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A Qualified Academic Freedom Privilege in Employment Litigation: Protecting Higher Education or Shielding Discrimination?

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RECENT DEVELOPMENT

A Qualified Academic Freedom Privilege in Employment Litigation: Protecting Higher Education or Shielding Discrimination?

I. INTRODUCTION

Courts have long honored the fundamental principle that the right to full and fair litigation assumes the unobstructed availability of evidence.[1] When the divulgence of information in court threatens interests or relationships of sufficient social importance, however, courts have recognized a compelling justification for sacrificing the free flow of evidence and have created rules of privilege.[2] Since 1972, when Congress extended Title VII of the Civil Rights Act of 1964[3] to academic institutions,[4] colleges and universities increasingly have faced broad discovery requests for confidential personnel files by plaintiffs alleging that discriminatory factors such as sex, race, or age played an impermissible role in the institution's employment decisions.[5] In response, some institutions have asked the courts, with mixed success, to recognize a new privilege for personnel files and tenure review committee materials based upon the fundamentals of academic freedom.[6]

This Recent Development considers whether the federal courts should recognize a qualified privilege for the discovery of peer review materials in litigation brought by university educators denied employment, tenure, or promotion based on what they allege are impermissible discriminatory grounds. Part II examines the underlying rationale for establishing an academic freedom privilege, focusing on the Constitution, statutes, judicial rules, and the common law as possible bases of support. Part II also examines

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1. *See, e.g.*, United States v. Bryan, 339 U.S. 323, 331 (1950) (stating that "the public . . . has a right to every man's evidence").

2. *See, e.g., In re* Dinnan, 661 F.2d 426, 430 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72, at 171 (3d ed. 1984).

3. 42 U.S.C. § 2000e (1982).

4. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972). Prior to this amendment, academic employees had to demonstrate a violation of civil rights under 42 U.S.C. §§ 1981, 1983, or 1985. *See, e.g.*, Holliman v. Martin, 330 F. Supp. 1 (W.D. Va. 1971). This requirement virtually foreclosed a right of action by private college or university employees unable to make the requisite showing of state action leading to denial of their civil rights. *See, e.g.*, Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) (holding that alleged sex discrimination in employment practice by a private university did not amount to state action because the university was not performing a "public function" by providing education).

5. *See, e.g.*, McKillop v. Regents of Univ. of Cal., 386 F. Supp. 1270 (N.D. Cal. 1975) (in which the plaintiff sought all papers, letters, forms, reports, and other documents included in a university's personnel files concerning her hiring, evaluation, promotion, and denial of tenure, as well as all written materials in the files of past and present tenure-tracked personnel in her department who were eitber granted or denied tenure).

6. *See, e.g.*, EEOC v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983); *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

plaintiffs' ability to rebut any presumption of privilege recognized by the court. Part III discusses the inconsistencies in recent judicial responses to the disputed privilege. Part IV argues that the existing split among the federal circuits provides inadequate guidance for the lower courts faced with claims of privilege and suggests a two-step analysis to determine in each case whether a privilege should be recognized. Part V concludes that federal courts should adopt a qualified privilege based upon academic freedom to require the courts to balance the conflicting interests of academic freedom and freedom from discrimination.

II. LEGAL BACKGROUND

The Federal Rules of Evidence govern the discovery of privileged information in the federal courts.[7] The current rule of privilege, however, differs from the original proposal. The proposed rules allowed only those privileges required by the Constitution or federal statutes or included in the rules themselves.[8] Fearing that the proposed rule would freeze the law of privilege, Congress adopted a new rule allowing courts to develop rules of privilege on a flexible, case-by-case basis.[9] Federal Rule of Evidence 501 states that in the federal courts:

> Except as otherwise required by the Constitution . . . Act of Congress or . . . rules prescribed by the Supreme Court . . . , the privilege of a witness, person, government, State, or political subdivision . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.[10]

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7. The United States Supreme Court in February 1972 promulgated a code of evidentiary rules for the federal courts. Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183 (1972). Under the Rules Enabling Act, 28 U.S.C. § 2072 (1982), the code was to become effective in 90 days barring congressional disapproval in the interim. Facing a barrage of criticism leveled at the proposed rules, however, Congress intervened by delaying the effective date of the rules of evidence until they were "expressly approved by Act of Congress." Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973).

8. *See* Rules of Evidence for the United States Courts and Magistrates 501, 56 F.R.D. at 230-58. The proposed privilege section, listing only nine specific privileges, generated more comment and controversy than any other section of the proposed rules. 120 CONG. REC. 40, 891 (1974) (remarks of Rep. William L. Hungate of Missouri, principal author of the federal Rules of Evidence).

9. *See* 120 CONG. REC. 40,891 (1974) (remarks of Rep. William L. Hungate).

10. FED. R. EVID. 501. The quoted language applies in federal criminal cases and in civil actions "unless State law supplies the rule of decision for a claim or defense, or for an element of a claim or defense" in which case Rule 501 requires application of state privilege law. 120 CONG. REC. 40,891 (1974) (remarks of Rep. William L. Hungate); FED. R. EVID. 501. Although some courts have decided claims of privilege in academic discrimination cases under state law, *see, e.g.*, McKillop v. Regents of Univ. of Cal., 386 F. Supp. 1270 (N.D. Cal. 1975), the majority have viewed claims brought under Title VII or 42 U.S.C. §§ 1981, 1983,

Rule 501 clearly grants the federal courts the power to recognize new privileges.[11] Even so, the judiciary has been reluctant to exercise that power.[12] Nevertheless, Rule 501 requires courts at least to consider four possible grounds as the basis for recognition of new evidentiary privileges: the Constitution, federal statutes, Supreme Court rules, and the principles of common law.[13]

A. *A Constitutional Privilege Based on Academic Freedom*

Academic freedom denotes a belief that new theories and hypotheses must be generated and explored in an academic arena unrestrained by society's entrenchment in the status quo.[14] Historically, Americans have regarded open intellectual discourse in a free marketplace of ideas as an essential element in the preservation of meaningful educational forums vital to the continuation of an informed populace.[15] Although academic freedom is not expressly guaranteed by the Constitution,[16] the Supreme Court has deemed the freedom to disseminate information, theories, and ideas in the realm of academia to be "a special concern of the First Amendment."[17] Academic freedom, therefore, may provide a constitutional basis upon which to formulate an evidentiary privilege for the educational community.[18]

The Supreme Court's first clear articulation of the protected status of academic thought[19] came in *Sweezy v. New Hampshire*,[20]

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and 1985 as invoking both federal question jurisdiction and the federal privilege rules.

11. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 47 (1980) (commenting that the purpose of Rule 501 is "to leave the door open to change").

12. *See* United States v. Nixon, 418 U.S. 683, 710 (1974) (stating that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth"); *In re* Dinnan, 661 F.2d at 430 (finding "notable hostility" in judicial responses to proposed new privileges).

13. FED. R. EVID. 501.

14. *See* Comment, *Academic Freedom vs. Title VII: Will Equal Opportunity Be Denied on Campus?*, 42 OHIO ST. L.J. 989, 993 (1981).

15. *Id.*

16. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (stating that "[a]cademic freedom . . . [is] not a specifically enumerated constitutional right").

17. *Id.*; Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); *see also* Shelton v. Tucker, 364 U.S. 479, 487 (1960) (declaring that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools").

18. *See generally* Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538, 1544-55 (1981). First amendment academic freedom, however, does not provide a blanket privilege for all areas of academic life. *See, e.g.*, Wilkinson v. FBI, 111 F.R.D. 432, 441 (C.D. Cal. 1986) (refusing to recognize a constitutional privilege of donors not to reveal documents placed in archives under a restricted access agreement).

19. Note, *supra* note 18, at 1545; *see also* Comment, *supra* note 14, at 994. Justice

in which the Court upheld a university professor's right to withhold the contents of one of his lectures from a state committee investigating subversive activities. Chief Justice Warren, speaking for a plurality of the Court, stated that forcing the professor to disclose the information would be an infringement on his academic freedom and liberty of political expression, areas on which "government should be extremely reticent to tread."[21] Justice Frankfurter's concurrence provides a clear statement of the role of government and the courts, suggesting that academic inquiries and speculations should be left as free from restrictions as possible.[22] Of perhaps greater significance in the employment context, however, is Justice Frankfurter's use of a statement made by a group of South African scholars emphasizing the university's need to foster an atmosphere conducive to speculation, experimentation, and creation.[23] The scholars had stated that in such an atmosphere "four essential freedoms"[24] must prevail: a university must be free to determine on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[25]

Frankfurter, joined by Justice Douglas, concurring in the Court's earlier decision in Wieman v. Updegraff, 344 U.S. 183, 194-98 (1952) (Frankfurter, J., concurring), discussed academic freedom in a constitutional framework in upholding a university professor's right to refuse to take a "loyalty oath" to retain his position. Frankfurter noted:

> [I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.

Id. at 195.

20. 354 U.S. 234 (1957).

21. *Id.* at 250. Chief Justice Warren went on to stress the crucial role of academic freedom in a democracy:

> The essentiality of freedom in the community of American universities is almost self-evident . . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id.

22. *Id.* at 262 (Frankfurter, J., concurring). Justice Frankfurter stated that "[p]olitical power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling." *Id.*

23. *See id.* at 263.

24. *Id.* (quoting *The Open Universities in South Africa* 10-12, a statement by a conference of senior scholars from the University of Capetown and the University of the Witwatersrand).

