OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNIVERSITY OF PENNSYLVANIA, Petitioner V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CASE NO: 88-493

PLACE: WASHINGTON, D.C.

DATE: November 7, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

UNIVERSITY OF PENNSYLVANIA,

Petitioner,

v. : No. 88-493

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C.

Tuesday, November 7, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

REX E. LEE, ESQ., Washington, D.C.; on behalf of the Petitioner.

KENNETH W. STARR, ESQ., Solicitor General, Department of Justice, Washington, D.C; on behalf of the Respondent.

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PROCEEDINGS

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning on No. 88-493, the University of Pennsylvania v. the Equal Employment Opportunity Commission.

Mr. Lee.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE PETITIONER

MR. LEE: Mr. Chief Justice, and may it please the Court:

The issue in this case is very narrow because of the facts out of which it arises and the way the Third Circuit decided it.

Professor Rosalie Tung, contending that her denial of tenure by the University of Pennsylvania's Wharton School of Business was based on gender and national origin discrimination, filed a claim with the EEOC which initiated an investigation and eventually issued a subpoena.

Among the items sought by that subpoena are confidential peer review materials in Ms. Tung's file and also the files of five male candidates. The University supplied all of the documents sought by the EEOC except for the peer review materials.

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As to those, it concluded that its ability in the future to obtain confidential, candid evaluations indispensable to its tenure determination would be impaired if expectations of confidentiality were breached.

QUESTION: (Inaudible) peer review materials are --

MR. LEE: Yes. They basically fall in two categories, Justice White.

One is both outside and inside evaluations of the candidate's work that are made by colleagues. Some within the Wharton School and some from business schools in other parts of the country.

And the others are the deliberative materials similar to a confidential conference held in any context, in which the persons responsible for making the tenure determination meet, discuss, as the minutes of those kinds of meetings.

The Third Circuit conceded that disclosure would infringe the University's right to determine who may teach. And both the Third Circuit and the government here --

QUESTION: Conceded the University's right to determine who may teach. Right according to what? State law or --

MR. LEE: Well, its interest in deciding who may teach,

which we contend -- well, and really the government concedes, that it is First Amendment based.

QUESTION: Well, Mr. Lee, that certainly is a weak sort of a First Amendment interest and wouldn't the same interest extend to employees of a newspaper or a public advocacy organization or to a wide range of employees? It strikes me as a rather minimal First Amendment interest, if it is such.

MR. LEE: Well, at least -- for what, now? -- over 30 years the Court has acknowledged that academic freedom is based in the First Amendment.

QUESTION: Well, but that's really language from our cases where you're talking about a state university, where you're talking about the state infringing it.

There is really no holding of this Court that says that professors are any freer from state infringement than any other type of people who might have freedom of speech infringed.

MR. LEE: I think that's probably right, Mr. Chief Justice, that in -- well Keyishian might be a holding. There have been four instances in which the Court has dealt with the issue, and in each instance there has been -- the Court has said that the First Amendment does include academic freedom and that academic freedom includes the right to determine who may teach.

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Now, to be sure, this is the first case that has squarely raised that question. But at the very least -- at the very least -- it must be agreed, as I think it is on all sides, that there are -- that it is a serious constitutional issue. And as a consequence, as the cases comes before this Court, there are two elements to the issue.

The fist is did Congress really intend to give to the EEOC a completely unlimited, unqualified, absolutist right to all peer review materials, notwithstanding any absence of a particularized showing on the part of government that it really needs it.

QUESTION: Well, if they're relevant?

MR. LEE: Excuse me?

QUESTION: A showing of relevance. A showing of relevance.

MR. LEE: Yes.

QUESTION: And need.

MR. LEE: And it should be noted, Justice O'Connor, that there is no dispute that these issues -- that these matters are relevant. And so that's the question. Is relevance the only showing that must be made?

But I want to nail down the extreme nature of -- and therefore -- of the Third Circuit's holding, and,

therefore, the narrow nature of the issue that this Court is being required to pass on today.

At the very least, there is a serious constitutional question here, so that in deciding whether --

QUESTION: What is this serious constitutional question?

MR. LEE: It is this, Justice -- Mr. Chief Justice. In order to carry out what we contend and actually what this Court has said on four occasions is a First Amendment-based right of academic freedom, and particularly its component of who may teach, it is essential that the University have available to it those materials that will enable it to carry out -- to carry out that determination.

I would invite your attention in that respect to the briefs that have been filed by the Association -- American Association of University Professors and the American Council on Education.

In the event that -- well, in the event that the University does not have available to it these confidential peer review materials, then there would be substituted in its place a substitute system which would rely on informal communications and in which merit would be replaced by influence and connections.

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QUESTION: But of course --

QUESTION: But what --

QUESTION: Excuse me.

QUESTION: Go ahead.

QUESTION: Go ahead, Chief Justice.

QUESTION: Well, what case is -- is the best from this Court supporting a proposition that universities have a First Amendment right to determine who should teach?

MR. LEE: Four cases.

QUESTION: Well, what's the best one? I don't need all four.

MR. LEE: The best one I would say is probably Keyishian because it's a holding. But it in turn builds on Justice Frankfurter's earlier dictum that the Court has repeated on four occasions that the right to determine who may teach is an aspect of First Amendment freedom that is protected -- well, that is protected by the First Amendment.

