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

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHN D. APEL, MACGREGOR
EDDY, and STEPHEN M. KELLY,
Defendants.

**CVB Case Nos. 1981283-RCF,
2576523-RCF, 1982007-RCF,
1981239-RCF, 2576524-RCF,
1982006-RCF**

**ORDER DENYING
DEFENDANTS' MOTION TO DISMISS**

Defendants John D. Apel, MacGregor Eddy, and Stephen M. Kelly ("Defendants") each were charged with trespass under 18 U.S.C. § 1382, by entering Vandenberg Air Force Base after having been ordered not to reenter the base. Defendants Apel and Eddy were charged with trespass on January 31, 2010, and March 3, 2010. Those charges were joined for trial. Defendants Apel and Kelly were charged with trespass on April 7, 2010, and those charges were joined for trial. All defendants moved to dismiss the charges on First Amendment grounds. The Court consolidated the hearing on the motion to dismiss with respect to all six charges. Following oral argument on July 15, 2010, the Court denied the motion to dismiss. At the close of trial, Defendants renewed the motion to dismiss on the basis of additional evidence presented at trial. The Court again denied the motion, and agreed to issue this written ruling setting forth the basis for its ruling.

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1 **Facts**

2 The Commander at Vandenberg Air Force Base ("VAFB") has designated the base as a
3 "closed base." Non-military and non-Department of Defense personnel are not permitted to enter
4 the base without the express permission of the Commander. Roadway easements that traverse
5 the base are limited to use for road maintenance and vehicular travel through the base. Persons
6 conducting activities in an easement that are not expressly permitted are subject to prosecution
7 for trespassing.

8 In 1989, as part of a stipulation for settlement in Fahrner v. Oliverio, CV 88-5627-AWT(Bx),
9 the VAFB Commander adopted a policy statement authorizing peaceful protests to take place on
10 the base. The 1989 Policy Statement provides as follows:

11 "People involved in peaceful protest demonstrations will be permitted to
12 assemble and protest in the concurrent jurisdiction areas adjacent to the
13 intersection of State Highway 1 and Lompoc-Casmalia Road at the Main Gate
14 (Santa Maria Gate) of Vandenberg Air Force Base, California. The Air Force is
15 obligated to insure that peaceful protests do not result in unsafe vehicle and people
16 congestion around the Main Gate. If necessary, restrictions may be placed on
17 peaceful protestors who encumber the roadways or engage in activities which can
18 result in unsafe conditions for themselves or others. Protest demonstrations may
19 be curtailed in this area when they materially interfere with or have a significant
20 impact on the conduct of the military mission of the U.S. Air Force."

21 On October 23, 2008, the VAFB Commander issued a memorandum acknowledging that
22 limited permission had been granted to personnel who were not otherwise authorized to enter the
23 base, and who had not previously been barred from the base, to conduct peaceful protests in a
24 designated area near the Main Gate. The boundaries of the protest area are demarcated by
25 Highway 1, Lompoc-Casmalia Road, temporary fencing, and a painted green line placed on the
26 pavement on California Boulevard, which leads from Highway 1 to the Main Gate entrance.

27 The area designated for protests is located within the confines of the VAFB property, as
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1 are the immediate surroundings, including all of the locations described at trial. Highway 1, which
2 marks one of the boundaries of the protest area, is a public road that traverses the base. VAFB
3 officials have granted a roadway easement to the State of California and the County of Santa
4 Barbara to construct, use, and maintain Highway 1 for purposes of a right of way. VAFB, the
5 State, and the County exercise concurrent jurisdiction over the right of way. The protest area is
6 located within the area subject to the concurrent jurisdiction of the three entities.

7 Approximately 200 yards beyond the green line on California Boulevard is a guard shack
8 and barricade. Between the green line and the guard shack is a visitor control center and a public
9 transit stop for bus service operated by the City of Santa Maria. The guard shack, barricade,
10 visitor's center, and bus stop are all located on property that is subject to the exclusive control and
11 jurisdiction of VAFB.