25. *Id.*

The Court reaffirmed the protected status of academic concerns in *Keyishian v. Board of Regents*.[26] Justice Brennan, in an opinion striking down a state statute that required teachers to swear an oath that they had never been members of the Communist Party, stressed the importance of protecting academic freedom. The Court noted that government regulation in the area of academic freedom should be narrow and specific.[27] A similar view prevailed in the Court's most recent delineation of the constitutional nature of academic freedom in *Regents of the University of California v. Bakke*.[28]

As one commentator has noted, however, the principle of academic freedom may be bifurcated into individual and institutional components.[29] That commentator finds the right of an individual instructor to discourse freely upon the topics of his choice, shielded from either administrative or governmental interference, to be a frequently asserted and widely accepted constitutional right.[30] Because the institution itself is threatened when a court orders production of confidential employment files during litigation, however, the less developed institutional branch must form the constitutional basis for a possible evidentiary privilege.[31]

Although a majority of the Supreme Court never has expressly rejected or recognized "institutional" academic freedom, the "four essential freedoms" put forth by Justice Frankfurter in *Sweezy*[32] and adopted by Justice Powell in *Bakke*[33] emphasize the right of an institution as an entity to determine who may teach and what subjects may be taught. Further, federal cases have shown marked deference toward universities' decisions concerning students[34] and

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26. 385 U.S. 589, 602-04 (1967).

27. *Id.* at 604 (quoting NAACP v. Button, 371 U.S. 415, 432-33 (1963)).

28. 438 U.S. 265 (1978). Justice Powell, in the Court's lead opinion, cited with approval the "four essential freedoms" set out in Justice Frankfurter's *Sweezy* concurrence. *Id.* at 312. Powell further reiterated that academic freedom, "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Id.*

29. *See* Note, *supra* note 18, at 1546-51; *see also* Cooper v. Ross, 472 F. Supp. 802, 813 (E.D. Ark. 1979) (stating that the right "involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference").

30. *See* Note, *supra* note 18, at 1546.

31. *Id.* at 1546-47.

32. 354 U.S. at 263 (Frankfurter, J., concurring).

33. 438 U.S. at 312.

34. *See, e.g.*, Regents of Univ. of Mich. v. Ewing, 106 S. Ct. 507, 513-14 (1985) (granting university faculty broad deference in review of a student's academic dismissal); Board of

employment[35] based on academic grounds. More recent cases, however, have illustrated the courts' increasing willingness to address discrimination claims in suits arising from academic personnel decisions.[36] The shift is largely the result of criticism directed at the judiciary's perceived failure to follow Congress' mandate that Title VII be extended to academic employers.[37] Given the growing participation of the judiciary, then, the courts now must face the issue of the breadth and depth of discovery of confidential employee files to be allowed plaintiffs in academic discrimination suits. In this context, some academic defendants have begun to assert, with varying degrees of success, a privilege based on constitutional grounds. Courts, in considering such claims, are required to balance carefully the competing needs of the litigants and to order disclosure only when justice demands.[38]

Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 (1978) (declaring that "courts are particularly ill-equipped to evaluate academic performance").

35. *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974). This sex discrimination suit was filed by a female medical school instructor who was not rehired. The Second Circuit affirmed the district court's acceptance of the university's claim that budget restraints necessitated the decision not to rehire, noting its own lack of expertise in reviewing the qualifications of faculty members. The court articulated a "hands-off" philosophy, stating that, "[o]f all fields . . . which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision." *Id.* at 1231-32. For other examples of courts refusing to consider the merits of faculty complaints, see Clark v. Whiting, 607 F.2d 634, 638 (4th Cir. 1979); Huang v. College of the Holy Cross, 436 F. Supp. 639, 653 (D. Mass. 1977); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1353-54 (W.D. Pa. 1977); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1270 (M.D. Pa. 1976).

36. *See, e.g.*, Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir. 1978). In *Kunda* the Third Circuit overruled the university's decision and reinstated the plaintiff, awarding not only back pay but also the previously denied tenured status.

37. In Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir. 1978), the Second Circuit attempted to repair some of the precedential damage caused by its broad deference to the university's decision in Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974). In explaining that its previous cautious stance did not advocate absolute judicial nonintervention, the court stated:

> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964 [Title VII].

Powell, 580 F.2d at 1153.

Similarly, the Fifth Circuit in Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980), stated that "caution against intervention in a university's affairs cannot be allowed to undercut the explicit legislative intent of Title VII." *Id.* at 1383.

38. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (opinion of

B. *Protection for Universities Based on Supreme Court Rules*

In the absence of a federal statute protecting an educational institution's confidential employment files during discovery,[39] Federal Rule of Evidence 501 directs the academic defendant seeking a shield to search the rules prescribed by the Supreme Court.[40] According to the liberal discovery rules of the federal courts,[41] "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[42] The Supreme Court has stated, however, that the requirement of relevance should be strictly applied.[43] Further, a court in its discretion may grant a protective order prohibiting discovery of even relevant, nonprivileged material when necessary to protect a party from annoyance, embarrassment, oppression, or undue burden or expense.[44] Moreover, a court, through its control over the sequence and timing of discovery, may direct a litigant to exhaust all possible alternative sources for the desired material before ordering compliance with a motion to compel discovery of confidential information.[45]

In *Marrese v. American Academy of Orthopaedic Surgeons*[46] the plaintiffs sought discovery of confidential review files used in excluding the plaintiffs from membership in a medical professional organization.[47] The Seventh Circuit noted that a court considering a Rule 26(c) motion to limit discovery in the face of a plaintiff's request for confidential information must compare the relative

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Justice Powell) (stating that even where legitimate academic considerations are involved, "individual rights may not be disregarded").

39. *See* Kroll, *Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom*, 13 URB. L. ANN. 107, 115 n.44 (1977).

40. FED. R. EVID. 501.

41. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 177 (1979) (holding that "discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials").

42. FED. R. CIV. P. 26(b).

43. *Herbert*, 441 U.S. at 177.

44. FED. R. CIV. P. 26(c). The Court in *Herbert v. Lando* stated that "[w]ith this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process." 441 U.S. at 177.

45. FED. R. CIV. P. 26(d); *see, e.g.*, Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1161 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985). The court in *Marrese* noted that, "[o]f course, if the plaintiffs do not need anything beyond the . . . [confidential] files to prove their case, they cannot be asked to do any other discovery before getting access to the files." *Id.*

46. 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985).

47. *Id.* at 1151-52.

burdens that an adverse decision would impose on each party.[48] The court directed that both the nature of the hardship and its magnitude be weighed, with emphasis given to interests having a value more social than private.[49] Further, the judge must consider the possibility that a carefully crafted protective order may reconcile the competing interests.[50] The same analysis applies under Rule 26(d); however, the court stated that an order merely postponing a discovery request may be granted more freely than one denying the request altogether.[51]

Some courts have advocated the use of a combination of Rule 26(c) protective orders[52] and orders aimed at protecting confidentiality in the academic context through *in camera* review, sealing of records, redaction or use of assumed names, and strict control over copies.[53] However, reliance upon the judicial discretion granted in the rules of civil procedure provides uncertain, and therefore unsatisfactory, protection for the universities' interest in confidentiality.[54] The use of protective orders to create a protected status for confidential materials sought in discovery is at once an awkward and contrived twisting of the true purpose behind the rule—the prevention of bad faith or abusive, unreasonable discovery requests.[55] Further, the discretionary basis of the rule forces univer-

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48. *Id.* at 1159.

49. *Id.*

50. *Id.*

51. *Id.* The court directed that on remand the district court should follow the procedure adopted in its recent decision in EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 338-39 (7th Cir. 1983). In *Notre Dame* the court ordered the files of faculty tenure deliberations redacted to remove names and information identifying committee members and directed the district judge to review the files *in camera*. If the redacted files contained incriminating material, the plaintiff's attorney could request that the judge divulge the names of the members so that they might be deposed. *Id.* at 338.

52. *See, e.g.*, Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

53. *See, e.g., Notre Dame*, 715 F.2d at 338-39; Guerra v. Board of Trustees of Cal. State Univ., 567 F.2d 352, 355 (9th Cir. 1977); Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

54. *But see* Lee, *Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation*, 9 J.C. & U.L. 279, 309 (1982-83) (arguing that the federal rules already allow trial judges to use a balancing test "nearly identical to that used when a qualified privilege is raised," nullifying any need for recognizing a new privilege); Comment, *An Academic Freedom Privilege in the Peer Review Context:* In re Dinnan *and* Gray v. Board of Higher Education, 36 RUTGERS L. REV. 286, 345 (1983) (suggesting that discretionary application of the discovery rules might provide a better solution given judicial reluctance to recognize privileges).

55. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2036, at 270 (1970).

sities to convince the court in each instance that the files are worthy of a judicial shield,[56] resulting in expensive, time-consuming litigation. Finally, because the use of Rule 26(c) would provide no certainty of confidentiality for the reviewing parties, it would fail to foster honest, open criticism of faculty members under review. Indeed, the institution's fear of possible future litigation[57] might actually facilitate ad hoc, discriminatory employment decisions without full consideration of the applicant's merits and without the benefit of accurate written records.

C. *Common Law Privilege*

Should the courts refuse to recognize a privilege based on constitutional principles, statutes, or Supreme Court rules, Rule 501 instructs the judiciary to consider "principles of common law . . . interpreted . . . in the light of reason and experience."[58] Federal common law principles provide that privileges from discovery should be cautiously created and narrowly construed.[59] Thus, evidentiary privileges should be recognized only to the extent that the refusal to testify or produce relevant evidence carries a social benefit that transcends the acknowledged need to employ all available means in ascertaining the truth.[60]

Professor Wigmore's classic analysis suggests that a privileged status may arise only upon the satisfaction of four fundamental conditions:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.[61]

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56. *See* Note, *supra* note 18, at 1544.

57. *Id.*

58. FED. R. EVID. 501.

59. *See* United States v. Nixon, 418 U.S. 683, 710 (1974) (holding that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth").

60. Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

61. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. ed. 1961) (footnote omitted) (emphasis in original). Wigmore notes that "[t]here is . . . authority for a 'qualified privilege' protecting against disclosure of the identities of academicians participating in a peer review process in connection with promotion or tenure procedures at a college or university." *Id.* § 2286 (Supp. 1986) (footnote omitted) (citing EEOC v. Univer-

One recent commentator, in his consideration of a common law based privilege, has reformulated Wigmore's test,[62] noting that courts typically consider three main factors in assessing a common law privilege claim: (1) the need for relevant facts to be fully disclosed; (2) the importance to society of the interest that the privilege seeks to protect; and (3) the need for protecting the interest througb the use of an evidentiary privilege.[63] In determining whether peer review material is to be presumptively privileged, then, courts must balance the plaintiff's need for the information in pursuit of successful litigation, taking into consideration the plaintiff's ability to obtain the evidence through less intrusive means, with the defendant's interest in maintaining open and candid evaluation of faculty in pursuit of its academic goals, taking into consideration tbe danger of illicit discrimination being buried under a subterfuge of confidentiality protestations.

When examining the merits of the claimed common law academic privilege, a court must focus initially upon the interests of the plaintiff in discrimination litigation. Weighing heavily in favor of the plaintiff's discovery requests is the strong common law tradition that favors the free accessibility of evidence[64] to promote the fair adjudication of competing claims. This tradition is further embodied in the liberal discovery rules for the federal courts.[65] Moreover, Congress' 1972 extension of Title VII specifically to include academic employers[66] mandates that the courts promote

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sity of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983)). *But see* 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5431 (1980 & Supp. 1986) (recognizing decisional authority for the privilege, but stating that "there are a great many presently unprivileged relationships that have a better claim on judicial creativity than the combination of back-scratching and character assassination that too often passes for peer review in academic institutions").

62. Note, *supra* note 18, at 1556.

63. *Id.* The writer suggests that Wigmore's factors are very similar to those propounded in his own test. *Id.* at 1556 n.120.

Some courts also have examined whether the nine privileges spelled out in the proposed Federal Rules of Evidence include the privilege claimed in the current litigation, viewing the proposals as a reflection of dominant common law analysis. The proposed rules are useful only as guides, however, and are rarely dispositive. *Id.*

Further, some courts have looked to state law in determining whether to recognize a federal law privilege, noting that "a strong policy of comity hetween state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal suhstantive and procedural policy." *Id.* (quoting United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976), *aff'd*, 563 F.2d 559 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978)).

64. *See, e.g.*, United States v. Bryan, 339 U.S. 323, 331 (1950).

65. *See supra* notes 41-42 and accompanying text.

66. *See supra* note 4.

meaningful litigation under the federal statute by refusing to allow the university's claim of "confidentiality" to circumvent the legislative purpose of protecting minority academicians as fully as minority factory workers or custodial employees.[67] Accordingly, the courts must acknowledge that the discussion and the commentary that accompany one's consideration for promotion or tenure may be the most important factors behind a decision that the plaintiff asserts was motivated by discrimination.[68] An outright judicial refusal to allow discovery could effectively deny the extended application of Title VII that Congress intended.

Courts also must assess the interests of the academic defendant in maintaining an effective peer review system for employment decisions.[69] Collegial decisionmaking and review by one's peers comprise a time-honored system of faculty governance.[70] Commen-

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67. The legislative history to the 1972 extensions shows clearly the importance of Title VII protection in the academic context:

> The committee feels that discrimination in educational institutions is especially critical. The committee cannot imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act.

H.R. REP. No. 238, 92d Cong., 2d Sess. 20, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2155.

68. *See, e.g.*, Corngold, *Title VII and Confidentiality in the University*, 12 J.L. & EDUC. 587, 599 (1983). The writer notes:

> A court that decides to keep such materials confidential determines, in effect, that Congress, in prohibiting discrimination by colleges and universities, exempted discrimination that occurs in closed faculty meetings or in peer evaluations. But since the peer-review process is the locus of potentially discriminatory hiring, firing and retention decisions, such an approach would largely nullify the effectiveness of Title VII for faculty plaintiffs.

Id.

69. In the typical peer review process, the tenure applicant's department head, with a department committee, obtains statements and evidence from the applicant supporting the applicant's position. The committee next solicits written evaluations of the applicant's scholarship, teaching, and service from both inside and outside the university. The committee considers the evidence and votes by secret ballot to determine whether to recommend that the applicant be granted tenure. The committee submits its recommendation to the department chair, who forwards it with a recommendation to the dean of the college involved and the university provost, who in turn make their recommendations to the university president, who ultimately decides whether to grant or deny tenure. Confidentiality of the views expressed accords with long-standing tradition. *See, e.g.*, EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 333-34 n.1 (7th Cir. 1983).

70. *See, e.g.*, Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). The court stressed the importance of faculty interaction in employment decisions:

> [I]t is beyond cavil that generally faculty employment decisions comprehend discre-

tators who oppose allowing discovery of review files and committee votes argue that disclosure could lead to a loss of candor in evaluating one's co-workers out of fear that adverse comments will later be divulged.[71] A relevant University of Chicago faculty report quoted by one commentator clearly expresses the institution's belief that assured confidentiality is vital to the maintenance of frank, balanced commentary and evaluation necessary for effective peer review.[72] The report further states that, without some guarantee of privacy, outside experts who are asked to make evaluations will be reluctant or less candid for fear of the reaction if disclosure should occur.[73] The academic defendant, therefore, asserts that

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tionary academic determinations which do entail review of the intellectual work product of the candidate. That decision is most effectively made within the university and although there may be tension between the faculty and the administration on their relative roles and responsibilities, it is generally acknowledged that the faculty has at least the initial, if not the primary, responsibility for judging candidates . . . . [T]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution.

Id. at 547-48 (citing Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977)).

71. *See* Lee, *supra* note 54, at 302-03.

72. *Id.* The writer quotes the *Report of the Committee on Confidentiality in Matters of Faculty Reappointment*, U. CHI. REC. 165 (May 22, 1979).

[I]n a collegial form of administration the process of decision depends on rational persuasion and concern for the common good. When difficult choices must be made in a group in which there are disagreements about the merits of alternatives, it is vital that deliberation be conducted with as full and open a discussion as possible among the members. Frankness in speaking one's mind to one's colleagues is essential for the collegial system to work well. . . .

Nowhere is the expectation of confidentiality more important than in the appointive process. Because members must work with one another as peers over a number of years, and in the case of tenure appointments perhaps over a number of decades, the utmost candor is essential in the evaluative process. Once a decision is reached, those who opposed as well as those who supported the decision must join together to carry it out. Confidentiality of the deliberations by members of the deliberative body and by those within the University to whom recommendations are transmitted is necessary for effective self-government of a university organized on a collegial basis.

73. *Id.* This premise is supported in a letter to the University of California, Berkeley, from an outside evaluator, exerpted in Smith, *Protecting the Confidentiality of Faculty Peer Review Records:* Department of Labor v. The University of California, 8 J.C. & U.L. 20 (1981-82):

I want to make it perfectly clear that this is a confidential assessment, and is not to be regarded otherwise. If it should turn out that your attempt to maintain confidentiality breaks down, then you must delete this letter from your file and make no further use of it. If you then wish support from me in the form of a letter that can be shown to the candidate, then you should write to me again asking for me to put on paper a suitably bland version of my opinion of the case. I take it, however, that what you are asking for at the moment is a really thorough and frank assessment which it would, in my view be quite inappropriate to give to the candidate, and I want you plainly to understand that you are in no circumstances to do that.

confidential peer review is not contrary to the desire for fair employment practices, but instead actually deters discriminatory practices in the public interest by fostering decisions based upon relevant, candid evaluations of qualifications and job skills.[74]

In considering a claim of qualified privilege, the court ultimately must balance the parties' interests and determine whether the public interest propounded by the university overrides the plaintiff's private employment interest, compelling recognition of the privilege. In keeping with the judiciary's inherent reluctance to create evidentiary privileges,[75] courts have required that a privilege be essential for the protection of the asserted interest.[76] The Supreme Court in *Trammel v. United States*[77] denied a claimed privilege on the ground that it was unnecessary. The lower court convicted Trammel on federal drug charges primarily through the testimony of his wife, an unindicted co-conspirator.[78] Trammel had asserted a privilege to prevent his wife from testifying against him.[79] The district court agreed that confidential communications were privileged, but allowed the wife to testify about acts she had observed during the marriage and conversations made in the presence of third persons.[80] The court of appeals affirmed, holding that common law precedent prohibiting a wife's testimony against her husband did not prevent the court from shifting the privilege to the witness spouse only and allowing her voluntary testimony to be heard.[81] Noting that the traditional justification for the privilege

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Id. at 22 n.9. One commentator points out that this "chilling effect" on candid evaluations and voting could seriously impair the efficacy of the peer review system. *See* Kroll, *supra* note 39, at 114-15. Decisionmakers, realizing that evaluations are inherently less trustworthy as they become less candid, will refuse to rely on them as objective evidence of a candidate's qualifications. *Id.* at 115. Decisions instead will be based on incomplete information, ad hoc personal appraisals, and informal conversations that are themselves discriminatory, *see* Corngold, *supra* note 68, at 601 n.67, and debilitative to the pursuit of superlative instruction and scholarship. *See* Kroll, *supra* note 39, at 115.

74. *See* Note, *supra* note 18, at 1559-60.

75. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 710 (1974).

76. *See* Note, *supra* note 18, at 1560 (stating that "[t]o do otherwise would be to incur the costs of the privilege without realizing a correlative increase in benefits").

77. 445 U.S. 40 (1980).