And, in a sense, the best case, though it does not specifically --

QUESTION: Excuse me. Who has this right? I mean, what if -- what if a state runs the university and it says we think all hirings in the university are going to be made by a committee of the Senate, would that be

unconstitutional?

MR. LEE: Excuse me?

QUESTION: I mean, I guess somebody has a right to say who may teach, but does it have to be the faculty? Is that --

MR. LEE: It -- it would be those who are responsible for determining the academic affairs of the university.

QUESTION: So it could be the Senate? You could have a committee of the Senate --

MR. LEE: The faculty senate?

QUESTION: No. The Senate. The Senate of the state.

MR. LEE: The state Senate?

QUESTION: Right.

MR. LEE: That would be a harder case, but, yes, in that instance it -- it --

QUESTION: I suppose you could have the governor decide.

MR. LEE: It would be a harder case.

QUESTION: Why?

MR. LEE: It would be a harder case.

QUESTION: That's my problem.

QUESTION: Why?

MR. LEE: Well --

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QUESTION: I mean, what is the principle that -- that members of a faculty have a constitutional right to -- to -- well, replicate themselves --

MR. LEE: In the event --

QUESTION: -- like amoeba or what?

(Laughter.)

MR. LEE: In the event that you had those kinds of determinations that are central to the operation of the academic mission of the university being operated, as it never has, by someone in government, then it is that entity that would enjoy the First Amendment freedom, yes.

QUESTION: So the government has a First Amendment right. That's phenomenal.

MR. LEE: It is -- well, what you're posing for me, of course, is a hypothetical that so far as I know exists in no place. But the proper framework for analysis under standard First Amendment principles established by this Court is that when government -- the only government in this case is the United States of America, the Equal Employment Opportunity Commission, who seeks access to these confidential peer review materials.

And when the government seeks to infringe upon a constitutionally-protected right, then government must show that that is supported by a compelling state interest narrowly tailored to the achievement of that compelling

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state interest.

It happens that throughout our universities today those rights are exercised. Peer review, tenure determinations are made by universities. And I want to stress that there are two bases on which the Court can find that those are entitled to some level of protection, that there has to be at least some kind of a showing -- some kind of a showing -- that the government really needs these materials.

QUESTION: Well, Mr. Lee, the -- the interest on the other side in this case of a -- a faculty member to be considered for tenure without the impermissible consideration of race or gender seems to be a much more direct constitutional right that we're talking about.

What about the -- the employee's constitutional rights here?

MR. LEE: We fully concede --

QUESTION: And certainly these -- these evaluations on which the tenure decision is based are of critical importance. I can't imagine anything that would be more relevant than an examination of those tenure evaluation letters.

MR. LEE: There is no question that the right to be free from discrimination is very important. And there is no question that these documents are highly

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relevant to that issue.

But we're not the ones who are advocating an absolutist point of view that that's the only thing that you take into account. We are the ones who are advocating that the government's side of the balance scale, if you will, is not permanently nailed to the floor. That you have to take into account something on both sides of the balance scale.

QUESTION: Well, didn't Congress do that when it enacted Title VII?

MR. LEE: No. What Congress did when it enacted Title VII was to determine that Title VII would be applicable to universities. And the government makes a great deal out of that proposition that Title VII is applicable to universities.

We fully concede that. But that is not the issue here. The issue is not whether Congress intended to make Title VII applicable to universities. It is, rather, whether Congress intended to give the EEOC access to peer review materials. And on that particular issue, there is nothing in the statute that indicates that Congress even thought about the issue.

QUESTION: Well, Mr. Lee, despite your welcome assurances that this is a narrow issue, I just can't see it that way. As Justice O'Connor's first question

indicated, what about the right of the press to hire the reporter that it wants or the editor that it wants, or the movie producer to hire the screen writer that it wants?

All of those are very, very close to protected First Amendment expression, core First Amendment expression. And the Congress hasn't made any special rules for them either.

So, the principle you're asking us to establish, I respectfully suggest, is one of vast scope. It's not a narrow issue at all.

MR. LEE: Justice Kennedy, I'm not aware of any practice in any other context, employment context, that is analogous to the one that has developed with respect to the exercise of the determination of who may teach.

In the industrial context, in any other context, those decisions are made not by peers, not by colleagues, but by supervisors. And what we have here is something very analogous to recommendations that you get when you hire law clerks, and I guess that's the closest analogy that I can think of.

It just doesn't work that way in other contexts. And what we have here --

QUESTION: Well, what we get are all letters saying they're wonderful.

(Laughter.)

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MR. LEE: Really, not all of them. Not all of them.

QUESTION: I agree with that. There are some --

(Laughter.)

MR. LEE: And -- and that is the point, Justice Blackmun and Justice O'Connor. That's what you would get if those letters were made public.

And that's what we fear here. There just is no analogy to what is at stake here.

QUESTION: Mr. Lee, what about in the medical field? Letters of recommendations as to the physician's being given staff privileges at a hospital?

MR. LEE: Justice Blackmun, you would be far more aware of how that one works than I am. But I will tell you -- and this is developed in our brief -- that in the medical context, state laws as a matter of -- state laws generally protect those kinds of medical peer review evaluations. And that may be another one that comes fairly close to what we're talking about here.

In any event --

QUESTION: It seems to me, Mr. Lee, that the very fact that the tenure system is recognized and established gives it a certain institutional strength that can resist any pressures that a contrary holding might have -- holding contrary to your position.

