SUPREME COURT OF THE UNITED STATES

No. 08-0437

Andrea "Andy" Sommerville

v.

Olympus State University, William DeNolf as President of Olympus State University

On Appeal from the
Seventeenth Circuit Court of Appeals

ORDER OF THE COURT ON SUBMISSION

Having duly considered the written briefs of counsel for the parties and the Records of the Seventeenth Court of Appeals, this court finds that the resolution of this case rests upon interpretation of statutory and constitutional materials.

IT IS THEREFORE ORDERED that counsel appear before this court to present oral argument on the following issues:

1) Whether the type of forum created by the University's free speech zones and the exclusions imposed by the University are consistent with freedom of expression and the First Amendment to the United States Constitution?

AND

2) Whether the dismissal and disciplinary actions taken against the student ambassador violated procedural due process?

JURISDICTION

The judgment of the United States Court of Appeals for the Seventeenth Circuit was entered April 19, 2008. This Court granted the petition for writ of certiorari. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

* The original idea and work for this problem is credited to Laura Hock and the Pepperdine University School of Law.

368 F.4th 1

United States Court of Appeals,
Seventeenth Circuit

Andrea "Andy" Sommerville, Petitioner
v.
Olympus State University, William DeNolf, as President of Olympus State University, Olympus State Univ., Respondent

No. 07-1882

Submitted: March 17, 2008
Filed: April 17, 2008

Kruger, K., for herself, Godfery, S. and Hoffman, S.

Petitioner Andrea "Andy" Sommerville, a senior at Olympus State University, a state institution of higher education, appeals the district court's ruling denying her request for an injunction sought under 42 U.S.C. section 1983. Petitioner claims her First Amendment free speech rights were infringed when she was disciplined for speech activity on the campus. Petitioner also argues her procedural due process rights were violated by the University in the imposition of that discipline. We have studied the matters raised by the appeal, and we hereby affirm the district court's finding of no violation of the First or Fourteenth Amendments. Injunctive relief against William DeNolf, the President of the University, is hereby denied.

FACTS

The City of Syspeanville in the State of Olympus is home to one of the premier U.S. military bases, Fort Zeus. Much of Olympus's population has some tie to the military, either as enlisted troops, retired soldiers, base personnel, or as the family members of these individuals. Since the Iraq war began in 2003, patriotic sentiments have run high in Olympus as residents try to find ways to support the troops' efforts.

Next door to Fort Zeus is Olympus State University, a large public university with a current enrollment of 15,000 students. The sprawling campus covers 150 acres and includes 30 buildings. Owing in large part to the strong military presence within Olympus, the school has established a Reserve Officer Training Program (ROTC) to prepare future military leaders through problem solving, leadership development, and strategic planning. As part of the ROTC program, cadets engage in training exercises on Olympus State University's campus. A good number of Olympus State University ROTC graduates are serving, or have served, in the ongoing Iraq war. Sadly, some – including a cousin of Petitioner Sommerville – have made the ultimate sacrifice.

Like most universities, class discussion sometimes engenders demonstrative activity. In recent years, campus demonstrations or protests have related to controversial issues or speakers on abortion and gay rights. When these protests were held near classrooms and faculty offices, complaints were voiced by teachers and other students regarding the disruptive effect on classes, University-sponsored activities, and administrative work. During the 2005-2006 academic year, a student organized civil rights protest drew a crowd of approximately 100 students and turned violent when two students with opposing viewpoints engaged in an altercation that sent one of them to the hospital. As a result of this incident, administrators at Olympus State University, led by President William DeNolf, began to discuss ways to minimize the disturbance caused by campus protest activity, as well as to protect the safety of those within the University community. At a board meeting on October 28, 2006, President DeNolf proposed the creation of free speech zones that restrict speech to particular areas of the campus. The University counsel indicated that these free speech zones, if properly conceived as limited designated public forums, could exclude both those not associated with the University as well as certain problematic or inappropriate subjects from the protests. For example, views for and against the ROTC program that, DeNolf said, "perennially stir up trouble, would be excluded from these areas.

