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Robert M. O'Neil
Indiana University School of Law - Bloomington

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PUBLIC EMPLOYMENT, ANTIWAR PROTEST AND PREINDUCTION REVIEW

Robert M. O'Neil*

I. INTRODUCTION

Six months apart, the Supreme Court decided its first cases involving the rights of public employees to criticize government policy and of draft registrants to obtain court review of Selective Service classifications prior to induction. The imminent juxtaposition of these two important decisions could hardly have been foreseen at the time. Yet there was already pending in the federal district court a case that would intertwine in most curious fashion the rights of government employees and draft registrants. Decisions in this case, both on preliminary motions and on the merits, afford an occasion for analysis of two rapidly burgeoning fields of public law.

The facts can be summarized briefly at the outset. Stephen Bruce Murray joined the Peace Corps in the spring of 1965 and began serving immediately after graduation from college. He thereupon received from his draft board an occupational (II-A) deferment from military service, supplanting his II-S student deferment. After his training period, Murray was sent to Concepcion, Chile, to teach music at the University. Just before his departure, he checked with his draft board to make sure that his deferment would carry him beyond his twenty-sixth birthday in November, 1967. The facts emerged during the trial, and are drawn in part from summaries of testimony appearing in N.Y. Times, Sept. 20, 1969, § 1, at 12, col. 4; Sept. 21, 1969, § 1, at 29, col. 1; Oct. 5, 1969, § 1, at 65, col. 4; and Dec. 25, 1969, § 1, at 1, col. 4, § 1, at 18, col. 1.

* A.B., A.M., LL.B., Harvard University. Professor of Law, University of California, Berkeley.

5 There was in fact considerable uncertainty about the precise expected termination date of the Peace Corps appointment. Although the complaint alleged that the tour of duty would end in January 1968, the preliminary argument revealed a terminal date as early as October 1967, which would have preceded Murray's 26th birthday. The court resolved the ambiguity in Murray's favor, however. Murray v. Vaughn, 300 F. Supp. 688, 692 n.2 (D.R.I. 1969).
clerk assured him that his present status would continue, although his initial deferment would expire in June, 1967.

Life in Chile was relatively quiet until the spring of 1967. As a result of growing concern about the Vietnam War, a group of Peace Corps volunteers circulated among their colleagues a petition calling for an end to the bombing of North Vietnam and immediate peace negotiations. The United States Ambassador promptly warned the authors that the planned publication of the petition would result in their expulsion from Chile and possibly from the Corps as well.

When his turn came, Murray signed the petition, finding in it an accurate reflection of his own views on Vietnam. A few days later, a letter from the Director of the Peace Corps was read orally to all volunteers in Concepcion, warning that signers of the petition risked “administrative discipline” and probable expulsion. Murray asked for a copy of the directive, but his request was denied. He argued unsuccessfully with the local Peace Corps director about the underlying policies and the implications of such an admonition.

Declining to remove his name from the petition or resign from the Corps—the two alternatives officially suggested to him—Murray composed a letter to the New York Times setting forth his view of the controversy and its probable effect on the Corps.

Dear Sir,

I am writing this letter in regard to the recent directive read to me, which has been issued about the right of Peace Corps Volunteers to dissent in the realm of the United States government's international policies. As I understand it, we are not allowed, as Peace Corps Volunteers and hence representatives of the U.S. government, to express opinions contrary to U.S. policy either in speech or writing. This applies in particular to a recent petition circulated among PCVs in Chile asking for a halt to the bombing in Viet-Nam and a beginning to negotiations, which was destined to be printed in the New York Times if a certain number of signatures could be obtained.

The directive from the Peace Corps, which had to be transmitted to volunteers orally for fear of having it printed and the possibility that it could be read by anyone besides a PCV, states that if a volunteer finds this policy erroneous, he should resign, and if he does not resign, appropriate measures will be taken. Presumably, the appropriate measures are ejection from the Peace Corps. I, for one, do not accept this policy, but I will not resign. I am prepared to meet the consequences.

I wish to make clear in my letter my reasons for rejecting this policy. First, in regard to politics, I completely agree that the volunteer should not meddle in the politics of the host country, but I do not feel that this applies to the international politics of the U.S., which may be of interest to the host country. The volunteer, although a representative of and paid by the U.S. government, does not, upon entrance into the Peace Corps, automatically forfeit any of his rights under the First Amendment. Nor does any other

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7 The full text of the letter is sufficiently important to an understanding of the case that it merits reprinting here:

June 5, 1967
Concepcion, Chile

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letter charged that the directive deterring signers of the petition "had to be transmitted to volunteers orally for fear of having it printed and the possibility that it could be read by anyone besides a PCV [Peace Corps Volunteer] . . ." While making clear that he thought it inappropriate for volunteers to "meddle in the politics of the host country," Murray maintained that such constraints were inapplicable to "international politics of the U.S. which may be of interest to the host country." The letter further argued that public expression of dissent from American foreign policy was protected by the first amendment and was generally allowed to other federal employees. The letter continued that the author's effectiveness as a volunteer was compromised by restrictions on his ability to communicate effectively with citizens of the host country: "I find it a contradiction for the Peace Corps to try to suppress any part of the personality of the volunteer and I shall not tolerate any such suppression." Finally, the letter reaffirmed Murray's refusal to remove his name from the petition, whatever the consequences.

After the Times had declined to print the letter, Murray submitted a Spanish translation to a Chilean daily, El Sur, which published the full text and a photograph of its author. Copies of the English text had meanwhile been sent by Murray to the regional directors in Chile, and forwarded by them to Peace Corps Director Jack Vaughn in Washington. One of the local directors had dis-

employee of the U.S. government forfeit such rights. Furthermore, working for the U.S. government does not put the employee under any obligation to guard his silence in respect to a government policy with which he does not agree. Also, the First Amendment does not restrict a person from using the position in which he is employed, be it PCV or any other form of employ-ment, on a petition or any other form of protest.

Part of the job of a PCV is to give an opportunity to citizens of a foreign country to know an American citizen in all the varied aspects of his personality including his thoughts on important issues. The better understanding that can result from this interchange of ideas can be a great factor in leading to peace in the world. I find it a contradiction for the Peace Corps to try to suppress any part of the personality of the volunteer, and I shall not tolerate any such suppression.

In conclusion, I wish to state that I continue to oppose the war in Viet-Nam, both as an individual and as a PCV. I do not want my name stricken from the petition I have signed, and I am prepared to sign others in what may be the vain hope that some form of protest can lead quickly to a peaceful conclusion to a cruel, and in my opinion, unjust war.

The following statement by William Douglas is, I think, an apt closing to this letter.

'There is no free speech in the full meaning of the term unless there is freedom to challenge the very postulates on which the existing regime rests.'

Bruce Murray
Peace Corps Volunteer
Concepcion, Chile

300 F. Supp. at 704-05, n.10.

8 Id.
cussed the matter with Murray at some length before the letter appeared in El Sur.

While conducting the university orchestra the following Monday afternoon, Murray was interrupted with a message that the regional director wished him to report at once. The director told Murray that he was being recalled to Washington for "consultation." Since there was no mention of possible termination or even change of assignment, Murray left most of his belongings in Concepcion and took the first plane for Washington. Upon arrival at Dulles Airport, he was met by a Peace Corps officer, who told him to write his Newport address rather than Chile on a baggage claim form because, "you've been terminated." This was the first indication Murray had of any dissatisfaction with his services. (It later...

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10 The Peace Corps' views on dissent had already attracted considerable attention at home. Early in June the New York headquarters of the American Civil Liberties Union began receiving complaints from volunteers in Chile that official pressure was being applied by the embassy and the State Department to discourage signatures on the petition. ACLU Executive Director John DeJ. Pemberton sent strongly worded telegrams to President Johnson and to Peace Corps Director Vaughn urging that volunteers in Chile be informed "that they are free to sign the petition in question and that the government intends no intimidation in the exercise of their First Amendment rights." The telegram also announced that the ACLU would furnish counsel to any volunteer dismissed or penalized for refusal to heed official warnings against signing the petition. American Civil Liberties Union, Press Release No. 279, June 13, 1967. (Reports received by ACLU in New York indicated that volunteers were read a memorandum from Peace Corps Director Vaughn asking for the withdrawal of signatures and recommending that volunteers who refused to withdraw their names should resign from the Corps. Most of the signers had refused to comply.)

It is quite unclear what rule or regulation precipitated Murray's discharge. No provisions of the governing statute appear to restrict activities of this sort by Peace Corps volunteers. One who enrolls in the Corps is required to take an oath and to swear that he does not advocate the overthrow of the government and is not a member, with knowledge of the illegal aims, of an organization that advocates the overthrow of the government. 22 U.S.C. § 2504(j) (1964). The statute does authorize the President to promulgate regulations governing the "terms and conditions of the enrollment, training . . . and all other terms and conditions of the service of volunteers . . ." 22 U.S.C. § 2504(a) (1964). But the regulations do not deal directly with dissent or protest. Probably the most apposite provisions are those governing political activity, which simply note the applicability to Peace Corps volunteers of the Hatch Act, and explain that "[t]hese restrictions do not affect the right of employees to express their personal political opinions, so long as they do not take an active part in political campaigns or management or to participate in the activities of national or State political parties to the extent that such participation is not proscribed by law." 22 C.F.R. § 301.735-4(a) (1969). The regulation notes that the Foreign Service Act "prohibits any Foreign Service employee from (1) corresponding in regard to the foreign affairs of any foreign government, except with proper officers of the United States, and (2) recommending any person for employment in any position of trust or profit under the government of the country to which he is detailed or assigned." 22 C.F.R. § 301.735-4(d) (1969). One other regulation provided that no employee may "submit for publication any writing the contents of which are devoted to the Peace Corps' programs or to any other matter which might be of official concern to the U.S. Government without in advance..."
turned out that the regional director had in fact recommended termination and knew at the time he summoned Murray from the orchestra rehearsal that he would be dismissed."

Meanwhile, the executive director of the Newport draft board telephoned Murray's mother (who knew nothing of these events) to say that her son was on his way home. When Murray called a few hours later, he discovered not only that his imminent arrival was no surprise to his mother, but that a notice of reclassification (from II-A to I-A) was already on its way to Concepcion. It later developed that the draft board had taken this action at least ten days earlier—two days after the original letter was dispatched to the Times.11

Murray learned on September 11 that his internal appeal from the reclassification had been rejected and that he was to report for induction early in October. He promptly consulted ACLU lawyers in New York. With their help he prepared an application for exemption as a conscientious objector, but the local board summarily refused to reopen the classification to consider its merits. When Murray appeared at the center on October 16, he refused to submit to induction. Early in January he was indicted for refusing induction.

Immediately thereafter, the ACLU attorneys brought suit on Murray's behalf against the Director of the Peace Corps, the state and local Selective Service officials and the United States Attorney for the District of Rhode Island. The complaint alleged that the dismissal and the reclassification independently violated Murray's clearing the writing with the Executive Secretary." 22 C.F.R. § 301.735-6(c)(3) (1969).