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Whereas, if we spread it to the newspaper world and so forth, there might be a tendency for newspaper people to be very cautious about recommendations. But the very fact that it's established seems to me to cut somewhat against you. There is a resiliency here, an ability to adopt.

MR. LEE: Uh-huh. It really cuts in two directions, Justice Kennedy. What you say is correct. There is some resiliency to it.

And that is why in the event that what were adopted is what we're advocating, not an absolutist test on our side but a qualified privilege such as the Seventh Circuit has adopted, or a balancing test such as the Second Circuit has adopted, so that people who give these evaluations will know that there will not be routine disclosure but that in the event a court, after careful consideration determines that the case is strong enough that it needs to be -- that it needs to be disclosed, then I think people will continue to give those assurances or to give those evaluations in that kind of context.

But I will tell you -- and this is not just my own point of view. It is substantiated by the Association of American University -- the American Association of University Professors, the AAUP, the American Council on Education and two very prominent

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educators -- and all these are referred to in the briefs -- David Reisman and Paul Mishkin.

If what you have is the Third Circuit's view becoming the national law on this subject, then there is going to develop in place of this confidentiality-based objective system -- there is going to have to be some kind of a replacement system for evaluation.

As Professor Reisman said, it's going to be the informal telephone call that will replace the confidential peer review evaluation, and merit and objectivity will be replaced by informality and connections.

Instead of equality being the governing standard, it will be, in its place, favoritism and informal relationships.

QUESTION: Why is that, Mr. Lee? Are academics so -- so cowardly that they won't say openly what -- what they're willing to say confidentially? I mean, isn't there something in fact unattractive about a system in which the applicant for a job is given it or denied it on the basis of statements that he never -- he never learns? He doesn't -- doesn't know why the trap door has been pulled, he's just gone?

MR. LEE: Well, as you well know, Justice Scalia, there are in my profession a few cowards. But that isn't the principal reason that we're concerned here.

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Confidentiality is just as important in the academic setting, and the need to keep certain kinds of communications confidential is just as important in the academic setting as it is in the governmental setting. The same kind of thing that led this Court in United States v. Nixon to announce that there was a confidential privilege for communications among government servants. And it's not just a matter of --

QUESTION: Well, wait. But while you're talking about an analogy to the Executive Branch, didn't we go through this in the Executive Branch a number of years ago when all executive agencies that get recommendations with regard to potential hirees send notices to people whose advice is asked about the qualifications telling them that this may be made public?

Isn't it true that that material can be made -- can be received by the individual under the Freedom of Information Act?

MR. LEE: Yes. And if -- if -- yes, that is true that that has --

QUESTION: And it hasn't destroyed the Executive Branch.

MR. LEE: No, but what it does not apply to, Justice Scalia, is certain kinds of relationships that in their very nature, in their very nature, require

confidentiality in order to function.

This Court requires that certain relationships, certain communications be kept confidential. The same is true of Congress and the same is true of the Executive Branch and the Freedom of Information Act does not apply to this.

And I want to make the point that it is more than just -- than just weakness. If A is asked to express a view about B, and particularly to compare B with C and D, and that information -- and it is perfectly candid, perfectly open -- and then that is disclosed, that affects A's relationship for the rest of his professional career not only with B but also with C and with D.

What I want to bring you back to is the proposition why -- what is there on the other side of the balance scale?

The government says that if anything other than its absolutist point of view is brought into play, then it will impede its enforcement efforts. My answer to that is that the government need not speculate about what the effect would be of some kind of a balancing test because for the best part of this decade the government has had experience in two circuits, the Second and the Seventh, which are the home of hundreds of colleges and universities with this kind of a system.

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It need not speculate as to what the effect of that kind of a system would be. It knows, and it isn't telling, notwithstanding several invitations that we have given them, as to what their experience has been. If it had really caused problems, then the government would not have opposed certiorari twice --

QUESTION: Well, wouldn't -- wouldn't your concerns be partially satisfied at least, Mr. Lee, by the adoption of some sort of a privilege such as attorney/client that perhaps qualified the general rule of Oklahoma Press v. Walling?

MR. LEE: Yes. Yes, it would. Yes, it would. That's all we're -- and that's why I say it's very narrow.

QUESTION: Well, you know, but the attorney/client privilege doesn't depend on any concept that the attorney/client relationship is protected by the First Amendment.

MR. LEE: And you need not reach that First Amendment issue in order to adopt that. This Court has the ultimate authority under the rules of evidence to say what the rules of evidence are. And if you prefer not to base it on the First Amendment, then that, of course, is a -- is a -- is a alternative that this Court can certainly take.

QUESTION: But you really want to just construe

Title VII.

MR. LEE: That is correct. It could be done, Justice White, by construing Title VII and no one takes Title VII literally at its literal language because if Title VII did entitle the government to all relevant evidence, then that would include privileged material and even the government concedes that that is not the case. That's one round.

Another is to say that you construe these statutes in such a way as to avoid serious constitutional questions, and, at the very least, the Court would have some explaining to do as to what it really meant when on four separate occasions it did say that academic freedom is based in the -- in the First Amendment. Finally, it could be done simply as a matter of a rule of evidence.

But all that needs to be done to reverse the Third Circuit is to say that on any one of those bases the government's side of the balance scale is not permanently nailed to the floor, that something counts on our side.

