidentiality where the plaintiff had previously learned from other sources much of the content of the evaluations and the names of the evaluators.137 The court did, however, support the balancing approach used in Jepsen and Keyes.138
Post-Dinnan Decisions

To date, since Dinnan was decided, five federal lower court cases have addressed the issue of the release of confidential tenure review material. All five decisions employed a balancing approach to determining whether this information should be released.

In Zaustinsky v. The University of California, for example, the U.S. district court required the plaintiff to establish a prima facie case of discrimination before confidential information could be discovered. Having first established that peer review materials were eligible for treatment as privileged confidential communications, the court went on to determine whether the plaintiff's need for the information outweighed the university's need for confidentiality. If it appeared that the plaintiff could establish a prima facie case of discrimination, the court reasoned that the university must then give reasons for its actions and disclose supporting evidence. Should the reasons be based upon materials in confidential files, the university would then be required to release those files so that the plaintiff could attempt to show that the university's articulated reasons were pretextual.

The court permitted the university to release information in stages, beginning with a written statement of the reasons for its decision, including a comprehensive summary in writing of the substance of confidential documents in the records. If after
that production it appeared to the court that the material did not fully reflect the basis for the university's action, the court would determine the extent to which the university's position implicated other confidential and undisclosed material.\textsuperscript{144}

The court in \textit{Rollins v. Farris}\textsuperscript{145} required that tenure files of various faculty members and minutes of faculty tenure committee meetings that considered the plaintiff's tenure application be discoverable in a discrimination suit.\textsuperscript{146} The court rejected the college's argument that the information could not be compelled to be disclosed without "some independent evidence of discrimination on the part of the university" or evidence that plaintiff's qualifications were "clearly superior".\textsuperscript{147}

Instead, the court adopted the position of the Second Circuit in the \textit{Gray} case and stated that "if plaintiff alleges that the tenure committee harbors a discriminatory animus against him and if this animus would be reflected in the notes of the deliberations or votes taken, then the information is discoverable."\textsuperscript{148} The court concluded that "the degree of infringement on the process of peer selection is outweighed both by the demands of fair employment as well as those of academic excellence and freedom" and that "the requested materials would be discoverable under the tests of all circuits to have reached this issue other than that of the Seventh Circuit [in \textit{Notre Dame Du Lac}]"\textsuperscript{149}
Two faculty personnel cases were decided on the same day by the federal district court of the northern district of California. Paul v. Stanford University\textsuperscript{150} dealt with a plaintiff who sought access to her personnel file in connection with her tenure denial in an attempt to establish a Title VII claim based upon sex and national origin discrimination. In asserting that the plaintiff had established a prima facie case of discrimination, the court believed that she had the right to the information in the files.\textsuperscript{151} However, in order to protect the confidentiality of the tenure files, the court ordered that the identity of the evaluators be kept confidential. It ordered further that a special master, acceptable to both parties with expertise in related academic matters, prepare full summaries of the materials in the plaintiff's tenure file and release only those summaries to the plaintiff.\textsuperscript{152}

In Rubin v. Regents of the University of California\textsuperscript{153} the federal district court relied heavily on Zaustinsky and Paul. In this case, the plaintiff alleged that she was not hired as a professor in the geography department at the University of California-Berkeley because of sex discrimination.\textsuperscript{154} She claimed that a male faculty member changed the position description and placed unsolicited letters in a male candidate's file in order to influence the hiring committee's decision.\textsuperscript{155} The court, in ordering release of the file, implied that confidentiality was not as critical in faculty hiring decisions as it was in promotion and tenure decisions. Furthermore, the
letters were not obtained with the promise of confidentiality and the plaintiff's need for the information clearly outweighed any confidentiality interest that may exist.\textsuperscript{156}

Finally, the plaintiff in \textit{Jackson v. Harvard University}\textsuperscript{157} was denied access to the identities of the faculty and peer reviewers involved in her tenure denial because she failed to show a "particularized need" sufficient to overcome the university's qualified academic privilege against disclosure.\textsuperscript{158} The court, however, did require production of material from the tenure files of male faculty members in the department because it was needed by the plaintiff to establish a prima facie case of discrimination. The court stated that "the qualifications of men who were granted tenure may be relevant to show that, notwithstanding Harvard's assertions, plaintiff met the objective tenure requirements such as years of teaching experience or publication of scholarly materials."\textsuperscript{159} Accordingly, the court permitted discovery of male faculty tenure files provided that names and identifying information were withheld.\textsuperscript{160}

It appears that most courts that have faced the confidentiality issue have carved out a "middle ground" between complete privilege and total disclosure in determining when and what confidential information must be released pursuant to discovery or issuance of an EEOC subpoena. Most lower federal courts have rejected a strict Dinnan approach and have opted instead for a balancing approach before establishing a qualified privilege. If courts determine that confidential information must
be released, they often employ further tests to determine the specific information needed by the plaintiff in order to attempt to prove a case of discrimination. Often names and identities of reviewers are withheld from the released information.
III. Arguments in Favor of Privilege

Few academicians argue that an absolute privilege should exist to protect faculty peer review information from disclosure in all instances. Indeed, an absolute privilege would thwart Congress' purpose for enacting Title VII and would be contrary to public policy. Many who advocate a privilege to withhold tenure review materials from discovery or subpoena feel that each court should assess discrimination charges on a case-by-case basis and require release of confidential information only upon an independent showing of discrimination.

Proponents of qualified privilege believe that confidentiality in the tenure review system is essential in the effective evaluation of teaching or scholarly excellence. They feel that full disclosure would eventually lead to the demise of peer review. College and university officials raise concern about the chilling effect on honest evaluations, the disharmony in working relationships, and the erosion of institutional academic freedom should full disclosure become prevalent.