Apparently the official reprisals for the antiwar petition rested not on any of the foregoing provisions but rather on an admonition found in the Peace Corps Handbook: "With respect to both United States domestic issues and our Government's foreign policy, you are free to express your views to your co-workers and to other Americans. Be sure, however, that in doing so you do not leave the impression that you are speaking on behalf of the Peace Corps or the United States Government. Since the identification is virtually impossible to avoid when the forum is a public one, the Peace Corps asks that you avoid discussing political issues, either United States or host country, through host country news media or at public gatherings. You may express your views on United States issues in the American press or by petitioning United States Government officials using, if you wish, your Peace Corps identification." See N.Y. Times, Oct. 17, 1969, §1, at 13, col. 1.

11 For a detailed summary of the intricate facts surrounding this aspect of the case, see Murray v. Blatchford, 307 F. Supp. 1038, 1044-45 (D.R.I. 1969). Although the plaintiff had alleged a conspiracy between the Peace Corps and the Selective Service System to punish him for his expression of dissent, and that issue was reserved in the preliminary rulings, the court eventually found such a claim incredible in view of the close proximity between the sending of the first letter and the termination of the deferment.
constitutional rights, and that there had in addition been collusion between the two responsible government agencies to penalize Murray's expression of dissent. The suit requested appropriate relief, including an injunction against the imminent criminal prosecution, reinstatement in the Peace Corps and restoration of the occupational deferment.

The case was under advisement for some months following preliminary argument. In June, 1969 the district court denied motions to dismiss, finding jurisdiction as to all matters and setting the case down for trial in the fall. A seven day trial took place in September and October. On Christmas Eve the court reached a decision on the merits, finding in Murray's favor on all counts.

The preliminary opinion ruled on two matters of most immediate concern here—the validity of Murray's dismissal from the Peace Corps and the availability of pre-prosecution review of the draft reclassification. These holdings were reaffirmed following the trial. In addition, the court held that both the Peace Corps and the Selective Service System had failed in critical respects to follow the procedures prescribed by their own regulations. Although no substantial evidence existed of conspiracy or collusion between the Peace Corps and the Selective Service—the deferment having been withdrawn before news of Murray's letter could possibly have circulated through inter-agency channels—the court concluded that "had Murray not been terminated from the Peace Corps, he would have received, upon request, a II-A occupational deferment for the

14 For discussion of these procedural errors and irregularities, see text accompanying notes 16-18 infra. In view of the failure of the Peace Corps to adhere to its own regulations, the court found it unnecessary to decide an important and novel question raised by the complaint—whether a Peace Corps volunteer is constitutionally entitled to a hearing and to accompanying procedural safeguards before being dismissed. As the court recognized, in declining to reach the question: "The minima required by due process in the context of a termination from Peace Corps service has [sic] never been decided. Because such a decision would ... require a searching analysis of various agency procedures, and would reach to the frontiers of constitutional development, I am reluctant to carry it out at the trial level, in a case such as the instant one where it is clear that the involved agency has violated its own regulatory framework for termination." 307 F. Supp. at 1052. For a recent and hesitant suggestion that a public employee may be constitutionally entitled to a hearing under comparable conditions, see Olson v. Regents, 301 F. Supp. 1356 (D. Minn. 1969).
remainder of his Peace Corps service."\textsuperscript{15} Even if such a request were not granted \textit{pro forma}, pursuit of available internal remedies would presumably still have enabled Murray to reach his twenty-sixth birthday, thus permanently removing the threat of military service before he could be inducted. Thus proof of collusion or conspiracy was unnecessary to find that the acts of one agency had unlawfully exposed Murray to the reach of another from which he should have been immune.

There were, moreover, a number of serious irregularities in the procedures of both agencies. The Peace Corps, in violation of its own regulations or policies, had failed to apprise Murray of his termination while he was still in the field; had never informed him of the content of the charges; had not told him of his right to retain counsel and to challenge or refute the adverse inferences by confronting his accusers and in other ways; and had not invited him to prepare his own statement of the case prior to his terminal interview with the Director. Though each of these transgressions may have appeared slight by itself, the court concluded that "the fundamental wrong which weaves itself throughout the whole fabric of Murray's termination was that there was no opportunity for vigorous and fully informed adversarial confrontation on the issues raised . . . ."\textsuperscript{16}

If the conduct of the Peace Corps was bad, that of the draft board was worse—at least procedurally and functionally the more egregious of the two administrative performances. Although the notice sent to Murray so stated, the court found that in fact no vote was ever taken on his initial request to reopen. This constituted a clear violation of Selective Service regulations. Moreover, the handling of the request for a conscientious objector exemption "in the face of a classic and clearly stated \textit{prima facie} claim" provided

\textsuperscript{15} 307 F. Supp. at 1048. The court relied in large measure upon the long experience of cooperation between the Peace Corps and the Selective Service with regard to deferment of volunteers. Testimony by the Selective Service Liaison Officer of the Peace Corps disclosed that of more than 20,000 volunteers who served between 1961 and 1969, only eight entered Peace Corps service with a II-A deferment that was terminated prior to the scheduled end or actual conclusion of volunteer status. No volunteer lost his deferment under these conditions before the fall of 1967. Moreover, no volunteer from Rhode Island had ever been inducted prior to the conclusion of Peace Corps service.

This general impression of the relations between the two agencies was reinforced by specific testimony of the only member of Murray's local board who appeared at the trial. Under persistent cross-examination, he admitted "that the fact of whether or not Murray was in the Peace Corps in summer of 1967 was central to the board's consideration of Murray's request for occupational deferment in July and August of 1967." \textit{Id.}\textsuperscript{16}

\textsuperscript{16} \textit{Id.} at 1053.
additional evidence of "procedural lawlessness" by the board.\textsuperscript{17} A confidential memorandum adverse to the C.O. claim had been included in the file without notice to Murray and was later improperly removed contrary to Selective Service rules. Finally, the board's refusal to reopen the case in October to consider the merits of Murray's nonfrivolous request for an exemption violated other applicable regulations.\textsuperscript{18}

On the basis of these findings the court: ordered the Peace Corps to recompute and augment Murray's reassignment allowance (a retroactive reinstatement after the expiration of his original term of duty); ordered the draft board to readjust his file so as to show a II-A classification from the date of the withdrawal in 1967, and to cancel the induction order; and enjoined any further prosecution of the indictment for refusing induction.\textsuperscript{19}

II. A PROSPECTUS: THE INTERDEPENDENCE OF GOVERNMENT BENEFITS

\textit{Murray v. Blatchford}\textsuperscript{20} raises two central constitutional issues: the extent of protection for protest and dissent within the public service, and the availability of judicial review of an allegedly lawless draft classification prior to induction or prosecution. Something must be said at the start about the unique juxtaposition of these two issues. Murray was the recipient and holder of two important government benefits—a position in the Peace Corps, and a temporary exemption from military service. Since the granting of the deferment was based entirely upon his service as a volunteer, we might designate the deferment as the secondary benefit and the Peace Corps position as the primary benefit. The case is intriguing because the withdrawal or cancellation of the primary benefit brought about the termination of the secondary benefit.

The interdependence of two valuable government benefits is hardly unique to the Murray case. Frequently the termination of one beneficial status will bring about the loss of another—a student is expelled from a state university and thereupon loses both his federal fellowship\textsuperscript{21} and his draft deferment; a city employee

\textsuperscript{17} Id. at 1057.
\textsuperscript{18} Id. at 1053-57.
\textsuperscript{19} Id. at 1059. In Murray v. Vaughn, 300 F. Supp. 688, 694-703 (D.R.I. 1969), the court had already resolved various procedural and jurisdictional doubts about the propriety of issuing such mandates.
is fired and the next day is evicted from the low-rent housing project provided for municipal workers; a lawyer is disbarred by the state courts and automatically loses his right to practice before the federal court in the same state. In each case it is essential to untangle the threads in order to assess the options (and the obstacles) facing the beneficiary who suffers two blows because of a single act.

Naturally the beneficiary will start by trying to recover the primary benefit. If he succeeds, the restoration of the secondary benefit may follow automatically if its withdrawal was an automatic result of the primary forfeiture. It may suffice simply to notify the agency or official responsible for dispensing the secondary benefit that the primary status has been restored. However, restoration is often uncertain, for although termination of the secondary benefit may indeed have been an automatic or reflexive act, the secondary benefactor may now be unwilling to reverse its position without an independent review of the claimant's eligibility. Alternatively, it may decide that the beneficiary is a bad risk for the future, and that its constituency would be better served by not taking a second chance.

If the secondary benefactor declines to restore the status quo ante, the next step is litigation. Where the decisions and acts of the benefactor are readily reviewable, a restoration order may follow promptly. But if—as is far more often the case with government benefits—the dispensing judgment is either discretionary or otherwise insulated from court review, the beneficiary may be unable to obtain complete redress no matter how wrongful or improper the original forfeiture.

The question then arises whether the particular circumstances of the case—the special relationship between the two benefits—militate sufficiently in favor of judicial review to overcome obstacles that would ordinarily be preclusive. The argument for review is compelling, for example, where the termination of the primary benefit has been held to abridge the beneficiary's first amendment rights, or to have violated due process. The case is less substantial but still persuasive where constitutional rights are not implicated but where the primary agency has simply acted lawlessly (e.g., in disregard of its own rules), or out of error or mistaken judgment. Here the beneficiary cannot fully regain the status to which he is legally entitled simply by getting back the primary benefit. Unless a court will hear his plea for restoration of the secondary benefit as well, his grievance remains substantially unredressed. And in some cases, restoration of the primary benefit without the second-
ary may even be futile—if, for example, the wrongfully expelled student has meanwhile been drafted or cannot remain in school without financial aid; or if the municipal worker cannot afford housing except in the civic project; or if the improperly disbarred attorney has a principally federal court practice.

The Murray case poses the problem of interdependent government benefits most acutely for three reasons: first, because Murray's claim to restoration of the primary benefit rests on very firm constitutional ground; not only have first amendment liberties of expression and association been abridged, but procedural due process has arguably been denied. Second, judicial review of termination of the secondary benefit is unusually elusive; Congress has raised a very high barrier by a recent law permitting federal courts to review Selective Service reclassifications only in criminal prosecutions for refusing induction. Third, the restoration of the primary benefit without resumption of the second would be a hollow victory indeed: it would do Murray little good to be assured during basic training or while enroute to Vietnam that he was wrongfully removed from the Peace Corps and thus should never have lost his deferment.

Unless he can persuade a court to consider both claims (while protecting him equally from induction and prosecution) the vindication of his primary claim will be meaningless. Thus the critical issue of the case is whether a finding in Murray's favor on the first count will suffice to carry the second claim over the very high jurisdictional threshold that Congress has erected. The answer to the second question demands a careful answer to the first. Accordingly we begin by analyzing the scope of a public employee's constitutional right to engage in protest and to criticize national or agency policy.

