



DEPARTMENT OF THE AIR FORCE
30TH SPACE WING (AFSPC)

Lieutenant Colonel Vincent M. Buquicchio
Staff Judge Advocate, 30th Space Wing
747 Nebraska Ave Ste C-134
Vandenberg AFB, CA 93437-6261

14 APR 2008

Mr. Peter Eliasberg, Esq.
Managing Attorney, Manheim Family Attorney for First Amendment Rights
American Civil Liberties Union
1616 Beverly Boulevard
Los Angeles, CA 90026-5711

Dear Mr. Eliasberg

I am in receipt of your letter dated 15 February 2008, which was addressed to Colonel Stephen M. Tanous, the commander of the 30th Space Wing here at Vandenberg AFB. Colonel Tanous referred your letter to me as his Staff Judge Advocate, i.e., the wing's senior uniformed attorney, so that I could respond and provide you with a point of contact for future communications. I appreciate your concern regarding our treatment of Mr. Wisniewski--as an attorney and officer in the United States military, I am keenly aware of the need to protect First Amendment rights, and we take very seriously our responsibilities in this regard.

My staff and I have reviewed the legal authorities cited in your letter, as well as additional legal authorities on this matter, base property documents pertaining to this area, and the history of the permitted protest activity at the Santa Maria Gate/Highway 1 intersection. Upon careful consideration and discussion of this information and your request, we have advised Colonel Tanous that, as the installation Commander, he and his authorized designees indeed have the authority to control public access at the Santa Maria Gate/Highway 1 intersection, and to bar certain individuals therefrom based on their behavior. On this closed base, the Commander has the responsibility to ensure the safety and security within installation property, and ensure there is no interference with the installation's military functions. The permissible protest activity is limited so that he can fulfill these responsibilities.

We understand your letter to argue that the Government, in order to prohibit anyone from protesting in an area, must have sole ownership or exclusive possession (i.e., lack of an easement) of that area (United States v. Watson, 80 F.Supp. 649, 651 (E.D. Va. 1948)), and that an easement exists in the area at issue here. However, we note that the United States Supreme Court, U.S. Circuit Courts of Appeals, and a 9th Circuit District Court, have distinguished or further explained Watson, and we believe Watson does not control in the way you have argued. I summarize just a few of those cases below.

In United States v. Vasarajs, 908 F.2d 443 (9th Cir. Alaska 1990), the Court affirmed a trespass conviction of a Defendant who had previously been barred. The court reasoned the Defendant (like Mr. Wisniewski) was aware of the boundary, and the military post (like Vandenberg AFB) had exercised sufficient control over the access road (Government owned and possessed) over which the Defendant traveled, to support the conviction. The court entered into a property discussion in which it provided that proof of an easement might have been a defense, but that the Defendant would have also had to show that the activity was authorized by the easement.

Similarly, in United States v. LaValley, 957 F.2d 1309 (6th Cir. 1992), in which protestors had marched down a grass strip that had been fenced off but was still part of a highway easement, they were found guilty of trespass because they were using the grass strip in a manner that was inconsistent with its use as part of the roadway easement. The easement at Vandenberg AFB is also a roadway easement, and while the Commander allows its use from time to time as an area for legal, peaceful protest, he also retains the authority to bar persons from being present in the area for purposes other than its originally-intended purpose, i.e., other than as a road. The easement provides that the Commander has the authority to prescribe rules and regulations in order to properly protect the United States.

Citing Vasarajs, LaValley and other precedents (including US Supreme Court cases), on 20 February 2008, Judge Rita Coyne Federman, United States Magistrate Judge in United States v. Parker, Case Nos. R3442836-RCF, *et al.*, issued her findings and found the Defendant guilty of trespass for protesting on Vandenberg Air Force Base property even though he was factually determined to be standing in an easement through Vandenberg Air Force Base (see, text of decision, attached). Judge Federman determined that the road (easement) was only a vehicular route, that the Defendant was not using it for that purpose, and that the purpose for which he was using it was not permitted by the Government.

I have confirmed with Col Tanous that the web-based protest advisories, and the 22 October 2007 barment letter served upon Mr. Wisniewski, remain in effect. Mr. Wisniewski's conduct at past protests led the Commander to bar him from the base, including this part of the base, because Mr. Wisniewski ignored base security personnel's directions to step back behind the green line that marks the designated protest area, and entered and remained in the active roadway, despite oncoming traffic, posing safety risks to himself, drivers, and base personnel.