Chilling Effect

The peer review process has long been considered the most effective way to guarantee that only the most qualified faculty members receive tenure and promotion. Faculty peers, especially those within a tenure candidate's department, have expertise in both subject matter and teaching methods and can
properly evaluate overall performance. If knowledgeable faculty members routinely refuse to serve on tenure committees, the academic quality of an educational institution will likely suffer.\textsuperscript{166} Two suppositions emerge to advance the argument that disclosure of faculty personnel information would have a chilling effect on peer review. The first supposition is that, as a result of disclosure, some faculty members will refuse to serve on peer review committees due to fear of reprisal by plaintiffs, deans, or department chairpersons. The second supposition is that, those who choose to serve on peer review committees will compromise their opinions because they fear that those opinions will be made public. Consequently, all reviews will be favorable resulting either in the diminution of teaching quality and scholarly excellence in permanent faculty or the discounting of faculty opinions by university decision-makers.\textsuperscript{167}

Responding to the reprisal concern, the court in \textit{Dinnan} felt that, if, as a result of disclosure, some faculty members refuse to serve on tenure and promotion committees, society would be better off without these "weak-willed individuals". Also the \textit{Dinnan} court determined that there should be minimal chilling effect since disclosure would be only "occasional".\textsuperscript{168} This opinion is by no means universally shared. Immediately following the \textit{Dinnan} decision, the AAUP urged that courts weigh circumstances before compelling disclosure, partly "as a matter of prudence, resting upon the higher competence of those engaged in the enterprise to select their peers and the chilling effect upon that exercise of judgment engendered by external
After the Third Circuit's decision in Franklin & Marshall, an official at the college stated that, although no one had yet declined to review faculty candidates for fear of disclosure the possibility "may not be far off."  

Likewise, the demand for disclosure of peer review information has by no means been occasional. In 1974, the court in McKillop predicted that it could not assume that law suits "which present equivalent justification for disclosure [as the case before it] would be rare; indeed they would probably be quite frequent." Statistics indeed show that Title VII and § 1981 suits involving faculty personnel policies have been quite frequent and disruptive to the collegial governance of higher education.

Academicians also fear that if the formal evaluations are made public, peer evaluations will become useless with rewards of tenure being granted routinely to underqualified individuals. The court in Notre Dame agreed, stating: "Academicians who evaluate their peers for tenure have, since the inception of the academic tenure concept, been assured that their critiques and discussions will remain confidential." "Without this assurance," the court continued, "academicians will be reluctant to offer candid and frank evaluations in the future. Some academicians believe that written evaluations will say virtually nothing, while, informal reviews could take the form of phone calls or talks in the hall."
Courts have traditionally abhorred any attempt by the state to chill expression in higher education settings.\textsuperscript{175} In \textit{Sweezy v. New Hampshire},\textsuperscript{176} the U.S. Supreme Court stated that any prior restraint by the state or academic freedom would "impose [a] strait jacket upon the intellectual leaders of our colleges and universities" that would "imperil the future of our Nation. Scholarship cannot flourish in an atmosphere of suspicion and distrust."\textsuperscript{177} And in \textit{Keyishian v. Board of Regents of the University of the State of New York},\textsuperscript{178} the Court declared that "the classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."\textsuperscript{179} Also, recent developments in college student newspaper cases show a consistent narrowing of what is permissible prior restraint of student expression in an academic setting.\textsuperscript{180}

If confidentiality in the peer review process is a necessary prerequisite to honest and frank communication and evaluation, then any breach of that confidentiality must have a chilling effect on the valid determination of "who may teach".\textsuperscript{181} Absent a compelling reason to the contrary, confidentiality of tenure review should not be breached. Given a compelling reason by a faculty plaintiff, the court should only permit minimal intrusion into the confidential process so that its chilling effect will be minimized and the integrity of the process will be upheld.\textsuperscript{182}
Disharmony in Working Relationships

Some faculty members and academic officers argue that the disclosure of tenure review materials will lead to disharmony within faculty ranks and between department faculty and members of the administration. Departmental faculty feel that by disclosing candid comments about a tenure candidate's worth as a scholar or effectiveness as a teacher, they risk straining collegial relationships and losing many positive aspects of collegial governance. In addition, some academicians argue that pressure brought by members of the administration on certain faculty members who favor or disfavor a particular tenure candidate might lead to adversarial relationships between faculty and administration.

If discrimination issues were not at stake in these cases, there would be merit to the argument that the disclosure of confidential peer review materials would result in strained relationships in the university setting. However, a charge of discrimination in and of itself usually raises tension within faculty and administrative ranks and it is hard to comprehend that, given such a charge, disclosure of confidential material would increase the strain on collegial relationships.

Academic Freedom and Institutional Autonomy

The academic freedom privilege provides the basis for the evidentiary privilege claimed by colleges and universities.
Academic freedom may protect the remarks or actions of individual instructors or the manner in which an academic institution operates. The freedom of an institution to determine for itself, without outside interference, who may teach and what will be taught has been defined by the AAUP and the U.S. Supreme Court as a right protected by the first amendment.

The AAUP embraced this claim when it submitted its amicus curiae brief in *Barenblatt v. United States*, 186 a case dealing with a faculty member's right not to testify before the House Committee on Un-American Activities. The AAUP stated that "one of the essential preconditions of academic freedom--of freedom in teaching and research--is untampered control by the university over employment and dismissal of its faculty." 187 And the U.S. Supreme Court in *Bakke* gave credence to a constitutionally based concept of institutional academic freedom, when Justice Powell wrote: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." 188 Justice Powell went on to define one aspect of academic freedom as "the freedom of a university to make its own judgments as to education." 189

Further, Justice Stevens in *Regents of University of Michigan v. Ewing* alluded to the Court's responsibility to safeguard institutional academic freedom. 190 He stated that, "academic freedom thrives not only on the independent and
uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself."191

Academic freedom, however, should not permit absolute autonomy in institutional decision-making if discriminatory bias taints the fairness of the decision-making process.192 If one of the ways in which an institution selects and retains its best faculty is through peer review and if institutional autonomy does raise a first amendment academic freedom claim, then individual plaintiff rights in discrimination suits must be balanced against the constitutional right of the institution to run its own affairs before a court should compel possible disruption of the peer review process.