QUESTION: I'll -- well what would be enough for the government to -- for the EEOC to show or for the plaintiff to show --

MR. LEE: Yes.

QUESTION: How would they ever make that showing?

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MR. LEE: Here's what I believe should be done, Justice White. And as I understand it, this is the way it works, from my reading of the Notre Dame case and the Gray case. Here I think is the way it works.

The first thing they do is to -- the first thing that they would do is to look at the complaint on its face and the complaint on its face says such things as that Wharton is not interested in China-related research and that there had been some sexual harassment.

Those kinds of claims can be investigated without ever getting into confidential materials. And then there are other investigations that the court -- that the EEOC could make with materials that are non-peer review, that are available to it.

All we're really asking is -- at some point in time the government is going to have to examine the materials that it already has that we have given them and materials -- non-peer review materials that we have already given them --

QUESTION: What -- what level of -- what threshold does the plaintiff have to -- have to surpass to get these materials?

MR. LEE: Under the Seventh Circuit's view it's a particularized showing of need.

QUESTION: What does that mean?

MR. LEE: I think it means -- I think it means that they have to say -- that they have to show that the materials, the non-privileged materials --

QUESTION: Is it probable cause -- the probable cause standard?

MR. LEE: Well, at least -- all you have to do to avoid -- to reverse the Third Circuit is any kind of a showing. But I would --

QUESTION: Well, I know, but I don't --

MR. LEE: Yeah, all right.

QUESTION: Might like to know what it means.

MR. LEE: All right. All right. All right.

(Laughter.)

QUESTION: Mr. Lee, educate me a little bit. Where did the concept of tenure come from and how widespread is its use? Does every university in this country use the tenure plan?

MR. LEE: Not ever university in this country does. In my opinion, Justice Blackmun, it is the majority and certainly among the -- well, it is the majority.

QUESTION: Now, you are a president of a university, I take it? It's employed at --

MR. LEE: Yes. Yes.

QUESTION: Is it imposed -- by what? By the faculty?

MR. LEE: It is a long-standing practice that really is rooted in academic freedom. There is a classic statement on tenure that has been issued by the AAUP, which incidentally is the organization whose principal responsibility is the care of all interests of university professors.

And the interests of university professors are on both sides, and the way they balance that is by saying that tenure should continue, that confidential peer review materials should be protected unless some kind of a threshold showing can be made I think basically of need. Inadequacy of other materials that are non-privileged for the government's purpose. And only on those --

QUESTION: And certainly the --

MR. LEE: -- only under those circumstances.

QUESTION: And certainly the denial of tenure can -- can ruin a career, can it not?

MR. LEE: There is no question about that. And there may very well be -- there will be instances under our test in which these do have to be disclosed.

QUESTION: (Inaudible.) If somebody says, well, I've looked around and I can't find any other material, I have to have this or I'm out of court, is that enough?

MR. LEE: Probably so. But we would like that --

QUESTION: That's easy.

MR. LEE: We would like that decision -- no. But we would like that decision to be made by a judge with us having an opportunity to say, but, look, we can supply these other materials for you. What is it that you want? We can supply these other materials for you that may be sufficient.

QUESTION: Are you arguing that this applies only to tenure review decisions? Why -- why don't the same principles apply to the initial hiring of --

MR. LEE: They would.

QUESTION: -- an academic? They would?

MR. LEE: They certainly would.

QUESTION: So it's not just -- not just --

MR. LEE: That is correct.

QUESTION: It's all -- all decisions on hiring or tenure made by academic --

MR. LEE: That is also part of who may teach.

I'd like to save the rest of my time --

QUESTION: Mr. Lee, just one more point. It seems to me that this is not a question where we have the First Amendment on one side and employment policies on the other because a person from a racial minority or a woman on a faculty where men are not represented has her own very strong First Amendment right in participating in this

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principle -- in this privilege of academic freedom that you're defending.

MR. LEE: I agree.

QUESTION: So it seems to me that they also have a First Amendment right.

MR. LEE: And it is they for whom I am speaking. Thank you.

QUESTION: Thank you, Mr. Lee.

General Starr.

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONER

MR. STARR: Mr. Chief Justice, and may it please the Court:

In our view, four broad considerations should guide this Court's analysis in this case.

The first is that privileges, although fostering important relationships, also stand as obstacles to the ascertainment of truth. Justice Stewart put it very well in Trammel against the United States. There, in his separate opinion, he said any rule that impedes the discovery of truth impedes as well the doing of justice. And thus this Court has been --

QUESTION: You might even say that about the exclusionary rule, can't you?

MR. STARR: It could indeed, and this Court has

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recognized any number of exceptions to that rule by virtue of the concerns about impediments to the ascertainment of truth.

But the Court, Justice Blackmun, has been reluctant to recognize privileges that have not enjoyed the sanction of law.

Second, the recognition of privileges is a well-established function of the judiciary. We do not quarrel with that. But in our view, the Court should not, respectfully, engage in that exercise in this context. The context of a comprehensive Congressional regime embodied in Title VII and in which Congress made a policy choice with respect to the coverage of colleges and universities in the face of expressions of concern about academic freedom much in the nature of what we have heard this morning.

That is especially so. The factor counseling restraint is very powerful, whereas here there is no effort on the part of the government to impose any sort of orthodoxy of ideas. Rather, the government is seeking to vindicate a powerful national interest in the eradication of invidious discrimination.