III. Public Employment and Political Protest

A. The Special Case of the Peace Corps Volunteer

Before reaching the constitutional issues, brief attention must be given to two threshold problems, peculiar to Peace Corps type activities, not considered by the district court. Initially, there may be some doubt whether one who serves in the Peace Corps can claim the legal safeguards now afforded public employees. He is designated a "volunteer" and receives only nominal compensation

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for his service. Arguably, therefore, he should receive only diminished constitutional protection or none at all.

There is, however, a dispositive case to be made for a definition of public employment broad enough to ensure the Peace Corps volunteer the full panoply of constitutional safeguards.

First, he does in fact receive both monetary and non-monetary benefits of substantial value. Moreover, to stress the quid pro quo of the relationship by looking at salary and the like really misses the basic point. Even if Peace Corps service were wholly gratuitous—indeed, especially if it were—there would be cruel irony in denying to one who serves without remuneration the constitutional safeguards now assured to those who work for government at competitive salaries. While there may be incidental or part-time jobs to which these protections do not properly apply, the reason for suspending them would almost invariably be the discretionary character of the appointment rather than any lack of reciprocity in the arrangement. And even if volunteering a few hours a week does not constitute true "government employment," the same can hardly be said of one who devotes his full time for a year or more to the service of his government overseas. As though to confirm this view, the regulations governing the Peace Corps fully subject volunteers to the conditions, restrictions and limitations by which most federal civil servants are bound. Thus there is little doubt that Congress intended Peace Corps service to carry

24 22 U.S.C. § 2504(c) (1964) ("readjustment allowances").
26 22 U.S.C. § 2504(c) (1964) ("at a rate not to exceed $75 for each month of satisfactory service as determined by the President.") Although such compensation is noncompetitive with salaries for other government positions, and the living allowances are modest, the opportunity to travel and to serve in exotic foreign lands would by themselves constitute sufficient consideration to make the relationship one of mutual benefit. (Travel and transportation allowances are covered by 22 U.S.C. §§ 2504(b) (1964)). In addition, there are incidental or fringe benefits of considerable value—various forms of insurance on health and life (22 U.S.C. §§ 2504(d), (e), (f) (1964)), a government commitment to pay any legal costs incurred in the course of official duty (22 U.S.C. § 2504 (Supp. IV, 1969)) and a program of counselling for career choice upon return to stateside civilian life (22 U.S.C. § 2504(k) (1964)).
27 22 C.F.R. § 301.735-13 (1969). The statute stipulates that "except as provided in this chapter, volunteers shall not be deemed officers or employees or otherwise in the service or employment of, or holding office under, the United States for any purpose." 22 U.S.C. § 2504(a) (1964).
with its rights commensurate with those responsibilities, even though the draftsmen deliberately used the term "volunteer" for reasons more emphatic than euphemistic.

More importantly, any suggestion that a volunteer cannot claim the constitutional safeguards of public employment insidiously revives the ghost of the long interred distinction between "rights" and "privileges" in the law of government benefits. It is manifestly impossible to draw a line which differentiates activities and interests that merit constitutional protection from those that do not. Some benefits are of much greater importance than others, of course. And courts may properly decline to review claims to denial or uneven distribution of certain types of governmental gratuities. Yet there is no benefit so insubstantial that it can be encumbered or distributed in any way whatever—for example, by being denied to Blacks or Jews or Catholics, or offered only on condition that the recipient give up his right to worship or to vote. Thus to ask whether a Peace Corps volunteer is paid enough to make him a government employee is to raise an argument that can be readily dismissed; but it is also to ask the wrong question altogether, and to pose the issue in a dangerously misleading way. Today we know enough about the law of government benefits to avoid the trap.

A second threshold matter may be easily resolved. The Government originally argued in Murray that judicial review was inappropriate or even unavailable because Peace Corps volunteers serve "at the pleasure of the President" and are thus subject to summary dismissal, for reasons good or bad, by the Peace Corps Director who is the President's delegate. The argument was buttressed a bit by a suggestion that the foreign relations power was somehow implicated, and that courts should thus be even more inclined than usual to keep hands off. Though the claim received but brief attention in the preliminary opinion, the district court gave the correct and sufficient reply. If the use of terms like "at the pleasure of the President" sufficed to insulate discharge and dismissal decisions from judicial review, then even the most flagrant violation of constitutional rights might lie beyond the reach of the courts unless civil service or tenure statutes furnished channels of review. Employees who had not yet attained that degree of job security could thus be dismissed at the political, racial or religious whim of a superior and would be without recourse of any kind.

kind. Courts have consistently rejected this notion in analogous contexts\(^3\) and no governmental interest advanced in the Murray case warrants a special immunity for the Peace Corps.

B. The Public Employee's First Amendment Right to Criticize

The right to criticize or protest government policy is a special component of a rapidly evolving and expanding body of constitutional law. The time was, not so long ago, when courts still accepted the view of Mr. Justice Holmes that a man "may have a constitutional right to talk politics, but he has no right to be a policeman."\(^3\) As recently as 1952, the Supreme Court upheld New York's loyalty-security law on the pretext that workers who did not like disclaimer-type oaths were always "at liberty to retain their beliefs and associations and go elsewhere."\(^3\) The underlying premises, which died hard, were that public employment was somehow a "privilege" rather than a "right"—a notion which gave the employer unlimited power to dispense or withhold; and that since government agencies possessed the "greater" power to deny employment to an applicant, they could with impunity exercise the "lesser" power to offer civil service positions on any conditions they wished.

These fallacies have finally been put to rest by clear recognition of the damage that may be done to first amendment liberties by the conditioning of such an important benefit. The Supreme Court has declared in recent cases that "public employment may [not] be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."\(^3\) While declining to classify public employment as a "right" or "privilege", the Court has insisted that the undoubted governmental power to refuse to create jobs or to hire a particular applicant may not be used to stifle expression or political activity.\(^3\)

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This rapid evolution of legal protection for the liberties of the public worker has naturally left lacunae. One special problem, frequently before state and lower federal courts, has been the scope of a government employee's right to criticize government policy or the acts of his superiors. That question eventually reached the Supreme Court through the cases of two public school teachers discharged because of sharply critical and allegedly false public statements they had made about school administration policy. Both state courts had sustained the dismissals without probing the constitutional questions very deeply.

In *Pickering v. Board of Education*, the Supreme Court reversed and remanded both cases. An opinion by Mr. Justice Marshall answered the immediate question—the extent of constitutional protection from reprisal for false statements about the policies of one's own agency—but left many others unresolved. On the particular issue at bar, the Court agreed that a public employee should be treated no more harshly than a member of the general


Meanwhile, the courts of several states have built even tighter safeguards for the government worker. The California Supreme Court, most notably, has insisted that governmental restrictions on the political liberties of civil servants be justified by a demonstration: "(1) that the political restraints rationally relate to the enhancement of the public service; (2) that the benefits which the public gains by those restraints outweigh the resulting impairment of constitutional rights; and (3) that no alternatives less subversive of constitutional rights are available." Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 501-02, 421 P.2d 409, 411, 55 Cal. Rptr. 401, 403 (1966). See also Rosenfield v. Malcolm, 65 Cal. 2d 559, 421 P.2d 697, 55 Cal. Rptr. 505 (1967); Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).

Apart from or beyond the cases, scholars and commentators have sought to develop even firmer protection for the rights of public employees. Professor Hans Linde has, for example, argued that restrictions on government employment should be valid or invalid, depending upon whether government could compel private employers to impose the same restrictions and conditions on their workers. Linde, *Justice Douglas on Liberty in the Welfare State: Constitutional Rights in the Public Sector*, 40 Wash. L. Rev. 10, 75-77 (1965). Recently Professor William Van Alstyne has analyzed and taken issue with Professor Linde's test, although he concurs in the importance of expanding the essential guarantees of liberty in the public sector. See Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A. L. Rev. 751 (1969).


public whose similar statements might subject him to civil liability for defamation. That is, dismissal could be justified only by “proof of false statements knowingly or recklessly made” by the public employee. The Court was to a perceptible if uncertain degree influenced by the relationship between the teacher and the content of the statements: since none of the accusations pertained to matters about which the teacher had special knowledge, and since they contained no attacks upon named colleagues or superiors, “the fact of employment is only tangentially and insubstantially involved in the subject matter of the . . . communication. . . .” The Court left open the possibility of different disposition of a number of cases involving arguably stronger governmental interests.

Clearly the Pickering decision was limited to situations in which a government agency discharges an employee for false attacks on official policy or conduct. The case did not purport to deal with reprisals for the unauthorized release of statements that are accurate—although a footnote suggested that “the need for confidentiality . . . [might be] so great that even completely correct public statements might furnish a permissible ground for dismissal.” Situations fitting the supposition can readily be imagined: an agency is about to launch criminal investigation, and a member of the staff leaks advance notice to the press. A compromise is effected which has the most sensitive implications for foreign policy, and the inside story is carelessly or maliciously given to a reporter before the treaty is signed. Drastic changes are made in the penultimate version of a budget before submission to the legislature, and copies of the earlier document are publicly distributed. A law clerk tips his friends off about the result of a forthcoming decision so they may speculate profitably in the stock market. In countless situations, strong governmental interests demand confidentiality and secrecy. But before a breach of these interests will warrant a sanction so drastic as dismissal, two requirements seem appropriate: first, that there be a specific rule or regulation defining the scope of confidentiality and secrecy; and second, that the unauthorized or premature disclosure be shown in each case to impair the operations of the agency quite substantially—perhaps even to the extent of a clear and present danger.

It is equally clear that Pickering does not touch the case of the public worker who attacks the policy of his government or his superiors in terms that are neither true nor false because they con-

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39 Id. at 574.
40 Id.
41 Id. at 570 n.3.
vey opinions and judgments rather than facts. Most internal criticism of the Vietnam War policy is of this type. Such attacks may well contain statements that seem susceptible to proof of truth or falsity. Yet closer analysis suggests the inappropriateness of applying such a test. If a government employee charges that the United States pursues an "immoral and unlawful" policy in Southeast Asia, or is in fact the aggressor, or is supporting a puppet government in Saigon against the wishes of the majority of the Vietnamese people, etc., it would surely be unsound to rest his fate upon his ability to demonstrate the truth—or the government's capacity to prove the falsity—of each of these charges. Similarly, the use of pejorative epithets—public name-calling and worse—may impair the dignity, if not the morale and the efficiency, of the civil service. But the issue of truth has no place in judging the appropriateness of censure or discipline.

A more pertinent inquiry would rest upon the relevant government interests that may warrant sanctions against such an employee. The Murray case itself is illustrative: the letter that led to Murray's dismissal did contain a few statements of fact amenable to a test of truth—for example, the allegation that the Peace Corps directive had to be transmitted orally for fear that a printed document might reach unfriendly hands. But the bulk of the letter consisted of opinion, judgment, and criticism about Peace Corps policy—hardly the sort of material that one could profitably call "true" or "false." The much more relevant issue in such cases is whether and to what extent government agencies may censure statements that are critical and possibly damaging because of the strength of the opinion or of the rhetoric rather than because of any distortion of the truth.