12 The VAFB "Protest Advisory," which is available on the VAFB website, sets forth a lengthy
13 list of rules governing the conduct of protest activities. Among other things, it requires that
14 protests be scheduled and coordinated at least two weeks in advance with the VAFB Public
15 Affairs office and Security Forces. Protestors are barred from erecting structures or equipment
16 in the protest area, from soliciting or distributing materials, and from having weapons, skates,
17 bicycles, or containers larger than one foot square, including backpacks and coolers. All
18 locations, including the protest area, are subject to search, and protesters must possess valid
19 identification and present it upon request. Parking for the protest participants is provided at the
20 Vandenberg Middle School across the street from the Main Gate. The Protest Advisory reiterates
21 that persons barred from VAFB are not permitted to attend peaceful protests.

22 Prior to scheduled protests, VAFB Public Affairs and security forces personnel regularly
23 conduct meetings to review the rules to be applied during the protests. In particular, personnel
24 review the photographs and other documentation of persons who have received bar orders, so
25 that they can be readily identified and cited in the event they attend the scheduled protest.

26 Prior to the charged offenses, the VAFB Commander issued bar letters to each Defendant,
27 barring them from entering the base because they previously had violated base rules. On the
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1 three dates in question in these matters, Defendants attended peaceful protests at VAFB and
2 remained at all times within the area designated for conduct of the protest demonstrations. They
3 were charged with unlawfully reentering the base after having been barred by the Commander.
4 At all times prior to, during, and after their arrest they conducted themselves in an orderly fashion,
5 and left the base without incident after they were cited.

6 During the second trial involving the events on April 7, 2010, VAFB Staff Sergeant Andrew
7 Cox testified that during the year that he had been patrolling the base, it was his practice to
8 regularly approach and question any individual who lingered outside the Main Gate entrance for
9 more than a few minutes. Defense witnesses testified that prior to the charged incidents, they
10 attended peaceful protests at VAFB on numerous occasions when they were not approached by
11 security forces personnel.

12 Discussion

13 Defendants contend the VAFB Commander has created a public forum on the base for
14 peaceful protests, and that under the First Amendment, they are entitled to participate in the
15 protests even though they had received bar orders. The parties advised the Court that VAFB is
16 the only military base that has a designated protest area located within the confines of the base,
17 and thus this issue is one of first impression.

18 A. First Amendment Forum Analysis

19 "Nothing in the Constitution requires the Government freely to grant access to all who wish
20 to exercise their right to free speech on every type of Government property without regard to the
21 nature of the property or to the disruption that might be caused by the speaker's activities."
22 Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 799-800 (1985);
23 United States v. Kokinda, 497 U.S. 720, 725 (1990) (plurality opinion). The extent to which the
24 Government can control access to its property for free speech purposes depends on the nature
25 of the forum in question. Cornelius, 473 U.S. at 800; Kokinda, 497 U.S. at 726; Hopper v. City
26 of Pasco, 241 F.3d 1067, 1074 (9th Cir.), cert. denied, 534 U.S. 951 (2001). Speakers can be
27 excluded from a traditional public forum only when the exclusion is necessary to serve a
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1 compelling state interest and the exclusion is narrowly drawn to achieve that interest. Cornelius,
2 473 U.S. at 800. Similarly, when the Government has intentionally designated a place as a public
3 forum, speakers cannot be excluded absent a compelling governmental interest. Id. On the other
4 hand, access to a nonpublic forum can be restricted as long as the restrictions are reasonable and
5 do not amount to an effort to suppress expression of unfavorable views. Id.

6 The Ninth Circuit has identified four categories of fora for free speech purposes: (1)
7 traditional public fora; (2) designated public fora; (3) nonpublic fora; and (4) limited public fora.
8 Hopper, 241 F.3d at 1074; see also Cornelius, 473 U.S. at 802 (identifying three categories: public
9 fora, designated public fora, and nonpublic fora). Public fora and designated public fora are
10 subject to strict scrutiny, whereas nonpublic fora and limited public fora are subject to the more
11 lenient reasonableness standard. Kokinda, 497 U.S. at 726-27; Hopper, 241 F.3d at 1075.

12 **B. The Protest Area at VAFB is Not a Traditional Public Forum**

13 “[A] principal purpose of traditional public fora is the free exchange of ideas.” Cornelius,
14 473 U.S. at 800. Public fora include places which have been devoted to public assembly and
15 debate by long tradition or government fiat, such as public streets and parks. Id. at 802; Hopper,
16 241 F.3d at 1074 n.5.

