

1 "exclusive possession"? Does the fence have any
2 relevance? What is the relevance of the fence?

3 MR. CHEMERINSKY: Well, the fence is
4 tremendously relevant, in determining where the
5 government believes the military installation begins,
6 and also, it's very important in terms of national
7 security.

8 JUSTICE ALITO: But there are bases that
9 have no fences. So what, there? None of that is under
10 the exclusive possession of the government?

11 MR. CHEMERINSKY: No, Your Honor. The
12 government gets to decide the area of exclusive
13 possession. So take the Greer case as an example. In
14 Greer, this case emphasized that Fort Dix, even though
15 it was open, still was in the exclusive possession. In
16 fact, the first paragraph of this Court's opinion in
17 Greer says, "exclusive possession."

18 Maybe the analogy that is closest to this
19 case, then, is this Court's decision in *United States v.*
20 *Grace*, where this Court drew a distinction between the
21 sidewalks that run outside this building and the
22 building itself.

23 And the Court said, as to those sidewalks,
24 even though they abut the Supreme Court, it still is
25 open for speech purposes. Sidewalks, public roads are

1 inherently open --

2 JUSTICE ALITO: I'm still completely
3 confused about the test that you are asking us to -- to
4 apply. Either -- either fences are relevant or they are
5 not relevant. If you can have exclusive governmental --
6 exclusive military possession of a base where there are
7 no fences, I don't really see what the significance is
8 of the fence here.

9 That's just -- that's just for starters.

10 MR. CHEMERINSKY: Obviously, the fence is
11 significant, in terms of answering the government's
12 concerns with regard to national security. I think the
13 fence is also important to go, to Justice Sotomayor's
14 point, with regard to the functional approach. My
15 answer to your question --

16 JUSTICE SCALIA: Excuse me. What about the
17 portion of the base on the other side of the road
18 easement, where the government does have exclusive
19 possession?

20 MR. CHEMERINSKY: Well --

21 JUSTICE SCALIA: Is that okay? That's still
22 part of the base.

23 MR. CHEMERINSKY: But what's interesting, as
24 was pointed out --

25 JUSTICE SCALIA: Yes or no, under your

1 theory?

2 MR. CHEMERINSKY: The government does not
3 have not exclusive possession there. There is a public
4 school there, for example, that anyone can drive and go
5 to.

6 One of the consequences of the government's
7 interpretation of 1382 is that, if Mr. Apel had a child
8 attending that public school, he could not go pick up
9 his child at school, but you or I or anyone else could
10 drive --

11 JUSTICE SCALIA: That may be very bad, but
12 is it bad because the government does not have exclusive
13 possession of every --

14 MR. CHEMERINSKY: Yes.

15 JUSTICE SCALIA: You know, when you talk
16 about the road, they've given an easement, so you can
17 say, oh, yeah, they don't have exclusive possession.
18 But the other side of the road, that vast tract, you are
19 saying the government, what, does or does not have
20 exclusive possession?

21 MR. CHEMERINSKY: The government does not
22 have exclusive possession. The --

23 JUSTICE SCALIA: Then the word "possession"
24 means nothing. You are -- you are applying solely a
25 functional test. It only possesses that which it is

1 using for military purposes. That is not a possession
2 test. It's a purely functional test.

3 MR. CHEMERINSKY: But, Your Honor, Congress
4 didn't, in 1382, say, "all land owned by the military."
5 It used the phrase "military installation," and whenever
6 that phrase has been defined, it always refers to the
7 area that is reserved to be used for military purposes.

8 The United States can draw the green line
9 and build the fence wherever it chooses. Here, it
10 decided to do so in a particular place, leaving open a
11 fully open public road with a designated protest zone.

12 JUSTICE SOTOMAYOR: I'm sorry. I have the
13 same problem that Justice Breyer has. PXes belong to
14 the military, generally, the land, but they are run by
15 outside contractors, sometimes. Are you saying because
16 they've given up exclusive control of the PX, that they
17 fail your test?

18 So does the utility company. I don't know
19 if it's possible that military bases generate their own
20 utilities, but I presume that, somewhere, they don't,
21 and they have an easement to drive up and read their
22 meters.

23 There may be easements for repairs of
24 certain underground things that -- that supply the base.
25 That's not exclusive control, so I'm -- or possession.

1 So what -- what does your test mean?

2 MR. CHEMERINSKY: It is where the United
3 States chooses to exercise exclusive possession. The
4 United States, for example, in Greer, said, we are
5 claiming we have exclusive possession over the entire
6 area of Fort Dix, even though there was a public road.
7 If the government wants to say, even as to the PX within
8 Vandenberg, that's within our exclusive possession, it
9 can do so.