1. Maintaining the Efficiency, Morale and Discipline of the Public Service

The strongest case for censure is one in which a subordinate's accusations seriously jeopardize the efficiency, morale or discipline of the agency. In Pickering, the Court expressly distinguished charges and accusations which might make it impossible to maintain "either discipline by immediate superiors or harmony among co-workers. . . ."42 Three criteria must be reviewed in applying this precept: the content and character of the statements; the relationship between the critic and the object of the criticism; and the relationship between the critic and his sources of information.

42 Id. at 570.
a. Character or Content of the Statements. In the Pickering case Mr. Justice Marshall suggested that "a teacher's public statements...[might be] so without foundation as to call into question his fitness to perform his duties in the classroom." A worker might in any of several ways indicate through his charges or accusations his unsuitability for the position he holds. The first and most obvious instance would be the one Justice Marshall presumably had in mind—where the statements depart so far from the truth, reflect such critically poor judgment or reveal such deep-seated hostility toward the critic's superiors that they go to the core of the employee's suitability for his job.

The character of the statements might also be highly relevant if they called for insurrection or revolt against the agency or its administrative officers. Two California cases suggest the application of this criterion. In 1960, Pranger v. Break sustained the discharge of public employees who had made critical and possibly inflammatory statements to the press during a salary dispute. In contrast, the court six years later in Belshaw v. City of Berkeley ordered the reinstatement of a Berkeley fireman discharged for sending the local newspaper a letter criticizing the disparity between firemen's and policemen's pay scales. The second court found the two cases readily distinguishable because statements in the first case seemed to incite "a sit-down or strike or other unlawful pressure" which would be illegal and seriously disruptive.

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48 Id. at 573 n.5.

A very recent decision of the United States Court of Appeals for the District of Columbia suggests the application of this governmental interest. The case, Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), concerned a civilian instructor employed by the Air Force to provide English language training to foreign officers who were guests of the United States Government as Lackland Air Force Base. After several warnings against using his classroom for discussion of controversial political subjects, he was dismissed for making two particularly sensitive statements—one to the effect that "those who burned themselves to death as a protest against the Vietnam war are the true heroes, and he wished he had the courage to do it himself"; the other "that Jews are discriminated against in America, and that he had felt such discrimination throughout his life, including his service at the Language School." Id. at 1171. Goldwasser brought suit in the district court seeking review of his discharge, but was denied relief. The Court of Appeals affirmed over the dissent of Chief Judge Bazelon. Writing for the majority, Judge McGowan distinguished Pickering in part because the statements involved there took place out of class, while the statements for which Goldwasser was discharged had all been in-class, on-the-job comments. Moreover, the court stressed that Goldwasser had deviated from his assigned pedagogical task to the extent that he discussed politics and international relations rather than the English language: "Appellant's observations on Vietnam and anti-Semitism would appear to have, at best, minimal relevance to the immediate classroom objectives." Id. at 1177.

46 Id. at 497, 54 Cal. Rptr. at 730.
Where declarations of a government worker constitute such a threat to the order and integrity of the public sector, discipline might well be warranted. But the concession is inapprupto Murray, where none of the statements could be read as urging action by anyone but the author.

b. Position of the Speaker in the Public Service. Equally pertinent is the position the critic holds in the governmental hierarchy. The opinion of the Court in Pickering clearly indicated the strength of the governmental interest in regulating statements "directed toward any person with whom [the critic] would normally be in contact in the course of his daily work. . . ." The prospect of subversion of "discipline" and "harmony among co-workers" appeared to vary inversely with the distance between the accuser and the accused.

A recent federal court of appeals decision, Meehan v. Macy,\(^{48}\) nicely illustrates the point. The case involved non-native police officers in the Canal Zone who publicly expressed their opposition


\(^{48}\) 392 F.2d 822 (D.C. Cir. 1968). While the facts of Meehan are suggestive, the soundness of the result has been seriously questioned by Pickering and other subsequent cases. A recent decision of the Maryland Court of Appeals on strikingly similar facts reflects a more sensitive approach. The case, Brukiewa v. Police Comm'r of Baltimore, No. 149, Sept. Term, 1969 (Md. Ct. App. Feb. 13, 1970), involved a police officer who had appeared on a local television program and made statements highly critical of the administration of the police force. He charged, inter alia, that department morale "hit its lowest ebb, right now"; that "the men feel right now they are completely lost from the public"; and that "the bottom is going to fall out of this City." The trial judge sustained a one-year suspension of the officer, noting that these statements were especially dangerous to department morale and efficiency because they closely followed the April, 1968 riots and attendant public criticism of law enforcement agencies.

The court of appeals reversed the suspension, relying heavily on Pickering and attempting to distinguish Meehan. Noting that none of the statements in question were alleged to be false, the court found no basis for the inference "that the utterances were in fact corrosive of confidence in the police department and tended to widen the breach between the police and the public . . . ." Further, neither the department nor the disciplinary board "made any findings which would support the State's right to inhibit or hamper Brukiewa's right to speak freely on matters of public importance, particularly matters as to which he had experienced expertise." The proper test to be applied in such a case placed "the burden . . . on the State to establish that public utterances make the utterer unfit for public service or adversely affect public services to a degree that justifies their restriction."

Although the Maryland court did attempt to distinguish Meehan in terms of the substance of the statements, the more pertinent consideration was that Meehan's "reasoning and philosophy are not in accord" with New York Times and Pickering. Moreover, an unreported en banc decision of the District of Columbia Circuit, after Pickering, had vacated the earlier judgment and remanded for further consideration in light of the supervening change in applicable law. Meehan v. Macy, No. 20,812 (D.C. Cir., May 12, 1969). Thus Meehan was at best dubious precedent for post-Pickering cases.
to the Governor's decision to bring more Panamanians into the police force. Despite official warning, the president of the Policemen's Union, one Richard Meehan, held an interview with Associated Press and New York Times reporters. During the interview he made statements highly critical of the Governor's personnel proposal. A week later, Meehan intensified his criticism by distributing copies of a letter and a poem that lampooned the Governor. The letter urged each reader to write his congressman to protest the hiring plan. Meehan was thereupon dismissed for conduct unbecoming an officer, disregard of a command not to talk with the press, and failure to clear his statements with the Governor's office. The court of appeals sustained the discharge under Civil Service regulations.

The court first gave attention to the character and quality of Meehan's statements. The poem they found an "intemperate lampoon" and the epithets in the letter had a "contemptuous quality." The opinion then turned to the second factor—the position of the critic in the governmental hierarchy. Since Meehan was both a police officer and an official of the union, his strategic place in the Canal Zone service imposed upon him a special responsibility and compelled a higher degree of loyalty than might reasonably be required of others. Moreover, the case arose at a "tense and troubled time and place" because of the turmoil in the Zone that led to the gubernatorial decision to change police hiring practices.

These factors clearly differentiate Murray's case from Meehan's. Even if Meehan has survived the Supreme Court's holding in Pickering unimpaired, which is doubtful, it does not control Murray for several reasons. First, the position of the Peace Corps in Chile during the summer of 1967 was certainly not so precarious as to warrant special precautions or emergency restrictions on speech. Second, whatever the general status of his branch of the public service, Murray's own position in the hierarchy was so insensitive and inconspicuous that his public statements would not attract the attention naturally given to Meehan's statements about the Canal Zone police. Nor would anyone, either in Chile or at home, reasonably suppose that Murray had access to confidential or secret information that would give his statements a credibility not ordinarily due a person at his rank or level. A contrasting review of these two cases thus suggests the relevance to the scope of civil servant's first amendment rights of the position he holds in the public service—not only his rank, but even more important.

49 Id. at 836.
EMPLOYMENT, PROTEST, REVIEW

the functional relationship between his position and the position of those he criticizes.

c. Relation of the Speaker to the Source of Information. If the critic’s relationship to the object of criticism is relevant, account should also be taken of the proximity of the critic to the information on which his criticism is based. Justice Marshall’s opinion in *Pickering* suggested that the case might well be different if “a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher’s presumed greater access to the real facts.”

Since the case itself involved a classroom teacher expressing views on the use of funds for athletic programs, “the fact of employment is only tangentially and insubstantially involved. . . .” These comments suggest a possible formula for cases of this sort: the scope of a public servant’s freedom to criticize his superiors should vary *inversely* with his proximity to confidential or privileged information, since the credibility of his charges would presumably vary in direct proportion to such access.

There are, however, persuasive reasons for expanding rather than contracting the privilege to comment as one approaches the source of information. When *Pickering* was before the Illinois Supreme Court, Mr. Justice Schaefer noted in his dissenting opinion that “teachers are in closer contact with the actual operation of the schools than anyone else and the public should not be deprived of their views.” Thus the public interest in permitting criticism of official policy increases with proximity between critic and information; the employee who attacks from the sidelines may not be believed as readily as the man in the center, but there is correspondingly less reason why anyone *should* believe him. It is also true that the critic who has access to inside information can do much more damage than one who is just guessing. Yet if the law does not permit the man who knows the truth to disseminate it with substantial latitude for distortion, then the truth may never reach the public. The risk of falsification by one who knows better

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51 *Id.* at 574.
52 *Pickering v. Board of Educ.*, 36 II. 2d 568, 584, 225 N.E.2d 1, 10 (1967) (dissenting opinion). Essentially the same conclusion was reached by the Maryland Court of Appeals in *Brukiewa v. Police Comm’r of Baltimore*, No. 149, Sept. Term 1969 (Md. Ct. App. Feb. 13, 1970). In upholding the discharged police officer's constitutional right to make critical statements about morale and efficiency within the force, the court emphasized his opportunity “to speak freely on matters of public importance, particularly matters as to which he had experienced expertise.”
is undoubtedly a substantial one, for all the obvious reasons. Moreover, the act of falsification by one holding such a position of trust is particularly reprehensible. There may indeed be occasional cases in which the insider should be given less latitude if, for example, he distorts the truth for personal gain or out of sheer malice. Yet in the typical case, Justice Schaefer seems to have the better of the argument; the public interest in allowing the man who has access to the information broad latitude in disseminating it outweighs the interests of those who may be hurt by exaggeration or distortion in the process.

d. Amount of Time Devoted to Protest Activity. There is a further factor that might justify curtailment of criticism to protect the internal efficiency and integrity of the public service. One can imagine a disgruntled public employee becoming so involved in a dispute with his superiors that the performance of his assigned task suffers badly. Deterioration in his work may result either because he cannot concentrate on the job when feelings about agency policy are so intense, or because he simply devotes so much of his working day to politics that his formal duties are slighted. It was this prospect that convinced Justice Frankfurter a decade ago that Arkansas should be allowed to ask all public employees what organizations they belonged to each year. The governmental interest in seeing that employees do stay on the job during working hours and make the public service their primary commitment in those hours cannot be gainsaid. Yet the enforcement of that interest poses substantial threats of abuse as a device to remove thorns from the side of a harried or timid administrator.

