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Easement arguments deflect Catholic Worker's free speech case

Megan Fincher | Dec. 16, 2013

The Catholic Worker who went to the Supreme Court Dec. 4 expecting to hear arguments about free speech and the First Amendment instead got a lesson on property law.

Every month for 17 years, John Dennis Apel -- the defendant in *United States of America, Petitioner* v. *John Dennis Apel* -- had protested outside of Vandenberg Air Force Base in California. When he was barred from the base for life in 2010, Apel went to court to defend his right to free speech. He lost his early cases, but the federal appeals court ruled in his favor. That's how Apel, founder of Beatitude Catholic Worker House in Guadalupe, Calif., ended up in the Supreme Court with his wife and children Dec. 4.

Apel and his lawyer, Erwin Chemerinsky, dean of the University of California, Irvine law school and a constitutional lawyer, had expected that the case could help define First Amendment law on the right to peaceful protests, but they found themselves instead answering questions about property rights and national security.

"The Supreme Court spent an hour ... basically trying to figure out what a property easement means," Lyle Denniston wrote about the case on SCOTUSblog.com [1], which covers the Supreme Court.

Vandenberg Air Force Base may not be what most people think of when they imagine a military base. Its more than 150 square miles* encloses a public bus stop, two schools, sandy beaches and an Amtrak station.

The base is a 30-minute drive from Beatitude Catholic Worker House, which Apel founded with his wife, Tensie Hernandez-Apel, in 1996. Vandenberg regularly launches intercontinental ballistic missiles to targets in the Marshall Islands, according to its website.

"When they fire the intercontinental ballistic missiles, they're very powerful," Apel told *NCR*. "It rattles the windows in our house and you can feel it in your chest. It's a constant reminder that they are practicing for nuclear annihilation."

California Highways 1 and 246 weave through Vandenberg's restricted property, but they are open for public use due to an easement granted to the state of California and the county of Santa Barbara. The Apels have led a monthly peace vigil near the base entrance since 1996, standing on the public side of Highway 1 "within the area of the easement ... [in] a small area set aside by Vandenberg for public protests, pursuant to a base policy which dates back to 1989," according to Apel's Supreme Court brief. That area is marked with a meter-wide green line.

"It's always been, if you cross the green line, you get arrested and charged with trespassing. If you don't cross the green line, you don't get arrested," Apel said.

In 2003, ahead of the U.S. invasion of Iraq, Apel threw his blood onto Vanderberg's entrance sign and crossed the green line as an act of civil disobedience. The military barred him from the base for three years, but Apel continued to hold monthly vigils behind the line and organize larger protests without contest.

After Apel crossed the line again in 2007, the military banned him from the Vandenberg property for life, and in 2010 added the protest zone to the ban. In matters of national security, the military said, the highway is under military jurisdiction.

Though Apel never left the protest zone, the military arrested him at every monthly peace vigil for 15 consecutive months. He was cited with three Class B misdemeanors for violating the lifetime ban.

"Eventually, I think they decided that I wasn't going to stop protesting and so they took it to court," Apel said.

Both a magistrate judge and a federal district judge ruled that even within the protest zone, Apel was violating the military ban. Chemerinsky took Apel's case pro bono to the U.S. Court of Appeals for the Ninth Circuit, which ruled in the Catholic Worker's favor, stating that because of the easement "the federal government lacks the exclusive right of possession of the area on which the trespass originally occurred."

U.S. Solicitor General Donald Verrilli Jr. decided to take the case to the Supreme Court. In a brief, he argued that the Ninth Circuit's approach "would threaten substantial harm to the safe and orderly operation of many of this Nation's military installations."

Chemerinsky continued to represent Apel, and in oral arguments before the Supreme Court Dec. 4, spoke for his First Amendment rights, but the justices wouldn't have it.

When Chemerinsky tried to raise the issue of free speech, Justice Antonin Scalia stopped him.

"You can raise it, but we don't have to listen to it," Scalia said, according to the court transcript.

Justice Anthony Kennedy told Chemerinsky, "Now, you may ... have a First Amendment argument. I understand that. But let's just concentrate on the property ownership."

Chemerinsky tried to argue that the "rules and regulations with regard to the easement ? must be consistent with the Constitution. For example, the commander couldn't exclude African-Americans from that road. And that's why the --"

Scalia cut him off to say, "You keep sliding into the First Amendment issue, which is not the issue on which we granted certiorari. We're only interested in whether the [ban and bar] statute applies [to the easement]."

Justice Elena Kagan told Chemerinsky that the military was "very sensible. It keeps tight what it needs to keep tight, but it allows to be more open areas that ... it doesn't have an interest in securing entirely. ... What's wrong with that?"

Chemerinsky replied, "Your Honor, what's wrong with that is there is no need to exclude peaceful protesters from the public road in a protest zone in order to achieve the national security interest of the government."

However, Benjamin Horwich, assistant to the solicitor general, argued that Apel "has been individually identified as posing a threat to the order and security of the base."

To this, Justice Sonia Sotomayor replied, "It seems such an odd thing for a Class B misdemeanor to be used to protect the national security; that Congress has determined that the threat is so great, that the only thing you

need is a Class B misdemeanor to protect the U.S."

Chemerinsky told the justices, "Like so many cases to come before you, this one is about where do you draw the line. Here the government has drawn the line and it's a green line. Now, on this side of the green line, there is a First Amendment right to speak."

The court is expected to rule on the case in June.

**An earlier version of this story incorrectly identified how large the base is.*

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