Parallels with Other Privileges

One argument raised by Professor Dinnan was that an absolute privilege of confidentiality existed because it paralleled other common law evidentiary privileges. Dinnan asserted that the tenure review process was parallel to the secret ballot privilege and, therefore, that there existed a common law privilege to keep the review process confidential. The Fifth Circuit disagreed, stating that the secret ballot privilege applied only to political or politically related elections in order to protect voters against reprisal by the victors and to encourage voting by even the most timid individuals.193
Most common law privileges of confidentiality are based upon a special relationship between parties where confidentiality must be upheld in order to maintain this special relationship. This is certainly the case in the attorney-client privilege and the husband-wife privilege. The tenure evaluation privilege, however, is designed to keep information, not only from the state or public at large, but from the person being evaluated. There is no special relationship that needs to be maintained between the faculty evaluators and the tenure candidate. Consequently, when the rights of a tenure candidate come into conflict with the need to maintain absolute privilege, a court will not establish an absolute common law privilege.

An equally troubling aspect to establishing a common law privilege to withhold tenure votes is the third prong of Wigmore's four-part test. To qualify as privileged, a communication must be one that the community values. Here, courts and commentators wrestle over whether or not society values keeping faculty peer communications confidential, especially in the face of accusations of race or sex discrimination. As the court in Dinnan described it, the judiciary is "hostile" to recognizing new privileges and "public policy served by a new privilege must transcend the normally dominant truth-seeking considerations" in order for a privilege to be established. In the Dinnan case, society's goal of eliminating discrimination clearly outweighed the interest of "encouraging timid faculty members to serve on tenure committees."
If society values academic freedom and academic freedom includes, as some suggest, institutional control over the quality of teaching, then it is an appropriate societal goal to preserve that freedom wherever possible. In the peer review process, however, that freedom cannot be used to cloak discrimination. Therefore, an absolute common law evidentiary privilege to withhold tenure information should not be created. Rather, courts should apply a balancing test to determine whether a qualified constitutionally based privilege exists in each case. The court's goal should be to release only the necessary information for a plaintiff's substantive claim of discrimination to receive a full and fair hearing.
IV. Arguments Compelling Release

Faculty plaintiffs and other opponents of privilege argue that plaintiffs must have access to peer review information in order to prove that discrimination was the true reason for tenure or promotion denial. They argue that the legislative history relating to the extension of Title VII to higher education, the investigatory authority of the EEOC, the importance of race and sex discrimination claims in education, the necessity of obtaining confidential information in establishing a prima facie Title VII claim, and the fallacy of the institutional academic freedom argument are reasons why full discovery should be compelled.

Legislative History of Title VII's Extension to Higher Education

The Third Circuit's decision to order Franklin and Marshall to release voluminous amounts of confidential materials was heavily influenced by Congress' purpose in extending Title VII to colleges and universities.¹⁹⁹ When the House Education and Labor Committee proposed several amendments to Title VII in 1972,²⁰⁰ the committee members made it quite clear that the proposal to eliminate the exemption for education was designed to impact higher education.

Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been
permitted entry into white institutions is common knowledge. ... When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than male counterparts ... 201

Accordingly, the committee felt that educational institutions should report their activities to the EEOC and should be subject to the provisions of the Equal Employment Opportunity Act of 1972. 202 The Senate passed the amendments to Title VII despite the objections of Senators Allen and Ervin who felt that federal oversight of academic employment practices would be a violation of academic freedom. 203

It was the clear intention of both Houses of Congress to eliminate discrimination in higher education despite the effect that this federal legislation might have upon institutional autonomy. 204 Some commentators and courts claim that Congress' reasons for extending Title VII should give a private plaintiff carte blanche when gathering evidence to prove a case of discrimination under Title VII. 205 However, it would be unrealistic to interpret Congressional intent to include the view that confidential faculty peer review should be abolished or that confidentiality should be destroyed solely because of an allegation of discrimination. Congress's inclusion of higher education under Title VII implies only that Congress intended for a faculty plaintiff to be able to pursue a case of discrimination in faculty personnel matters. Therefore, to be consistent with
the intent of Congress any accommodation designed to maintain confidentiality should be structured to permit plaintiff to pursue a valid claim of discrimination.

The Investigatory Authority of the EEOC

Title VII is enforced principally by the EEOC, which monitors employment practices by investigating charges of discrimination filed by individuals or by one of its commissioners. In the course of its investigation, the EEOC is authorized to subpoena records to determine if there is justification for the filing of a law suit.

Under federal law, the EEOC is authorized to "have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices." Courts have construed the concept of relevancy broadly when dealing with an EEOC investigation. Indeed it was the broad concept of relevance that led the Third Circuit in Franklin & Marshall to conclude that the EEOC was to be afforded access "to virtually any material that might cast light on the allegations against the employer" Some claim that this mandate prohibits courts from adopting a balancing approach or to occasionally withhold material from the EEOC when the EEOC subpoenas confidential information that it considers relevant to its investigation.
However, it is equally important that the EEOC not conduct a "fishing expedition" so that all files are opened up and confidentiality destroyed in order to discover information only remotely relevant to a charge of discrimination. As Chief Judge Aldisert stated in his dissent in Franklin & Marshall, certainly the doctrine of res inter alios acta is alive and kicking today, and I believe that before a federal agency should be allowed to poke through the confidential files of strangers to an employment discrimination claim, it should be held to some justificatory binder before a federal judge, rather than being annihilated with a ukase to fish any waters selected by it, and it alone.212

The Importance of Race and Sex Discrimination Claims

Whether a faculty employee raises a claim under Title VII, 42 U.S.C. §§ 1981, 1983, 1985 or Title VI or Title IX, the issues raised usually deal with unlawful discrimination in faculty employment based upon race, sex, or national origin. In addition to the discussions leading to Congress' adoption of the 1972 amendments to Title VII, there is ample evidence that Congress and the courts wished to eradicate discrimination in college and university settings.

For example, in Bob Jones University v. United States,213 the U.S. Supreme Court held that the government had a "fundamental, overriding interest in eradicating racial discrimination in education" that "substantially outweighed whatever burden placed on the university's exercise of its
religious beliefs. It could be easily argued that the denial of tax exemption to Bob Jones University was far more burdensome to the school than the opening of its faculty's tenure files or that the preservation of religious freedom is as equally compelling as the guarantee of institutional academic freedom. Similarly, discrimination based upon sex has been found to be unconstitutional in the public university setting despite Mississippi's intent in maintaining a school solely for women and the legislative history surrounding Title IX shows Congress' clear intent to eliminate sex discrimination in the private educational sector.