e. Effects of Restrictions on Agency Morale. Finally, there is a latent conflict between short and long range assessment of curbs on political activities of public employees. Restrictions that do indeed promote the present efficiency of the civil service may in the long run so undermine morale of those who are bound by them that the efficiency of the institution will ultimately suffer. The case of the Peace Corps provides the perfect illustration of this tension. Murray suggested in his letter what might be the effect on morale of the curbs he was attacking: “Part of the job of a PCV is to give an opportunity to citizens of a foreign country to know an American citizen in all the varied aspects of his personality including his thoughts on important issues. . . . I find it a contradiction for the Peace Corps to try to suppress any part of the personality of the volunteer. . . .” As the letter suggests, re-

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54 See Murray letter, supra note 7.
pressive restrictions of the sort that "angered" Murray and provoked his responses are likely to alienate and embitter idealistic young men and women who entered the Peace Corps with high hopes and motives.55

There is recent evidence of widespread support for Murray's view of the effect of such restrictions. During the anti-Vietnam War moratoria in October and November 1969, Peace Corps volunteers in many countries signed petitions and took part in other forms of protest, fully aware of the risks.60 Three volunteers in Turkey resigned after the regional director recommended their dismissal for taking part in moratorium day demonstrations outside the United States Embassy in Ankara. Faced with such reprisal, they said they found their jobs "meaningless," and had come to regard the Corps as "a clean, smiling commercial of American militarism, materialism, and racism."67 Meanwhile, volunteers in Bolivia, Columbia and the Dominican Republic paid for the publication in newspapers and on local radio stations of an indictment of the Vietnam War as "unjust and irrational" and calling for United States withdrawal from South Vietnam. A spokesman for the Dominican group, representing about half the volunteers in that country, found a most enthusiastic response by citizens of the host country. "For the first time," he observed, "many people here have stopped looking on us as CIA agents."68

To a degree at least, the views of volunteers about their own role were shared by former Peace Corps Director Jack Vaughn. During testimony on an appropriations bill in the summer of 1968, Vaughn expressed his belief that Corpsmen should not be required to support United States foreign policy wherever they go. When

55 A similar view has recently been expressed by those in the field, who should be in the best position to comment. About the time Murray was on his way back to Washington, six Peace Corps Volunteers in Ecuador wrote a letter to the New York Times voicing deep anxiety about the implications of the anti-war petition incidents:

Now, it effect, we have been ordered to support the war in Vietnam—
with our silence at least—as long as we remain connected to the Peace Corps.
... We have been partially deprived of our status as free agents, as repre-
sentatives of the American people rather than the American government.
This has damaged our relations with the people with whom we work. Many
of them who strongly distrust the American government had over the past
five years come to regard the Peace Corps as a special sort of organization;
and Volunteers as unusually sincere people. ... Now the distinction between
the Peace Corps and other agencies of the United States has become blurred.
We are losing the confidence of many of the people we came here to help.

56 See Kent, Protestors in Peace Corps More Vocal, L.A. Times, Nov. 18,
§ 1 at 13, col. 1.


58 See de Onis, Dominicans Hail War-Protest Ad, N.Y. Times, Oct. 17, 1969,
§ 1 at 13, col. 1.
challenged by at least one hostile congressman, Vaughn invoked repeated assurances by Secretary of State Dean Rusk that volunteers were "not a part of United States foreign policy, not to be considered as such."

The authorizing statute supports this view to a degree. It identifies the objectives of the Peace Corps as helping international understanding and the manpower training needs of the people of the host countries, rather than serving the transcendent political interests of American foreign policy. Moreover, the role that volunteers play in other countries identifies them much less clearly as representatives of the United States than the diplomatic personnel or non-diplomatic representatives of the State Department, such as staff members of the Agency for International Development. Thus restriction of free expression within the Peace Corps may actually inhibit or jeopardize important interests, both those in internal morale and commitment, and in relations with the people of the country who are the intended beneficiaries of the program.

2. The External Image and Neutrality of the Public Service

If the internal impact of criticism by a staff member is the starting point, the external implications should not be overlooked. Again the Peace Corps well illustrates both the legitimacy of the government interest and the dangers of its abuse. The Corps has a very substantial interest in avoiding friction with or embarrassment to policies and officials of the host country. It is not hard to justify the Peace Corps' decision to send home a volunteer in a newly independent African country who wrote on the back of a postcard addressed to her parents how "primitive" and "unsanitary" she found conditions in the capital city. The government was furious when someone in the post office intercepted the card and transmitted the contents to the chiefs of state. The whole Peace Corps program in that country would probably have collapsed had not the incautious volunteer been dismissed forthwith.
It it also possible to imagine a time so tense and troubled—rather like the conditions in the Canal Zone that led the District of Columbia Circuit to affirm Meehan's discharge—that special emergency strictures are necessary to preserve the neutrality of the Corps. Following a clash between the United States and the host country, for example, anti-American feeling might reach the point where local reporters would be looking for ways to arouse their readers still further by embarrassing the United States. In such a case the regional director might be justified in forbidding, for the duration of the emergency, the public issuance of certain derogatory statements that would ordinarily be innocuous.

Save for emergency situations, however, it is hard to see how statements about United States policy, unrelated to the politics and policies of the host country, could invoke this interest in neutrality and external image. Peace Corps workers in adjacent Southeast Asian countries may well have less latitude to discuss Vietnam policy than their counterparts in other areas of the world. Volunteers in Chile may be a bit less free to impugn United States policy toward Latin America than are their colleagues on other continents. For the moment, however, the relevant cases involve no such sensitive concerns. It will be time enough, when the case does arise, to decide how far beyond host country politics the external interest properly extends.

3. Clearance of Statements and Observance of Channels

Both Pickering and Meehan suggested a third set of governmental interests. In Meehan, the court invalidated a requirement that Canal Zone employees clear any statements to the press with the Governor's office before releasing them—but only because the rule was impossibly vague and probably had "lapsed for desuetude."63 A footnote in Pickering wondered how far "teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon before bringing the complaints before the public."64 Recently the Supreme Court of Iowa struck down a clear-

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ance requirement as applied to firemen who publicized the issues of a labor dispute in which they were involved. Although a fire department was necessarily a "semi-military organization," there was no warrant for requiring clearance, under penalty of loss of employment, "in the absence of a showing of impairment of public service," which had not been made in that case.

Justice Marshall's footnote in *Pickering* about "narrowly drawn grievance procedures" cannot be dismissed as inadvertent. Perhaps there is a governmental interest in requiring the disgruntled employee initially to go through channels. Surely, however, the first amendment would not permit the channel to become a dead-end street—or, for that matter, a maze. Two specific rules might meet the constitutional guarantees now applicable to personnel policies in the public sector: one, a requirement that where the employee really has a dispute with or claim against a particular superior, he first pursue whatever internal remedies are available—if they are adequate and responsive—before broadcasting his grievance to the press or the community. This would represent simply an application of the traditional exhaustion-of-remedies rule, and would merely postpone, not destroy, the employee's right to free speech. Second, the government might require that a copy of any statement critical of the agency or its policies be delivered to the agency head no later than the time of its release to the media. Perhaps prior notification could even be required, to give the agency time to prepare a reply. But surely "clearance" in the usual sense of the term may not be made a condition of continued public employment; the agency managers cannot constitutionally be given a veto over statements critical of them and their policies. Finally, as the court suggested in *Meehan*, any requirement of this sort must quite precisely define its scope and application, so that no reasonable doubts can arise as to who is covered or what kinds of statements must be submitted.

4. Availability of Alternative Means to Serve Valid Governmental Interests

A demonstration of legitimate, even compelling, governmental interests no longer suffices where regulations on public employment affect constitutional liberties. The courts have increasingly insisted

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65 Klein v. Civil Serv. Comm'n, 260 Iowa 1147, 152 N.W.2d 195 (1967).
66 Id. at 1157, 152 N.W.2d at 201.
on the use of minimal regulation. "Even though the governmental purpose may be legitimate and substantial," the Supreme Court has consistently reaffirmed, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."69

Application of this precept involves two inquiries—into the nature of the governmental interest sought to be served on the one hand, and into the narrower methods of implementation on the other. The juxtaposition of these two facets of the Peace Corps problem reinforces the conclusion reached by the Court. The Corps has, as we have seen, a quite legitimate interest in preserving its neutrality, and a less clear but still colorable interest in the overseas image of its activities. A regulation might be drawn to serve only these interests, and to ensure as well a necessary degree of internal discipline and unity. At the very least, volunteers could be prevented from attacking publicly—in the local or the stateside press—the policies or leaders of the host country. Further, under Pickering the reckless or malicious issuance of false and defamatory statements about superiors could be made ground for discipline. Perhaps false statements that are not reckless or malicious could bring about a volunteer's dismissal if they seriously impair the operations or activities of the Corps—if, for example, they so undermine the confidence of host country officials in the regional office that Washington is forced to close it down. Finally, penalties could be provided for the unauthorized or premature divulgence of certain highly confidential, sensitive or secret information, even if the disclosures are factually accurate. But a regulation designed to serve these three specific and legitimate governmental needs could not constitutionally reach either substantially accurate but non-confidential disclosures about the Peace Corps and its officials, or general criticism of United States domestic or foreign policy unrelated to the host country. Thus the only regulations that could have been drawn and enforced consistent with the first amendment surely would not have covered Murray's case. The judgment in his favor thus becomes conclusive by either of several routes.

A brief look at what has happened elsewhere in the public sector confirms this judgment about the regulatory options available to the Peace Corps. The question of protest against the Vietnam War has arisen throughout the federal service during the past

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five years. The Civil Service Commission has taken a surprisingly enlightened position; in April, 1968 Chairman John W. Macy informed a group of irate congressmen that he would take no action against federal employees who signed a petition protesting American involvement in Vietnam. "There is," he replied, "no law or regulation that would prohibit most Federal employees from signing" such a petition, although it was destined for the White House.\textsuperscript{70} Even the army has recently adopted a benign view of protest within the ranks. A memorandum issued in September, 1969 sets forth a number of important constraints on regulation of dissent among the troops: distribution of a publication that is critical, "even unfairly critical" of government policies, may not be barred for that reason alone, but only for "cogent reasons." And a commander in the field must obtain approval from Washington before he does ban a publication on his base.\textsuperscript{71}

The new Army directive is hardly a model for the civilian sector. Undoubtedly many of the restrictions it continues would not pass constitutional muster as applied to non-military employees. Yet it is ironic that the Army has recognized what the Peace Corps apparently has not—at least, had not at the time Murray's case arose. Two points which emerge clearly from the Army memorandum are absent from Peace Corps regulation. The first is that restrictions on speech should be drawn as narrowly as possible to serve only essential needs and interests. Secondly, a reprisal for protest or dissent which seems harsh or disproportionate, "rather than serving as a deterrent, may stimulate further breaches of discipline." One point is based on constitutional principle, the other on practical needs of public administration. Both are important and

\textsuperscript{70} Recently, for example, Senator Sam J. Ervin charged that the Department of Health, Education, & Welfare was requiring misconduct reports on staff members who took part in demonstrations against the Vietnam War. HEW denied the charge, maintaining that no such regulation exists presently or in contemplation. L.A. Times, Dec. 25, 1969, § 1, at 29, col. 1.