78. *Id.* at 43.

79. *Id.* at 42.

80. *Id.* at 43.

81. *Id.* In its most recent ruling on spousal privilege prior to *Trammel*, Hawkins v. United States, 358 U.S. 74 (1958), the Court had left the federal privilege for adverse spousal testimony in its common law state, continuing "a rule which bars the testimony of one spouse against the other unless hoth consent." *Id.* at 78. The *Trammel* court relied on the fiexibility provided by Federal Rule of Evidence 501 to alter the *Hawkins* rule. 445 U.S. at 47-48.

relied on its role in fostering marital harmony,[82] the Supreme Court held that vesting the privilege in the witness spouse, who may testify if he or she volunteers, would continue to further the public interest in marital harmony while eradicating unnecessary burdens on law enforcement.[83] Because the witness spouse in *Trammel* testified of her own accord, the Court held the spousal-testimony privilege for the non-witness spouse to be unnecessary to protect marital harmony. The asserted privilege therefore did not promote interests sufficiently important to outweigh the need to obtain probative evidence in criminal trials.[84]

Thus, in order for the materials sought to be deemed presumptively privileged in the peer review context, the court must find that confidentiality is necessary to further sufficiently important interests. Courts in a number of analogous contexts have balanced the asserted interests and found the need for confidentiality to predominate. Certain socially important relationships have been found to subsist meaningfully only on a diet of open communication guaranteed by assured confidentiality.[85] For example, confidential disclosures made by a client to his attorney in order to obtain legal assistance are privileged.[86] This privilege encourages clients to make full disclosure to their attorneys without fear of divulgence.[87] The Supreme Court in *Fisher v. United States*[88] noted that without such a privilege a client, knowing that damaging information could be obtained from his attorney even though the client himself could not be forced to reveal it, would be reluctant to confide in his lawyer, depriving himself of fully informed legal advice.[89]

A similar attempt by the courts to foster open communication in an atmosphere free from fear of forced disclosure is evidenced

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82. *Trammel*, 445 U.S. at 44.

83. *Id.* at 53.

84. *Id.* at 51.

85. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 403 (1976) (attorney-client); Blau v. United States, 340 U.S. 332 (1951) (husband-wife); Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958) (priest-penitent).

86. *Fisher*, 425 U.S. at 403; *see also* C. MCCORMICK, *supra* note 2, § 87; J. WIGMORE, *supra* note 61, § 2292.

87. *Fisher*, 425 U.S. at 403; *see also* United States v. Goldfarb, 328 F.2d 280 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1952); Prichard v. United States, 181 F.2d 326 (6th Cir.), *aff'd per curiam*, 339 U.S. 974 (1950); Modern Woodmen of Am. v. Watkins, 132 F.2d 352 (5th Cir. 1942).

88. 425 U.S. 391 (1976).

89. *Id.* at 403.

by judicial recognition of a priest-penitent privilege.[90] In *Trammel v. United States*[91] the Supreme Court stated that such a privilege furthers the human need to obtain, in confidence, guidance and consolation from a spiritual counselor.[92] Even in the context of these recognized interests of broad social import, however, the Court has been careful to apply a privilege only when necessary.[93]

An analogy might be drawn between judicial recognition of an academic privilege and earlier privileges allowed on grounds of preserving the public's interest in open communication.[94] The "executive or official information" privilege protects opinions or recommendations of governmental officials in making decisions and setting policy.[95] The Supreme Court in *United States v. Nixon*[96] recognized the detriment caused to the decisionmaking process by the human tendency to temper candor on behalf of self-interest when public dissemination of one's remarks is expected.[97] In holding presidential communications presumptively privileged, therefore, the Court acknowledged the public stake in candid, objective, blunt, or harsh opinions within the context of executive decisions.[98] The Court stated that the President and his aides must be free to explore alternatives when making decisions with the expectation that the process will remain confidential.[99]

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90. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 51 (1980); United States v. Wells, 446 F.2d 2 (2d Cir. 1971); Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958); *In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971).

91. 445 U.S. 40 (1980).

92. *Id.* at 51.

93. *Fisher*, 425 U.S. at 403. Courts also have construed strictly the basic requirements for a privileged communication. In United States v. Gordon, 493 F. Supp. 822 (N.D.N.Y. 1980), *aff'd*, 655 F.2d 478 (2d Cir. 1981), the district court refused to hold as privileged conversations between the defendant and a priest when the priest held an executive position in defendant's company, the defendant knew the priest to be on leave from the priesthood, and the statements were related to business matters. 493 F. Supp. at 823-24.

94. *See* Note, *supra* note 18, at 1559.

95. Deleted FED. R. EVID. 509, 56 F.R.D. 251, 253 (1972) (advisory committee's notes).

96. 418 U.S. 683 (1974).

97. *Id.* at 705.

98. *Id.* at 708.

99. *Id.* In finding a qualified privilege, tbe Court rejected Nixon's claim of absolute privilege based on a need for confidentiality in high level communications. The Court stated:

> The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of sucb material for *in camera* inspection

Other courts have arrived at similar findings when considering the requested discovery of internal evaluations performed by hospitals to ensure that high professional standards of patient care are upheld.[100] In *Bredice v. Doctors Hospital, Inc.*[101] the plaintiff in a malpractice action sought to discover the minutes and reports of medical staff reviews made by a committee of doctors at the hospital. The hospital stated that the sole purpose of the staff meetings was to improve the care and treatment available to patients, emphasizing that the committee performed its work with the express understanding that all communications would remain confidential.[102] The court accepted the correlation between educating doctors through discussions and improving patient care.[103] Noting that the value of the proceedings would be destroyed if discovery of minutes and participant identities was allowed,[104] the court stated that upholding the public interest is a valid ground for prohibiting discovery into certain matters. The court stated that the doctors' responsibility to make life and death decisions mandates unimpeded access to up-to-date techniques and information. The court recognized an "overwhelming public interest" in allowing the staff meetings to be held on a confidential basis, preserving a free flow of ideas and advice between the doctors.[105]

The defendant asserted a similar "self-evaluation" privilege in *Rosario v. New York Times Co.*,[106] a class action suit brought against a daily newspaper alleging employment discrimination. The *New York Times* refused to produce a number of documents, which the newspaper claimed consisted of a self-evaluation of its

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with all the protection that a district court will be obliged to provide.

Id. at 706; *see also In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577 (E.D.N.Y. 1979) (recognizing an official information privilege for opinions and recommendations, but not purely factual material, in Office of the Comptroller of the Currency reports).

100. *See, e.g.*, Mewborn v. Heckler, 101 F.R.D. 691 (D.D.C. 1984); Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

101. 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

102. *Id.* at 250.

103. *Id.*

104. *Id.* The court stated:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations.

Id.

105. *Id.* at 251.

106. 84 F.R.D. 626, 627 (S.D.N.Y. 1979).

compliance with affirmative action requirements.[107] Following *in camera* inspection, the court agreed, in the interest of free discussion aimed at compliance with the law, to protect the documents from discovery.[108]

It is evident, therefore, that common law precedent exists recognizing a qualified privilege based upon the public's interest in, and benefit from, candid communication and evaluation free from fear of disclosure during litigation. A court considering a proposed academic privilege must determine therefore whether that public interest outweighs the disappointed academician's desire for full disclosure of the deliberation process, bearing in mind that no privilege should be recognized unless it is necessary to protect the public interest at stake.

D. Plaintiff's Rebuttal of the Presumption of Privilege

Even if a court recognizes a qualified academic privilege on either constitutional[109] or common law[110] grounds, the university's battle is only half won. The plaintiff still may rebut the presumption of privilege. The court, then, must undertake a second balancing of interests, even if the court finds that the defendant's need for confidentiality generally should prevail. In *United States v. Nixon*,[111] for example, the Supreme Court first found a qualified privilege for Presidential communications,[112] then examined whether that privilege should stand in the context of criminal prosecution presented by the facts of the case.[113] The Court described the process as a balancing of the President's interest in protecting communications made in the performance of his duties

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107. *Id.* at 631.

108. *Id.* For other cases recognizing an "evaluative" privilege, see Gillman v. United States, 53 F.R.D. 316, 318 (S.D.N.Y. 1971) and Banks v. Lockheed-Georgia Co., 53 F.R.D. 283, 285 (N.D. Ga. 1971).

109. *See supra* notes 14-38 and accompanying text.

110. *See supra* notes 58-108 and accompanying text.

111. 418 U.S. 683 (1974).

112. *Id.* at 705-07; *see also supra* notes 96-99 and accompanying text.

113. *Nixon*, 418 U.S. at 711-12. The Court limited its holding to the criminal context:

> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

Id. at 712 n.19.

against the fair administration of criminal justice.[114] The Court concluded that presidential advisors would not temper the candor of their statements merely because evidence of such conversations possibly could be called for in a criminal prosecution.[115] The Court did find, however, that withholding relevant evidence in a criminal trial through blanket protection of presidential communications would seriously threaten the constitutional guarantees of due process and impair the basic function of the courts.[116] The Court explained that while a President's need for confidentiality in communications is general in nature, the need for production of relevant evidence in a criminal proceeding is specific and often central to a fair adjudication of the case. Denying access to specific facts may totally frustrate a criminal prosecution.[117] The Court held that limited disclosure of only those conversations shown to have some impact on the criminal trial would not vitiate the office's general reliance on confidentiality.[118]

The traditional need for freely accessible evidence in criminal proceedings also has led the Court to allow discovery over the assertion of privilege by persons involved in the newsgathering process.[119] Newsgathering, like academic freedom, implicates the first amendment,[120] providing a constitutional foundation for the claim of privilege.[121] Like the official information privilege,[122] the newsgathering privilege has yielded when the need for information relevant to criminal prosecution is found to outweigh the need for confidentiality.[123] Civil plaintiffs, however, also have demonstrated

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114. *See id.* at 711-12.