Yet it is noteworthy that Bob Jones and other cases deal with discriminatory actions that were not in dispute. In Bob Jones for example, the university printed its policies against interracial dating and marriage in its student handbook and in Mississippi University for Women v. Hogan, the university acknowledged its policy denying admission to men. Most confidentiality disputes arise in the initial stages of an investigation of alleged unlawful tenure denial where the plaintiff has yet to prove that discrimination was the real reason for the denial.

The Burden of Establishing a Prima Facie Case in Title VII Cases

The U.S. Supreme Court, in McDonnell Douglas Corp. v. Green, set the standards and order in which the plaintiff must prove a violation of Title VII. The plaintiff must first prove a
prima facie case of discrimination. Next the institution must articulate a legitimate, non-discriminatory reason for the adverse decision. Finally, the plaintiff must prove that the institution's articulated reason is a pretext for intentional discrimination.

Some courts, guarding against unrestrained intrusion into the peer review process, have required a plaintiff to prove a prima facie case of discrimination by using some indicia other than material in peer review files before ordering the release of confidential information. Having done so, the plaintiff would be entitled to confidential peer review materials in order to show that the college's articulated reasons for its personnel decision are pretextual. 220

In order to prove a prima facie case of discrimination in tenure or promotion review, the plaintiff must show:

1. That the plaintiff belongs to a previously underrepresented class protected by Title VII.
2. That the plaintiff was qualified for tenure or promotion.
3. That the plaintiff was not granted tenure or promoted.
4. That the educational institution promoted or granted tenure to other persons possessing similar qualifications at approximately the same time that the plaintiff was denied the promotion or tenure. 221

A plaintiff may argue that, without peer review information, he cannot show that he is qualified for tenure or promotion or that
other faculty who possess qualifications on a par with the plaintiff were promoted or granted tenure when he was denied.\textsuperscript{222} Indeed some courts have imposed standards on the plaintiff requiring her to show that she was more qualified for tenure than her peers, or to provide subjective indicators such as peer recommendations and favorable evaluations which show that she was at least minimally qualified for tenure.\textsuperscript{223} Consequently, this burden would require a plaintiff to have access to review material for the initial step of the \textit{McDonnell Douglas} test.

A related obstacle in establishing a prima facie case in tenure review is that one of the major components of tenure review, teaching ability, is not assessed solely on objective criteria. Often times the material that is maintained as confidential, that is, peer evaluation, is precisely what is given the most weight in evaluating teaching ability. Without the knowledge of what is contained in the peer review files, there is no way for a plaintiff to determine how the evaluation of teaching quality influenced the tenure or promotion decision.\textsuperscript{224}

Therefore, any prima facie requirement placed on the plaintiff before a court will require the release of peer evaluations should rely only on objective evidence or subjective material that is not considered confidential. Also, the plaintiff should only be required to show that he was equally qualified for tenure or promotion as his peers who were awarded tenure or promotion. Any greater burden on the plaintiff would almost certainly inhibit plaintiff's ability to pursue a discrimination case, thus thwarting the intention of Congress and the courts.
Academic Freedom Does Not Encompass Freedom to Withhold Confidential Information

The Fifth Circuit Court of Appeals admonished the appellant in Dinnan for construing academic freedom to "include more than it does," when he argued that academic freedom included his right to withhold his tenure vote.225 The court concluded that academic freedom was recognized as a legal right by the courts so that the institution and its faculty could be protected in the face of government pressure. Access to confidential information by a faculty peer, the court argued, does not fall into the same category as pressure from an external governmental source.226

The Dinnan court also stated that Frankfurter's four essential freedoms included the freedom of a university "to determine for itself on academic grounds who may teach."227 The court concluded that, "we have an allegation that the University of Georgia decided a tenure application on other than academic grounds," which falls outside the protection of academic freedom.228

One commentator claims that confidentiality of tenure votes is "entirely inconsistent with the purposes for which academic freedom has been recognized."229 He gives two reasons for this position. First, academic freedom is the freedom "of individual academic men (and occasionally women) to research and teach, and the freedom of students to learn."230 Second, relying on the Dinnan decision, he states that even if a court were to determine that the concept of institutional autonomy falls under Justice
Frankfurter's enunciation of the four essential freedoms, institutional decision-making involving race or sex discrimination is clearly not based upon academic criteria and thus should fall outside of academic freedom protection.\textsuperscript{231}

As stated earlier, the U.S. Supreme Court and other courts have determined that institutional autonomy is one freedom protected by the first amendment. It is equally clear that Congress and more recently the courts do not envision academic freedom protections as a means to permit discrimination in faculty employment decisions. Therefore, if the release of confidential peer review materials can affect the institutional decision-making process, it would seem inappropriate for a court to determine that a mere allegation of an impermissible employment decision is sufficient to impose a chill on the faculty peer process which is so vital to the academic endeavor.\textsuperscript{232} It would be equally inappropriate for a court not to permit a plaintiff or the EEOC to have access to confidential information if the court determines that there is some foundation to the discrimination claim.
V. SUGGESTED APPROACHES TO FUTURE DECISIONS

AAUP Recommendations

Immediately following the Dinnan decision, the AAUP issued a statement which suggested that courts should adopt a balancing approach that was subsequently endorsed by the court in Gray. In developing its policy, the AAUP sought to "balance the need for confidentiality in the peer review process against the need for disclosure to vindicate civil rights." The AAUP recommended that ideal faculty personnel policies should include some internal reporting procedure and an appeals process. These recommendations are clearly spelled out in the AAUP's Statement on Procedural Standards in the Renewal and Nonrenewal of Faculty Appointments and many colleges have adopted these procedures as part of stated faculty personnel policy. According to the AAUP, in all cases of an adverse decision or renewal, a faculty member should (1) be advised of the reasons which contributed to the decision, (2) have an opportunity to request a reconsideration by the decision-making body, and (3) have available a standing hearing committee to entertain any complaint that an impermissible consideration played a role in the decision.