\textsuperscript{71} Moreover, servicemen may not be forbidden to frequent off-base coffee houses unless the activities taking place there include "counselling soldiers to refuse to perform duty or to desert or otherwise involve illegal acts with a significant adverse effect on soldier health, morale or welfare." A commander may not punish soldiers who work off-base, on their own time and with their own money on an underground newspaper, "unless that newspaper contains material that is punishable under federal law." Finally, civilians may not be denied a permit to demonstrate in public access areas on or adjacent to the base unless the demonstration would present "a clear and present danger to loyalty, discipline, and morale." The rationale for the memorandum was to "safeguard the service member's right of expression to the maximum extent possible." The Secretary observed, apropos of enforcement and reprisals, that "severe disciplinary action in response to a relatively insignificant manifestation of dissent can have a counter-productive effect on other members of the command," and should therefore be avoided. N.Y. Times, Apr. 6, 1968, § 1, at 15, col. 1.
should give pause to agency heads in the civilian sector who feel they need to curb all antiwar sentiments within their domains.

IV. PREINDUCTION REVIEW OF RECLASSIFICATIONS

Even if Murray's claim to reinstatement in the Peace Corps is irrefutable, a finding in his favor on that issue will do him little good if he has already been either inducted to active duty or imprisoned for refusing induction. Thus the essential corollary question is whether he can (in the same or an ancillary proceeding) obtain judicial review of the draft board's decision to withdraw his II-A deferment because he originally lost the job on which that deferment depended.

The Murray case does not directly raise the issue of review prior to induction; Murray had already been called for induction, had refused to step forward, and was under indictment at the time he filed his civil suit. Thus the narrow question here is one of access to the courts between induction and prosecution. While this may be a somewhat less complicated issue to resolve, many of the same considerations apply as in the preinduction context.

A. Availability of Pre-Prosecution Judicial Review

The necessary starting point on all such questions is the 1967 Selective Service Law amendment which provides that "no judicial review shall be made of a classification or processing of any registrant by local boards ... except as a defense to a criminal prosecution ... after the registrant has responded either affirmatively or negatively to an order to report for induction ..." The application of the statute to the Murray suit is unclear. Murray had already responded (negatively) to an order to report for induction. Yet by seeking to enjoin the reclassification (or recover his deferment) he requested court review of a draft board decision by a civil suit rather than "as a defense to a criminal prosecution." Although the prosecution in which the claim could be raised precisely as stipulated by the statute was already pending in the very same court, it had not yet come to trial. Indeed, this criminal prosecution could not come to trial until after disposition of the civil suit, since the complaint included a prayer for injunctive relief against the United States Attorney.

Despite the uncertainties, a compelling case for pre-prosecution review can be made. First, although this is not in fact the relief

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that Murray sought, the statute clearly implies an exception for
civil review of reclassifications by habeas corpus petition.\textsuperscript{73} As the
Supreme Court has recently observed, although the statute “pur-
ports on its face to suspend the writ of habeas corpus . . . everyone
agrees that such was not its intent.”\textsuperscript{74} Were the jurisdictional pro-
vision of the 1967 amendments construed to foreclose habeas cor-
pus, the most serious constitutional questions would arise. Typi-
cally, habeas corpus would be sought after conviction. But in the
draft context, there is at least one case recognizing the registrant’s
peculiar dilemma and permitting habeas corpus after receipt of an
induction notice, since the strong possibility of indictment places
him in “constructive custody.”\textsuperscript{75} Murray’s case should follow a
fortiori, for Murray had already refused induction, been indicted
and was awaiting trial.\textsuperscript{76} Thus an exception must clearly be read
into the statute in such a case in order to spare a direct conflict
with the habeas corpus guarantee of the Constitution.

There is a second channel of judicial review that is presumably
open to a registrant in Murray’s position: a motion to dismiss the
criminal charges on constitutional grounds. It could be argued, for
example, that reclassification based solely upon the exercise of a
registrant’s first amendment rights may not constitutionally be
maintained. For even under the narrow standard of review govern-
ing draft prosecutions,\textsuperscript{77} such a claim would certainly warrant care-
ful consideration before setting the case down for trial.

Since two avenues of judicial review already exist in such a
case, it would appear a needless formalism to force the registrant
to maintain separate but concurrent proceedings in the same court
to try identical issues. Moreover, the maintenance of a single action
between indictment and prosecution would actually further, not

\textsuperscript{73} See Witmer v. United States, 348 U.S. 375, 377 (1955); United States ex rel.
Reed v. Badt, 152 F.2d 627 (2d Cir. 1945).
\textsuperscript{74} Oestereich v. Selective Serv. Local Bd. No. 11, 393 U.S. 233, 238 (1968).
\textsuperscript{75} Ex parte Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952). The registrant had re-
cieved an induction notice while studying at a medical school abroad, followed shortly
by a letter from the United States Attorney threatening indictment if the registrant
did not return promptly. He then filed a petition for habeas corpus, alleging that the
threat of indictment placed him in “constructive custody” even though the criminal
process had not yet begun. The court granted the petition on this ground. 105 F. Supp.
at 148.
\textsuperscript{76} Indeed, the Solicitor General in his brief in Oestereich argued against the need
for preinduction review partly on the ground that pre-prosecution review was available
by habeas corpus. “[A] registrant may file a petition for a writ of habeas corpus
immediately after induction.” Brief for Respondents at 23, Oestereich v. Selective Serv.
Local Bd. No. 11, 393 U.S. 233 (1968).
\textsuperscript{77} See, e.g., Witmer v. United States, 348 U.S. 375 (1955); Dickinson v. United
undermine, the very policies that underlie the statutory foreclosure of preinduction review. The pertinent language of the Senate Committee Report on the 1967 amendments recalled the "original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction."\footnote{S. REP. No. 209, 90th Cong. 1st Sess. 10 (1967).} The House Committee, a bit more precise, reaffirmed that "existing law . . . clearly precludes such a judicial review until after the registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order."\footnote{H.R. REP. No. 267, 90th Cong. 1st Sess. 30 (1967).} Therefore, to the extent that legislative history controls—and these two reports contain about all the legislative history that exists—there is nothing sacred about deferring until trial of the criminal charges an adjudication of the validity of a registrant's reclassification.

As the foregoing excerpts make clear, draftsmen of the 1967 amendments apparently saw two governmental interests jeopardized by preinduction review: "First, [the statute seeks] to protect the integrity of the Selective Service System. Therefore, a registrant should exhaust his administrative remedies before seeking judicial review. Second, it wishes to prevent litigious interruptions of the mobilization of manpower. As a result, a registrant should not impede conscription by a premature resort to the courts."\footnote{Note, Preinduction Judicial Review, 57 CALIF. L. REV. 948, 985 (1969) [hereinafter cited as Preinduction Review].} Granting the legitimacy of both interests, and their relevance to judicial review, neither appears to be subverted by allowing pre-prosecution review in a case that has matured as far as Murray, where all available internal remedies had been exhausted within the Selective Service System.\footnote{Although the opinion of the court is rather sketchy on this aspect of the case, the amended complaint recites the following sequence of events: On July 27, 1967, Murray submitted to his local board a written request for reopening of his classification so that he might receive a new occupational deferment. The basis for this request was an offer he had received from the University of Concepcion to serve as Professor of Composition in the School of Music, notwithstanding his termination from the Peace Corps. The board met on August 9, but failed to consider the request. A letter sent to Murray the following day advised him that "the information recently submitted . . . did not warrant reopening of your classification." Soon thereafter an appeal was taken. On September 11 Murray was informed that the appeal had been rejected by the Rhode Island Selective Service Appeals Board, apparently by unanimous vote. The Government seems at no time to have argued any failure to exhaust remedies available within the Selective Service System. For the recent views of the Supreme Court on the issue of exhaustion of these remedies, see McKart v. United States, 395 U.S. 185 (1969).} Murray had even filed a late application for exemption as a conscientious objector, but the local board refused to
reopen the classification by considering this request on its merits. Thus whatever failure there may have been to review the case fully within the Selective Service System was the board's fault, and not the registrant's. Clearly, therefore, the civil suit could not fairly be dismissed for failure to exhaust internal administrative remedies. To the contrary, the board's unexplained refusal to reopen after a timely request for an alternative exemption from service actually buttresses the case in favor of review at this point, since the procedural error was so egregious as to jeopardize the board's jurisdiction. Nor can judicial review of reclassification on the eve of a criminal trial be said to interrupt the mobilization of manpower. If anything, the expeditious interests of the Selective Service would be enhanced rather than undermined by having all aspects of the case settled in a single proceeding. The alternative, for which the Government argued in Murray, would be to defer to a separate and subsequent (or possibly concurrent) criminal proceeding all the draft issues—with the virtual certainty of longer and more costly litigation. If the Government lawyers did not see their own interests served by consolidating the issues, the court insisted that discrete considerations of judicial efficiency decreed a single proceeding. Moreover, the district judge stressed that "complete relief can be obtained only if a court reaches the whole controversy." The opinion continued:

Certainly, neither of the involved agencies can give to the complaining party the whole relief he alleges to require . . . [O]nly a court can resolve the problem by unravelling the whole controversy and adjudicating first the question first in line, that is, the allegedly wrongful act of the other government entity and second, the question next in line, that is, the board's classification. Thus many factors converge in support of consolidation of the several claims presented by the Murray complaint. Without a statute such as the 1967 amendment narrowing district court jurisdiction, the propriety of a single lawsuit would be beyond question. Since that amendment seeks to serve interests that are in no way jeopardized by pre-prosecution review in such a case, any adverse implications from its language can readily be avoided. Thus Murray on its

82 The trial court observed in this regard: "[P]laintiff has alleged that Local Board No. 3 refused to reopen, not on any substantive basis, but only in order to punish plaintiff for his previous First Amendment assertions. This allegation buttresses plaintiff's claim of regulatory lawlessness by bringing it close to the category of cases described by Mr. Justice Douglas in Oestereich as clearly reviewable in a pre-prosecution equity suit . . . ." Murray v. Vaughn, 300 F. Supp. 688, 708 (D.R.I. 1969).
83 Id. at 702 (emphasis in original).
facts falls far short of testing either the reach or the constitutionality of section 10(b)(3).

