

## **TENURE AND PROMOTION POLICIES IN COLLEGES AND UNIVERSITIES: CONFIDENTIALITY AND DEFAMATION IN PEER REVIEWS**

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### **ABSTRACT**

One of the most noteworthy Supreme Court decisions in recent years for administrators in institutions of higher education is *University of Pennsylvania v. EEOC*. The Court held that colleges and universities may be forced to disclose confidential peer review records when accused of illegally denying tenure to a faculty member. This article reviews the results of a national survey of chief academic officers concerning the impact of the Supreme Court's decision on the tenure review process. A brief review of defamation law is provided. Implications for academic administrators and peer evaluators are discussed. Predictions by legal experts of dramatic changes in the peer review process have thus far become reality at only a few institutions (e.g., abolishing tenure). The policies and practices employed in tenure decisions by colleges and universities are reviewed. Analysis of the data indicates that most institutions have implemented few significant changes as a result of the Court's ruling.

### **NATURE OF THE PEER REVIEW PROCESS**

The process of tenure review is normally initiated upon recommendation by members of the faculty in the candidate's department. A record is assembled, including evaluations on research, teaching and service. In some cases, peers in other institutions may be asked to provide evaluations of the candidate's scholarship. Such evaluations are normally submitted with the expectation of confidentiality.

The departmental recommendations and the candidate's case are reviewed by the university administration. Advice may be solicited from a university committee of faculty members before the case is referred to the dean or president of the university. At each level of review, the particular reviewing committee prepares a record that includes the candidate's academic credentials, references, publication record, and evaluations of teaching and scholarship.

The courts of the United States recognize the importance of the peer review system to tenure and promotion decisions, and historically have been extremely deferential to institutions accused of discrimination in the awarding of tenure. In particular, the standards and procedures developed to evaluate candidates for tenure are given special consideration as evidence that may be relevant to discrimination complaints.

### JUDICIAL POLICY OF DEFERENCE

The highly subjective nature of academic tenure decisions has deterred most courts from second-guessing peer-review committee judgments. A multitude of justifications for this deference has been asserted by the courts. Often-cited reasons include the subjective nature of performance evaluations, judges' general lack of competence in evaluating academic qualifications of professors, and the need to protect the academic freedom of universities [1].

Judicial deference to academic institutions has a long history. As early as 1790 in *Bracken v. Visitors of William and Mary College* [2], the court gave the college unreviewable discretion to exercise any power contained in its charter and refused to compel the Board of Visitors to reinstate a professor of a defunct grammar school.

Perhaps the strongest assertion of the doctrine of judicial deference is found in the opinion of the Second Circuit in *Faro v. New York University* [3]. The plaintiff brought suit under Title VII of the Civil Rights Act alleging unlawful sex discrimination in a tenure decision. The court denied relief and stated that "of all fields which federal courts should hesitate to invade and take over, education and appointments at the university level are probably the least suited for federal court supervision" [3].

In *Powell v. Syracuse University* the doctrine of judicial deference in academic matters received serious reconsideration and sharp criticism [4]. Ironically, this criticism came from the Second Circuit, which four years earlier in *Faro* had made one of the most influential statements supporting the doctrine. The court recognized that a policy of judicial nonintervention was improper in light of congressional intent underlying Title VII. The court quoted a house report that indicated discrimination in the field of education was as pervasive as in other areas of employment and needed to be remedied.

A review of cases since *Powell* reveals that courts continue to acknowledge the unique and subjective nature of tenure decisions. However, courts have abandoned their earlier totally noninterventionist posture, and appear to be taking their role in scrutinizing academic employment decisions more seriously [1].

### **UNIVERSITY OF PENNSYLVANIA v. EEOC (1990)**

The University of Pennsylvania is a private university with approximately 18,000 full-time students enrolled in twelve schools. The tenure process at the university includes evaluations from colleagues within the applicant's department and evaluations from scholars outside the university.

Rosalie Tung, an assistant professor in the Management Department at the University's Wharton School of Business, was denied tenure in 1985. She filed a charge with the Equal Employment Opportunity Commission (EEOC) claiming discrimination on the basis of race, sex, and national origin.