At the conclusion of the board meeting, a new Freedom of Expression Policy was adopted by a unanimous vote. The policy was posted on the Administration Building bulletin board and published in the campus newspaper the next day, October 29, to give students notice of the adopted policy. Also, it was included as an amendment on that same date to the 2006-2007 Student Code of Conduct, which is available to students on-line and in hardcopy.

The Olympus State of Expression Policy read as follows:
(1) The primary function of higher education is to discover and disseminate knowledge by means of research, teaching and public service. To fulfill this function a free interchange of ideas is necessary. It follows that the higher education institution must do everything it can to ensure within it the fullest degree of intellectual Olympus State. For these reasons, Olympus State University recognizes the right of individuals to pursue their constitutional right of free speech and assembly, and welcomes open dialogue as an opportunity to expand the educational opportunities of our campus communities. However, a higher education institution may place reasonable restrictions on speech to protect the safety of individuals, minimize disruption, and provide for the continuity of the educational process.
(2) Students, faculty, and staff are free to express themselves, individually or in organized groups, orally or in writing or by other symbols, subject only to rules necessary to preserve the equal rights of others and to integrate such speech harmoniously with the particular traditions and other functions of Olympus State University. These traditions and other functions are best accommodated by designating appropriate locations for demonstrative speech activity, where the use of signs, banners, tables, exhibits, and amplified sound equipment can be reasonably regulated to prevent threats to safety and disruption to educational activities, including that necessary to maintain a positive relationship of the University with the ROTC program and the neighboring military base.

(3) Except as designated herein, the campus of Olympus State University is a nonpublic forum. Students, faculty, or staff of the University wishing to engage in any demonstrative speech activity must do so within one of the two free speech zones set aside by the University: the lawn near the Student Union or the walkway in front of the cafeteria. The University reserves the right to withdraw an area's designation as a free speech zone at any time for any reason, including violation of this policy.
(4) Activities within the free speech zones shall not impede access to and from classrooms, offices, study areas, or other buildings and shall not interfere with University activities.
(5) In enforcing this policy, the University intends no unconstitutional limitation of the viewpoint or content of speech.
(6) All regular disciplinary proceedings are provided for under the Student Code of Conduct.
Violations of this policy may result in disciplinary action, including but not limited to suspension from University privileges, activities, class, and where warranted, suspension for a semester (or more) or expulsion.

The free speech zones comprise approximately five acres of Olympus State University's campus and are areas with high campus traffic. Numerous events are held in the Student Union resulting in a large number of students passing by the free speech zone on their way into the building. Similarly, the cafeteria is a common meeting place in between classes and during meal times. None of the zones are visible from the Administration Building, which contains the offices of senior University administrators, including that of President DeNolf. The on-campus streets and sidewalks immediately adjacent to the Administration Building have not been designated a free speech zone, even though dating to the 1960s that area had been the principal location of many, if not most, campus demonstrations.

Petitioner Sommerville is a senior at Olympus State University and was one of four University Presidential Ambassadors. Students are handpicked for this highly sought after position by President DeNolf. Selection is based upon academic achievement, dedication to service, poise and maturity, and leadership skills. Selection is for a one-year term, subject to the availability of funding and that the student selected maintains the "ambassadorial spirit of optimism and good will." Students found to be lacking in these qualities may be dismissed by the President at his discretion. No student, dating to the 1960s, had been dismissed from the program, since Bobby Bronner and Chester Commerford were dismissed for publicly burning their draft cards in opposition to the Vietnam War.