10 But the government, by granting the easement, by
11 allowing the public road, by creating the designated
12 protest zone, has done something very different than
13 exclusive possession.

14 JUSTICE SOTOMAYOR: So that -- that road for
15 the public utility for which there is an easement of
16 travel is not exclusive to the U.S.? So anybody can
17 travel into the base at any time they want to?

18 MR. CHEMERINSKY: No, Your Honor, because in
19 order to come on to that utility easement, you would
20 need the express permission of the base commander. So
21 that utility easement would still be an exclusive
22 control, to go to Justice Breyer's question.

23 CHIEF JUSTICE ROBERTS: You need the express
24 permission of the base commander to drive down the road.
25 It's just that he has given it to the public at large.

1 MR. CHEMERINSKY: Well, Your Honor, everyone
2 has the authority to drive down that road. Somebody
3 who --

4 CHIEF JUSTICE ROBERTS: Because it's been
5 ceded by the United States for the convenience of the
6 traveling public.

7 MR. CHEMERINSKY: Exactly. And then the
8 question is once the United States has ceded the
9 easement, under 1382 can a person be prosecuted? And
10 once the United States has ceded that easement, does it
11 violate the First Amendment in light of this Court's
12 decision in *Flower* to prosecute --

13 CHIEF JUSTICE ROBERTS: I thought you just
14 answered the question from Justice Sotomayor by saying,
15 no, no, the utility easement doesn't work because the
16 military commander has not granted permission to anybody
17 else to use that easement. Here we have a public road
18 easement, and you said that's different. And my
19 question was: No, it's not, because the military
20 commander has given permission to use easement. Now, I
21 want to know what distinguishes the two cases.

22 MR. CHEMERINSKY: And this goes to
23 Justice Kennedy's question earlier if we are talking
24 about an easement. An easement that is created for a
25 public road inherently has free speech rights attached

1 to it. In fact, many lower court cases have always said
2 an easement for a public road includes the right to use
3 it for speech purposes. That is very different than an
4 easement that exists for purposes of a utility.

5 JUSTICE SCALIA: It seems to me a First
6 Amendment argument and not an argument that goes to the
7 scope of Section 1382.

8 MR. CHEMERINSKY: No, Your Honor, because
9 you need to interpret the statute to avoid the
10 constitutional issues. If you interpret the statute to
11 allow excluding speech on this public road easement in
12 the designated protest zone, then interpreting the
13 statute that way would raise grave First Amendment
14 issues.

cited in U.S. v. Apel, No. 11-50803 archived on September 25, 2014

15 JUSTICE SCALIA: So you are saying we should
16 read the statute to say it only applies when it doesn't
17 violate the First Amendment. Of course we'd read it
18 that way.

19 MR. CHEMERINSKY: Of course, you should read
20 it that way.

21 JUSTICE SCALIA: But not because it has
22 anything to do with the scope of authority of the
23 government. It's what the government can do. I -- I
24 don't know how to read that, that text, in such a way
25 that it will avoid all First Amendment problems. There

1 is no way to do that.

2 MR. CHEMERINSKY: I disagree, Your Honor. I
3 think that the reason that every lower court and the
4 United States government itself have read "military
5 installation" as exclusive possession is that otherwise
6 it would raise First Amendment problems.

7 JUSTICE ALITO: Well, you are arguing that
8 the military cannot grant an easement across a military
9 installation for the purpose of allowing the public to
10 drive from a point, let's say, to the south to a point
11 to the north, without also granting an easement that
12 would allow people to linger along the road and engage
13 in First Amendment activity. Is that your argument?

14 MR. CHEMERINSKY: No, it is not, Your Honor.

15 JUSTICE ALITO: Because I can understand why
16 the military might be willing to say, well, fine, we
17 understand that it would be very inconvenient to make
18 everybody drive around the installation. We'll allow
19 them to drive through, but we do not want people
20 lingering here because that does create security
21 concerns.

22 MR. CHEMERINSKY: No, Your Honor, that is
23 not my position. If the government wanted to have a
24 closed base and say, we're going to allow this road to
25 go through, but there were signs to let everyone know

1 they were still on the closed base, there were guards
2 that were there, that is Greer. That is not this case,
3 and that's not Flower.

4 JUSTICE KAGAN: Your -- your argument is
5 sort of a use it or lose it argument, is that correct?
6 That the government has this commanding authority,
7 unless the government uses it to its full extent every
8 day of the week, it loses it?