17 A military installation is not a location where the free exchange of ideas usually is
18 accommodated, either by tradition or by design. Rather, it is “the business of a military installation
19 like [VAFB] to train soldiers, not to provide a public forum.” Greer v. Spock, 424 U.S. 828, 838
20 (1976). Thus, a military base ordinarily is not a public forum for First Amendment purposes, even
21 if it is open to the public. Cornelius, 473 U.S. at 804; United States v. Albertini, 472 U.S. 675, 684
22 (1985); Greer, 424 U.S. at 838.

23 In United States v. Albertini, the Supreme Court considered whether an Air Force Base
24 Commander had transformed a closed military base into a temporary public forum by opening
25 portions of the base to the public each year for an open house event. The defendant, who
26 previously had been barred from the base, attended the open house and conducted a peaceful
27 demonstration in an area that was accessible to the public as part of the open house. Albertini,

1 472 U.S. at 678-79. The Court upheld the defendant's trespassing conviction, finding it was
2 "dubious" that the base had been transformed into a public forum, and noting that the base did
3 not become a public forum merely because it was used to communicate ideas or information
4 during the open house. Id. at 686.

5 Greer v. Spock involved a challenge to a base commander's decision to deny entry onto
6 the base to civilians who wished to distribute political campaign literature and discuss election
7 issues. Civilian speakers had been permitted to enter the base to speak on issues such as drug
8 abuse and business management, clergymen had been invited to participate in religious services,
9 and entertainers had been invited to perform. Base regulations, however, barred political
10 speeches and partisan political activity. This restriction was rigidly enforced. See Greer, 424 U.S.
11 at 830-31. The Court held that due to its basic mission to train soldiers, the base was not a
12 traditional public forum and the defendants did not have a First Amendment right to distribute
13 campaign literature. Id. at 838. Nor was the base transformed into a public forum merely
14 because other civilian speakers and entertainers had been invited onto the base. Id. at 838 n.10.

15 In this case, the VAFB Commander has declared VAFB to be a closed base. The
16 Commander exercises exclusive jurisdiction over the base property, with the exception of the
17 roadway easement where the peaceful protests occur. The use of the roadway easement is
18 limited to the construction, use, and maintenance of the road for purposes of traversing the base.

19 Although the protest area is located within the easement on property that is subject to the
20 concurrent jurisdiction of VAFB, the State, and the County, the 1989 Policy Statement adopted
21 in the Fahrner litigation permits only limited use of a small portion of the roadway easement for
22 peaceful protests. The Policy Statement clearly indicates the VAFB Commander retains control
23 over the protest area to restrict the conduct of the protestors and to curtail protest activities when
24 necessary to preserve the mission of the base.

25 The VAFB protest area does not have the characteristics of a public sidewalk or space that
26 traditionally is open to expressive activity. See Kokinda, 497 U.S. at 727-28 (concluding that a
27 sidewalk located entirely on Postal Service property was not a public forum because it was not
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1 a traditional public thoroughfare designed to facilitate the daily commerce and life of the
2 neighborhood, but was designed solely to assist postal patrons to negotiate the space between
3 the parking lot and the post office). VAFB's limited accommodation of peaceful protests under
4 restrictive conditions does not alter the primary mission of the base and is not sufficient to
5 transform the protest area into a traditional public forum. As in Albertini, the protest area did not
6 become a public forum merely because it is used on occasion to communicate ideas. See
7 Albertini, 472 U.S. at 686. Moreover, the protest area is open to the public only for the purposes
8 of peaceful protests, not an unlimited category of speech activities, further supporting the
9 conclusion that it is not a public forum. See Greer, 424 U.S. at 838 n.10.

10 Defendants contend this case is controlled by Flower v. United States, 407 U.S. 197 (1972)
11 (per curiam). Flower, however, involved a military base that was deemed to be "an open post,"
12 with no sentry post or guard, and containing streets that were heavily used by the public as
13 important traffic arteries. Flower, 407 U.S. at 198. The Supreme Court found that the base
14 commander had abandoned any right to exclude civilian traffic or regulate expression. Id. In
15 subsequent cases, the Court has acknowledged that Flower concerned "unusual facts" and is
16 distinguishable on that basis. Albertini, 472 U.S. at 685; Greer, 424 U.S. at 835-37. Similarly,
17 Flower is distinguishable here, because the VAFB Commander actively regulates activities that
18 take place on the base, including the area set aside for peaceful protests. For the same reason,
19 United States v. Gourley, 502 F.2d 785 (10th Cir. 1973), also is distinguishable. See id. at 787-88
20 (holding that the First Amendment barred prosecution of defendants for trespassing at a football
21 stadium and chapel located on an otherwise closed base because the public was encouraged to
22 visit those locations and they were open to the public without restriction).