Being an Ambassador offers students several valuable benefits. First, University Presidential Ambassadors are given a partial scholarship and the opportunity to work part-time in the President's office where they serve as escorts for important visitors to Olympus State University's campus. Second, University Presidential Ambassadors serve as informal advisors to President DeNolf on campus-wide issues affecting students. Once a week, the President has a meeting with the ambassadors at which time they are able to express their views. Finally, University Presidential Ambassadors are given

access to the administration bulletin board located prominently on the exterior face of the Administration Building. The bulletin board is the principal way the administration communicates officially with the University community. Generally, only senior administrators or chaired faculty have access to this bulletin board, and postings must have the approval of the President's office. University Presidential Ambassadors are held in high esteem as campus leaders. Of course, like any student enrolled, Ambassadors must observe the Olympus State University Student Code of Conduct. A student found in violation of the Code of Conduct after proper investigation by the University disciplinary committee may suffer loss of University privileges, including University scholarships, employment, suspension, or where warranted, expulsion. Violations of the Code of Conduct are included in a student's permanent record, but are not noted on a student's transcript.

Sommerville is generally opposed to any campus speech regulation because she believes students have the right to express themselves without limit. During the weeks leading up to the board's adoption of the free speech zone policy, Sommerville repeatedly stated her opposition of the policy to just about anyone who would listen. Sommerville was cautioned several times by the President's secretary, Ms. Karen Valeri to keep her voice down while speaking with other staff and students in the building about the subject; Ms. Valeri believed Sommerville's "tone to be off-putting," and said, "it was an inappropriate topic for an Ambassador to discuss while important visitors were in the building." Part of Sommerville's opposition to the proposed free speech zone policy derived from her strong disagreement with the Iraq war and her desire to persuade others to bring the troops home. Sommerville also thinks ROTC belongs off-campus and she freely, and repeatedly, reminded the President of her opinions at their weekly meetings.

On the morning of October 28, the day the board ultimately decided to adopt the free speech zone policy, Sommerville was overheard by Ms. Valeri loudly discussing something. After the board meeting, Ms. Valeri told the President that Sommerville had been engaged in "anti-war, anti-ROTC talk" with one of her fellow Ambassadors, when, in actuality and unbeknownst to Ms. Valeri, Sommerville had been talking on her cell phone to her history instructor about her mid-term grade in a course on the History of War. In addition to this, Ms. Valeri explained that Sommerville had posted an unapproved flyer on the administrative bulletin board announcing an anti-war rally for the following day to take place in front of the Administration Building. Ms. Valeri mentioned these things to the President after the board meeting. Tired from a long day, and still having a fundraising event to attend that evening, the President called Sommerville into his office. Sommerville contested the facts as reported by Ms. Valeri, but after patiently listening for ten minutes or so, the President said "Andrea , you are a passionate person. That's fine. I admire people with passion. But University Presidential Ambassadors have to conduct themselves in a more diplomatic fashion," and with that the President said that, based on her disruptive speech toward the ROTC and the military, he had no choice but to dismiss Sommerville from her ambassadorial position.

The next day, October 29, Sommerville held her anti-war rally, but shifted the location to the free speech zone outside the Student Union building. Led by Sommerville, the group

of 150 students chanted: “Bring our troops from overseas---A United World is the key” and “William DeNolf hear our plea---No more ROTC.” The same phrases were displayed on signs held by the students. The campus security officer on duty, Jonathan Ide, noting the subject of the protest related to ROTC, informed Sommerville that the protest was contrary to University policy and that she would have to stop. When Sommerville refused, Officer Ide, informed her that she would be charged with violating University policies and as such, Sommerville’s charge was forwarded to the University disciplinary committee that same day.

In accordance with Olympus State University policy published in the Student Code of Conduct, the committee reviewed the incident report filed by the campus police officer. The report observed that “while the protest was orderly, it would likely impede access to a campus facility and likely jeopardize the relations with the military base.”

Based upon its evaluation of the evidence, the disciplinary committee determined Sommerville had breached the Code of Conduct and a letter was sent to Sommerville to inform her of the committee’s decision. The letter stated Sommerville would be permitted to enroll in classes for her final semester but would be precluded from serving as a University Presidential Ambassador and from participating in the University’s commencement exercise. In addition, Sommerville forfeited all eligibility for University financial aid. The committee gave Sommerville the option of appealing the decision at an in-person hearing before that same committee. Sommerville chose to appeal. At that time, she was informed by the University that a full hearing would be held fourteen days later so as to allow her sufficient time to prepare her appeal. At the hearing, Sommerville was able to present witnesses on her behalf, including students who testified to the protest’s peaceful, non-disruptive nature. She also had the opportunity to cross-examine the campus police officer who filed the report. After the hearing, the disciplinary committee affirmed its original decision which was approved on appeal by the Dean of Students in accordance with standard Code of Student Conduct procedures.