The EEOC began investigating the allegations and requested that the university provide confidential peer review materials related to the professor's tenure review process. The university supplied a wide range of documents but *refused* to release confidential peer review materials relating to Tung's tenure review and similar records for five male candidates.

The EEOC then issued a subpoena seeking: 1) Tung's tenure file; 2) tenure files for the five other candidates considered with Tung for tenure; 3) the identity, tenure status, and qualifications of all individuals involved in management department tenure decisions since June 1984; and 4) the identity of all members of the university's personnel committee.

The university *again refused* to produce all of the documents, citing the need to maintain academic freedom and confidentiality in tenure decisions. It requested that the EEOC modify its subpoena to exclude what it termed "confidential peer review information," specifically, 1) confidential letters written by Tung's peer evaluators; 2) the department chairman's letter of evaluation; 3) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations relating to Tung's application for tenure; and 4) review files of the five males.

The university's request was denied, and when the university failed to deliver the documents, the EEOC successfully pursued an enforcement order in the United States District Court for the Eastern District of Pennsylvania [5].

After an unsuccessful appeal to the Third Circuit Court of Appeals [6], the university next appealed to the United States Supreme Court. The Court agreed to hear the case and finally settle the issue of whether tenure review files are protected from disclosure by a special privilege.

## THE SUPREME COURT DECISION

In its appeal to the Supreme Court, the university argued that it should *not* be required to surrender the tenure review files on two grounds. It first sought recognition of a qualified common-law privilege against disclosure of confidential materials. It also asserted a first amendment right of “academic freedom” against complete disclosure of the peer review documents [5, p. 581]. The university argued that requiring full disclosure would result in “a ‘chilling effect’ on candid evaluations and . . . as the quality of peer review evaluations declines, tenure committees will no longer be able to rely on them.” Disclosure would “work to the detriment of universities, as less qualified persons achieve tenure causing the quality of instruction and scholarship to decline” [5, p. 586].

In response to the university’s arguments in favor of withholding the tenure review documents, the Court had a sharply worded ruling. Justice Blackmun stated that “Indeed, if there is a ‘smoking gun’ to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files” [5, p. 584]. The Court endorsed the language used by the Third Circuit Court of Appeals:

Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memorand[a] which the [college] seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears . . . [T]he peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision [8, p. 116].

In a unanimous decision, the Supreme Court found neither a common-law nor a First Amendment academic freedom privilege for tenure review files. In so doing, the Court affirmed the relevance standard that applied to EEOC investigations: access is allowed to all evidence that may be relevant to the discrimination charge being investigated.

## OTHER SIGNIFICANT COURT DECISIONS

Prior to *University of Pennsylvania v. EEOC*, the Third and Fifth Circuit Courts of Appeal had already concluded that tenure review files were not protected by a special privilege. To get some feel for just how far a subpoena might reach into a university’s files, a brief review of the decisions rendered in these circuits is enlightening.

In one case that gained national attention, *In re Dinnan* [7], Professor Dinnan of the University of Georgia was fined \$3,000 and sentenced to ninety days in jail for his refusal to testify in a sex discrimination suit concerning how he had voted on a female professor's application for promotion and tenure. The Fifth Circuit refused to grant a privilege to withhold the information and upheld the trial court compelling Dinnan to testify. Among Dinnan's arguments was the contention that faculty members would be inhibited in making tenure decisions if there was a possibility that committee members would be required to reveal their votes [7].

With a strong admonishment, the Court responded that if a tenure committee was acting in good faith, disclosure should not "adversely affect its decision-making process." The court observed that its opinion "should work to reinforce responsible decision making in tenure questions as it sends out a clear signal to would-be wrongdoers that they may not hide behind 'academic freedom' to avoid responsibility for their actions."

No one compelled Professor Dinnan to take part in the tenure decision process. Yet, persons occupying positions of responsibility, like Dinnan, often must make difficult decisions. The consequence of such responsibility is that occasionally the decision-maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the decision-maker has acted for legitimate reasons, he has nothing to fear. We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions. If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them [7, at 432].