9 MR. CHEMERINSKY: Well, in a sense, yes,
10 Your Honor. The sense is that the government gets to
11 decide where to draw the green line. The government
12 gets to decide where to put the fence. And when they
13 decided to create a public road with a protest zone
14 outside of it, then to interpret 1382 applied, as I said
15 to Justice Scalia --

16 JUSTICE KAGAN: One of the arguments that
17 the government makes is, look, what the military wants
18 to do here is something very sensible. It keeps tight
19 what it needs to keep tight, but it allows to be more
20 open areas that can -- that it -- it doesn't have an
21 interest in securing entirely. And that's for the
22 convenience of military personnel. It's for the
23 convenience of other people who live around the base.
24 What's wrong with that?

25 MR. CHEMERINSKY: Your Honor, what's wrong

1 with that is there is no need to exclude peaceful
2 protesters from the public road in a protest zone in
3 order to achieve the national security interest of the
4 government.

5 CHIEF JUSTICE ROBERTS: Well, that's usually
6 the sort of determination that's left to the military
7 commander. I can think of a lot of reasons why the
8 commander would not want a gathering of people on the
9 road but would be willing to let people drive through
10 the road.

11 MR. CHEMERINSKY: That's exactly right, Your
12 Honor. The military commander gets to decide that. But
13 by creating a designated protest zone outside of that,
14 it's indicative that the military commander doesn't
15 perceive any national security threat from allowing a
16 gathering there.

17 CHIEF JUSTICE ROBERTS: Well, it indicates,
18 as the -- the barment order does, that he does see some
19 kind of threat by allowing somebody in there who's
20 vandalized the base in the past.

21 MR. CHEMERINSKY: Your Honor, but we -- this
22 Court has never said there's a permanent forfeiture of
23 First Amendment rights because somebody misbehaved at
24 one time.

25 CHIEF JUSTICE ROBERTS: Is there -- can

1 there be a temporary forfeiture of First Amendment
2 rights?

3 MR. CHEMERINSKY: Of course there can be.
4 People can be in prison and lose their First Amendment
5 rights. There can be restraining orders issued.

6 CHIEF JUSTICE ROBERTS: Well, I'm talking
7 about what this case is about, which is the temporary
8 exclusion. Would your case be the same if Mr. Apel was
9 barred for one year?

10 MR. CHEMERINSKY: Well, he can be barred
11 from coming onto the base, as drawn by the green line,
12 for one year of --

13 CHIEF JUSTICE ROBERTS: No, he can traverse
14 it. He can traverse. There -- there's no question of
15 that. Could he be barred from participating in protests
16 for a year because he vandalized the base?

17 MR. CHEMERINSKY: Yes, Your Honor, a
18 sentence could include that. There's no doubt that
19 there could be, or if somebody was perceived --

20 CHIEF JUSTICE ROBERTS: Now here, as I
21 understand it, he was barred permanently subject to the
22 right of him to apply for removal of the barment.

23 MR. CHEMERINSKY: That's correct, Your
24 Honor. There is the ability to appeal a bar order to
25 the commander.

1 JUSTICE BREYER: It's more than that. It
2 says I mean, you know, if you wanted to take someone to
3 school. It said -- first, if you need medical
4 treatment, you can just go in, and then it said you --
5 you have to receive prior written approval from me, the
6 commander, or my designee, but if you get it. So I
7 suppose if he had a child at the school, he would ask
8 and they'd give it to him. I mean, it didn't seem to me
9 an absolute bar. It seemed to me a bar for purposes of
10 going to that particular --

11 MR. CHEMERINSKY: He can ask the commander
12 of the base who issued the bar order for permission to
13 use it.

14 Four Honors --

15 JUSTICE BREYER: Do we have to get into any
16 of that? Do we -- just like I don't know where he
17 really was physically. I don't know whether that grass
18 strip is within something, without something. These all
19 sound like First Amendment relevant matters.

20 MR. CHEMERINSKY: But they're also relevant
21 to the statute. They're relevant to interpret the
22 statute to avoid constitutional doubt. They're relevant
23 because --

24 CHIEF JUSTICE ROBERTS: To avoid -- just to
25 interrupt -- to avoid grave constitutional doubts.

1 MR. CHEMERINSKY: Yes, Your Honor.

2 And, Your Honor, also, since every other
3 court has interpreted the statute as we're suggesting,
4 there's at least ambiguity, which under the Rule of
5 Lenity means it has to be construed in favor of a
6 criminal defendant.