The next day, a number of Sommerville’s friends demonstrated outside the Administration Building at noon. One used a bull-horn to denounce Sommerville’s discipline and the free speech zone policy, itself. These students were subject to the same university disciplinary process as Sommerville and received the same discipline as Sommerville. Each appeal was subsequently affirmed by the Dean of Students in accordance with the standard Code of Student Conduct procedures.

Distressed by the blatant noncompliance with the free speech zone policy as it had been originally articulated, the President, upon polling the board, withdrew the previously-designated free speech zones until such time as the board could re-convene at its summer meeting to study the matter more fully. In the interim, the President indicated in his withdrawal statement that students wishing to demonstrate would need to do so either off-campus in accordance with the law or on non-game-day Saturday mornings in the football field parking area. “Students should be studying and discussing issues in the classroom not marching around the campus with placards,” President DeNolf told the campus paper.

ANALYSIS

The US Supreme Court has recognized two types of public forums: traditional public forums and limited or designated public forums. Regulation of speech in these settings triggers different standards of review.

A traditional public forum is property that has "immemorially been held in trust for the use of the public, and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Public streets and parks are the most common examples of traditional public forums. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In order to be upheld, restrictions on the content of speech must serve a compelling state interest and be narrowly drawn to accomplish that interest. Content-neutral regulations as to the time, place, and manner of speech will be permitted, provided they "are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45.

A public facility that does not qualify as a traditional public forum may be characterized as a limited or designated public forum. Created by "purposeful governmental action," *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1998), a limited or designated public forum does not arise by "inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." A court will examine the government's policy and practice to determine whether there was intent to create a public forum in a place that is not traditionally open to debate and assembly. The government's intent is ascertained by considering the nature of the property and its compatibility with expressive activities. The same restrictions on speech that apply in a traditional public forum also are used for limited or designated public forums.

Under the public forum framework, all government property that is not considered a traditional public forum or a limited or designated public forum is a nonpublic forum. The government has the greatest latitude to regulate speech in a nonpublic forum. Governmental restrictions on speech are permitted "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's views." *Ark. Educ. Television Comm'n*, 523 U.S. at 677-78.

The Speech Fora

Unlike parks and streets outside a university, a university campus is by tradition a place for study and introspection, not a free-for-all free-speech zone. See *Widmar v. Vincent*, 454 U.S. 263 (1981). Moreover, whatever the policy may be at other public institutions, with the exception of the streets and sidewalk area outside the Administration Building, Olympus State University has never dedicated the outdoor areas of its campus for use by the general public as a public forum. To the extent the campus is a "forum" at all, it is a

forum for that which the faculty, staff, and students wish to say, hear and study, not for that which others may believe the university should hear.

The area adjacent to the Administration Building is not a traditional public forum. What does this mean for student access, and in particular, for Petitioner Sommerville? Since the University was careful not to designate this area a free speech zone, it is a nonpublic forum from which student speech activity, including that of Sommerville, can be excluded every bit as much as the general public can be excluded so long as these exclusions are not viewpoint-based. While it is true that a modern university contains a variety of fora, and that which is held out by designation would be treated differently, the Administration Building area has not been designated for speech activity. For this reason, we disagree with Justice Brigham's dissenting view that this area is a traditional public forum and we do not need to inquire whether a traditional public forum can be withdrawn.