In *EEOC v. Franklin & Marshall College*, the Third Circuit Court of Appeals, like the Fifth Circuit, denied the existence of a privilege to protect the confidentiality of tenure review files [8]. A greater importance was placed on full disclosure and the elimination of discriminatory employment practices in educational institutions.

An assistant professor charged he was denied tenure because of his national origin. In the course of its investigation, the EEOC issued a subpoena requesting a great number of documents. The college complied only partially and refused to provide the bulk of the material sought.

The subpoena demanded that the college provide the following materials for each faculty member considered for tenure between 1977 and 1983: tenure recommendation forms; analysis of student evaluations; grade surveys; enrollment data; annual evaluation forms; governance evaluation forms; publication information;

evaluations by outside experts; letters of reference; information concerning academic advising; all notes, letters, memoranda, and other documents considered during each tenure case, including curricula vitae; recommendations of the professional standards committee in each tenure case; actions taken by the president in each tenure case; all notes, letters, memoranda, or other documents generated by each member of the professional standards committee; the minutes of the professional standards committee in each tenure case. In all, the college was forced to hand over the complete files of thirty-two faculty members which totaled over 8,000 pages of tenure review documents [9].

A single faculty member's complaint can trigger the demand for an entire department's personnel files including all documents that may have been written confidentially. Given the already less-than-tolerant attitude of some courts, more liberal discovery rules, and the increased potential for litigation, faculty lawsuits challenging tenure decisions will likely have a disruptive and burdensome effect on many academic institutions.

### IMPLICATIONS FOR PEER EVALUATORS

While there should be increasing concern among university administrators about the accessibility of peer review files, the Supreme Court's *University of Pennsylvania* ruling should be of particular concern to both departmental colleagues and outside reviewers who are requested to evaluate a candidate's scholarly work. A decision for or against tenure for some candidates may depend on comments found in peer evaluations. Given the greater accessibility of tenure review files and the likelihood that a denial of tenure will result in termination of the candidate, evaluators may be called upon more frequently to defend their evaluation in court.

Employee defamation law has burgeoned into one of the most heavily litigated employment issues in recent years. Typical litigation involves discharged employees suing former employers for revealing information that results in loss of future employment opportunities. The same legal principles that result in liability for references that harm a former employee could be used by university professors to recover for the loss of employment caused by an evaluator's remarks. Any statements a jury might find to be false and injurious to a professor's relationship with a present or future employer could expose the evaluator to a potentially costly defamation claim.

### IMPLICATIONS FOR CIVIL SUITS

The Supreme Court's ruling raises the question of whether or not the plaintiff's right to access to tenure review files in a civil action may be affected. The Court did not address this issue. However, William W. Van Alstyne, general counsel of

the American Association of University Professors and a law professor at Duke University sees far-reaching implications for the private plaintiff [10].

The Supreme Court's refusal to accept the arguments in favor of academic freedom and confidentiality probably will prevent the courts from creating a privilege where professors make other claims against institutions or individuals, as in private defamation actions.

## DEFAMATION

In recent years, there has been a substantial increase in the volume of litigation involving defamation claims (as many as 8,000 defamation suits filed in a 5-year period). Plaintiffs are winning a high percentage of the cases (74%) [11], and jury awards are averaging in the six-figure range [12]. This legal environment coupled with the increased accessibility by potential plaintiffs to peer review files should cause substantial concern for evaluators. Although a detailed review of defamation law is outside the scope of this article, an overview of relevant general principles is helpful to better understand the potential liability that evaluators could face.

As a general rule, a plaintiff must prove four elements to succeed in a defamation suit. These elements consist of the existence of a false statement, a tendency of the statement to harm the plaintiff's reputation, publication to a third party, and some evidence of fault, e.g., negligence on the part of the defendant. The law varies from state to state with differences in what specifically must be proven by plaintiff to prevail in court.

Defenses, like the elements of defamation, vary from state to state. Some of the more often-used defenses are truth, privilege (absolute or qualified), and consent. For a faculty member who has provided a negative letter of recommendation or one who has spoken negatively on a peer review committee, the most likely defense would be that of qualified privilege.

The defense of qualified privilege is a strong defense against defamation suits. However, this defense does not mean the faculty member can say anything he or she wishes about the candidate; the "qualified" part of the defense requires that the communication 1) be made in good faith, 2) on a subject in which the university has a legitimate interest, 3) to a person having a corresponding interest. As a general rule, all statements must be limited in scope to that shared interest.