23 Defendants also cite to dictum in United States v. Hobart Parker, CR 09-0518-AHM, in
24 which the Court, reviewing a misdemeanor trespass conviction on appeal, stated that the protest
25 area in front of the VAFB Main Gate "clearly was a First Amendment protected public forum." In
26 making that statement, however, the Court was distinguishing the designated protest area at the
27 Main Gate from the unauthorized area in which Mr. Parker conducted his protest. The Court in
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1 Parker was not called upon to evaluate the legal nature of the forum provided at the Main Gate.
2 Therefore, its statement that the area was a “protected public forum” is not controlling here, and
3 does not determine the level of scrutiny to be applied to restrictions on access to the protest area
4 at the Main Gate.

5 **C. The Protest Area at VAFB is Not a Designated Public Forum**

6 Defendants argue in the alternative that the VAFB protest area is a designated public forum
7 subject to strict scrutiny. The Government counters that if the protest area is not a nonpublic
8 forum, it is no more than a limited public forum, subject to the reasonableness standard.

9 A designated public forum may be created when the Government intentionally opens up
10 a nontraditional forum for public discourse. Hopper, 241 F.3d at 1074. In contrast, a limited
11 public forum exists when the Government intentionally opens a nonpublic forum to certain groups
12 or to certain topics. Id.

13 Government intent is the essential question in determining whether a designated public
14 forum has been established. Hopper, 241 F.3d at 1075 (citing Cornelius, 473 U.S. at 802). To
15 determine the intent, the Court looks to the “policy and practice” of the Government in regulating
16 access to the forum. Cornelius, 473 U.S. at 802; Hopper, 241 F.3d at 1075. In evaluating the
17 policy and practice of the Government, the Court considers whether there is a specific policy
18 restricting access, and whether that policy is consistently enforced. Hopper, 241 F.3d at 1075.
19 “[C]onsistency in application is the hallmark of any policy designed to preserve the non-public
20 status of a forum.” Id. at 1076.

21 The Court also examines the selectivity employed to open the forum to expression. The
22 more restrictive the criteria for admission and the more administrative control over access, the
23 less likely the forum will be deemed public. Hopper, 241 F.3d at 1078.

24 Finally, the Court considers the nature of the property and its compatibility with expressive
25 activity. Cornelius, 473 U.S. at 802; Hopper, 241 F.3d at 1078. In cases where the principle
26 function of the property would be disrupted by expressive activity, the Supreme Court has
27 cautioned that courts should be “particularly reluctant” to hold that the Government intended to
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1 designate a public forum. Cornelius, 473 U.S. at 804.

2 Of particular importance in this case is “the historically unquestioned power of a
3 commanding officer to exclude civilians from the areas of his command.” Albertini, 472 U.S. at
4 687 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 893 (1961)). “Air Force installation
5 commanders are responsible for protecting personnel and property under their jurisdiction and
6 for maintaining order on installations, to ensure the uninterrupted and successful accomplishment
7 of the Air Force mission.” 32 C.F.R. § 809a.2(1)(a). In carrying out this authority, “[e]ach
8 commander is authorized to grant or deny access to their installations, and to exclude or remove
9 persons whose presence is unauthorized.” 32 C.F.R. § 809a.2(1)(b).

10 The paramount importance of the VAFB Commander’s ability to control activities and entry
11 to the base is the single most important factor weighing against a finding that the VAFB protest
12 area is a designated public forum. The Commander demonstrated his intent to retain a high
13 degree of control over the protest area by restricting access to the area and reserving the right
14 to curtail demonstrations if they interfere with the mission of the base. The Protest Advisory
15 further outlines the degree of control he exercises, by requiring advance coordination of protests,
16 designating the area permitted for parking, and regulating the materials that can be brought to the
17 protest site, down to the size of the backpack that may be carried by participants. Protestors are
18 subject to search and must present valid identification. By selectively opening the protest area
19 subject to significant restrictions, the VAFB Commander did not demonstrate an intent to create
20 a public forum.