Further, we do accept the dissent's charge that labeling the campus as one single type of forum is an impossible, futile task. See *Justice for All v. Faulkner*, 410 F.3d 760, 766 (5th Cir. 2005) (stating that "the Supreme Court's forum analysis jurisprudence does not require us to choose between the polar extremes of treating an entire university campus as a forum designated for all types of speech by all speakers, or, alternatively, as a limited forum where any reasonable restriction on speech must be upheld"); see also *Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1354 n.6 (11th Cir. 1989) (Tjoflat, J., dissenting) (stating that not all of a University campus is a public forum, but rather that a campus contains a variety of fora). Some places on the University's campus are not opened as fora for use by the student body or anyone else in a speech activity sense. These areas are nonpublic fora, and they are for the "business" of the University. Other campus locations, such as auditoriums or stadiums, and in the present matter the free speech zones, allow for certain speech on certain topics. These locations may be described as designated public fora or limited designated public fora.

But while limited designated public fora can be limited by group or subject matter, they cannot be discriminatory in terms of viewpoint without compelling justification. Viewpoint discrimination in a limited or designated public forum "is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). Petitioner argues that the free speech zone policy discriminates on its face in favor of views that advance a "good relationship" with the ROTC program and the military base. We do not find that to be true. The free speech zone policy states explicitly that it is not intended to be an "unconstitutional limitation of viewpoint."

Petitioner contends that the incident report reveals that it was specifically her criticism of ROTC that triggered her discipline. We think Petitioner is reading into the report something that is not there. Nothing in the First Amendment requires that we presume bad faith on the part of the University. See *Perry Educ. Ass'n.*, 460 U.S. at 46.

The parties differ as to the level of scrutiny applicable to restrictions on speech that falls within the genre of speech allowed in a limited or designated public forum. A careful reading of the case law finds that the proper judicial standard for speech in designated public forums when such speech is limited insofar as its subjects or purposes is that of reasonableness or rationality. Conversely, the appropriate judicial test for speech in limited public fora is the three tiered test of strict scrutiny. Petitioner's speech fell outside the ROTC limitation; therefore, it is not necessary for us to resolve this difference of opinion.

Petitioner contends that we must determine the level of review because even if her speech was outside the subject matter permitted, the President's subsequent withdrawal of the free speech zones and re-orientation of all speech either off campus or to a remote athletic field parking lot on a single morning illustrates animus toward the protected subject matter. Petitioner points to the President's categorical dislike for demonstrative activity. It has long been settled, however, that officials may choose to close such a designated public forum at any time. *Perry Educ. Ass'n,* 460 U.S. at 46 ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."). Moreover, the President's preference for students who study and stay in-doors is not an impermissible content limitation, so it cannot be said that the closure of the initial two free speech zones was content or viewpoint based, which we admit would be unconstitutional. Closing the forum is a constitutionally permissible solution to the dilemma caused by concerns about maintaining an orderly campus environment. Accordingly, the fact that the President chose to close the forum rather than put up with demonstrative activity in general or risk further disruption or litigation does not constitute viewpoint discrimination

The Discipline

Sommerville argues that she was improperly removed from her ambassadorial position because of her speech on a matter of public concern. "The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1957 (2006); *see also Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 147, (1983). These principles were recently reaffirmed but qualified somewhat in *Garcetti*.

Garcetti involved an assistant district attorney, Ceballos, who raised objection to what he believed was improper police behavior in the execution of a warrant. After finding that Ceballos' memo addressed a matter of public concern, the Ninth Circuit balanced Ceballos' speech interest against the interest of his supervisors to respond to it. The circuit court weighed the balance in Ceballos' favor, finding that Petitioner "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. That court also determined that Ceballos's First Amendment rights

were clearly established and that the actions of Petitioner were not objectively reasonable.

At the Supreme Court, the Ninth Circuit was reversed. The Court found Ceballos to be speaking not as a public citizen but as an employee with regard to an aspect of his employment. Wrote Justice Kennedy: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960.

Upon review, we find *Garcetti* is inapplicable to the facts of our case. Sommerville was hired to play a distinctly academic role. *Garcetti* can have little purchase in this context if universities are going to maintain their integrity. Nothing in *Garcetti* suggests that it would apply to the teaching of a public university professor, and it should not apply either to students in the academic environment who, by virtue of their maturity and ability, become true collaborators in the life of the university. In light of this sound line of precedent, we do not enlarge the *Garcetti* qualification for speech related to "job-related" duties beyond its terms. We therefore proceed to analyze Sommerville's speech as outside the limitations stated by the *Garcetti* framework.