Base personnel may request Mr. Wisniewski to vacate the peaceful protest area if the on-scene commander determines he is in violation of the protest advisories and rules or in violation of the barment order. If Mr. Wisniewski fails to vacate the premises upon such request, he would be subject to a trespass violation.

If you have any additional questions or concerns on this matter please contact Ms. Laura Ornelaz of my office, at (805) 605-6207.

Sincerely,

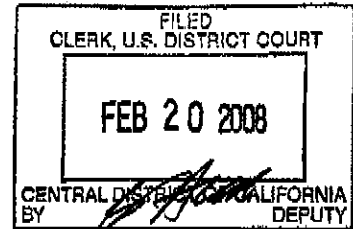


VINCENT M. BLAQUICCHIO, Lt Col, USAF
Staff Judge Advocate

Attachment:

United States v. Parker, Case Nos. R3442836-RCF, R3443702-RCF and R3444058-RCF

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOBART PARKER, JR.,

Defendant.

**Case Nos. R3442836-RCF
R3443702-RCF
R3444058-RCF**

VERDICT FOLLOWING NEW TRIAL

Proceedings

Defendant conducted a roadside protest at Vandenberg Air Force Base on November 15, 16, 20, 22, and 28, 2006. He was charged with the following five counts arising out of his protest activities: two counts of assaulting, resisting or impeding an officer, under 18 U.S.C. § 111; and three counts of unlawful entry on a military base, under 18 U.S.C. § 1382.

On April 19 and 20, 2007, the Court conducted a trial on all five charges. Defendant moved for a judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The Court reserved a ruling on the motion and took the matter under submission after closing argument by the parties.

While the case was under submission, the Court granted the Government's motion to dismiss the two counts of assaulting, resisting or impeding an officer. On May 17, 2007, the Court issued a verdict on the remaining counts, finding Defendant guilty of all three counts of

1 trespassing. The Court denied the Rule 29 motion in a written ruling issued on May 18, 2007.

2 Defendant moved for a new trial. The Government concurred in the request for a new
3 trial. On September 20, 2007, the Court granted the motion, ordering a new trial to allow the
4 parties to present new evidence to be considered in addition to the evidence presented in the
5 initial trial proceedings. Fed. R. Crim. P. 33(a).

6 The new trial proceeded on January 16 and 17, 2008. For the reasons that follow, the
7 Court finds Defendant guilty of three counts of trespassing.

8 Factual Findings

9 At issue are the remaining three counts of unlawful entry at Vandenberg Air Force Base
10 ("VAFB") on November 20, 22, and 28, 2006. Based on the evidence presented at the initial
11 trial and the new trial, the Court makes the following findings of fact.

12 VAFB is located in Santa Barbara County near the town of Lompoc, California. VAFB
13 is a "closed base," which means that non-military and non-Department of Defense personnel
14 may not enter the base without the express permission of the Installation Commander.

15 VAFB is bisected by Ocean Avenue, which connects the town of Lompoc to the east,
16 with Surf Beach, to the west. Ocean Avenue was formerly known as Highway 246, and still is
17 referenced as Highway 246 on maps and by certain witnesses.

18 The western end of Ocean Avenue provides access to an Amtrak railway station,
19 located adjacent to Surf Beach. Surf Beach and the Amtrak station are open to the general
20 public, except for periodic closures of the beach. In addition, a public bike path runs through
21 VAFB parallel to Ocean Avenue, and leads to the beach.

22 Although Ocean Avenue is a public roadway, VAFB owns the land on which the road is
23 located. VAFB's ownership of the land is subject to an easement in favor of Santa Barbara
24 County for use of Ocean Avenue by the public as a road. The grant of easement, executed in
25 1960, granted to the State of California "an easement for construction, use, maintenance,
26 operation and repair of a road." [Defense exhibit 119.] The State of California later
27 relinquished its rights in the easement to the County of Santa Barbara. Based on this
28 relinquishment, it appears the State no longer has rights or duties associated with Ocean

1 Avenue, but this point was not clearly elucidated by the evidence and is not pertinent to the
2 issues presented in the case.

3 The roadway easement is 142 feet in width at the location where Defendant conducted
4 his protest. The paved portion of Ocean Avenue generally runs through the center of the
5 easement. [Defense exhibit 122.]