115. *Id.* at 712.

116. *Id.*

117. *Id.*

118. *Id.* at 713.

119. *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Branzburg v. Hayes, 408 U.S. 665 (1972).

120. *Compare Branzburg*, 408 U.S. at 681 (stating that without some protection for newsgathering, the first amendment freedom of the press could be eviscerated) *with* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (noting that academic freedom has long been "viewed as a special concern of the First Amendment").

121. Under traditional first amendment doctrine, constitutional rights secured by the first amendment "cannot be infringed absent a 'compelling' or 'paramount' state interest." Baker v. F & F Inv., 470 F.2d 778, 784 (2d Cir. 1972) (citing NAACP v. Button, 371 U.S. 415 (1963), *cert. denied*, 411 U.S. 966 (1973)).

122. *See supra* notes 113-18 and accompanying text.

123. In Branzburg v. Hayes, 408 U.S. 665 (1972), the Court found the public interest in law enforcement and effective grand jury proceedings sufficient to override "the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a

a need for information sufficiently compelling to overcome the assertion of the newsgathering privilege.[124]

In *Silkwood v. Kerr-McGee Corp.*[125] the Tenth Circuit addressed how a trial court should proceed when faced with a constitutionally derived newsgathering privilege in the discovery phase of civil litigation.[126] The dispute arose when the defendant corporation ordered a non-party witness to produce confidential information he had obtained while investigating the death of Kerr-McGee employee Karen Silkwood as the subject for a documentary film.[127] In denying the filmmaker's request for a protective order, the trial court failed to balance the opposing interests and to consider the existence of a qualified privilege for newspersons.[128] The court of appeals first noted that the Supreme Court had never limited the privilege to newspaper reporting[129] and concluded that the implicated first amendment interests entitled the filmmaker to invoke the privilege.[130] The appellate court remanded the case, instructing the trial court to balance the interests in accordance with the criteria laid down in *Garland v. Torre*[131] and subsequently reaffirmed in *Baker v. F & F Investment.*[132]

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valid grand jury investigation or criminal trial." *Id.* at 690-91. The Court similarly rejected a press claim for special protection from law enforcement demands for information in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), upholding an *ex parte* warrant authorizing the search of a campus newspaper office for photographs of a demonstration.

124. *See, e.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir.) (libel action), *cert. denied*, 358 U.S. 910 (1958). *But see* Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972) (refusing to compel disclosure in civil action), *cert. denied*, 411 U.S. 966 (1973).

125. 563 F.2d 433 (10th Cir. 1977).

126. *Id.* at 437-39.

127. *Id.* at 434. The filmmaker had assured interviewees, who demanded confidentiality, that both the information and their identities would he shielded from disclosure. *Id.* at 435.

128. *Id.* The trial court held that the filmmaker was not entitled to invoke the privilege because be was not a newsman regularly engaged in obtaining, writing, editing, or otherwise preparing news. *Id.* at 436.

129. *Id.* at 437 (citing Lovell v. City of Griffin, 303 U.S. 444 (1935)).

130. *Silkwood*, 563 F.2d at 437.

131. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

132. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

In *Silkwood v. Kerr-McGee Corp.* the court delineated the *Garland* criteria as:

1. Whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful.
2. Wbether the information goes to the heart of the matter.
3. Whether the information is of certain relevance.
4. The type of controversy.

563 F.2d at 438. This analysis is intended to rule out "compulsory disclosure in the course of a fishing expedition." *Id.* Despite generally broad discovery rules in the federal courts, *see supra* notes 41-42 and accompanying text, this test requires "certain relevance." *Silkwood,*

In *Garland* the Second Circuit ordered disclosure of the identity of a news source in a libel action.[133] A columnist had published allegedly defamatory statements about actress Judy Garland, attributing the statements to an unnamed CBS executive.[134] The writer refused to reveal her source at a pretrial deposition, claiming a journalist's privilege.[135] The court held the writer in contempt and ordered disclosure, focusing on Miss Garland's unsuccessful attempts to determine the identity from alternate sources.[136] According to the court, the identity of the news source was essential to the libel action and went "to the heart of the plaintiff's claim."[137]

The Second Circuit reached a different result under the same analysis in *Baker v. F & F Investment*.[138] *Baker* was a civil rights class action filed against Chicago realtors who allegedly engaged in racially discriminatory sales practices.[139] The plaintiffs deposed a journalist who had written an article about discriminatory "blockbusting" based on an interview with a Chicago realtor to whom the journalist had promised confidentiality.[140] The court followed the *Garland* criteria in holding that the plaintiffs could not compel disclosure of the confidential source. The court first noted that the deposed journalist, unlike the writer in *Garland*, was not a party to the action.[141] Further, the plaintiffs had not sought the information from other available sources.[142] The court concluded that disclosure by the journalist of his source was neither essential to the outcome of the case nor necessary to uphold public interest in the fair administration of justice.[143] The court also rejected the plaintiffs' argument that the mere presence of a claim brought

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563 F.2d at 436.

133. 259 F.2d at 550.

134. *Id.* at 547.

135. *Id.*

136. *Id.* Miss Garland had deposed two CBS executives who denied either making the statement or having knowledge of who did. *Id.*

137. *Id.* at 550. Even in requiring disclosure, however, the court emphasized that its holding was strictly limited to the facts of the case. The court noted that it was "not dealing here with use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality." *Id.* at 549-50.

138. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

139. *Id.* at 780.

140. *Id.*

141. *Id.* at 783.

142. *Id.*

143. *Id.* (noting that the source's identity "did not go to the heart of [plaintiffs'] case").

under the federal civil rights acts provides a compelling justification for overriding the journalist's privilege.[144]

Thus, in overcoming a qualified academic privilege in a discrimination suit, the plaintiff must show an overriding need for the information that goes to the heart of the matter, demonstrate the information's certain relevance, and prove the absence of alternative, less intrusive sources of the information. On balance, the plaintiff must prove sufficient danger to his rights and sufficient need for the information to override the university's need for confidentiality recognized in the court's grant of qualified privilege.[145]

The Supreme Court has held that discovery rules are to be accorded broad and liberal treatment, particularly where proof of intent is required.[146] Historically, discrimination suits against academic employers were limited to suits against public institutions brought under the Civil Rights Act of 1871,[147] which requires a finding of discriminatory intent.[148] The 1972 extension of the Civil Rights Act of 1964,[149] however, rendered virtually all colleges and universities vulnerable to discrimination suits. Most such suits take the form of Title VII disparate treatment actions[150] alleging different treatment of individuals based exclusively on their sex, race, religion, or national origin. The Supreme Court articulated the general requirements for establishing a prima facie case of dis-

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144. *Id.* at 782-83. The court stated:

> This argument, we believe, goes too far, for it would require disclosure of confidential sources in every case based upon federal question jurisdiction or, at least, in every case raising a claim under the civil rights acts. We can see no justification for either a blanket rule covering all federal question cases, or for a partial rule of disclosure for all civil rights actions.

Id. at 783.

145. *See* Note, *supra* note 18, at 1563-64. Although the fact that the information is sought in furtherance of a civil rights claim does not itself entitle the plaintiff to unlimited discovery, *see supra* note 144 and accompanying text, the needs of a plaintiff in a discrimination suit should be considered in determining the necessity of forced disclosure of confidential peer review materials. The review files or votes arguably would go to "the heart of the matter" if the plaintiff would be unable to prove an essential element of his case without them.

146. *See* Herbert v. Lando, 441 U.S. 153, 177 (1979).

147. 42 U.S.C. § 1983 (1982). One commentator has noted that even under § 1983's long standing protection of public university faculty memhers, courts have been reluctant to examine faculty peer review decisions. *See* Lee, *supra* note 58, at 279.

148. *See* General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982).

149. *See supra* note 4.

150. *See* Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Title VII Litigation*, 60 B.U.L. REV. 473, 482-83 (1980).

parate treatment in *McDonnell Douglas Corp. v. Green.*[151] The Court expressly approved these standards for use in Title VII cases involving academic employment in *Board of Trustees of Keene State College v. Sweeney.*[152] In an academic setting, the *McDonnell Douglas* test requires a showing that: (1) the plaintiff is a member of a minority or disadvantaged class; (2) the plaintiff sought a position for which he or she was qualified; (3) the plaintiff was rejected, and (4) the institution filled the position with an applicant of plaintiff's qualifications or promoted other persons with similar qualifications at approximately the same time.[153]

The plaintiff, therefore, initially carries a minimal burden in compelling the defendant to raise a defense.[154] Direct proof of discriminatory intent is not necessary;[155] a plaintiff must prove only that she was denied an available position for which she was qualified.[156] Once a prima facie case is established, the defendant must show a "legitimate, nondiscriminatory reason" for rejecting the employee.[157] The burden then shifts back to the plaintiff, who must prove by a preponderance of the evidence that the justifications offered by the defendant differ from the defendant's true motivation.[158] The plaintiff meets her burden of persuasion by proving either that "a discriminatory reason more likely motivated the

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151. 411 U.S. 792 (1973). The Court required the plaintiff to prove:

> (i) 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 complainant's qualifications.

Id. at 802. The Court stated that the test was sufficiently flexible to allow its extension to other Title VII actions. "The facts necessarily will vary in Title VII cases, and the specification of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13; *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (stating that the *McDonnell Douglas* formulation was "not intended to be an inflexible rule").

152. 439 U.S. 24 (1978).

153. Smith v. University of N.C., 632 F.2d 316, 340 (4th Cir. 1980).

154. *See, e.g.*, Friedman, *Congress, the Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles*, 34 VAND. L. REV. 37, 43 (1981).