Sommerville was a public employee who was entitled discuss matters of public concern if those discussions did not undermine the efficiency of the office. We find that Sommerville was removed for the disruption and inefficiency she brought to the Presidential office – not for her views on matters of public concern.

It is not entirely clear that the free speech policy of a public university is an "internal matter," and moreover, it is far from clear that the President could disaggregate Sommerville's speech advocacy about free speech policy from her anti-military speech activity. So for purposes of our analysis, we assume the speech giving rise to Sommerville's dismissal was a matter of public concern. The question, then, was that speech disruptive? In ascertaining that, we need to address the reasonableness of the President's assessment of disruption, including the fact that it was premised upon secretarial hearsay that proved to be somewhat inaccurate.

Prior to *Garcetti,* it was established that "[t]he key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Waters v. Churchill,* 511 U.S. 661, 675 (1994). In conducting this balance, the Court consistently has given "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved was on a matter of public concern." *Id.* at 673.

What are we to make of Ms. Valeri's error in thinking Sommerville was making anti-ROTC and anti-war remarks when, in fact, she was reviewing a mid-term grade in a history class on the subject of warfare? As the Supreme Court explained in *Waters*, the government's role as employer necessitates a different mode of constitutional review from that used in its role as sovereign. *Id.* at 674. "Restrictions . . . are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it. Rather, the extra power the government has in this area comes from the nature of the government's mission as employer." *Id.*

The President's reliance upon Ms. Valeri in this case is questioned as a reasonable measure of disruptiveness. "But employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct." *Id.* at 676.

Waters makes plain that the Court is not bound to look only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. *Id.* at 677. The plurality in *Waters* instructs us to "look to the facts as the employer *reasonably* found them to be." *Id.*

Outside of the First Amendment context, "such care is normally not constitutionally required unless the employee has a protected property interest in her job" – a matter we conclude below not to be true here – *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-78 (1972); but *Waters* found the possibility of inadvertently punishing someone for exercising her First Amendment rights makes such care necessary see *Waters*, 511 U.S. at 678.

Reasonable employers often may dispute the level of investigation and amount of evidence needed, as well as the credibility of the various parties. As a result, there may be multiple courses of action that are all reasonable. The only procedures that may be considered unreasonable are those "outside the range of what a reasonable manager would use." *Id.*

The procedure followed here was reasonable in light of the nature of the employment (part-time, student) and the record evidence that Sommerville had been less than diplomatic in nature on a number of occasions, contrary to the nature of what her ambassadorial position required. It is not necessary for us to decide if Sommerville was let go because of her opposition to the free speech zone policy or her anti-military remarks or even to determine whether the former are matters of private or public concern. That he may have obtained some incorrect information (the secretarial error) mixed in with the correct – e.g., there was no doubt that Sommerville violated the terms of access to the administration bulletin board, a nonpublic forum – does not preclude the President from safeguarding the efficiency of his office. For these reasons, we find the First Amendment no obstacle to Sommerville's termination from her ambassadorial role.

Due Process

We find no support in our cases for the dissent's view that the University trenched upon Sommerville's Fourteenth Amendment rights. The dissent relies primarily on *Board of Regents v. Roth.* In *Roth,* the Court repeated the pronouncement in *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), that the liberty guaranteed by the Fourteenth Amendment "'denotes not merely the state from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.'" *Bd. of Regents v. Roth*, 408 U.S. at 572 (quoting *Meyer,* 262 U.S. at 399). But neither *Roth* nor *Meyer* even came close to identifying the asserted "right" violated by the President in this case. Neither case will bear the weight placed upon it by the dissent because neither case supports the conclusion that the actions of the President or his public safety officers deprived Sommerville of a protected property or liberty interest.