Although a strong defense, the qualified privilege can be lost if the employer/faculty member abuses it. One form of abuse occurs when statements are made about unnecessary matters or statements are made to parties who do not need the information. A defendant may also abuse the privilege by acting with a heightened degree of fault. For example, depending on the applicable law, abuse can occur if the statements are made with more than simple negligence. Some states hold that abuse occurs if the communication is made with no reasonable grounds for believing the statements to be true. Courts in other states hold that the defendant

loses the privilege if the statements are made with ill will. Finally, in some states the employer abuses the privilege only if it deliberately lies or recklessly disregards the truth [13].

Several additional points concerning the law are worth noting. First, even though a plaintiff might not be able to successfully sue for defamation, there are other civil actions that could be the basis for recovery. For example, publication of a truthful statement can be the basis of a claim for intentional infliction of emotional distress or invasion of privacy.

The fact that defamation law varies substantially from state to state should be of concern to all faculty. As a general rule, the law of the state where the wrong occurred (usually where the damage occurs) would be the law applied in the case. If a letter of recommendation is sent to an out-of-state institution, a defendant could not only be required to appear in the state court where plaintiff suffered the loss, but could also have the law of that distant state applied, which could be much harsher than the law of defendant's home state.

Finally, depending on the circumstances, a plaintiff could sue the institution and the faculty member or could sue either party and hold either one totally responsible for all damages. Just being named as a defendant could result in costly legal fees. For an individual, losing in court could mean financial disaster.

### **INITIAL RESPONSE FROM THE ACADEMIC COMMUNITY TO *PENN v. EEOC***

Reaction from the academic community to the Supreme Court's decision has been predictably divided. Some feel it could strengthen the process and help ensure that reviews are conducted more fairly. Many others believe the process of evaluating candidates for promotion and tenure will be weakened and have offered the prediction that it could lead to blander recommendations by scholars who are asked to evaluate candidates. All evaluators will have to exercise care to ensure that their appraisals are fair and based on fact. A law professor who assisted the EEOC with its case stated "If I were an outside evaluator, I'd write as though what I wrote was going to be on the front page of the *New York Times*" [14].

In the period of time since the Supreme Court's pronouncement, universities have had to sort through the mixed emotions and diverse opinions that were generated. How have the nation's universities adapted to this changing environment? Specifically, what changes have occurred in the tenure review process in the wake of *University of Pennsylvania v. EEOC*? These questions and others are addressed in the remainder of this article.

### **FIELD SURVEY OF CHIEF ACADEMIC OFFICERS**

*University of Pennsylvania v. EEOC* obviously precipitated many questions regarding the nature of tenure and promotion decisions in the future. The policies



and procedures of our universities must be reconciled carefully with the legal issues and case results cited in the previous portion of this report. To facilitate reconciliation and to determine the national attitude regarding the questions stemming from the Supreme Court's decision, a national survey of chief academic officers was conducted.

### Survey Procedure

A special questionnaire was designed, consisting of three demographic measures and seventeen items related to tenure and promotion practices. The questionnaire was mailed to the 3600 colleges and universities in the United States. We received 1325 usable responses (36.7%) from colleges and universities in forty-nine states (Nevada schools did not respond), the District of Columbia, Puerto Rico, and Guam. Frequencies and percentages for each item are reported below. In addition, selected items are cross-tabulated with the demographic features and reported below.

### Demographics

Respondents were asked to identify their institution by ownership status (public/ private) and size of enrollment. The results are shown in Table 1.

Responding institutions were also identified by the state in which they are located. Based on this information, participants were grouped geographically using membership in the regional accrediting associations of colleges and schools recognized by the American Council on Education (ACE). The results are shown in Table 2.