In discovery pursuant to a discrimination charge, the AAUP states that it was "inappropriate for a court to compel disclosure of the actions and motivations of the individual participants in a faculty non-renewal decision without first weighing the facts and circumstances asserted by the complainant." Among the
factors that a court may weigh are: (1) adequacy of the procedures employed to reach the non-renewal decision, (2) the adequacy of reasons offered to defend the decision, (3) the adequacy of the review procedures internal to the institution, (4) statistical evidence that might give rise to an inference of discrimination, (5) factual assertions of statements or incidents that indicate personal bias or prejudice on the part of the reviewers, (6) the availability of information sought from other sources, and (7) the importance of the information sought to the issues presented. 238

The AAUP concluded that a court must then decide if there is a significant inference that impermissible considerations were likely to have played a role in the non-renewal decision. This inference must "overcome the presumption in favor of the integrity of the academic process." 239 If so, then the court can order release of confidential information.

Author's Recommendations and Conclusions

Most federal courts that have faced the qualified privilege issue in faculty promotion and tenure review disputes have applied a balancing test to determine whether confidential material should be released. Only the court in Dinnan asserted that, constitutionally based institutional academic freedom does not permit an institution to conduct its own confidential peer review process, free from the chilling effect of outside pressures resulting from disclosure, if it is alleged that the process was
biased. In determining whether to grant an evidentiary privilege, most courts have acknowledged that, in the absence of discrimination in the tenure process, confidential peer review is protected by a constitutionally based academic freedom privilege.

It is equally evident that every court that has addressed the privilege issue believes that the goal of eliminating discrimination in faculty employment practices is a compelling one. The AAUP offers suggestions of indicia where a faculty plaintiff or the EEOC can compel release of confidential information. The AAUP suggestions preserve the confidentiality of the review process in the absence of a well-grounded charge of discrimination.

In sifting through the cases and commentaries on confidentiality, a recommended approach to the problem emerges. Initially, the plaintiff should show at least one of the following before a court compels release of confidential material: (1) that certain criteria of fairness in the review process were not met, (2) that discrimination occurred outside of the tenure decision, or (3) that the plaintiff was equally qualified for tenure or promotion as her recently tenured colleagues. Once a court determines that confidential material must be released, a process should be set in place so that only that information which is relevant to the charge of discrimination is released.
To compel discovery, the plaintiff might show that the procedures employed in peer review were not fair or properly followed. To determine this, it would not be necessary for a court or plaintiff to delve into confidential material. The plaintiff would need to show either that promulgated tenure and promotion procedures were not followed or that the procedures do not conform to AAUP procedural standards which assure that decisions are made on academic grounds, provide for an internal appeals process, and include a statement of reasons for denial.\textsuperscript{240} If the plaintiff can raise a doubt in the mind of the court that the review process was fair, then the court could reasonably presume that it is likely that factors other than teaching, publication, and service played a role in the final outcome of the personnel decision. The plaintiff should then be entitled to confidential peer review information to discover what those factors may be.

A plaintiff could alternatively show that some personal animus harbored by a committee member influenced the tenure decision or that statistical evidence exists to support a history of past discrimination within the institution. If the only evidence that a plaintiff can rely upon is a mere suspicion that a certain professor was biased solely because the plaintiff was denied tenure, then a court should not open up tenure files to disprove this suspicion. But, if the plaintiff could show and corroborate that a certain professor had made discriminatory remarks outside of the tenure committee meetings or held certain discriminatory beliefs that influenced the professor's decision or
that statistics show a trend of bias in promotion and tenure decisions within the department or institution, then files should be released since all tenure decisions involving minority or women faculty would be under suspicion.\textsuperscript{241}

The plaintiff could also show that her performance on the three criteria for evaluating tenure and promotion (teaching performance, publication, and college and community service) are on a par with those who have recently acquired tenure or promotion. In the area of teaching performance, a faculty plaintiff could rely upon student evaluations to show that qualifications were met for tenure or promotion. While not dispositive in granting tenure, strong evaluations could help satisfy the plaintiff's burden for release of confidential peer materials.\textsuperscript{242} The plaintiff could also supply written recommendations and sworn statements from peers who could evaluate the plaintiff's teaching ability. As to publications, the court could look at the number of publications, the quality of journals publishing plaintiff's research, and the reviews of books or articles written by the plaintiff. Here, the court may wish to employ an expert trained in the plaintiff's discipline to evaluate these publications and make recommendations to the court. College and community service could be evaluated by determining which committees a plaintiff served on, offices held, and the length of such service.

The college may be called upon to justify the weight it puts on each of the tenure and promotion criteria, but as long as it
could show that departmental faculty were generally evaluated equally in these areas, there would be no reason to believe that the plaintiff was unfairly evaluated. On the other hand, if the plaintiff could establish, by the above criteria, that he was equally qualified for promotion or tenure as his peers or could raise a suspicion that factors other than teaching quality, publications, and college and community service were determinative in the decision to deny tenure, then the plaintiff should be entitled to his peer review materials to discover the true reason for denial.

If a court determines that the faculty plaintiff has shown that at least one of the above criteria has been met, then it should order release of peer evaluation material. At this point a special master could be used by the court to review the files and determine if evidence of bias is contained within the confidential materials. A special master was used by the court in Paul to summarize the material contained in confidential files and by the court in McKillop to evaluate whether any evidence of discrimination was contained in confidential records. A special master was also recommended by one commentator as someone who could be used to evaluate the fairness of confidential letters submitted by external experts in the tenure review process. This special master should be a faculty member (not necessarily one at the plaintiff's institution) who is approved by both the plaintiff and the college and who is familiar with the tenure review process.
The special master could summarize and evaluate the plaintiff's personnel file and release this summary to all parties. Should the master find evidence of bias, then the master could pinpoint pertinent information for discovery or suggest that faculty members alleged to be biased be deposed. A faculty plaintiff should show the court a particularized need for material in other faculty members' files before that material is summarized by the special master. Not only is the process of opening colleagues' files time consuming, but oftentimes the contents will not reveal any information that cannot be deduced from non-confidential sources. Further, disclosure of colleagues' files could compound the chilling effect caused by the release of that of the plaintiff. Peer reviewers could not help but be mindful that their comments about all of their colleagues could be revealed by the filing of a single complaint.