Sommerville had no property interest in the ambassadorial post since it, by its express terms, could be terminated at any time. While the dissent is right that it could not be terminated for an improper reason, like a desire to suppress protected speech, we have already dispatched of Sommerville's speech claims and have found them wanting. Likewise, the attempt to manufacture some reputational liberty is strained and unpersuasive. The notation of student discipline on a student record is not the equivalent of a tangible injury to liberty or defamation.

While the Fourteenth Circuit has held that a student's interest "in pursuing an education is included within the fourteenth amendment's protection of liberty and property," here, the Petitioner was not deprived of that interest. Sommerville is permitted to continue and complete her education at the University. Petitioner has no reasonable expectation of a protected property or liberty interest, and therefore, it is wholly unnecessary to address what procedure the Constitution would require were a protected property or liberty interest present.

The district court is affirmed and the request for injunctive relief denied.

Brigham, C. for herself and Mendelsohn, L., dissenting

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The speech at issue in this case was prohibited simply because it did not meet with the approval of President DeNolf. However, the law of the land has long held that a person's right to free speech does not depend on the favor of any government official. "If there is a bedrock principle underlying the First Amendment, it

is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson, 491 U.S. 497 (1989).* Further, the state's asserted interest in preserving nationhood and national unity does not justify the lesson taught to Ms. Sommerville by this fine university.

The Speech Fora

The record in this case indicates that the streets and sidewalks adjacent to the Administration Building have been the locus of demonstrative activity since the 1960s, and that the University has made little effort to exclude members of the general public or the student body from this location. This area is, according to the very authorities cited by the majority, a traditional public forum. In order to close or restrict access to a traditional public forum, the most demanding justification must be supplied. That justification is lacking here, and for that reason, it was improper to discipline Petitioner for undertaking the same type of speech activity that would by definition be allowed on the streets and sidewalks outside the campus.

The free speech zone policy of the university is also fatally flawed insofar as it is viewpoint-based. See *Roberts v. Haragan*, 346 F.Supp. 2d. 853 (2004). No amount of infelicitous phrasing can obscure that the policy on its face favors those who favor the ROTC and the actions of the military in general. For the same reason, the application of the policy to Sommerville has been unconstitutional.

Public Employment

I agree with the majority that *Garcetti* does not apply to Sommerville's speech. The academic context depends intimately upon informed public discussion which is necessarily within the job description of teachers and students alike. *Garcetti*, however, is a puzzling and problematic limit upon public employee speech that certainly should not be extended, and some would say, should be overruled.

"The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities." *Garcetti*, 126 S. Ct. at 1964 (Souter, J., dissenting). Prior to *Garcetti*, "we have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer. In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Supreme Court followed *Pickering* when a teacher was fired for complaining to a superior about the racial composition of the school's administrative, cafeteria, and library staffs. In that case, the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job." *Id.*

The difference between a case like *Givhan* and the one at bar is that the subject of Sommerville's speech arguably falls within the scope of her job responsibilities as an Ambassador. The effect of the *Garcetti* constitutional line between these two cases, then, is – as the dissent pointed out in *Garcetti* – that "a *Givhan* schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants. This is an odd place to draw a distinction.[1]" *Id.* at 1965.

My agreement with the majority ends with the conclusion that *Garcetti* does not apply to Sommerville's speech. Applying *Pickering* to the facts before us, it becomes apparent that Sommerville's speech has not resulted in the kind of disruption that merits denying speech on a matter of public concern protection. This is all the more true in light of the cursory fashion the President undertook to ascertain the facts. It is clear that Ms. Valeri misunderstood the nature of Sommerville's speech on the job, and that her information did not become reliable merely by its repetition to her boss. The free speech zone policy and policies related to ROTC and the military are matters of public concern and their expression by Sommerville merits the protection of the First Amendment and this court.

Due Process

I also differ with the majority over its crabbed assessment of the Fourteenth Amendment. That amendment prohibits governmental actions that would deprive "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. Before the government deprives an individual of an interest protected by the amendment—life, liberty, or property—the government must institute fair procedures to determine the basis for the government's actions.