Third, the need for confidentiality, which has been so vigorously advanced before you, is by no means crystal clear. As evidenced by the practices of many

colleges and universities, reflected in the Bednash study that is described at pages 31 and 32 of our brief. Any number of colleges and universities follow a very different vision, a vision of basic human dignity, of treating all individuals in the intellectual community with dignity, including describing for them why the trap door has opened.

Fourth, and final --

QUESTION: Which colleges are those? Is there any indication of who they are?

MR. STARR: They are not identified in our brief, but they run a fairly substantial gamut, as we describe at pages 31 and 32, approximately 20 percent of the surveyed colleges, approximately 100 colleges and universities responded to the survey do provide information either with respect to inside peer reviewers or outside peer reviewers. We don't quarrel with --

QUESTION: Just give me a few of the best known. I'm -- you know --

MR. STARR: I am unable to give you specific names and verses. A number of these colleges, indeed, were protected in terms of confidentiality, as I understand it, in the study.

(Laughter.)

MR. STARR: That, however, does not intrude into

my argument.

QUESTION: You hope.

(Laughter.)

MR. STARR: I hope you will be convinced that my confidence is well-founded.

QUESTION: You say they furnish information, but do they furnish the materials?

MR. STARR: A substantial percentage, not the majority --

QUESTION: I know, but --

MR. STARR: A substantial percentage --

QUESTION: -- let's just take any --

MR. STARR: -- furnish the materials --

QUESTION: Actually furnish the written materials --

MR. STARR: That is correct.

QUESTION: -- they just don't summarize it or just say, now here was really the reason? Do they disclose who said what?

MR. STARR: They disclose everything.

QUESTION: Okay.

MR. STARR: They disclose everything.

QUESTION: Then you're really giving up something. Now, maybe it's not very much. But I think it's very difficult to believe that one is going to be as

candid when you know that the person that you're reviewing is going to see the thing as when you're not. It's been well-said that all comparisons are invidious, and that's certainly true here.

MR. STARR: I don't think there's any question that confidentiality is of value. We don't question that. That value is trumped here by Congress' visitation to this subject, its determination in 1972 to eliminate an exemption that colleges and universities had previously enjoyed by reasons, among other things, of concerns about academic freedom.

But in extending Title VII's coverage in 1972, Congress was acting not just on the basis of the nation's moral commitment to eliminate invidious discrimination, but out of the Congress' express concern with discrimination in higher education, discrimination that was especially difficult in terms of the barriers being placed before women and before blacks and other minorities.

And that is why Congress saw fit, over the objections of those who said this will curtail academic freedom, the confidentiality process that has been previously enjoyed and has characterized the tenure review process, that will all come to an end. And the Congress acted in the face of those very concerns and extended

Title VII's coverage.

QUESTION: Did you mention before or --

MR. STARR: I think I was deflected. Thank you, Justice White.

QUESTION: Yes.

MR. STARR: The proposed qualified privilege that we have heard here, or the balancing test -- we've been told that they will be happy with either -- will, I think in all likelihood from what we have heard this morning, produce evermore of the wasteful unproductive preliminary kinds of litigation that besets an already overcrowded federal system.

In the Gray case, the Second Circuit case, is a prime example of there -- that. There the District Court fashioned a balancing test, applied the balancing test after engage -- after the parties had engaged in discovery, concluded that the private civil rights plaintiff there did not in fact need these materials.

The case went upstairs at Foley Square. The case was fully briefed, fully argued, and the Second Circuit unanimously disagreed. It said, no, we strike the balance differently.

And yet the benefits that would accrue to the academy from this sort of regime that Mr. Lee is urging upon you are quite marginal. This information, when we're

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talking about a Commission investigation, will not atypically need to be turned over to the Commission anyway. In fact, it's clear in this case and this kind of case that the Commission must have this information in order to do its job, and the amici seem to realize that.

QUESTION: Could I ask, why do they need the names of the people who have furnished these opinions?

MR. STARR: They need the names -- pardon me. Let me make one preliminary point, if I may. That is, the Third Circuit has left open on remand the subject of redaction. So this Court need not in fact address that point.

The Commission, however, as a --

QUESTION: (Inaudible) address that?

MR. STARR: I'm happy to address it in response to the question.

QUESTION: No, but are you addressing it in your argument? Have you been addressing it? Are you making the argument that you need all this material?

MR. STARR: Our argument is indeed that we need unencumbered access to it.

QUESTION: Including names?

MR. STARR: Including names. We need to know names, among other things, to determine whether the appropriate procedures were followed, whether the same

kinds of procedures were followed with respect to Professor Tung as were followed in other instances.

It is very easy -- we are advised it is very easy to skew a tenure review process by determining who will be the reviewers.

QUESTION: General Starr, many years ago -- and we've held it for many years -- that there are no limitations on government investigatory requests except that they have to be relevant to the -- to a subject. Maybe those decisions, which go back well before the Administrative Procedure Act, maybe we ought to reconsider them.

Why can't an investigatory request be arbitrary and capricious --

MR. STARR: Oh, I think --

QUESTION: -- the way some other -- I mean, even if it is marginally relevant, why can't it be arbitrary or capricious and therefore be --

MR. STARR: Oh, I think it could.

QUESTION: -- subject to review under the APA?