21 Furthermore the Commander established a policy to exclude civilians who had received
22 bar orders from the protest area. These bar orders are regularly reviewed by base personnel prior
23 to scheduled protests to aid personnel in enforcing the Commander’s policy. Although there was
24 some evidence that security forces personnel did not always approach and question protestors
25 during every protest event, the evidence as a whole shows the VAFB Commander regularly
26 exercised significant control over the area, including enforcement of the rule excluding protestors
27 with bar orders from the protest area.

1 Based on the foregoing factors, the Court concludes that the VAFB protest area is not a
2 designated public forum. See, e.g., Cornelius, 473 U.S. at 804-06 (holding that in creating a
3 campaign for charitable solicitation of its employees, the Government applied a consistent policy
4 to limit participation to appropriate agencies and retained wide discretion to control its personnel
5 and internal affairs, and therefore the charitable campaign program was a nonpublic forum). By
6 limiting access to the protest area to those who have not previously been barred from the base,
7 and for the limited purpose of conducting peaceful protests, the Commander created at most, a
8 limited public forum. See Hopper, 241 F.3d at 1074 (a limited public forum exists when the
9 Government intentionally opens a nonpublic forum to certain groups or to certain topics).

10 **D. The Restrictions on Access to the Protest Area at VAFB Are Reasonable**

11 "When the [Government] establishes a limited public forum, the [Government] is not
12 required to and does not allow persons to engage in every type of speech. The [Government]
13 may be justified in reserving its forum for certain groups or for the discussion of certain topics."
14 Good News Club v. Milford Central School, 533 U.S. 98, 106 (2001). Restrictions on access to
15 a nonpublic or a limited public forum are permitted as long as the restrictions are reasonable in
16 light of the purpose served by the forum and are viewpoint neutral. Cornelius, 473 U.S. at 806;
17 Hopper, 241 F.3d at 1075.

18 The VAFB commander has extensive authority to exclude civilians from the base in order
19 to promote the security of the institution. Defendants previously had received bar letters for
20 violating base regulations, which provided a reasonable basis for excluding them from the base,
21 including the protest area. See Albertini, 472 U.S. at 687 (holding that the issuance of a bar letter
22 provided a reasonable basis for excluding the defendant from an open house on a military base
23 that otherwise was open to the public); see also United States v. Walsh, 770 F.2d 1490, 1492 (9th
24 Cir. 1985) (holding that the issuance of a bar letter provided a reasonable basis for excluding the
25 defendant from the closed area of a military base, even though the area had been open to the
26 public in the past). Moreover, the rule excluding those with bar letters from the protest area is
27 viewpoint neutral because it is premised on a prior determination that they pose a threat to base
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1 security due to prior conduct, not due to the expression of a particular viewpoint.

2 At trial, Defendants presented evidence to show that on the dates of their arrest, they were
3 engaged in peaceful activities and were in full compliance with the restrictions imposed by VAFB
4 concerning the location and conduct of the protests. As in Albertini, however, these facts miss
5 the point. Defendants were prosecuted not for engaging in peaceful protests, but for reentering
6 VAFB property after being ordered not to do so. See Albertini, 472 U.S. at 686. Although barring
7 them from the protest area might not have been "essential in any absolute sense to security" at
8 VAFB on the dates of the protests, the validity of the Commander's exclusion of Defendants does
9 not require the Court to agree with the Commander concerning the most appropriate manner for
10 promoting his significant interest in maintaining security at the base. Id. at 688-89. Rather, it is
11 sufficient that the exclusion of Defendants promotes a substantial government interest. Id.

12 Finally, the Court notes that Defendants were issued bar orders for failure to comply with
13 base security regulations in the past. "Nothing in the First Amendment requires military
14 commanders to wait until persons subject to a valid bar order have entered a military base to see
15 if they will conduct themselves properly." Albertini, 472 U.S. at 689. Based on their prior
16 violations of the rules, the Commander could reasonably conclude there was a risk Defendants
17 might violate the rules again, and thus barring them from the base was an appropriate means of
18 preventing future violations and maintaining security.

19 **Order**

20 For the foregoing reasons, IT IS ORDERED that Defendants' Motion to Dismiss is denied.

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22 Dated: July 21, 2010



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25 RITA COYNE FEDERMAN
UNITED STATES MAGISTRATE JUDGE