A court need not insinuate itself into academic decision-making if it concludes that an academic institution has adhered to its own standards and if those standards are in compliance with the procedural standards of fairness established by the AAUP. Equally, a court need not substitute its expertise for that of academicians if it relies on a special master to summarize and evaluate the confidential material once it believes release is warranted. Finally, the chilling effect of disclosure would be minimized by the presence of an outside faculty expert to review the material and by the release of solely relevant confidential information or summaries to the plaintiff or the EEOC.
As to the removal of indentifying information, it is questionable whether redacted material can truly hide peers' identities from the plaintiff or whether the release of redacted material can have as similar of a chilling effect on the peer review process as the release of unredacted material. If the special master finds material relevant, then both material and identities should be disclosed.

These recommended procedures would help to ensure that confidential materials will be protected unless the plaintiff can show that there is a justification for release. Once releasable, only information that is relevant would be divulged. This procedure would guarantee that the plaintiff has the information needed to establish a discrimination case yet also assures the institution that the door to confidential review will not be left wide open. Confidential peer review is worth preserving because it contributes to maintaining academic excellence by protecting candid appraisal. Selective release of confidential information would help guarantee the continuation of valid peer review while not thwarting the equally important goal of eradicating discrimination in higher education.
NOTES

*Dean of Students, Adjunct Professor of Law, William Mitchell College of Law; B.S. Wake Forest University, 1973; M.A. Wake Forest University, 1975; Ed. D. in Education Administration, The Catholic University of America, 1982.

1See, e.g., U. of California Professors Launch a Drive to Give Tenure Candidates Access to Files, Chron. of H. E., Mar. 18, 1987, at 16-17; see also, Bitterly, College Prepares to Turn Over Confidential Tenure Files to U.S. Panel, Chron. of H. E., Aug. 13, 1986, at 17, col. 2.

2661 F.2d 426 (5th Cir. 1981).


While Title VI, (42 U.S.C. § 2000d (1976), and Title IX, (20 U.S.C. § 1681 (1976)), deal with race and sex discrimination respectively, and while the Supreme Court has determined that the statutes cover employment discrimination, (Northhaven v. Bell, 102 Ct. 1912 (1982)), few Title VI and IX suits have been brought
dealing with faculty tenure. There may be no appropriate remedy for faculty under these statutes, (See Cannon v. Univ. of Chicago 441 U.S. 677 (1979)).

State claims have also been raised (See, e.g., Dixon v. Rutgers University, 521 A.2d 1315, 37 Ed. Law 1218, (N.J. Super., A.D. 1987), certif. granted, 108 N.J. 199, 528 A.2d 22 (1987)) but the issues often parallel federal claims. Therefore, this article will concentrate its discussion on federal claims.

4In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court laid out the test for proving disparate treatment under Title VII. The plaintiff must establish (i) a prima facie case that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.

5See, e.g., Bitterly, College Prepares to Turn Over Tenure Files to U.S. Panel, supra note 2, at 20.

6See, e.g., U. of California Professors Launch a Drive to Give Tenure Candidates Access to Files, supra note 2 at 16.

7Supreme Court Refuses to Review Ruling that College Must Disclose Tenure Papers, Chron. of H. E., Jun. 11, 1986, at 43, col. 3.


J. Wigmore, Evidence, § 2285 (1961). These four conditions are: (1) the communications must originate in confidence that they will not be disclosed, (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties, (3) the relationship must be one which, in the opinion of the community, ought to be sedulously fostered, and (4) the injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. See also State ex rel. Haugland v. Smythe, 25 Wash.2d 161, 169 P.2d 706 (1946).


Rule 501 clearly lends great weight to the federal requirements regarding privilege since it begins with the phrase "[e]xcept as otherwise required by the Constitution of the United
States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority . . . ." Fed. R. Evid. 501.


15Tenure is customarily decided after a probationary period, often five to seven years, of full-time faculty appointment. It is common practice that a faculty member is either "up-or-out" at the time of tenure review. That is, either tenure is granted, or if denied, the faculty member must soon leave. 1982 Recommended Institutional Regulations on Academic Freedom and Tenure, Vol. 69, No. 1 Academe: Bulletin of the AAUP, 15a (1983).

16For a good overview of the history and background of the tenure process see, McKee, Tenure by Default: The Non-Formal Acquisition of Academic Tenure, 7 J. of C. & U. Law 31 (1981).


18Academic Freedom and Tenure, 1940 Statement of Principles and 1970 Interpretive Comments, AAUP Policy Documents and Reports 3 (1984). "Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic
security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society."

1982 Recommended Institutional Regulations on Academic Freedom and Tenure, AAUP Policies Documents and Reports 21, 23-25 (1984). Adequate cause for dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers and researchers. Financial exigency must be demonstrably bona fide; i.e., an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means must be shown. Program discontinuance will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.


28 Fuchs, supra note 17, at 243.


Id.
38 See Gray v. Board of Higher Education, City of New York, 692 F.2d 901 (2d Cir. 1982).

39 661 F.2d 426 (5th Cir. 1981).

40 Id. at 427.

41 Id. at 433.

42 See supra note 38.

43 Id. at 907.

44 Id. at 907. The AAUP brief suggested that "if an unsuccessful candidate for reappointment or tenure receives a meaningful written statement or reasons from the peer review committee and is afforded proper intramural grievance procedures," disclosure of individual votes should be protected by qualified privilege. 1982 Recommended Institutional Regulations on Academic Freedom and Tenure, AAUP Policy Documents and Reports 21 (1984).

45 715 F.2d 331 (1983).