Table 1. Ownership Status and Size of Enrollment

	Frequency	Percent
<b>Ownership Status</b>		
Public Institutions	701	53.6
Private Institutions	607	46.4
<b>Size of Enrollment</b>		
Less than 1,000	323	24.8
1,000-4,999	569	43.7
5,000-9,999	157	12.1
10,000-14,999	96	7.4
15,000-19,999	46	3.5
20,000-24,999	39	3.0
Over 25,000	72	5.5

Table 2. Geographic Representation by Regional Accrediting Unit

Association	Frequency	Percent
New England	70	6.3
Middle States	201	18.1
Southern	303	27.3
North Central	372	33.5
Western	95	8.6
Northwest	68	6.1

### Awareness of *University of Pennsylvania v. EEOC*

The first question asked of respondents concerned the extent to which they were aware of *University of Pennsylvania v. EEOC*. Only 11 percent reported being very familiar with the case, and 41 percent reported being somewhat familiar with the case. The remaining 48 percent were either vaguely or not at all familiar with the case. This latter figure is somewhat surprising considering that the respondents were the chief academic officers of the nation's colleges and universities.

Tenure and promotion are an integral part of the reward and governance systems of most institutions of higher learning. As such, it is fair to assume that any landmark decision of the U.S. Supreme Court affecting these systems would be of the utmost importance to the chief academic officers of our colleges and universities. Apparently this is not true across the board.

Chi-square test results indicate a significant positive relationship between case familiarity and size of school. Respondents at larger schools report being much more aware of the case than their counterparts at small schools. This may be due to a number of factors. Larger schools are perhaps more likely targets of EEOC action, and such risk necessitates awareness. Larger schools also have the human resources to monitor developments of this nature. Finally, faculty at the smaller schools, especially the very small ones, may not be as active in the area of equal employment rights.

### Change Precipitated by *Penn v. EEOC*

As a general measure of reaction to the Supreme Court's decision, respondents were asked whether there have been any changes in tenure or promotion policies and procedures at their institution as a result of the Pennsylvania case. The overwhelming response (89%) was no. Only seventy-six institutions (5.8%) responded positively. Interestingly, almost the same number (67, 5.1%) reported that they *did not know*. Of those institutions that reported a change, the majority characterized the change as either minor (54.8%) or moderate (35.6%). Only seven institutions described their changes as major.

Twenty-one respondents indicated their institution had made or was contemplating policy or procedure changes as a result of the Pennsylvania case. Four institutions have decided tenure will no longer be granted. Three of those four indicated they now offer multiyear contracts instead. Four respondents indicated they now inform everyone who serves as an evaluator that absolute confidentiality cannot be guaranteed. Four institutions will have a more "open system." Another four indicated their promotion and tenure systems was being reviewed or the entire process was being restructured. One noted that the less objective criteria were being eliminated from the peer evaluation form.

These figures clearly suggest that the *Penn* decision simply has not had much impact to date, but at some institutions its impact has been dramatic. Perhaps many institutions are still weighing the possible risks and responses available, in which case it is simply too early to draw any conclusions.

### **Peer Review Practices and Policies**

The next question was designed to determine the extent to which peer review is used for tenure and promotion decisions. The majority of respondents (81.5%) reported using it. Peer review is obviously a popular method of evaluation for tenure and promotion decisions, but not universally so. Cross-tabulations reveal private schools are significantly more likely to use peer review than public institutions. Additionally, institutions in certain regions of the country are more likely to use peer review than in others. Schools in the western and New England associations report greater usage than schools in the southern and north central regions.

Respondents who answered the previous question in the affirmative were subsequently asked if they had detected any noticeable reluctance on the part of faculty to participate in peer reviews. Again, the majority (74.5) reported no change, while chief academic officers at 167 schools (17.5%) said they had noticed a change. The remaining 8 percent were unable to detect any change.

A related question for respondents was whether there had been any recent instances of faculty refusing to go on record with their evaluations. Once again, there seems to be very little effect from the *Penn* decision, with 80 percent responding negatively. One hundred and eleven institutions (8.7%) responded positively and 147 institutions (11.5%) did not know.

### **External Review Practices and Policies**

Attention next shifted to the use of external review. Respondents were asked whether their institution uses external review for tenure and promotion decisions. A clear majority (65.2%) do not rely on external review and responded negatively. Approximately one third (34.5%) of responding institutions do use external review. The chief academic officers in the latter group were asked whether the use of external review is required or optional. It is optional for less than half this group

(41.4%). It is required for the remaining 58.6 percent. This means that one in five (20%) institutions (in our survey) requires the use of external review for tenure and promotion decisions. Thus, at present the use of external review does not appear to be extensive.