MR. STARR: I think it could. I think that the Commission's subpoena enforcement power is in fact subject to Fourth Amendment review, determining whether this is unduly burdensome, unduly oppressive. It's certainly, with respect to arbitrariness and caprice, is in fact

subject to any kind of allegation that the inquiry, the investigation by the Commission, is being undertaken from improper motive. That's well-established in the law and we don't quarrel with it.

QUESTION: Well, but arbitrary and capricious means more than just improper motive. It means your modus may be very good but you've gone too far, it's absolutely unreasonable. And I think that's essentially what -- what Mr. Lee is arguing here, that it's unreasonable in this context to ask for this kind of information when you have no reason to believe there's any offense on the basis of all the other information.

MR. STARR: Well, but that is not so at all, with all due respect. In fact, to the contrary.

Let us walk back and see what happened in this case. Very briefly, Professor Tung files her charge. Her charge has any number of highly specific allegations.

The Commission then undertakes an investigation which consumed a year. It was only at the conclusion of that year-long investigation, including meeting with the University, receiving documents that the University provided, that the Commission decided at the district director level that it needed this information in order to determine whether in fact there was reasonable cause to believe that Professor Tung had been the victim of

discrimination.

That determination was made here. That is consistent with the EEOC's Compliance Manual.

We are being told that we are engaged in wide open casual inquiries which would in fact sound in the nature of arbitrary and capricious conduct that --

QUESTION: Well, Mr. Starr -- General Starr, it seems to me that the Third Circuit certainly thought at least that furnishing the names might not be as relevant and not as necessary and that that could be redacted.

Now, it seems to me there ought to be perhaps some residual power in the court to determine the degree of relevance and perhaps to redact names if it thought that wasn't essential.

MR. STARR: We have not cross-petitioned with respect to the Third Circuit's determination, not that there should be redaction but that redaction is open for litigation at the district court.

And we would urge this Court not to in fact interfere with that process. That we will in fact will have to in fact determine, based upon our analysis of this file, whether we under the circumstances in the Third Circuit will litigate in favor of unencumbered access.

But we think the presumptive rule must be what Congress intended, which is unencumbered access.

QUESTION: Well, is the government retreating at all from the rule of Oklahoma Press against Walling, which certainly doesn't talk about any sort of arbitrary and capricious review for subpoenas but speaks in terms of if it's reasonably thought to be relevant, that's the end of it?

MR. STARR: I am not retreating at all. What I sought to clarify in response to Justice Scalia's question was that, as I understand the law, a government subpoena is under existing law subject to challenge not only on relevancy grounds but on Fourth Amendment grounds and on grounds that it is motivated by an impermissible purpose. That is the extent to which I would agree that the --

QUESTION: An impermissible purpose? What? Being discrimination on the basis of race or something?

MR. STARR: No. An improper motive on the part of the government agency to harass, to act vexatiously, arbitrarily against a subject on subpoena. Singling someone out arbitrarily for some improper motivation.

I was going to say that in --

QUESTION: I think you've changed your answer to me then. You would not be willing to have the Administrative Procedure Act standard of arbitrary and capricious apply to investigatory requests.

MR. STARR: I'm not sure that the issue --

QUESTION: Well, that standard goes well beyond bad, bad motive.

MR. STARR: I haven't taken this through an APA analysis. I'm not at all sure that the issuance of a subpoena sounds in the nature of agency action. It may very well be. I have not, frankly, thought that through as to whether this would be subject to APA review. They haven't sought that. That isn't what's being argued before you at all.

But what I do know is that there are certain limitations, in response to your earlier question, going beyond relevancy that in fact settled law would permit a district Court to inquire into. I wanted to give the Court assurance that this is not casual routine disclosure that's being requested.

The EEOC Compliance Manual is quite clear that the Commission has the authority that Congress gave it -- Section 710 of Title VII -- to issue subpoenas to obtain access to evidence. But here's the operative language, a subpoena should be issued only after all other means of eliciting information have failed.

This is not private litigation. This is not litigation mounted under the Federal Rules of Civil Procedure with its very generous discovery provision -- provisions. This is litigation under a subpoena that has

been issued by an agency that Congress established with the specific mission of investigating charges of invidious discrimination.

Now, Mr. Lee --

QUESTION: General Starr, that provision you read, really that doesn't say anything except you've got to try and get it informally. If you ask for it over and over again and they keep saying no, then you go ahead and get through the subpoena. That's all that says.

MR. STARR: That is a restraint. This is an -- Justice Stevens, I don't over-argue the point. The point is a very simple one. That this is an orderly process in which the Commission is called upon by its own procedures to engage in. It engaged in that orderly process here. This is not the wide open --

QUESTION: No, but you're basing -- as I understand you, what you're saying is if you go about in an orderly and polite way requesting peer review reports and they keep saying, we're not going to give them to you, and you keep saying we need them in order to make a full investigation, you're going to issue the subpoena and you have an unencumbered right to have the subpoena complied with.

MR. STARR: Absolutely. Absolutely. My point is narrow --

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QUESTION: You don't have to prove that you tried with other relevant information to prove the charge.

MR. STARR: That's quite right. My point is that the Commission's standards, unlike a private plaintiff, are that it must have determined that it needs this information. That's not what the statute imposes upon it. It gives it a right, as we read the operative statue -- 709(a) speaks very broadly in terms of what we see as a right of unencumbered access, subject, obviously, to existing privileges.

