

Vengalattore v. Cornell Univ., No. 20-1514

JOSÉ A. CABRANES, *Circuit Judge*, concurring:

I concur in the judgment of the Court and in Judge Kearse’s comprehensive opinion. I pause briefly to comment, in my own name, that, as alleged, this case describes deeply troubling aspects of contemporary university procedures to adjudicate complaints under Title IX and other closely related statutes. In many instances, these procedures signal a retreat from the foundational principle of due process, the erosion of which has been accompanied — to no one’s surprise — by a decline in modern universities’ protection of the open inquiry and academic freedom that has accounted for the vitality and success of American higher education.¹

This growing “law” of university disciplinary procedures, often promulgated in response to the regulatory diktats of government, is controversial and thus far largely beyond the reach of the courts because of, among other things, the presumed absence of “state action” by so-called private universities. Thus insulated from review, it is no wonder that, in some cases, these procedures have been compared unfavorably to those of the infamous English Star Chamber.²

Vengalattore’s allegations, if supported by evidence, provide one such example of the british overreach of university administrators at the expense of due process and simple fairness. His allegations, if corroborated, would reveal a grotesque miscarriage of justice at Cornell University. As

¹ See generally Richard Hofstadter & Walter P. Metzger, *The Development of Academic Freedom in the United States* (1955); and the related volumes Richard Hofstadter, *Academic Freedom in the Age of the College* (1961) and Walter P. Metzger, *Academic Freedom in the Age of the University* (1961). There are, fortunately, some notable exceptions — principal amongst them the University of Chicago, which in 2015 reaffirmed its “commitment to a completely free and open discussion of ideas.” *The Chicago Principles: Report on the Committee on Freedom of Expression*, University of Chicago, available at <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

² See American Association of University Professors, *The History, Uses, and Abuses of Title IX* (June 2016), at 87, available at <https://www.aaup.org/file/TitleIXreport.pdf>.

alleged, Cornell's investigation of Vengalattore denied him access to counsel; failed to provide him with a statement of the nature of the accusations against him; denied him the ability to question witnesses; drew adverse inferences from the absence of evidence; and failed to employ an appropriate burden of proof or standard of evidence. In other cases and other universities the catalogue of offenses can include continuing surveillance and the imposition of double jeopardy for long-ago grievances.³

There is no doubt that allegations of misconduct on university campuses — sexual or otherwise — must, of course, be taken seriously; but any actions taken by university officials in response to such allegations must also comport with basic principles of fairness and due process. The day is surely coming — and none too soon — when the Supreme Court will be able to assess the various university procedures that undermine the freedom and fairness of the academy in favor of the politics of grievance.

In sum: these threats to due process and academic freedom are matters of life and death for our great universities. It is incumbent upon their leaders to reverse the disturbing trend of indifference to these threats, or simple immobilization due to fear of internal constituencies of the “virtuous” determined to lunge for influence or settle scores against outspoken colleagues.

³ Elsewhere, I have criticized the “specialized inquisitorial procedures that universities have developed for sexual-misconduct cases.” José A. Cabranes, *For Freedom of Expression, for Due Process, and for Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 *Yale L. & Pol’y Rev.* 345, 353 (2017). These procedures can deprive the accused of various rights, including the right to a public hearing or the complete record of a private hearing, the right to have counsel speak on the accused’s behalf, the right to friendly witnesses, the right to confront and cross-examine adverse witnesses, and the right to the presumption of innocence until proven guilty. *Id.* at 355; *see also* José A. Cabranes, *The New ‘Surveillance University,’* *Washington Post* (Jan. 11, 2017) (describing the adoption of university surveillance and reporting regimes which can be used as “tool[s] for policing the teaching and research of the professoriate”). Even short of formal discipline, such lack of due process may inflict reputation harm, particularly where rules of “confidentiality” make it effectively impossible for an accused to respond publicly to damaging pronouncements by managers of the university grievance system.