46 Id.

47 Id. at 338-39.
49 Id. at 118. This material included:

1. Materials from Montbertrand's tenure file including:
   (a) Third and Second Year Reviews;
   (b) Letters to Montbertrand on the status of his tenure review; and
   (c) Documents of Montbertrand supporting his tenure application;

2. Compilation by the College of the national origin of tenure candidates from 1977 to 1981;

3. Untitled list of faculty members, country of birth, present citizenship, and citizenship at birth;

4. Evaluations of Montbertrand's writings from four outside professors identified by name and college or university;

5. Faculty merit evaluation forms for Montbertrand;

6. Correspondence relative to Montbertrand's tenure denial;

7. January 21, 1981, letter from College President to Montbertrand discussing the fact that deficiencies in scholarship and general contributions were not offset by governance performance in other areas;

8. Handbook of College;

9. Faculty handbook 1978;

10. Inter-office Memo from Chairman of French and Italian Departments, Angela Jeannet, to Professional Standards Committee, January 1980, regarding Third Year review of Montbertrand. The Memo provides information on work performance, publications, grants, professional activities, participation in college and department activities, and evaluation recommending Montbertrand for tenure with attached reappointment of probationary faculty.
11. COTE form results (Student Evaluations of Teaching Effectiveness);

12. Grade surveys;

13. Enrollment data;

14. Recommendations of Professional Standards Committee in each tenure case; and

15. Actions taken by the President in each tenure case.

50 Id. at 115.

51 See, e.g., Dinnan, 661 F.2d 426, 430 (1981).

52 See, e.g., Gray 692 F.2d 901, 906 (1982).


Id. at 427. Blaubergs sued under Title VII, alleging sex discrimination in the decision.

Id.

Id. at 427.

Id. at 428-29.

Id. at 430.

Id. at 430-41 citing 438 U.S. at 312.

Id. at 431.

Id.
66 Id. at 432.

67 Id.

68 Id.

69 Id.

70 Id. at 430.

71 Id. at 430.

72 92 F.2d 901 (1982).

73 Id. at 903.


75 Id.

76 Id. at 91.

77 Id. at 93.

78 Id.

79 Id. at 92.
91 715 F.2d 331 (1983).

92 Id. at 331.

93 Id. at 333. Prior to the issuance of the subpoena, the EEOC sent the University an eight-part questionnaire demanding inter alia the following: (1) "Describe in detail your tenure practices in the University of Notre Dame"; (2) "[I]dentification by name and race, of persons responsible for reviewing the qualifications of candidates for tenured positions"; (3) "Identify by name, race, and job title the individual(s) making up the tenure committees for the economics department from January 1, 1980 to June 1, 1980"; (4) Construct a chart detailing the name, race and employment history of each member of the University Economics Department; (5) "Furnish copies of the personnel records of the Charging Party [Brookins]." The university complied with each request with the exception of furnishing copies of personnel records of Brookins.

94 Id.

95 Id. at 334. The university also objected to the breadth of the EEOC subpoena (including the period after Brookins denial of tenure), stating that the only relevant records were those of faculty members who were eligible for tenure during the same period as Brookins.

Id. at 742.

Id. at 743.

Id. at 745. Rule 26(c) of the Federal Rules of Civil Procedure protected confidentiality of information once Brookins filed an action in court. The university was concerned that should Mr. Brookins receive information before proceedings were filed it would not have a forum in which to obtain a protective order. The Court responded that the EEOC expunges the names, identifying characteristics and statements of any witnesses who have been promised anonymity. Any person requesting confidential information must execute a written agreement not to disclose information to any other person, except as part of the normal course of litigation after a suit is filed. Id. at 745.


Id.

Id. at 338-9. The Court said that before producing the personnel files sought by the EEOC, the University should be permitted to redact the names, addresses, institutional affiliation, and any other identifying features of the reporting
scholars. In addition, both the redacted files and the unredacted files were to be given to the district court. First, the court would check both files to determine the "integrity of the institution to redact only identifying material." Second, the court would release unredacted material to the EEOC upon a showing of "particularized need" for relevant information, a burden similar to that imposed on a party seeking disclosure of grand jury materials. The court must then apply a balancing test to determine "whether the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the privilege."

103\textsuperscript{Id.} at 339, quoting

\begin{quote}
Courts have no more business in substituting their judgment for that of a legitimate peer review determination than they do in determining whether a particular physician or surgeon is qualified to practice in a particular hospital. We believe the procedure outlined above strikes the appropriate balance between the need to preserve the integrity of the peer review process and the need to adequately investigate proper charges of discrimination in higher education.
\end{quote}

104\textsuperscript{Id.} at 340.

105\textsuperscript{Id.}

106\textsuperscript{Id.} at 337 n.4.

107\textsuperscript{775 F.2d 110 (3rd Cir. 1985).}
108 Id. at 111.

109 Id. at 112.

110 Id.

111 Id. at 113.

112 Id. at 116.

113 Id. The college further argued that the court should adopt a qualified academic peer review privilege which would prevent disclosure of confidential peer review material absent a showing of an inference of discrimination. Id. at 116.

114 Id. at 114.

115 Id. The Dinnan court (5th Circuit) clearly felt that academic freedom did not include the right to keep tenure review procedures confidential. On the other hand, the 3rd Circuit seemed to accept the need for confidential peer review in order to guarantee the fair evaluation of "who may teach." In a way, the 3rd Circuit adopted its own balancing approach balancing the academic freedom of confidential peer review against the clear mandate of Congress in extending Title VII to higher education.

116 Id. at 115.
117 Id.

118 Id. at 116 quoting E.E.O.C. v Shell Oil Co., 466 U.S. 54 at 68-69, 104 S.Ct. 1621 at 1631.

119 Id. at 115.

120 Id. at 117.

121 715 F.2d 331 at 337 n.4.

122 504 F.2d 1296 (10th Cir., 1974).

123 Id. at 1299.

124 Id. at 1301.

125 Id. at 1303.


127 Id. at 1274. Specifically the Court relied on § 1040 of the California Evidence Code. That section provides:

(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because if there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

The court stated that, "Although [I] have found that state law rather than federal law controls the privilege question, application of federal law would also mandate the result reached here. Id. at 1278 n. 15.

128 Id. at 1275.

129 Id. at 1277. The court said that the "connection between the bias of an evaluator, undetectable from the face of the evaluation, and the propriety of the actions taken by the decision-makers on the basis of such evaluation is extremely tenuous. Furthermore, to allow depositions would require that the identity of the evaluators be disclosed in addition to the text of the evaluations. Such disclosure would represent the most serious
breach of confidentiality of the tenure selection process, a breach which even proponents of limited disclosure have opposed." \textsuperscript{130} \textit{Id.} at 1278.

\textsuperscript{130} \textit{Id.} at 1277-78.

\textsuperscript{131} 552 F.2d 579 (4th Cir.), \textit{cert. denied}, 434 U.S. 904, 98 S.Ct. 300, 54 L.Ed. 2d 190 (1977).