6 A "memorandum of agreement" exists between VAFB and the County of Santa
7 Barbara, delineating the respective responsibilities of the two entities concerning the use of
8 Ocean Avenue. Although the witnesses inferred that the agreement was in written form, the
9 parties did not introduce a written memorandum of agreement into evidence. Witnesses
10 explained that under the agreement, the portion of Ocean Avenue that crosses VAFB is
11 subject to the concurrent jurisdiction of VAFB and the County of Santa Barbara. Due to its
12 concurrent jurisdiction over Ocean Avenue, VAFB has the authority to enforce the laws on the
13 road, and actively patrols and monitors the road. VAFB retains the authority to close Ocean
14 Avenue to the public when necessary for base operations, such as for missile launches or
15 during periods of flooding.

16 Witnesses referred alternatively to an easement and to the area subject to concurrent
17 jurisdiction. The evidence as a whole supports the inference that witnesses who referred to
18 the area subject to "concurrent jurisdiction" were referring to the portion of the VAFB property
19 that is subject to the easement for use of a roadway.

20 There are no signs alerting drivers that they are entering VAFB as they travel west on
21 Ocean Avenue toward Surf Beach and the train station. Nor is there a gate or "guard shack"
22 on Ocean Avenue alerting drivers that they are entering VAFB. Signs are posted along
23 fencing that runs parallel to Ocean Avenue, which advise visitors that it is unlawful to enter the
24 area without the permission of the VAFB Commander.

25 Within the boundaries of VAFB, Ocean Avenue is intersected by Thirteenth Street,
26 which provides access to portions of the base. There are two gates on Thirteenth Street,
27 located on either side of Ocean Avenue, a short distance from the intersection of Ocean
28 Avenue and Thirteenth Street. In order to travel in either direction on Thirteenth Street,

1 visitors must pass through an inspection point at one of these gates, where a "guard shack" is
2 erected.

3 At the intersection of Ocean Avenue and Thirteenth Street a "green line" is present on
4 the ground, which denotes a jurisdictional change where the cooperative agreement between
5 VAFB and Santa Barbara County ends, and where VAFB's exclusive jurisdiction begins.

6 In all three charges at issue, Defendant was carrying signs of protest against VAFB
7 military police along the shoulder of Ocean Avenue, within the vicinity of Thirteenth Street.
8 During the new trial, it was clearly established by defense expert James Dixon that the area in
9 which Defendant was protesting was located in the area that is subject to the roadway
10 easement.

11 Ocean Avenue was open to the public at the time of all three incidents. Defendant did
12 not cross the green line on any of the dates in question, but rather, remained within the area
13 denoted as subject to the easement and the concurrent jurisdiction of VAFB.

14 On all three occasions, Defendant was advised repeatedly by military officers that he
15 was not permitted to protest on Ocean Avenue, and that the Installation Commander had
16 designated a protest area outside the VAFB Main Gate on Highway 1. On all three occasions,
17 despite repeated requests from military officers that he leave or relocate his protest to the
18 Main Gate, Defendant refused to leave the area.

19 On November 22, 2006, officers provided Defendant with verbal notice of a "barment"
20 letter, issued by the Installation Commander, barring Defendant from entering VAFB for any
21 reason for three years. On November 22, 2006, officers also provided Defendant with a
22 written copy of the barment letter, which Defendant refused to accept. A VAFB official mailed
23 a copy of the barment letter to Defendant by certified mail.

24 On November 28, 2006, VAFB officers advised Defendant that he was in violation of
25 the barment letter. He also was advised he could "traverse" the road, or walk through, but he
26 could not stay and actively protest.

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28 ///

Discussion

A. Issue Presented

In case nos. R3442836-RCF and R3443702-RCF, Defendant is charged under the first paragraph of 18 U.S.C. § 1382, which sets forth a penalty for the following conduct:

"Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation...."

In case no. R3444048-RCF, Defendant is charged under the second paragraph of 18 U.S.C. § 1382, which proscribes the following:

"Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof...."

A commander's restriction of entry under lawful authority is sufficient to meet the "prohibited by law" requirement of § 1382, if the defendant knows his entry is unauthorized. United States v. Cottier, 759 F.2d 760, 762 (9th Cir. 1985); United States v. Patz 584 F.2d 927, 929 (9th Cir. 1978).

The evidence showed that VAFB was a closed base, with entry permitted only with the express permission of the Installation Commander. On all three occasions Defendant stood in the area subject to the roadway easement and did not enter the portion of the base that is subject to VAFB's exclusive control. Thus, the issue presented is whether one "goes upon" a military installation or "reenters" a military installation by holding a sign of protest at the side of a road bisecting property owned by the military installation in a location subject to an easement for a public roadway.

B. California Law of Easements

As explained above, the easement in question is "an easement for construction, use, maintenance, operation and repair of a road." [Defense exhibit 119.] An easement gives the grantee of the easement the limited right to use the land of another for a specific use or activity. Kazi v. State Farm Fire and Cas. Co., 24 Cal. 4th 871, 880-81 (2001); Mehdizadeh v.