Chi-square test results reveal a strong pattern of usage of external review. Institutions in the western and New England areas are more likely to employ external review. Results also indicate a strong positive pattern based on size of institution. Larger schools are twice as likely to use external review as their smaller counterparts.

Two follow-up questions were asked of the respondents whose institutions use external review. The first concerned any increase or decrease in its use and the second addressed change in the weight assigned to external review. No change was reported by the vast majority (85.8%); it is being used more by 11.6 percent of respondents and less by 2.7 percent of respondents. A small group of twenty-five institutions reported assigning more weight to external reviews, while four institutions are assigning less weight. The remaining institutions have made no change in the assigned weight. Overall, it appears very little change has been precipitated by the *Penn* case regarding the use or importance of external review.

### **Confidentiality in Tenure and Promotion**

The next series of questions addressed the issue of confidentiality in the evaluation process. Respondents were asked if they believe that assured confidentiality is vital to the maintenance of candid peer and external evaluation. The results were a bit surprising, especially in light of the *Penn* decision and other decisions relating to exposure of raters. While 62.9 percent answered *yes* to this question, 27.5 percent (357 institutions) said *no*, and 9.6 percent (124 institutions) said they did not know. If faculty are asked to evaluate their peers at their own or other institutions and do not have the comfort of confidentiality, it seems highly likely that they will be less than forthcoming. The evaluations that are rendered are likely to be watered down and less useful to the purpose for which they are created. This then defeats their purpose. Answers to later items in this survey suggest this outcome.

Cross-tabulations of the confidentiality responses revealed some noteworthy findings. A significantly greater number of colleges and universities in the southern region reported the need for assured confidentiality, while institutions in the New England area reported the need for confidentiality least frequently.

How faculty members respond in their role as reviewers is significant to the overall purpose of the review process. To understand that role better we asked respondents a series of questions regarding reviewer behavior. The first question concerned the use of disclaimers. Faculty at 106 institutions (8.4%) routinely use disclaimers in their evaluations. The vast majority (77.2%) do not use disclaimers. Respondents at 182 institutions (14.4%) do not know. When asked whether there

has been any change in the frequency of use of disclaimers most (93.6%) said no. Fifty-two institutions (4.4%) said yes and 2 percent said there was actually less use.

Respondents were asked whether their institution had a policy for confidentiality of reviews. Only 56 percent of respondents said yes! No policy exists for 29.4 percent (373 institutions) and 184 institutions (14.5%) do not know if they have a policy. Analysis of the institutions responding to this item revealed a significantly greater propensity for private schools to have a policy in place.

A final question concerned recent modifications of policy of the responding institutions to ensure in greater confidentiality. Most (90.8%) have made no modification in their policy to ensure confidentiality. Only thirty-nine institutions reported doing so, and 138 did not know.

### **Documentation and File Access in Tenure and Promotion**

The next series of questions addressed various aspects of the evaluation process and documentation. A partial response to concerns over the issue of confidentiality is simply to edit reviews. Therefore, respondents were asked whether reviews are edited to preserve the reviewers' anonymity. The majority (76.4%) of responding institutions do not use editing; however, 203 institutions report doing so, and another 172 report that they do not know.

Next, respondents were asked how frequently they use open committee meetings for tenure and promotion decisions. *Never* was the response from 74.6 percent of respondents (923 institutions). Only 16 percent said that they *always* use open meetings. *Frequently* and *occasionally* were chosen by 4.9 percent and 4.5 percent of respondents, respectively. It is clear that an open decision-making process is not favored by most institutions.

Are candidates for tenure or promotion allowed to see everything in their files? This question was asked of respondents, and 65.5 percent said *always*. *Never* was the choice of 21.6 percent (266 institutions) of respondents. This seems remarkably high, especially in light of the *Penn* decision. *Frequently* and *occasionally* were reported by 5.2 percent and 7.7 percent of respondents, respectively.