A two-step analysis is utilized in evaluating procedural due process claims. First, the court must determine whether the interest claimed rises to the level of a property or liberty interest. If it does not, the second part of the analysis is unnecessary because no constitutionally protected interest is implicated. However, if a property or liberty interest is found, the court will balance the interests of the state against those of the individual to determine the required level of process.

First, I agree that in light of the terms of the position, Sommerville's role as a University Presidential Ambassador cannot be considered a protectible property interest. While nominally granted for one year, it is subject to explicit revocation. However, following the logic of *Goss v. Lopez*, 419 U.S. 565 (1975), it comes apparent that Sommerville has a liberty interest. In *Goss*, the Supreme Court recognized that students have a liberty interest in their good name and reputation. *Id*, at 574 (1975). "'Where a person's good

[1] "It seems stranger still in light of the majority's concession [in *Garcetti*] of some First Amendment protection when a public employee repeats statements made pursuant to his duties but in a separate, public forum or in a letter to a newspaper." *Garcetti*, 126 S. Ct. at 1965 n.1. Why would the President want Sommerville to have to demonstrate in the street to get his attention about a matter of public concern when he can hear from her directly on the job? In any event, the *Pickering* rule is fully applicable in either venue, protecting the President from the disruptive consequences of public employee speech wherever it occurs.

name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." *Id.* (quoting *Roth*, 408 U.S. at 573.) A year later, however, the Supreme Court held that injury to reputation, by itself, is not a deprivation of liberty. *Paul v. Davis*, 424 U.S. 693, 712 (1976). Since *Davis*, the Court has stated that the mandates of due process apply when a tangible detriment accompanies the harm to reputation.

Similar to an interest in reputation, Sommerville was deprived of the honor of serving as a University Presidential Ambassador of Olympus State University, the privilege of applying for financial aid, and the honor of participating in the University's commencement. Furthermore, the disciplinary measures were noted in Sommerville's permanent record where it may be disclosed to future graduate or professional school admissions committees and/or prospective employers.

Once a protected property or liberty interest has been found, the next question is what level of process is required. At a minimum, customary standards of due process require that students be given notice and a fair hearing. *Goss*, 419 U.S. at 579. The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). However, "the timing and content of the notice and the nature of the hearing [depends] on appropriate accommodation of the competing interests involved." *Goss*, 419 U.S. at 579. Sommerville argues that the hearing provided did not satisfy due process because it was given only after her University Presidential Ambassador position, scholarship, and ability to participate in commencement had been revoked. Even more egregious is the fact that Sommerville's hearing was heard by the same disciplinary committee that issued her initial sanction. Trial courts do not settle appeals from their own rulings nor should administrative boards that have the power to issue sanctions. I find this denial of process to be a breathtaking denial of Sommerville's due process freedoms. To affirm such would set a dangerous precedent that will be interpreted in the future to sustain further attacks upon due process -- continuing until all that is left is process.

In determining the level of process due to plaintiffs, courts balance three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The private interest affected by the school's action here is Sommerville's good reputations in the University community. As such, the risk of an erroneous deprivation is high. Indeed, "[d]isciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." *Goss*, 419 U.S. at 580.

The school's interest here is to preserve the learning environment on campus by discouraging further misconduct, and to preserve its own good reputation in the community. "Some modicum of discipline and order is essential if the educational function is to be performed." *Goss*, 419 U.S. at 580. However, the school's interest is not so great as to outweigh the added benefit of affording a prior hearing.

In *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970), the Supreme Court held that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process." Moreover, the Court held that as a "general rule" in school settings, notice and a hearing should precede the imposition of disciplinary procedures. *See Goss*, 419 U.S. at 582. In my view, Sommerville was entitled under the Due Process Clause to a pre-deprivation hearing.

The University has improperly and unconstitutionally sought to limit speech by withdrawing a traditional public forum without compelling justification, engaging in viewpoint discrimination in the design of its free speech zone policy, and in asserting disruption in a public workplace where none exists. The University has compounded these constitutional errors by denying Sommerville the basic fairness required by due process. The district court should be reversed.

I respectfully dissent.

LIST OF AUTHORITIES