1 Mincer, 46 Cal. App. 4th 1296, 1306 (1996); Harry D. Miller & Marvin B. Starr, California Real
2 Estate 3d, Easements, § 15:5 (3d ed. 2006) [hereinafter Miller & Starr]. Generally, the grantee
3 receives only those rights of use expressly conveyed and any additional rights that are
4 necessary and reasonable for enjoyment of the easement, consistent with the purpose of the
5 grant. Miller & Starr, Easements, § 15:56; see Camp Meeker Water System, Inc. v. Public
6 Utilities Com., 51 Cal. 3d 845, 866-67 (1990).

7 A "road" generally is understood to signify a vehicle route. See Cal. Vehicle Code §
8 527 (a "road" is a vehicle route); see also Cal. Vehicle Code § 360 (a "highway" is a way "open
9 to the use of the public for purposes of vehicular travel"); § 530 (a "roadway" is used for
10 vehicular travel); Cal. Vehicle Code § 590 (a "street" is a way "open to the use of the public for
11 purposes of vehicular travel"). The conveyance of an easement limited to roadway use grants
12 only a right of ingress and egress and a right of unobstructed passage across the easement.
13 Scruby v. Vintage Grapevine, Inc., 37 Cal. App. 4th 697, 703 (1995). It does not include the
14 right to use the easement for any other purpose. Id.; Miller & Starr, Easements, § 15:59.
15 Moreover, the grantee of a roadway easement may not have the right to use the full width of
16 the grant when it is not required for access. Scruby, 37 Cal. App. 4th at 704-05; Heath v.
17 Kettenhofen, 236 Cal. App. 2d 197, 204-05 (1965); Gaut v. Farmer, 215 Cal. App. 2d 278, 282
18 (1963); Miller & Starr, Easements, § 15:59.

19 Under California law, therefore, the roadway easement at issue in this case granted a
20 limited right of ingress and egress and a right of unobstructed passage along Ocean Avenue
21 from Lompoc to Surf Beach. Neither the easement grant nor the evidence of the historical use
22 of the roadway easement established any right to use the easement for anything other than
23 ingress and egress. Thus, by standing on the shoulder of the road holding a protest sign,
24 Defendant was not using the easement consistent with its limited scope. Cf. People v.
25 Sweetser, 72 Cal. App. 3d 278, 283-84, 285 (1977) (reversing a conviction for trespassing
26 where the defendant was using a county highway easement across private land consistent
27 with the scope of the easement). The Court must determine whether this amounted to a
28 violation of 18 U.S.C. § 1382.

1 C. Federal Trespassing Statute

2 There are relatively few cases applying 18 U.S.C. § 1382 in the context of a roadway
3 easement. In United States v. Vasarajs, 908 F.2d 443 (9th Cir. 1990), the court held that "the
4 government must exercise control over its property in order to preserve the right to exclude
5 others from it pursuant to § 1382." Id. at 447. In the present case, the evidence clearly
6 showed that VAFB officials exercised control over Ocean Avenue by actively and diligently
7 patrolling the road and advising Defendant on five separate occasions that he had unlawfully
8 entered the base by picketing at the side of the road. VAFB's exercise of control over the
9 road, however, does not resolve the question of whether Defendant "entered" the base by
10 limiting his protest to the shoulder of the road that was subject to the easement.

11 Vasarajs is not dispositive on this point. In Vasarajs, the defendant approached a
12 military base on a public highway that bisected the base. Id. at 445. She was charged with
13 unlawful reentry after she drove past two signs warning that she was on base property as she
14 approached the main gate. Id. The court emphasized that the defendant did not argue there
15 was an easement in favor of the public along the roadway as it approached the base, nor did
16 the record indicate that any such easement had been created. Id. at 446 & n.3; see also
17 United States v. Douglass, 579 F.2d 545, 547 (9th Cir. 1978)(in a case involving a § 1382
18 prosecution, emphasizing that the evidence did not show the area in question was subject to
19 an easement or that the military installation had relinquished control over it); United States v.
20 McCoy, 866 F.2d 826, 831 (6th Cir. 1989) (although a public right of way existed adjacent to a
21 military base, the defendant violated § 1382 by crossing a line delineating the base boundary
22 and entering the driveway belonging exclusively to the base). Thus, the Court in Vasarajs did
23 not have an occasion to rule on the relevance of the defendant's presence on an easement.