The last item dealing with the evaluation process asked respondents to rate the quality of their documentation procedures with respect to tenure or promotion applications. Cumulatively, 93 percent of respondents rated their documentation as adequate or above (above average, 32.9%; excellent, 21.1%). Only eighty-eight institutions (6.9%) admitted their documentation procedures were inadequate.

Cross-tabulation of the documentation question with the demographic measures produced some interesting results. There is a strong positive correlation between the size of an institution and the reported adequacy of its documentation. Additionally, public institutions felt better about their documentation than private institutions.

## The Importance of Nonverbal Communication in Evaluations

Most individuals have heard the expression "reading between the lines." A corollary is "writing between the lines." A good wordsmith can frequently say one thing with words but simultaneously convey a totally different or ulterior message. To determine whether this is possible when writing tenure and promotion reviews, respondents were asked, "If you wanted to write a negative review without it appearing as such in the review, what techniques would you use to communicate a negative evaluation to a tenure or promotion committee?" The results were surprising and quite varied (see Table 3).

A substantial number of respondents (157) stated they would not ever write such an evaluation. Many of these individuals found the concept itself reprehensible; a few even stated that this would be impossible to do, or that it certainly would be unethical. As distasteful as it may be to some respondents, twice as many indicated they would do such a thing and listed one or more techniques they would use. By far the most often-cited method that would be used (135) is to "damn with faint praise."

Seventy-five individuals stated they would communicate their comments orally, and eighteen would invite committee members to call or visit in person. Thirteen respondents would simply ask for confidentiality in their letter, ten would address areas for improvement, and nine would state their refusal or inability to evaluate a candidate. One respondent replied he "would seek legal advice." This may seem a bit extreme at first, but given the current legal environment, this may not be such a bad idea.

### Legal Actions since *Penn v. EEOC*

Respondents were asked whether they had been the subject of an EEOC legal action concerning tenure and promotion since January 1990. *Eighty-nine* institutions reported they have been the subject of such action. Chi-square results reveal larger institutions are significantly more likely than small institutions to be the

Table 3. Nonverbal Methods of Evaluation

Response	Frequency
I would not do this	157
Damn with faint praise	135
Oral comments	75
Invite committee members to call	18
Ask for confidentiality in letter	13
Address only areas of improvement	10
State refusal or inability to evaluate	9

subject of such action. Of the eighty-nine institutions reporting actions, only thirteen raised a defense to withhold confidential information.

## Assessing the Future

Finally, subjects were asked to make some predictions about the future as a result of the *EEOC versus Pennsylvania* decision. Specifically, respondents were asked to indicate their belief (positive or negative) about certain actions related to tenure and promotion. Table 4 contains the results.

The most striking message to be inferred from the numbers is that the respondents do expect serious changes in most aspects of the tenure and promotion process. The changes suggested by Table 4 and some of the earlier responses are somewhat contradictory, however. For example, more than half of the respondents expect a careful review and/or rewrite of their tenure and promotion policies. Yet most reported either no change in policy and general satisfaction with whatever documentation policies and procedures they have in place.

Another contradiction seems evident in the response to the use of disclaimers. Better than half of the respondents expect greater use of disclaimers. Yet, most institutions reported they do not regularly use, nor have they experienced an increase in the use of disclaimers.

A similar contradiction stems from the responses regarding reluctance to write reviews and reluctance to write candid reviews. Responses to the survey items addressing these behaviors indicated little reluctance to participate in peer review and little change in the use of disclaimers.

Table 4. Foreseeable Change as a Result of  
Peer Review Disclosure

	Frequency	Percent of Sample
Careful review/rewrite of policies	709	63.4
Less use of peer review	236	21.1
Less use of external review	231	20.7
Greater use of disclaimers by evaluators	683	61.1
Greater reluctance to write peer reviews	746	66.7
Faculty writing less candid reviews	836	74.8
More editing of reviews by administrators	466	41.7
Stronger confidentiality policies	563	50.5
Clearer tenure/promotion criteria	879	80.2
Attempts to validate criteria	823	73.6

Responses in Table 4 also suggest the expectation of clearer criteria and greater attempts to validate criteria for promotion and tenure. Yet there is little indication of this expectation in responses to survey items dealing with these issues.