155. *See* Lieberman v. Gant, 630 F.2d 60, 63 (2d Cir. 1980).

156. *See* Friedman, *supra* note 154, at 43. In order to meet the second step of the *McDonnell Douglas* test, the plaintiff must establish only that she was sufficiently qualified to be among those persons from whom a selection would be made. *See* Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1155-56 (D. Mass. 1980) (stating that the plaintiff "need only show that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure decision-making body"), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981).

157. *McDonnell Douglas*, 411 U.S. at 802.

158. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

employer"[159] or that the employer's justification is "unworthy of credence."[160] In any disparate treatment action, then, some proof of discriminatory intent ultimately is critical.[161]

Thus, in determining whether to recognize a plaintiff's rebuttal of a university's presumptive privilege for confidential material, a court must consider whether the information sought goes "to the heart of the matter"[162]—that is, toward proof of discriminatory intent. The court must analyze the plaintiff's efforts to obtain proof from any alternate sources and determine whether the requested material is of "certain relevance"[163] in proving that the defendant's asserted reasons for its employment decision were mere pretext.

III. Recent Developments

A. In re Dinnan

In 1981 the Fifth Circuit in *In re Dinnan*[164] became the first federal appellate court to consider a university's assertion of an academic freedom privilege.[165] The case arose when Maija Blaubergs, a female faculty member, was denied promotion to the rank of associate professor.[166] During discovery Professor James Dinnan, a member of Blaubergs' review committee, refused to answer when asked how he had voted on the application.[167] Dinnan's refusal ultimately led to a contempt citation,[168] which on appeal to

159. *Id.* at 256.

160. *Id.*

161. *See* Friedman, *supra* note 154, at 44 (citing International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), *cert. denied*, 454 U.S. 1098 (1981)). Professor Joel Friedman notes the difficulty that the plaintiff, usually forced to rely on less persuasive circumstantial evidence, encounters in proving the requisite intent because she "must ask the judge to find that a subjective evaluation, rendered by a professional in an area that frequently is outside the judge's areas of expertise, is really on a pretext asserted to camouflage the defendant's true motive—discrimination." *Id.* at 48.

162. *See supra* note 132 and accompanying text.

163. *Id.*

164. 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

165. The court stated that the "appellant is claiming a privilege, *i.e.*, a right to refrain from testifying, that heretofore has not been considered or recognized by any court." 661 F.2d at 427.

166. *Id.*

167. *Id.*

168. The case attracted much comment in the academic community. One writer reports that, "On July 3, 1980, dressed in academic regalia to show that the government was 'locking up the University of Georgia,' Professor Dinnan turned himself in to federal marshals. He served a three month sentence and was fined $3,000." Comment, *supra* note 58, at 286 n.2 (citing *Jailed Professor Wins Release*, Chron. Higher Educ., Oct 14, 1980, at 5, col. 5).

the Fifth Circuit was coupled with an appeal from the trial court's order compelling discovery.[169]

The court of appeals summarily dismissed Dinnan's privilege claim based upon academic freedom,[170] calling Dinnan's position a "gross distortion" of the facts.[171] Considering the problem to be evidentiary only, the court refused to agree that compelled discovery implicated any issue of constitutional dimension.[172] The court recognized the importance of academic freedom generally,[173] but emphasized that an employment decision allegedly made on non-academic grounds removes the entire decisionmaking process from its otherwise constitutionally protected realm.[174] The court concluded that the importance of finding the truth outweighed the privilege claimed by Dinnan.[175]

The court further recognized that academic freedom, despite its historical importance, is limited. The court stated that Dinnan and the University of Georgia deserved no exemption from the fundamental public policy prohibiting discrimination.[176] The Fifth Circuit rejected Dinnan's protestations that a loss of confidentiality would inhibit decisionmakers, stating that the court's decision would encourage responsible, good faith decisionmaking by depriving wrongdoers of a constitutionally protected hiding place behind a shield of academic freedom.[177]

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169. *In re* Dinnan, 661 F.2d at 427.

170. The court also rejected Dinnan's claim that the common law secret ballot privilege protected his vote, reserving that privilege for votes in political or politically related elections. *Id.* at 431-32. The court found neither argument "to be even slightly persuasive." *Id.* at 430.

171. *Id.* at 427.

172. *Id.*

173. *Id.* at 430-31. The court stated that "government should stay out of academic affairs" but emphasized that the instant situation involved not academic issues, but "a private plaintiff . . . attempting to enforce her constitutional and statutory rights in an employment situation." *Id.* at 430 (emphasis omitted).

174. The court pointed out that Justice Frankfurter's "four essential freedoms," commonly cited as grounds for academic freedom in the employment area, were premised on a university's determination being made "on academic grounds." *Id.* at 431 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

175. *Id.* at 432-33. The court stated that to hold otherwise would allow a claim of academic freedom to shield even those tenure committee votes totally devoid of legitimate academic basis. *Id.* at 431. The court called that possibility "a much greater threat to our liberty and academic freedom than the compulsion of discovery in the instant case." *Id.*

176. *Id.* The court noted that "[t]o rule otherwise would mean that the concept of academic freedom would give any institution of higher learning *carte blanche* to practice discrimination of all types." *Id.*

177. *Id.* at 432. The court criticized Dinnan for being unwilling to accept responsibility for his own actions:

B. Gray v. Board of Higher Education

The next assertion of an academic freedom privilege came in *Gray v. Board of Higher Education*.[178] Dr. S. Simpson Gray, a black instructor for five years at a New York community college, brought suit under 42 U.S.C. sections 1981, 1983, and 1985 after he was refused promotion and reappointment with tenure.[179] Gray sought to discover the votes of two members of the committee that had considered his promotion, arguing that the evidence was material and essential to his case.[180] The defendants claimed that their votes were protected under a first amendment qualified academic privilege.[181] The district court recognized a qualified privilege, holding that the confidentiality of the faculty peer review system should be fostered because protection of the tenure system is essential to the protection of individual teachers' academic freedom.[182] In refusing to compel discovery, the district court applied the *Garland v. Torre* factors,[183] finding that the action was civil in nature, the information sought by Gray was available from other sources, and the information was not clearly relevant.[184]

On appeal the Second Circuit refused to adopt a rule of privilege, not because the defendants failed to show a compelling justification for privilege, but because the court found that on balance the facts of the case leaned toward allowing discovery.[185] The court

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> 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 decisionmaker has acted for legitimate reasons, he has nothing to fear. We find nothing heroic or noble about [Dinnan's] position; we see only an attempt to avoid responsibility for his actions. If [Dinnan] was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process.

Id.

178. 92 F.R.D. 87 (S.D.N.Y. 1981), *rev'd*, 692 F.2d 901 (2d Cir. 1982).

179. Dr. Gray, under the college's established procedure, entered teaching at the instructor level, but was entitled to seek advancement to the rank of assistant professor after one year. *Gray*, 692 F.2d at 902.

180. *Id.* at 903.

181. *Id.*

182. *Gray*, 92 F.R.D. at 92-94.

183. *See supra* notes 136-38 and accompanying text.

184. *Gray*, 692 F.2d at 903.

185. *Id.* at 904-05. The court voiced neither agreement nor disagreement with the result in *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982), but stated that "the opinion accords too little weight to the concerns for confidentiality in the academic tenure decision-making process." *Gray*, 692 F.2d at 904 n.6.

of appeals stated that the district court had underestimated the plaintiff's need to know individual votes because, unlike in Title VII suits, a finding of discriminatory intent is required in section 1981 actions.[186] The court also focused on the college's failure to provide Gray with the reasons for the committee's decision.[187] The court adopted the position proposed in an amicus curiae brief filed by the American Association of University Professors (AAUP)[188] suggesting that review decisions should be shielded from discovery if accompanied by a detailed statement of reasons.[189] Without a statement of reasons, however, the AAUP found the balance in favor of discovery, not privilege.[190] Because the committee revealed to Gray neither its votes nor its reasoning, the Second Circuit allowed discovery in light of Gray's inability otherwise to prove the requisite intent for a section 1981 action.[191]

C. EEOC v. University of Notre Dame du Lac

The Seventh Circuit's 1983 opinion in *Equal Employment Opportunity Commission v. University of Notre Dame du Lac*[192] ex-

186. *Gray*, 692 F.2d at 905. The court noted that Dr. Gray might prove discriminatory intent "if he could establish that [the individual defendants] harbored a racial animus against him and that this was manifested in votes against his reappointment and tenure—but to begin with he would, of course, have to know the votes." *Id.*

187. *Id.* at 905, 906-08.

188. The brief suggests that " '[i]f 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 a qualified privilege." *Id.* at 907 (quoting Brief for Amicus Curiae of AAUP at 23).

189. *Id.* at 908. Adherence to the AAUP guidelines would protect academic freedom because "the institution's substantial adherence to the principles and procedures . . . will in many cases avert the need for judicially enforced discovery. In those circumstances . . . it may be appropriate to assert a qualified academic peer review privilege." *Id.*

190. *Id.* The court stated that requiring disclosure of votes in the absence of stated reasons may preserve the plaintiff's right to establish a prima facie case of discrimination. *Id.* The court noted, however, that if reasons were provided, the plaintiff's need for disclosure may turn upon the nature of the reasons put forth:

> If the defendants claim that the tenure denial was based on evaluations of Gray's performance discussed at the [review committee] meeting, then certainly Gray will be hamstrung if denied disclosure. If, in contrast, defendants claim that Gray was denied tenure, say, because of poor student evaluations, a record of tardiness and missed classes, or failure to meet a requirement of publication, then disclosure may not be necessary, for if these reasons were pretextual that can be proven without it.

Id. at 905.