B. Availability of Preinduction Review in a Murray-Type Case

If the facts of the Murray case do not really challenge congressional power to constrict judicial review, they at least suggest the type of case that will introduce the hard questions. Let us assume a situation substantially similar to Murray, in which review of the reclassification is sought before the registrant actually reports for induction (and thus before the issue reaches the criminal courts). If the registrant has lost his deferment because of a wrongful expulsion from the Peace Corps, and has unsuccessfully pursued his administrative remedies to regain the deferment, we have a paradigm case within which to review the scope of recent decisions under section 10(b)(3).84

Since its enactment in 1967, this statute has been twice tested before the Supreme Court. Oestereich v. Selective Service Local Board No. 11,85 involved a registrant who lost his exemption as a ministerial student and was reclassified I-A delinquent because he turned in his draft card to protest the Vietnam War. The Court held that his preinduction suit could be maintained despite section 10(b)(3), because the draft board’s act of reclassification was "basically lawless."86 Given the need to imply one exception (for habeas corpus) to the statutory foreclosure of review, the recognition of another exception by which to reach draft board conduct in violation of a congressional mandate was at least within reason. Since Oestereich’s exemption derived from a clear statutory guarantee,87 any other result would allow the draft boards to flout congressional will and leave the courts powerless to redress the most serious grievances of registrants. Mr. Justice Harlan concurred with this conclusion, although on a slightly narrower ground. To him the act of reclassification involved in the case did not reflect the "discretionary, factual, and mixed law-fact determinations" of a draft board designed to be insulated from early review by section 10(b)(3).88 Three Justices dissented because they found the statutory language so clear as to permit no exceptions other than the one constitutionally compelled for habeas corpus.89 The dissenters

85 393 U.S. 233 (1968).
86 Id. at 237.
88 393 U.S. at 240.
89 Id. at 249-51 (Stewart, J., dissenting).
thought the line drawn by the majority between reviewable and un-reviewable classifications both unworkable and disingenuous; they doubted the majority's assurance that the decision left section 10(b)(3) "unimpaired in... [its] normal operations...."\textsuperscript{90}

The scope of \textit{Oestereich} cannot be understood without considering the related case of \textit{Clark v. Gabriel},\textsuperscript{91} decided on the same day. In a memorandum opinion, without oral argument, the Court reversed a district court decision granting preinduction review of a denial of a conscientious objector claim. In contrast to \textit{Oestereich}, the \textit{Gabriel} case left "no doubt of the Board's statutory authority to take [the] action which [the registrant] challenges."\textsuperscript{92} The draft board's action, moreover, "inescapably involve[s] a determination of fact and an exercise of judgment."\textsuperscript{93} The presence of both these vital ingredients made it unnecessary to decide which of them (if either alone) was responsible for the different result in the two cases.

It soon became apparent that in \textit{Oestereich} and \textit{Gabriel} the Court had decided only the two easy cases lying at opposite poles. Between them lay a broad range of cases involving determinations less "discretionary" than \textit{Gabriel}, but also less clearly "lawless" than the reclassification in \textit{Oestereich}. The difficulty in applying the test, or deciding where to draw the line in this broad grey zone, results from the uncertain nature of the Court's reasoning.

One commentator, remarking on the Court's failure to reach the constitutional issues in either case, found the distinction between them "altogether disingenuous"; in his view, "\textit{Gabriel} is undoubtedly the clearest case for denying preinduction judicial review in terms of the \textit{Oestereich} analysis; at the same time, it is the clearest for permitting preinduction judicial review in terms of a constitutional analysis."\textsuperscript{94} Another critic suggested that the line drawn by the \textit{Oestereich} majority found little support either in logic or in legislative history, since "concern for the efficient operation of the draft system implies either no review or review for a larger class of plaintiffs: those who allege purely legal error in their classifications. Claims of purely legal error can be disposed of with greater dispatch than those involving questions of fact or mixed law and fact."\textsuperscript{95}

\textsuperscript{90} \textit{Id.} at 238.
\textsuperscript{91} 393 U.S. 256 (1968).
\textsuperscript{92} \textit{Id.} at 258.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Preinduction Review, supra} note 80, at 973.
\textsuperscript{95} \textit{The Supreme Court, 1968 Term, 83 Harv. L. Rev.} 7, 264 (1969).
The uncertain course charted by the lower federal courts in the ensuing months suggested how unsatisfactory the “test” implied by the two Supreme Court decisions proved to be. Federal district judges disagreed, for example, as to whether Oestereich applied only to statutory exemptions from military service, or might also be utilized by those seeking to recover deferments based on equally clear statutory language.\footnote{See, e.g., Foley v. Hershey, 409 F.2d 827 (7th Cir. 1969); Stevenson v. Selective Serv. Local Bd. No. 157, 303 F. Supp. 1254 (W.D. Wis. 1969); Turley v. Selective Serv. Local Bd. No. 134, 301 F. Supp. 845, 852-53 (C.D. Cal. 1969).} A second and ultimately more important uncertainty had to do with the kind of draft board departure from proper procedure that would warrant judicial intervention. The opinion of the Court in Oestereich saw no occasion to go beyond administrative acts clearly at variance with statutory mandate. But Justice Harlan had suggested in his concurrence that review might be appropriate wherever a clear legal error was alleged, even if a patent statutory breach was not involved. Several lower courts accepted this invitation and broadened the exception accordingly.\footnote{See, e.g., Rich v. Hershey, 303 F. Supp. 177 (D. Colo. 1969); Wiener v. Selective Serv. Local Bd. No. 4, 302 F. Supp. 266 (D. Del. 1969); Itzcovitz v. Selective Serv. Local Bd. No. 6, 301 F. Supp. 168, 178-80 (S.D. N.Y. 1969).}

Careful analysis of the two decisions confirmed that the exception had indeed swallowed the rule—that the dissenters were close to the mark in doubting the majority’s assurance that the statute survived “unimpaired in . . . its normal operations.” There were a few difficult cases, and many run-of-the-mill suits which (like Gabriel itself) involved factual determinations clearly within the competence of the local board and vital to the deferment or exemption. In these cases review was still clearly unavailable, for here the literal application of section 10(b)(3) could not be questioned. Only a holding that the statute was unconstitutional—something the Court was clearly unwilling to do—would have opened the doors of the district courts to suits of this type. But the bulk of cases involving reclassification or acceleration of registrants for protesting the Vietnam War (by turning in or destroying draft cards, sitting in at draft boards, etc.) probably fell on the Oestereich side of the line, within the logic of that decision if not its words. Several ingredients suggested the appropriateness of review in such cases. First, the status of the registrant—the basis of the deferment or exemption—had not changed, and thus the reclassification rested on extrinsic circumstances. Second, the action of the draft board seldom if ever involved any sifting of facts, weighing of evidence, or the like; the decision to withdraw the deferment or declare a registrant “delinquent” was an almost automatic response
to receipt of information about the registrant’s political activities. Third, access to the courts in such cases would not be likely to impede or disrupt the mobilization of manpower. Finally, these cases presented substantial constitutional claims—typically that reclassification punished the registrant for exercising first amendment rights—which would go unredressed unless early judicial review was available. Thus all of the underlying policy considerations in such cases pushed the line between the two Supreme Court decisions far toward the Oestereich side. It is, therefore, hardly surprising that many district courts found ways of granting review in cases not clearly covered by Oestereich.88

Much of this uncertainty was put to rest by a second pair of Supreme Court decisions about a year later. The first of these, Gutknecht v. United States,99 held the whole “delinquency” procedure unauthorized by the Selective Service Act, and thus confined to the criminal courts the punishment of protest activity by registrants. Justice Douglas, writing for the Court, reviewed the history of the delinquency regulations, rejected several proffered statutory bases for them, noted the complete absence of standards for local board discretion thereunder, and concluded that Congress had intended that criminal prosecution should be the sole method of dealing with registrants whose conduct renders them “delinquent” under the Act. Acceleration of induction, particularly abhorrent as a sanction where constitutional liberties were at stake, could not be allowed without “a vast rewriting of the Act.”100

If Gutknecht provided one leg of the triangle of resolution, the other two were supplied a week later in the companion case of Breen v. Selective Service Local Board No. 16.101 The registrant was an undergraduate student who had lost his II-S deferment after turning in his draft card during a protest meeting in the fall of 1967. After being classified I-A delinquent, Breen brought suit in the federal district court to enjoin his imminent induction. The district judge102 and the court of appeals103 thought the suit barred by section 10(b)(3) and unaffected by Oestereich. The Supreme Court unanimously reversed, with several Justices concurring on special grounds.104 Since Gutknecht had already disposed of the

88 See cases cited notes 96-97 supra.
100 Id. at 307.
104 Justice Harlan suggested the decision might better rest on the narrower ground he had proposed in Oestereich, and which we have considered. See text accom-
delinquency regulations on which Breen’s reclassification rested, the case for preinduction review was already substantially stronger than it had been the previous year. Yet two hurdles remained: the absence of a clear statutory command underlying the deferment; and the distinction between an exemption (as in Oestereich) and a deferment. The Court surmounted both with little difficulty.

Concededly, the statutory basis for student deferments is less precise and peremptory than the foundation of ministerial (and divinity student) exemptions. The Act does require the President to prescribe “rules and regulations” for ordinary student deferments; no such “discretion” is found in the section at issue in Oestereich. But the Breen Court found the difference immaterial; the delegation of authority contemplated merely “such additional administrative procedures as the President may find necessary to insure that all qualified students are given the deferment which Congress provided . . . .” Moreover, the 1967 statute had sought to narrow the range of Selective Service discretion in the granting or withholding of undergraduate deferments. Finally, there was certainly no implication in the statute or its history that “such deferred status could be denied because the registrant failed to possess his registration certificate.”

The Court made short work of the second hurdle as well. Whatever technical differences there might be between exemptions and deferments, it could not affect the scope of district court jurisdiction of preinduction suits. Instead, “the crucial distinction in draft classifications is between individuals presently subject to induction and those who are not so subject, either because of deferment or exemption.” Moreover, other portions of the statute disclosed a congressional reluctance to make substantive rights turn on the exemption-deferment distinction: those who were “exempt” might in the future become subject to service, while others who were only “deferred” might permanently escape military duty.

The recent decisions in Gutknecht and Breen thus serve to
confirm the early inferences about the reach of Oestereich. The judgment that review is equally appropriate in Breen and Oestereich suggests two conclusions: first, that the range of cases between Oestereich and Gabriel is very broad indeed, since those two decisions merely defined the poles of a wide spectrum; second, that most of the difficult and controversial cases fall on the Oestereich side of the line permitting review, rather than on the Gabriel side foreclosing it. Surely the reviewability of most cases involving anti-war protest activities is much clearer both because Gutknecht has set aside the basis for the reclassification, and because Breen opens the doors of the federal courts to declare that classification invalid before the registrant is forced to submit to a lawless or baseless prosecution.