QUESTION: But it seems to me not an unreasonable construction of the problem to say that the information that's most relevant in a case like this is the confidential information upon which the decision was made, so you're almost always going to want it and ask for it.

I mean, I'm not saying that's wrong, but it seems to be a perfectly normal enforcement practice.

MR. STARR: I agree that it's normal enforcement practice. The comfort I can give to those members, if any, of the Court who are concerned in this respect is that if the nature of the defense -- if the nature of the defense is that this individual was denied tenure on grounds of misconduct, on grounds of dereliction of duty, it may very well be that in certain circumstances -- and

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we saw that in Chief Judge Franklin Waters' opinion in the Arkansas case -- that there may be circumstances where it would not indeed be necessary and perhaps not even relevant.

QUESTION: You aren't really suggesting that it's necessary for the Commission to cross some threshold --

MR. STARR: Not at all.

QUESTION: -- other than relevance?

MR. STARR: That is correct. The assurance I'm giving the Court is this. We are suggesting to the Court --

QUESTION: Now, you don't want us to say as long as --

QUESTION: While the Commission sits.

QUESTION: As long as --

(Laughter.)

QUESTION: As long as the Commission continues to -- to say they have to make -- to show some special need, they may do it.

MR. STARR: Indeed not. Our view of what Congress has provided in Title VII is a right of access to any evidence that is relevant. It is clearly relevant here. It is powerfully relevant here in light of the steps that the Commission has taken.

What you're being urged to do is a policy matter -- we are involved in two things. We are talking about interpretation of the statute. We are also being told that there are profound First Amendment interests at stake.

What I am urging upon the Court is that in this context of a Commission inquiry, as opposed to those concerns that might be generated in private litigation, there are constraints in which the Commission operates and that, combined with the powerful right of access given to the Commission by Congress, counsels very powerfully it seems to us in favor of affirmance in this case.

QUESTION: General Starr, can I talk about the slippery slope argument that the -- that the government makes that if you do it for academics, you've got to do it for everybody, there's really no basis for drawing the line here.

Can you think of any other group where -- the point made by the Petitioners here is that this is a different field, that it's an area where the people who make the recommendations are part of a unit that's a very close association. The people who say my colleague deserves it or doesn't deserve it have to live with that colleague in a very close academic association for life tenure. Scary thought.

(Laughter.)

QUESTION: Now, isn't -- isn't that -- isn't that -- isn't that different from any other situation you can think of?

MR. STARR: I certainly can't think of an exact parallel. I have to concede that, that this is not exactly like the newsroom.

The argument that's being advanced, though, is because of what is not our particular governance. It is the fact that we should be shielded by the mantle of the First Amendment from -- from a congressionally authorized and indeed mandated -- because the Commission is obliged to investigate charges of discrimination -- that in fact a decision was not made on academic grounds.

What Dr. Tung is telling the Commission -- and she has convinced the Commission that it must go forward with her investigation -- is that she was denied tenure by virtue of invidious discrimination. And she was very specific in her charges, identifying a specific person as leading the effort to deny her tenure in the face of a favorable vote by her faculty department -- by her department, by her colleagues in the department.

I will not suggest to the Court, however, that newsrooms are governed in precisely in the same way. But I don't think that should give the Court pause. What the

Court has been urged is to create a special haven by virtue of the historic method of governance of universities and thereby prevent the Commission from discharging its duties effectively. And that, I think, the Court should not do.

QUESTION: I suppose that if -- that if the Commission just dropped this case and issued a right to sue letter and there was a suit that if this privilege is available, discovery -- she could not discover these materials.

MR. STARR: That's quite right. If the privilege were available, she would not be able to discover these materials.

We would urge, Justice White, the Court to consider this case on its facts, as the Court has done in privilege cases. In Upjohn, in the Ewing case, in the Horowitz case, the Court has been very cautious in proceeding step by step.

I don't think your ruling in this case -- the Court's ruling -- need go any farther than determining the Commission's right of access as opposed to the right of access of private litigants.

QUESTION: On what basis did the court of appeals remand on the redaction issue? Why did they think there was a case for a redaction perhaps? Was it sort of

a First Amendment concern or --

MR. STARR: It was broadly stated confidentiality concerns that there might not in fact be a need for this. It was --

QUESTION: It was sort of an evidentiary thing?

MR. STARR: Certainly leaving it opened for evidence to be adduced as to whether in fact the Commission needed this information. We think that is unfortunate, but we are prepared to litigate that. We did not cross-petition.

There are several points I want to make with respect to what is underlying the arguments that have been advanced before you. And that is academic freedom.

This inquiry into the university's decision-making process has nothing to do with the world of ideas. This is not Sweezy against New Hampshire, a governmental inquiry into what was being said in the lecture room. It is not Keyishian v. the Board of Regents where the Court was concerned with a governmental effort to cast, in the Court's words, a pall of orthodoxy over the classroom.

There is no effort to ferret out associations, which has so troubled this Court over recent decades. Shelton against Tucker, Bates against Little Rock; the great cases, NAACP v. Alabama; in the political setting, Buckley against Valeo. This is not that.

As the Fifth Circuit stated so forcefully in the In re Dinnan case, there is no attempt by the government in discrimination cases to suppress ideas.

QUESTION: Well, in a non-Title VII case the professor is denied tenure and he sues and claims that he's been denied tenure because his membership in some party. And he wants the peer review materials. So I think the issue -- it does involve the world of ideas, I suppose.