191. *Id.* at 906. The court said: "[F]orced as Dr. Gray is to chase an invisible quarry, without at least knowing the votes, he can hardly be said to have a 'full and fair opportunity,' to demonstrate employment discrimination." *Id.*

192. 715 F.2d 331 (7th Cir. 1983).

pressly recognized a qualified academic freedom privilege.[193] The action originated from a charge filed with the Equal Employment Opportunity Commission (EEOC) by a faculty member who had been denied tenure, allegedly on the basis of race.[194] The EEOC issued an administrative subpoena duces tecum requiring the university to produce files of the charging party and certain other faculty members in his department.[195] The university refused to comply, arguing that the personnel files contained peer reviews made with the assurance that they would remain confidential and that, unredacted, the evaluations were protected from disclosure by a qualified academic freedom privilege.[196] The district court refused to allow the university to delete all names and identifying features of the tenure review participants from the files, reasoning that no harm would result from disclosure of the files because the EEOC is statutorily prohibited[197] from disclosing any file information until a lawsuit is actually filed, even to the charging party.[198]

The Seventh Circuit reversed and remanded, finding a qualified privilege mandated by first amendment interests in fostering candid, critical, objective, and thorough evaluations in the peer review process.[199] The court of appeals directed the district court on

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193. *Id.* at 337.

194. *Id.* The complainant stated in his EEOC charge that, *inter alia*, the university had refused either to provide a written statement of reasons for denial or to disclose the identities of internal or external reviewers. *Id.* at 332.

195. *Id.* The university had offered to produce the files subject to the EEOC signing an agreement requiring that the EEOC maintain the confidentiality of the material, but tbe EEOC refused and issued the subpoena duces tecum. *Id.* at 333.

196. *Id.* at 333-34.

197. 42 U.S.C. §§ 2000e-2000e-8(e) (1982).

198. *Notre Dame*, 715 F.2d at 333-34. In reversing the district court decision, the Seventh Circuit stated that the EEOC is not prohibited from disclosing the contents of investigatory files to the charging party during investigation under the Supreme Court's holding in EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981). *Notre Dame*, 715 F.2d at 337.

199. *Notre Dame*, 715 F.2d at 335-36. The court analogized peer review to other socially important decisionmaking processes judicially recognized as deserving of protected status:

> Just as a limited executive privilege is necessary for the executive branch of our government to function properly, and as confidential judicial and jury deliherations are essential to preserve the integrity of those processes, confidentiality is equally critical in the faculty tenure selection process, in order that only the hest qualified instructors become the "lifeblood" of our institutions of higher learning.

Id. at 336-37.

The court recognized that some factors weighed in favor of disclosure, noting that a privilege should not be used to prohibit completely the disclosure of review files. Such an absolute privilege could shield evidence of discrimination and impair both the integrity of the truth-seeking process and the efficacy of congressional goals of eradicating discrimination. The court further stated that the EEOC's investigatory powers should not be unduly

remand to permit the university to redact the names and any other identifying features of the evaluators from each file.[200] The district court would examine both the redactions and the original files *in camera* to determine if the redactions were necessary; if so, the redacted versions would be turned over to the EEOC and the originals sent back to the university.[201] The EEOC could obtain further disclosure from the files only by making "a substantial showing of particularized need for relevant information."[202] The court of appeals described the "particularized need" standard as varying in proportion to the degree of access the party has to other sources of information. In order to prevent "fishing expeditions" judicially sanctioned through motions to compel discovery, the "particularized need" standard requires a party to exploit every possible source of information before seeking the privileged materials.[203] The court further stated that only a "compelling necessity" for the specific information requested, not mere relevance or usefulness, would satisfy the "particularized need" standard.[204]

D. EEOC v. Franklin and Marshall College

The Third Circuit displayed a different view of the issue in *Equal Employment Opportunity Commission v. Franklin and Marshall College*.[205] The dispute arose out of the EEOC's investigation of a charge of discrimination in violation of Title VII filed by a French professor who had been denied tenure on the basis of a college committee's recommendation citing "deficiencies in the areas of scholarship and general contributions . . . not sufficiently

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frustrated and recognized that academic freedom itself would be compromised if tenure decisions could be made on unlawful grounds. *Id.* at 337.

200. *Id.* at 338. The court stressed that its opinion was not an endorsement of free access to the EEOC to redacted files, but stated that this case was unique because the university had volunteered to produce redacted files. The court noted that "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available." *Id.* at 337 n.4.

201. *Id.* at 338.

202. *Id.* The court describes the burden as similar to that imposed on a party seeking grand jury materials, requiring the court to conduct a balancing test to determine whether the need of the party seeking disclosure outweighs the danger of infringement upon the privilege's underlying policies. *Id.*

203. *Id.*

204. *Id.; see also supra* note 132 and accompanying text (discussing the heightened standard of "certain relevance" required to obtain privileged materials).

205. 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2288 (1986). Justices White and Blackmun, dissenting in the denial of certiorari, stated that they would have heard the case to resolve the split in the circuits. 106 S. Ct. at 2289 (White & Blackmun, J.J., dissenting).

offset by performance in other areas."[206] The EEOC issued a subpoena duces tecum requesting materials from the personnel files of the charging party and all individuals considered for tenure since November 1977, offering to accept the materials with names and identifying characteristics deleted.[207] The college refused to comply fully,[208] and the district court issued the order to compel compliance.

The court of appeals specifically declined to follow the Seventh and Second Circuits, refusing to adopt either a qualified privilege or a balancing approach.[209] The court recognized the importance of confidentiality in obtaining candid, honest peer review in educational settings, especially in a small school like Franklin and Marshall where tenure applicants and tenure decisionmakers are in continual contact.[210] The court, however, relied on Congress' intent to subject educational institutions to the same Title VII requirements applied in other industries and stated that the Seventh and Second Circuits' positions allow educational institutions "to hide discrimination behind a wall of secrecy."[211]

Much of the court's opinion emphasizes the broad investigatory power of the EEOC, which the court stated encompasses access to anything that is relevant to the charge under investigation, not merely that which might be relevant at trial.[212] The court noted that relevance is construed broadly in the investigatory stage,[213] citing the Supreme Court's view that courts must allow the EEOC access to virtually any information that might prove or

206. *Franklin & Marshall*, 775 F.2d at 112.

207. *Id.*

208. *Id.* The college refused to provide materials including "tenure recommendation forms prepared by faculty members, annual evaluations . . ., letters of reference, evaluations of publications by outside experts, and all notes, letters, memoranda or other documents considered during each tenure decision." *Id.* at 112-13.

209. *Id.* at 114.

210. *Id.*

211. *Id.* at 115. The court stated that it could not ignore Congress' mandate and had "no choice but to trust that the honesty and integrity of the tenured reviewers in evaluation decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality." *Id.*

212. *Id.* The court relied largely upon the Supreme Court's decision in EEOC v. Shell Oil Co., 466 U.S. 54 (1984), which "rejected the proposition that a district court must find the charge of discrimination to be well-founded, verifiable, or based on reasonable suspicion before enforcing an EEOC subpoena." *Franklin & Marshall*, 775 F.2d at 116 (citing *Shell Oil*, 466 U.S. at 72 n.26, 77 n.33).

213. *Franklin & Marshall*, 775 F.2d at 116 (citing EEOC v. University of Pittsburgh, 643 F.2d 983, 986 (3d Cir.), *cert. denied*, 454 U.S. 880 (1981)).

disprove the allegations against the employer.[214] The Third Circuit ordered the college to produce the redacted materials, concluding that the EEOC should not attempt to reevaluate the candidate's qualification—a task strictly in the realm of the college—but should be free to investigate and intervene when decisions have been based on statutorily impermissible grounds.[215]

E. District Court Opinions

1. *Zaustinsky v. University of California*

In 1983 a federal district court in California[216] found the contents of a plaintiff's review file to be privileged communications.[217] *Zaustinsky v. University of California*[218] involved a claim of sex discrimination brought by a tenured faculty member denied promotion to full professor. Zaustinsky sought discovery of her peer evaluations, which had been written and submitted with an express expectation of confidentiality.[219] Although the university's assertion of privilege was not premised expressly on the principles

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214. *Id.* at 116 (citing *Shell Oil*, 466 U.S. at 68-69). The Supreme Court in *Shell Oil*, however, went on to note that the courts "must he careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement [of relevancy] a nullity." 466 U.S. at 69.

215. *Franklin & Marshall*, 775 F.2d at 117. Chief Judge Aldisert, in a strongly worded dissent, objected to the majority's automatic application of labor standards to the academic setting as an abhorrent example of dogmatic "slot machine justice." *Id.* (Aldisert, C.J., dissenting). The Chief Judge disagreed with the majority's view that academic institutions are the same as other employers:

> At least insofar as their administrative and governance structures are concerned, colleges and universities differ significantly from garden variety private employers. In the context of application of the provisions of tbe National Labor Relations Act the Supreme Court has counseled that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"

775 F.2d at 120 (footnote and citations omitted) (quoting NLRB v. Yeshiva Univ., 444 U.S. 672, 681 (1980)). The Chief Judge stated that he would adopt a flexible *Gray*-like balancing approach, *id.* at 121, requiring the EEOC to show compelling necessity for the confidential files of faculty members other than the charging party. *Id.*

216. Zaustinsky v. University of Cal., 96 F.R.D. 622 (N.D. Cal. 1983), *aff'd without opinion*, 782 F.2d 1055 (9th Cir. 1985).

217. *Zaustinsky*, 96 F.R.D. at 625. The court used Wigmore's classic criteria for a common law privilege, *see supra* note 61 and accompanying text, as a framework for its discussion, finding each of the first three criteria met. First, the evaluations were submitted with an expectation of confidentiality; second, confidentiality was essential to the effectiveness of a faculty review system; and third, the peer review system deserved fostering as the most reliable method for determining faculty appointments. 96 F.R.D. at 625.