It is even worth speculating whether anything remains of section 10(b)(3) but a hollow shell. The answer must be that a very large number of cases remain unreviewable despite Oestereich and Breen, and indeed, would be doubtful cases for review even if there were no preclusive statute. These are the easy and obvious cases in which the draft board has done what the Act contemplates—that is, where the board engages in the process described by Justice Harlan as "numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction." Gabriel itself is certainly one paradigm case. Even Justice Douglas, who has championed judicial review in this context, concurred in the view that the courts remain closed to registrants contesting the inferences drawn or the weighing of the evidence in disputed factual cases. Undoubtedly the vast majority of all classification decisions are of this type, and thus remain unreviewable prior to a prosecution for refusing induction. Yet here the exception is clearly far more important than the rule. Controversial cases in which draft boards use their power to deter dissent, to enforce political orthodoxy, or to impose their own predilections upon their registrants—are now cognizable by the district courts almost without exception. It is the occasional review of these cases that will help to keep draft boards honest, and will check the worst abuses or excesses of the Selective Service System.

The constitutional issue remains, of course. Even if the scope of section 10(b)(3) is confined to its underlying purposes—requiring exhaustion of internal remedies and avoiding disruptive litigation during mobilization of manpower—it may still be argued that

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Congress cannot deny a civil remedy to any registrant. That issue has, for the time being, been postponed because, with the sole exception of Gabriel, the Court has taken only cases in which non-constitutional grounds of decision were entirely sufficient to generate exceptions to the statute. If and when the issue arises, it will not be easy to resolve. It would be one thing if Congress had cut off all judicial review, or had made the validity of classifications unreviewable in the prosecution for refusing induction. But that is not what the statute does. It merely postpones review to a time at which the claim has matured—albeit at great cost and risk to the registrant who wishes to contest his classification. Thus the issue here is not whether to carve out one channel where Congress has created none, but whether to recognize two channels where Congress has provided one, on the ground that the one is constitutionally deficient. However, for the moment it is more profitable to speculate about the cases that have been decided than about the remaining constitutional issues.

C. The Preinduction Analogy

Understanding of the scope of the recent decisions may be enhanced by returning to the Murray-type hypothetical posed at the outset. The outcome of such a case was left uncertain by Oestereich and Gabriel. On the one hand, such a case would involve no violation by the draft board of a statutory mandate. The granting of a II-A deferment is highly discretionary, even under the pertinent regulations. Not only is there no express provision for deferment of volunteers, but the Peace Corps statutes in fact provide that service in the Corps “shall not in any way exempt such volunteer from the performance of any obligation or duties under the Selective Service Law.” Thus it could not be said a decision to reclassify a volunteer in such a case would be “lawless” in the sense that Justice Douglas used that term in Oestereich. On the other hand, the local board action would involve none of the “discretionary, factual, and mixed law-fact” determinations that Justice Harlan deemed the basis of judicial deference to the administrative judgment. Neither the original withdrawal of the deferment, a simple administrative error in Murray’s case, nor the refusal to restore that deferment would involve any sifting of facts, evaluation of testimony or assessment of conflicting inferences.

If Oestereich is not dispositive of this hypothetical, neither

is *Breen*. At the very least, *Breen* appears to preserve the requirement that a registrant seeking preinduction review demonstrate draft board violation of a statutory command. Moreover, both *Oestereich* and *Breen* involved punitive reclassifications under the delinquency regulations since invalidated in *Gutknecht.*\(^{114}\) Undoubtedly *Breen* contemplates availability of review for some non-punitve actions of the Selective Service. But the case probably has to be stronger where reclassification is *not* being used to punish dissent, and where the special threat of accelerated induction is absent. The case of a routine reclassification to I-A, which leaves scheduling of induction to the regular order of call, is a weaker one for dispensing with the “statutory violation” requirement at the threshold.

In two additional respects the *Murray*-type preinduction case would be harder than *Oestereich* or *Breen*. For one, the challenged action in the *Murray*-type case would not be the routine draft board decision to withdraw or terminate a deferment. Rather, it would be an administrative refusal to *restore* a deferment that had *expired* in ordinary course. Second and more important, *Oestereich* and *Breen* (like most delinquency cases) involved the withdrawal of a deferment or exemption for conduct that was irrelevant to the dispensation from military service. Where a student remains a student but turns in or destroys his draft card, the legality of the board’s action in terminating his deferment is clearly more vulnerable than where the board acts because the student has been expelled from or dropped out of college. In the *Murray*-type case, by contrast, the draft board’s refusal to reopen would be predicated upon the seemingly regular termination of a tour of draft-exempt Government service.

Thus *Breen* leaves *Murray* unresolved. Had the draft board carefully reviewed Murray’s record in the summer of 1967 and decided that teaching Chileans to compose and perform music was no longer “necessary to the maintenance of the national health, safety or interest”\(^{115}\) or that there no longer existed the requisite shortage of persons possessing these particular pedagogical skills,\(^{116}\) a decision to cancel the deferment would clearly be of the sort that *Gabriel* held unreviewable before prosecution. Had the local board made a general policy decision that Peace Corps service no longer merited an occupational deferment, reclassification would seem

\(^{115}\) 32 C.F.R. § 1622.22(a) (1969).
\(^{116}\) *Id.* § 1622.23(a)(2).
equally unreviewable even though no factual determinations would be involved in the individual case.

Suppose, on the other hand, that the Peace Corps erroneously reported Murray’s termination of service to his local board, having in mind a completely different Bruce Murray in another part of the world who had in fact been terminated. A literal reading of Oestereich, even as expanded by Breen, might hold the refusal to reinstate a II-A deferment in these circumstances immune from preinduction review. Yet if the board refused to correct sua sponte the consequence of a clear mistake as to identity, it seems obvious that a district court should have jurisdiction to compel such rectification. However explicit the terms of section 10(b)(3) may be, they cannot mean that a court is powerless to correct a “lawless” act simply because no clear statutory command has been breached. None of the underlying policies of the Selective Service System would be jeopardized by judicial intervention prior to induction in such a case, nor would there be any need for the court to encroach on the board’s discretionary or fact-finding functions.

The preinduction Murray case we have hypothesized seems much closer to the case of mistaken identity than to one involving reevaluation of general deferment policies or individual eligibility. If a court found that a registrant had been unlawfully expelled from the Peace Corps, would that not be tantamount to finding that the man admittedly expelled was a different Murray altogether? Here, as with the mistaken identity case, all factors favor review: there are no additional remedies to be exhausted; no draft board discretion is involved; and the efficiency of the Selective Service would in no way be impaired.

Moreover, a denial of district court jurisdiction in such a case might well revive the constitutional issue so neatly skirted in Oestereich and Breen. If Murray were told that he had a constitutional right to reinstatement in the Peace Corps, but that there was no way to vindicate that right because no court could order restoration of his deferment, and thus relieve the pressures of a beckoning military obligation, then his first amendment rights would be left without meaningful legal protection. His undoubted constitutional right to criticize United States foreign policy while serving the Government, and his right to question Peace Corps procedures while working as a volunteer, would then become valueless abstractions. In the case of volunteers not subject to the draft, and draft-vulnerable young men whose local boards respected the constitutional guarantees of dissent, these rights would be protected. But for others, like Murray himself, the very scope of the
right to speak while in Government service would be dependent upon the crude administrative fiat of a local draft board. Thus the argument for subjecting local board judgment on such matters to judicial review becomes quite compelling. It may well be that section 10(b)(3) unconstitutionally restricts district court jurisdiction in any case.\textsuperscript{117} But surely it cannot be construed to close the doors of the federal courts to preinduction review where judicial intervention at that stage affords the only remedy for a government employee unconstitutionally dismissed by another agency and thus delivered to the Selective Service System.

The greatest importance of \textit{Murray} may well lie in other contexts outside of governmental employment. The number of cases in which a loss of status in one area will lead to reclassification by the Selective Service System is enormous, and it is not difficult, for example, to see the applicability of \textit{Murray} to the student protestor, who is expelled from school by procedures in violation of school regulations, and then pounced upon by the Selective Service System. For the student, and for others in similar "double loss" situations, review in a civil suit before prosecution in a criminal case is a most feasible alternative.\textsuperscript{118} The arguments in support of this suggestion would be substantially those just reviewed in the government employment context. Review would, on the one hand, jeopardize none of the governmental interests sought to be protected by section 10(B)(3); while on the other hand, denial of early review would raise the most basic doubts about the constitutionality of the statute, since the expelled student, clearly entitled to reinstatement, would be left without an adequate remedy in any forum. A judgment in the student's favor by the university disciplinary appeals committee, or by a court reviewing the suspension or expulsion, would be small consolation to one who is either in basic training or in jail for refusing induction.\textsuperscript{119}


\textsuperscript{119} Similar remedies might also be available to a registrant wrongfully expelled by a private college or university, or improperly discharged by a private employer. If the private primary beneficiary either voluntarily reinstated the benefit, or if its acts were held to be sufficiently governmental affected or supported to constitute "state action," district court jurisdiction might then be available. Certainly the policy considerations favoring review are equally compelling, and the interests of the Selective Service no different. For a discussion of this issue as applied to private universities and colleges, see \textit{H. Friendly, The Dartmouth College Case and the Public-Private Penumbra} (1969). For discussion of similar issues in the context of private employment, see \textit{Berle, Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power}, 100 U. Pa. L. Rev. 933.
V. Conclusion

Cases involving termination of two interdependent government benefits merit special attention and require particular solicitude by the courts, both because of their complexity and because of the important individual liberties typically at stake. Murray forcefully illustrates and underscores that the need for vigilance and judicial sensitivity is especially great in this context, because of the drastic consequences of insulating Selective Service decisions from judicial review.

The conclusions which emerge from analysis of a particular juxtaposition of two important government benefits—Peace Corps service and temporary immunity from military service—are quite consistent with the general principles we posited at the start. It may be well to return to those principles by way of conclusion. Where the withdrawal of a primary benefit brings about or permits the forfeiture of a secondary or dependent benefit, the case for judicial review of the secondary termination is compelling after the primary benefit has been restored. There is a special urgency for judicial review in the presence of any of three additional factors: first, if the withdrawal of the primary benefit infringes the beneficiary's constitutional rights and liberties; second, if the cancellation of the secondary benefit follows automatically from the termination of the first, with no intervening assessment of the beneficiary's continuing eligibility; and third, if the principal importance of the primary benefit is as a means of access to a secondary benefit which the claimant would otherwise be denied.

All three elements appear to characterize the Murray case, and thus make the claim for judicial review unusually strong. Clearly the first two factors are present. The termination of Murray's Peace Corps status infringed his first amendment liberties of expression in the most serious way, and the withdrawal of his deferment (or the refusal to reinstate it) followed automatically from the expiration of Peace Corps service. The third element is problematical. It may well be that continued deferment from the draft was relatively unimportant in Murray's case, though many volunteers' motives have been at least mixed in this regard. If escaping the draft was not the primary inducement for joining the Peace Corps, however, the case is not necessarily weakened, for surely Murray's claim to full court review should not suffer because his primary motivation was to further the cause of world peace or to bring to the people of Chile the enjoyment of fine music.