\textsuperscript{132} \textit{Id.} at 581. The dissent felt that Keyes had established a prima facie case because the statistical evidence established a pattern of discrimination toward women faculty. It reasoned that since the college had failed to provide an adequate explanation for the salary disparity, the plaintiff was entitled the peer review information to show pretext. \textit{Id.} at 582.

\textsuperscript{133} 610 F.2d 1379 (5th Cir. 1980).

\textsuperscript{134} \textit{Id.} at 1384-85.

\textsuperscript{135} \textit{Id.} at 1382-83.

\textsuperscript{136} 656 F.2d 1337 (9th Cir. 1981). \textit{Lynn} was decided by the U.S. Ninth Circuit Court of Appeals on Sept. 21, 1981 and amended after rehearing on Dec. 28, 1981. \textit{Dinnan} is only referenced in a footnote, (see 1348 n. 16) and it appears to have had little influence on the Ninth Circuit's decision.
137 Id. at 1348.

138 Id. at 1347.

139 96 F.R.D. 622 (N.D. Cal. 1983).

140 Id. at 624. The court reasoned that no absolute privilege existed and that Rule 501 of the Federal Rules of Evidence permitted a "case-by-case adjudication 'in light of reasons and experience'" citing Trammel v. United States, 445 U.S. 40, 47-48, 100 S.Ct. 906, 910-11, 63 L.Ed. 2d 186 (1980).

141 96 F.R.D. 22 at 625.

142 Id.

143 Id.

144 Id. at 625-6.


146 Id. at 715.

147 Id.

148 Id. at 719.
149 Id. quoting Gray at 908.

150 39 EPD ¶35,918 (N.D. Cal. 1986).

151 Id. at 41,371-374.

152 Id. at 41,375.


154 Id. at 2.

155 Id.

156 Id. at 4. The court adopted the prima facie requirement of the Zaustinsky court and concluded that the plaintiff could "probably make out a prima facie case."


158 Id. at 474. The court relied heavily on Seventh Circuit's decision in Notre Dame. The university had already produced a complete copy of plaintiff's tenure review file which included all materials on which the decision to deny tenure was based. The only information the college withheld was the identities of faculty and peer reviewers.
Id. at 475. The court went on to say that a comparison of qualifications may also raise a doubt as to whether the reasons offered by the university for denying plaintiff tenure are the real ones or that criteria was applied to plaintiff in a discriminatory manner.

Id. at 476.


See also In re Dinnan, 661 F.2d 426 (1981); Zautinsky v. University of California, 96 F.R.D. 622 (1983).


Bitterly, College Prepares to Turn Over Confidential Tenure Files to U.S. Panel, Chron. of H.E., Aug 13, 1986, at 17, col. 2.


Notre Dame, 715 F.2d 331, at 336.

See, e.g., Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957); Dow Chemical v. Allen, 672 F.2d 1262, 1273-76 (7th Cir. 1982).


Id. at 250.


Id. at 603. Although, as the Dinnan court asserted, this freedom from censorship concerns the content of teaching, and is not meant to obscure discrimination in tenure decisions, it can be argued that courts or the EEOC could effectively decide who will teach if confidentiality in tenure discussions is eroded.

See, e.g., Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975); Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Stanley v. Magrath, 719
F.2d 279 (8th Cir. 1983); Comment, Student Editorial Discretion, the First Amendment, and Public Access to the Campus Press, 16 U. Calif. Davis L. Rev. 1089 (1983).


182 See, e.g., People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

183 See supra note 167 at 168.

184 See supra note 21 at 302.


Justice Powell also resurrected the "four freedoms" passage of Frankfurter. See Note, Academic Freedom and Federal Regulation of University Hiring, 92 Harv. L. Rev. 879 (1979).


Id. at 514, n.12. See also, Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 at 89-90, 48 S.Ct. 948, at 954-55 (1978).

See e.g., Regents of the University of California v1 Bakke, 438 U.S. 265; Bob Jones University v. United States, 461 U.S. 574 (1983).


Id. at 430 & 432.


202Id.


20629 C.F.R. § 1601.15.
207. 29 CFR § 1601.15. If reasonable cause exists that an unlawful employment practice has occurred, the EEOC may elect either to bring suit on behalf of the charging party or issue the charging party a right-to-sue letter, which authorizes the individual to institute a lawsuit within ninety days of receipt of the notice. 29 CFR § 1601.28 (1977)


210. 775 F.2d 110, at 116.

211. 775 F.2d at 116; See, also, E.E.O.C. v. U. of New Mexico, supra, note 203. The doctrine of res inter alios acta forbids the introduction of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute.

212. 775 F.2d 110, at 118. See also United States v. Morton Salt Co., 338 U.S. 632 (1950).

Id. at 605.


461 U.S. 574 at 580-1.

458 U.S. 718 at 719-20.


See, e.g., Lieberman v. Gant, 630 F.2d 60, 64 (2nd Cir. 1980); see generally Lee, Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation, 9 U. of C. and U. L. 279, 288-289 (1982-83).
Peer evaluations of the publications of a tenure candidate could also effect the outcome of tenure review. If these evaluations are also kept confidential, then they plaintiff would have one more obstacle to establishing a prima facie case.

Dinnan, 661 F.2d 426 at 430.

Id.

Id at 431 (emphasis in original).

Id. (emphasis in original).

Gregory, supra, note 23.


Id. at 1046.


236 Id. at 14.

237 Id.

238 Id. at 28.

239 Id. at 27.

240 Supra note 233.

241 See supra note 139.


243 Paul, supra note 150 and accompanying text, at 41, 375; McKillop supra notes 5126-130 and accompanying text.
Lee, supra note 21, at 313.

See, E.E.O.C. v. Franklin & Marshall, defendant's argument. A special master could also be used by the EEOC in its investigatory stages.

For example, Franklin and Marshall officials were not concerned about the release of Prof. Monterbrand's files since the college had already voluntarily complied with the E.E.O.C.'s request for his files. Officials were concerned about the release of all other review files of faculty members within Monterbrand's department. See Bitterly, College Prepares to Turn Over Confidential Tenure Files to U.S. Panel, Chron. of H.E., Aug. 13, 1986, at 17, col. 2.