218. 96 F.R.D. 622 (N.D. Cal. 1983), *aff'd without opinion*, 782 F.2d 1055 (9th Cir. 1985).

219. *Id.* at 623.

of academic freedom, the court looked to *Gray*[220] for procedural guidance.[221] The district court noted that a plaintiff, merely upon filing a claim of discriminatory treatment, is not entitled to a "general inquisition" into the university's files.[222] The court stated that the defendant must disclose the reasons for its action, after which the plaintiff will be allowed to discover only those confidential materials that reflect the reasons disclosed by the university, enabling her to meet the burden of proving the defendant's reasons pretextual.[223] The Ninth Circuit affirmed the district court in 1985 without publishing an opinion.[224]

2. *Rollins v. Farris*

A more recent opinion addressing the privilege question is *Rollins v. Farris*,[225] an action based on discrimination claims under Title VII and section 1983.[226] The plaintiff sought discovery of tenure files for various faculty members and minutes of the committee meeting in which her application for tenure was considered.[227] In considering the plaintiff's motion to compel production, the district court reviewed the split of opinion in the federal circuits and ordered the votes, minutes, and deliberations of the tenure reviewing body produced when proof of discriminatory intent is necessary to establish the plaintiff's claim or to rebut the defendant's proof.[228] The court specifically declined to follow the position of the Seventh Circuit.[229] Expressly adopting the Third Circuit's holding in *Franklin and Marshall*,[230] the court found that discov-

220. 692 F.2d 901 (2d Cir. 1982).

221. *Zaustinsky*, 96 F.R.D. at 624.

222. *Id.* at 625.

223. *Id.*

224. Zaustinsky v. University of Cal., 782 F.2d 1055 (9th Cir. 1985).

225. 108 F.R.D. 714 (E.D. Ark. 1985).

226. *Id.* at 715.

227. *Id.*

228. *Id.* at 719. The court stated that its stance would not give plaintiffs *carte blanche* to discover confidential materials merely by alleging discrimination. The court held that deliberations would be discoverable if the plaintiff alleged that the committee "harbors a discriminatory animus against him," which would be reflected in the minutes, or if the denial was premised on evaluations of the plaintiff's performance made at the meetings. *Id.* The court noted, however, that disclosure may be unwarranted when the stated reasons for denial are external to the committee's discussion and thus could be shown pretextual without compelled discovery of the confidential records. *Id.*

229. *Id.* at 720 (citing EEOC v. University of Notre Dame du Lac, 715 F.2d at 331 (7th Cir. 1983)).

230. 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2288 (1986).

ery rules adequately protect the interests of academic freedom.[231] The court noted, however, that the materials sought would have been discoverable under the holdings of the Second,[232] Third,[233] or Fifth[234] Circuits.

3. *Jackson v. Harvard University*

In *Jackson v. Harvard University*[235] the Massachusetts federal district court adopted the Seventh Circuit's "particularized need" standard[236] in an action brought by a female business school faculty member alleging sex discrimination in the tenure process. The court affirmed a magistrate's order denying the disclosure of the identities of faculty and peer reviewers who had furnished confidential evaluations for use in the plaintiff's tenure review.[237] Expressly acknowledging the existence of a qualified academic privilege,[238] the court held that the plaintiff had failed to make a showing of particularized need sufficient to overcome defendant's privilege.[239] The court noted that the defendants previously had produced a complete copy of the plaintiff's review file, including all materials on which the denial of tenure was based.[240] The court further ordered the production of tenure files for male faculty members receiving tenure within the relevant time frame of the plaintiff's action.[241] The court required, however, that any names in files produced, including the plaintiff's own file, be redacted in recognition of the university's interest in maintaining the confidentiality of its tenure files and the identity of persons involved in the tenure process.[242]

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231. *Rollins*, 108 F.R.D. at 720. The defendants did not appeal the court's granting of plaintiff's motion to compel. At trial, however, the defendants prevailed on the merits. Rollins v. Farris, 40 F.E.P. Cases (BNA) 1495 (E.D. Ark. Feb. 18, 1986), *aff'd*, No. 86-1367, slip op. at 4 (8th Cir. May 4, 1987).

232. *See* Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982).

233. *See* EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2288 (1986).

234. *See In re* Dinnan, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

235. 111 F.R.D. 472 (D. Mass. 1986).

236. *Id.* at 474; *see supra* note 202 and accompanying text.

237. *Jackson*, 111 F.R.D. at 474.

238. *Id.* (citing EEOC v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983)).

239. *Id.*

240. *Id.* at n.1.

241. *Id.* at 476.

242. *Id.*

IV. ANALYSIS

The present state of academic privilege law in the federal courts plainly is unsettled. Each case requires the reviewing court to reconcile an increasing number of equally relevant opinions.[243] As Justices White and Blackmun stated in their dissent to the Supreme Court's denial of certiorari in *Franklin and Marshall*,[244] the High Court should take advantage of its next opportunity to resolve the split in the circuits and provide some coherent guidance for the lower courts. In the interim, the lack of harmony among the courts may create a "chilling effect" for academic decisionmakers who desire the security of assured confidentiality before making candid appraisals.[245] Such a judicially fostered infringement upon freedoms derived from the first amendment[246] is intolerable when the problem might be rectified through the articulation of clear, cogent guidelines by which the lower courts may address academic privilege issues.

A logical procedure for dealing with an asserted privilege involves a two-step analysis. The first step, adopted by the *Gray* court from the American Association of University Professors, would find a qualified privilege for the confidential review materials only when the institution has furnished a detailed written statement of reasons to the faculty member denied appointment.[247] The privilege could be based on either constitutional[248] or common law[249] grounds. A statement of reasons would satisfy the plaintiff's

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243. *Compare In re* Dinnan, 661 F.2d 426 (5th Cir. 1981) (the first court to address the issue of an academic privilege) *with* Rollins v. Farris, 108 F.R.D. 714 (E.D. Ark. 1985) (district court in a circuit that had not yet addressed the issue and was forced to seek an answer among conflicting views of four other circuits).

244. 106 S. Ct. 2288, 2289 (1986) (White & Blackmun, J.J., dissenting).

245. Obviously, most peer review committee members do not anticipate litigation when they cast their votes for or against a fellow academician's appointment. However, scholars admittedly may alter their opinions if divulgence is a possibility. *See supra* note 73 and accompanying text. Further, if a committee member is aware that a co-member does harbor some discriminatory animus toward the candidate that could affect the committee's decision, the committee member may well decide that discretion is the better part of valor and make bis own statements less frank. *Id.*

246. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (noting that academic freedom has long been viewed as a special concern of the first amendment).

247. 692 F.2d at 908. The *Gray* court noted that requiring a statement of reasons "may serve to avoid arbitrariness or lack of consideration in the decision-making body itself." *Id.* at 907. However, the reasons must be stated with sufficient specificity to allow a plaintiff to disprove them. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

248. *See supra* notes 14-38 and accompanying text.

249. *See supra* notes 58-108 and accompanying text.

right to know the factors that entered into the decision to deny appointment; absent a suitable statement, the privilege would not be recognized, and the balance would tip in favor of discovery.[250]

Having recognized a qualified privilege, the court would then turn to the second step: allowing the plaintiff to attempt to rebut the presumption of privilege.[251] At this stage the courts would enforce the congressional mandate to apply anti-discrimination statutes to educational employers. If the denial of appointment was based solely on the discussions of the tenure committee, such materials go "to the heart of the matter"—proof of discriminatory intent or pretext on the part of the defendant—and thus are discoverable despite the qualified privilege.[252] If, however, the plaintiff can make her case using alternative sources of information, or if the reasons cited by the defendant otherwise can be proved pretextual, or if the material is of uncertain relevance,[253] discovery will not be allowed, protecting institutional confidentiality from groundless "fishing expeditions." This tripartite test of the plaintiff's need—whether the information (1) goes to the heart of the matter, (2) is of certain relevance, and (3) is unavailable from other sources[254]—would protect a university's decision based upon legitimate reasons but would pierce the veil of secrecy and allow discriminatory motives and pretext to be exposed during litigation. Furthermore, even if discovery occurs, the court may employ its power to control discovery[255] through the use of protective devices such as *in camera* review and redaction of names to protect whatever harmony exists between individual committee members and the disgruntled plaintiff, who may continue to work side by side.

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250. *See, e.g., Gray*, 692 F.2d at 908.

251. *See supra* notes 109-163 and accompanying text.

252. *Id.*

253. The test falls somewhere between *Notre Dame*'s requirement of "particularized need," 715 F.2d at 338, and *Franklin & Marshall*'s adoption of the liberal interpretation of "relevance" from cases involving processes of employment decisionmaking not implicating first amendment principles. 775 F.2d at 116-17.

254. *See supra* notes 131-32 and accompanying text.

255. *See supra* notes 52-53 and accompanying text; *see also* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1240 (6th Cir.) (commenting that effective management of complex litigation requires allowing the district judge broad discretion in guiding the discovery process), *cert. denied*, 454 U.S. 893 (1981).

V. Conclusion

A judicial clash between society's interest in first amendment principles of academic freedom and the interest of an individual in seeking and retaining the employment of his choice free from bias and discrimination provides a predictably explosive mix of opinions on which interest should prevail. Both interests are of paramount importance. Neither interest, however, should be deemed absolute to the detriment of the other. Under a judicially mandated, yet flexible set of guidelines, courts may balance the competing interests in order to provide fair and rational judicial outcomes that are sadly lacking in the existing chaotic state of the law within the federal circuits.

Jayna Jacobson Partain