One possible explanation for these apparent contradictions is the timing mentioned earlier. It may be that the results in Table 4 are more or less a prediction of what the respondents are anticipating at their institutions at some time in the future. Yet, at the time of the survey none of the anticipated changes had occurred. Another possible explanation is the perception that the changes expected in Table 4 are anticipated at other institutions across the nation and not necessarily at the respondents' respective institutions. This is similar to the perception of others needing to change but not the individual who is responding.

## CONCLUSIONS

The courts historically have stood at arm's length in decisions regarding academic tenure and promotion. A number of traditions in the courts have accounted for this behavior. However, beginning with the Civil Rights Act of 1964, the courts gradually began to change their position, and decisions unfavorable to the academic community were rendered. In 1990 this unfriendly posture was magnified by a unanimous decision of the Supreme Court in *University of Pennsylvania v. EEOC*. This ruling greatly diminished the traditional protection afforded professors in their evaluations of peers.

A national survey of chief academic officers suggests that *Penn v. EEOC* has caused mixed reactions on the nation's university campuses. Many CAOs are not fully aware of the decision, and their institutions are not contemplating any change. Some of the institutions making changes seem to be taking drastic steps, including the elimination of tenure.

The majority of schools employ peer review; however, only a minority have experienced a reluctance of faculty to participate as a result of *Penn v. EEOC*. Only one in five institutions uses external review, and apparently *Penn v. EEOC* has had little influence on its use.

A critical question raised by *Penn v. EEOC* is the confidentiality of peer reviews. Yet, about one-third of responding institutions do not see a critical relationship between confidentiality and the integrity of peer evaluations. Few schools report routine use of disclaimers as a protection against loss of confidentiality. Responding institutions are not equipped with a policy of confidentiality of reviews.

Considering some of the responses to this set of questions on confidentiality, faculty members at many institutions seem to be in a precarious position. The leadership does not feel as though assured confidentiality is essential to candid evaluation. Consequently, we should expect little effort at these institutions to afford protection. This is borne out by the fact that almost half of the reporting institutions do not have a policy regarding confidentiality.



Assuming we did not simply elicit socially desirable responses, the vast majority of institutions are satisfied with their documentation procedures. While these findings suggest a high comfort level, these institutions may need to double check their procedure because of the greater likelihood of having their documentation challenged.

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## ENDNOTES

1. E. Kluger, Sex Discrimination in the Tenure System of American Colleges and Universities: The Judicial Response, *Journal of Law & Education*, 15, pp. 332-335, 1986.
2. *Bracken v. Visitors of William and Mary College*, 7 Va. (3 Call) 573 (1790).
3. *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974).
4. *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978).
5. D. M. North, *University of Pennsylvania v. EEOC: The Denial of an Academic Freedom Privilege*. *Pepperdine Law Review*, 18, 213 at 232 citing Petitioner's Brief at 3, *University of Pennsylvania v EEOC*, 110 S. Ct. 577 (1990) (No. 88-493), affirming 850 F.2d 969 (3d Cir. 1988).
6. *EEOC v. University of Pennsylvania*, 850 F.2d 969 (3d Cir. 1988).
7. *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981) cert. denied, 457 U.S. 1106 (1982).
8. *EEOC v. Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 U.S. 1163.
9. L. McMillen, Bitterly, College Prepares to Turn Over Confidential Tenure Files to U.S. Panel, *The Chronicle of Higher Education*, p. 17, August 13, 1986.
10. D. E. Blum, Supreme Court Rejects Privacy Claim for Tenure Files, Says University Must Disclose Information in Bias Case, *The Chronicle of Higher Education*, p. 1., January 17, 1990.

11. D. Nye, Speak No Evil about Former Employees, *Across the Board*, pp. 25-30, November 1988.
12. D. Yulish and B. Heshizer, Defamation in the Workplace, *Labor Law Journal*, 41, pp. 355-360, 1989.
13. E. R. Horkan, Contracting around the Law of Defamation and Employment References, *Virginia Law Review*, 79, p. 517, 1993.
14. C. J. Mooney, Academics are Divided Over High-Court Ruling on Tenure Documents, *The Chronicle of Higher Education*, p. 1, January 24, 1990.

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