MR. STARR: It certainly could, depending on the grounds of the university's decision and on what the charge of -- what the allegation is. That would sound --

QUESTION: Well, he claims he --

MR. STARR: -- on the nature of a First Amendment violation.

QUESTION: He claims he's been denied tenure because of his membership in some party.

MR. STARR: That's right. That would be a violation of the First Amendment. And in fact, it seems --

QUESTION: If it's a public university.

MR. STARR: At a public -- precisely. That's right. I assume that in fact this was, in the hypothetical, a state university.

With respect to the university's right to

determine who will teach, which is one of the academic freedoms that Justice Frankfurter identified in his concurring opinion, that right, too, is not upon analysis genuinely implicated by this subpoena.

The Commission is certainly not telling the University of Pennsylvania and the Wharton School who they may promote. The governmental inquiry is very narrow, it's surgically precise and it relates to interests of compelling importance to the nation.

QUESTION: The inquiry is, but not the -- not the collection of information to pursue the inquiry. As a policy matter, I'd feel a lot more comfortable, General Starr if you could say -- but I gather from your argument that you can't -- that the EEOC does not automatically request all of these things whenever there is a complaint filed by an academic. So that in effect an academic can say to the -- to the faculty, you promote me or -- whether I deserve it or not and whether there is any hint or discrimination or not, you're going to have to disclose all the peer review reports about me.

MR. STARR: A case can be washed out by the Commission at any point. It can wash out a complaint, a charge that is filed, at the moment it interviews the charging party and concludes that she is incredible, not worthy of belief, it can wash out. There will be no

automatic access.

In fact, the Commission's records show that with respect to the substantial number of tenure charges, of tenure-related charges of discrimination in recent years, there have been a grand total of three subpoenas issue two of which have been issued to the University of Pennsylvania.

The Commission does not in fact engage in a scorched-earth litigation policy. It is charged by Congress to carry out its mission in order --

QUESTION: But, Counsel, some -- some plaintiffs do -- there have been any number of suits in the district courts where teachers who are denied tenure or appointment do follow a scorched-earth policy. And the privilege argument Mr. Lee is advancing to us would cover that.

MR. STARR: It certainly would cover that. I would urge the Court, for reasons already stated, not to deal with the scorched-earth case here. This is not that case. The Commission has not been accused, at least fairly, of engaging in a scorched-earth litigation policy. It does not do so, and, in fact, to do so would be in violation of its own Compliance Manual.

QUESTION: If you win this case, I would think the -- wouldn't you think that the plaintiff -- this scorched-earth plaintiff would be able to discover the

peer review materials?

MR. STARR: Once the private plaintiff, Justice White, is proceeding under the federal rules, then there is an enormous amount of latitude that is given to federal district judges in governing the conduct of the litigation, just --

QUESTION: I know. But you say there's no -- these materials just aren't protected by any kind of a privilege.

MR. STARR: I don't think the Court should address that issue here.

QUESTION: But the only argument you have in the district court is that it's burdensome and most district judges reject that. At least, they did when I practiced.

MR. STARR: Well, Mr. Chief Justice, with all respect, this Court has said time and again, including a very instructive opinion by Justice Powell in Branzburg against Hays, noting that district courts do not have to blind themselves to the sensitivity, the potential sensitivity of litigation, and can govern the litigation appropriately. That is --

QUESTION: Well, Justice Powell's opinion was a one-person opinion in Branzburg.

MR. STARR: Quite right. But I read it with great respect.

(Laughter.)

QUESTION: General Starr, some reference is made, though, to the University of Pennsylvania being a public institution. It is not such in the way of the state supplying funds to the university. Am I not correct in that?

MR. STARR: Quite right. It is a private institution.

QUESTION: It's a private institution in that respect?

MR. STARR: It's a very distinguished private institution.

QUESTION: As distinguished from Penn State?

MR. STARR: Quite right.

QUESTION: The distinguished public --

(Laughter.)

MR. STARR: I -- readily I accept.

QUESTION: Which is a distinguished public institution.

MR. STARR: The final thing that I want to leave with the Court is that the extent of this intrusion is narrow. This is not a blunderbuss subpoena.

I thank the court.

QUESTION: Thank you, General Starr.

Mr. Lee, you have two minutes remaining.

REBUTTAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE PETITIONER

MR. LEE: It is now very apparent just how narrow this case is. We have been given assurances as to the EEOC's procedure, how they do not come with a blunderbuss and how they first carefully examine. That is not at all our experience.

But the important point is that the EEOC's procedures and whether they are adequate and whether they really do give protection or not is now at issue. Under the Third Circuit's holding, that is not at issue; it's irrelevant.

This case must be reversed so that the Third Circuit can consider exactly that issue.

It has been conceded that confidentiality is a value, but it is asserted that it is trumped here. All that we are asking is that the inevitable and irrevocable holder of the trump card is not the Equal Employment Opportunity Commission.

What happened in the Gray case, to which the Solicitor General pointed with pride, is exactly what we're asking here. Not that our final day on these important issues be our adversary, but that it be -- that it be a court.

Look at what happened to little Franklin &

Marshall, and this is why redaction -- redaction may be the answer in some instances. It is one of several factors that ought to enter into the balance scale. But in the case of Franklin & Marshall, also in the Third Circuit, what the EEOC asked for -- I see my time is up.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)

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BY Lynn M. May

(REPORTER)