24 United States v. Watson, 80 F. Supp. 649 (E.D. Va. 1948), involved a charge of illegal
25 reentry where a defendant drove on a public road bisecting a military base in order to reach
26 the town of Quantico, which was not accessible by any other means. Id. at 650. Although the
27 Government owned the land on which the road was located, the court concluded that the
28 Government's ownership was subject to an implied easement in favor of the public to use the

1 road to access the town. Id. at 651. The defendant's alleged crime was "the use of the road"
2 after being barred from the base. Id. at 651. The court held that the Government was
3 required to show an "exclusive right to possession" of the road in order to prosecute the
4 defendant for unlawful reentry under § 1382. Id. The court further stated that evidence of the
5 Government's absolute ownership or possession of the road was sufficient to establish its
6 authority "to police the road, and to punish the defendant for improper conduct on the road,
7 but it does not warrant proscription of a correct use of the road." Id.

8 The Watson case is not on all fours with the present one, because in Watson, the
9 defendant was using the road to traverse the base, and thus was making "a correct use of the
10 road." Here, Defendant was not merely traversing the base via Ocean Avenue to reach the
11 beach or train station, but was engaged in a roadside protest.

12 A dissenting opinion by Justice Stevens in United States v. Albertini, 472 U.S. 675
13 (1985), underscores the importance of this distinction. Justice Stevens noted that "highways
14 or other public easements often bisect military reservations." Albertini, 472 U.S. at 698
15 (Stevens, J. dissenting). An individual could not be punished for unlawful reentry on a military
16 base merely by departing on an airline flight that used a runway traversing the base. Id.
17 Justice Stevens wrote that "[t]he use of these military lands *for the limited public purposes for*
18 *which they have been set aside* does not involve the bold defiance of authority" that is
19 reflected in the legislative history of § 1382. Id. at 698-99 (emphasis added); see also United
20 States v. LaValley, 957 F.2d 1309, 1313-14 (6th Cir.), cert. denied sub. nom. Bassett v. United
21 States, 506 U.S. 972 (1992) (noting that the defendant was not charged with intruding on the
22 base by merely driving a vehicle on an adjacent public roadway); McCoy, 866 F.2d at 831
23 (noting that the defendant was not prevented from using the public roadway adjacent to the
24 base for the limited public purpose of driving past the base).

25 The Sixth Circuit applied Justice Stevens's reasoning in United States v. LaValley. In
26 that case, the defendants were charged with marching down a grass strip of land running
27 parallel to a public road adjacent to a military base. LaValley, 957 F.2d at 1311. The road and
28 grass strip were located on base property, but were subject to an easement granted by the

1 base to the county for construction of a county highway. Id. Base officials erected an orange
 2 snow fence that barred pedestrian access to a portion of the grass strip. Id. A group of
 3 approximately four hundred protestors marched down the grass strip toward the base
 4 entrance. The protestors pushed down the snow fence and entered the grass area. Id. The
 5 defendants were charged with unlawfully entering the base. Id. at 1312.

6 Although the defendants were on the grass strip at the time they were taken into
 7 custody, the court in LaValley relied on a prior decision to hold that the grass strip was within
 8 the boundary it already had determined to be part of the base. Id. The court further held that
 9 "[t]he mere fact that an easement had been granted to the state for the construction,
 10 maintenance and use of Highway F-41 did not give the protestors the right, in bold defiance of
 11 military authority, to enter the base, after being previously barred." Id. This holding indicates
 12 that in the court's view, the protestors unlawfully entered the base by using the grass strip in a
 13 manner that was inconsistent with its use as part of the roadway easement.

14 Here, the evidence showed that VAFB's ownership of the land containing Ocean
 15 Avenue was subject to an easement in favor of the County for use of the road as a public
 16 highway to access the town of Lompoc to the east, and the public beach and train station to
 17 the west. Defendant was advised by VAFB officers that he could "traverse" the road, but he
 18 could not stay and protest. The evidence as a whole supports the conclusion that the
 19 easement for use of Ocean Avenue as a roadway is limited to its use as a means to travel
 20 across the base to reach the public areas on either side of the base. By using the road as a
 21 location for a protest, Defendant was not using the easement for the limited public purpose for
 22 which it had been set aside, and thus unlawfully entered VAFB within the meaning of §1382.

23 **Verdict**

24 For the foregoing reasons, the Court finds Defendant guilty of three counts of
 25 trespassing in violation of 18 U.S.C. § 1382.

26
 27 Dated: 2/20, 2008

28
 RITA COYNE FEDERMAN
 UNITED STATES MAGISTRATE JUDGE



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