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

12 CHIEF JUSTICE ROBERTS: I'm sorry, the Rule
13 of Lenity you said in favor of a criminal defendant.

14 MR. CHEMERINSKY: Yes, Your Honor.

15 CHIEF JUSTICE ROBERTS: We're talking about
16 barment here. Is that a criminal sanction?

17 MR. CHEMERINSKY: 1382 is the criminal
18 statute that he was convicted of violating.

19 CHIEF JUSTICE ROBERTS: Right, but this
20 doesn't -- you're not allowed to collaterally attack the
21 barment decision.

22 MR. CHEMERINSKY: No, Your Honor. What
23 we're saying is you have to interpret the words
24 "military installation." There are two different
25 interpretations or perhaps more has come out. What

1 we're saying is you have to choose the interpretation
2 that favors the criminal defendant. So we are using the
3 Rule of Lenity relative to interpreting the statute, and
4 that's why we believe that both in terms of the statute
5 and in terms of the First Amendment, the Ninth Circuit
6 should be affirmed.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Horwich, five minutes remaining.

10 REBUTTAL ARGUMENT OF BENJAMIN J. HORWICH

11 ON BEHALF OF THE PETITIONER

12 MR. HORWICH: Thank you. Just a couple of
13 points.

14 -- I think the colloquy with my friend
15 sort of shows that taking this functional approach to
16 where the statute applies day to day, place to place, is
17 really just not going to prove workable. And we have to
18 remember, this is a misdemeanor prosecution. This is
19 not something that should entail an extremely extensive
20 subtle inquiry that is going to vary from place to
21 place.

22 So I think that that shows the wisdom of
23 what the Court said in the Benson case, which we quote
24 at page 15 and 16 of our reply brief, which explains.
25 It says that: "When a tract has been legally reserved

1 for military purposes, courts follow the action of the
2 political department of the government and will not
3 inquire what the actual uses to which any portion of the
4 reserve is temporarily put."

5 As for the Ninth Circuit's approach, which
6 is this sort of real estate-based analysis, I think
7 there have been a number of hypotheticals offered that
8 show why that's going to produce some borderline absurd
9 or entirely absurd results. And so that's why we come
10 back to again respecting the decision to place -- to
11 place the installation under military command and that
12 Section 1382 provides the sanction to enforce the orders
13 entered pursuant to that lawful command.

14 I might say one word about the green line
15 and its relevance. My friend says that it is sort of
16 the threshold across which 1382 applies or doesn't
17 apply. The relevance in a 1382 prosecution of the green
18 line comes in a prosecution under the first paragraph
19 for violating a regulation. At Joint Appendix 51,
20 there's the commander's order closing the base, and what
21 it says is: "Pursuant to my authority, Vandenberg Air
22 Force Base is a closed base. General rule covering the
23 entire command authority."

24 Paragraph 2: "The roadway easements through
25 Vandenberg have limited use as provided," et cetera, et

1 cetera. "Use and occupation is for these purposes only
2 and is subject to any rules and regulations the
3 installation commander may prescribe," and so forth.

4 So what the green line is, is it's defining
5 the boundary between the closed base, the generally
6 closed base, and the road, which is open. So that is
7 what ensures that someone who is driving on the road is
8 not committing an offense against the commander's
9 regulations, if they are just an ordinary member of the
10 public. And, of course, if they cross over the line,
11 then they are violating the closed base regulation if
12 they don't have the commander's permission to cross that
13 line.

14 So the -- what is different, of course,
15 about Respondent is that he's been barred from the base.
16 So the rules that apply to the general public don't
17 apply to him. Of course that's the very purpose of the
18 second paragraph of Section 1382, is to recognize that
19 commanders can make individualized determinations that
20 the rules that work generally for the public don't work
21 for particular people who show themselves to be willing
22 to vandalize government property or disobey the
23 instructions to remain within the areas that they may
24 lawfully be present in. And, of course, that's the
25 basis for why Respondent was barred.

1 JUSTICE KAGAN: May I just ask a background
2 question, Mr. Horwich? What's the history of this First
3 Amendment area? What -- when did this speech area come
4 into being?

5 MR. HORWICH: There was a settlement of
6 litigation with the commander in the late 1980s. It's
7 in the -- it's reproduced -- part of it is reproduced in
8 the Joint Appendix -- which I guess shows a couple -- in
9 which the commander agreed that there would be a place
10 on the base where --

11 JUSTICE KAGAN: Was the litigation
12 essentially like this one, basically saying that this
13 was not under military command?

14 MR. HORWICH: To be honest, I'm not familiar
15 with the particular legal contentions there. But I
16 think what the settlement does show is that if it's the
17 commander who is authorizing this, the commander remains
18 in charge of this. And of course, the current protest
19 policy which is reproduced in the Joint Appendix is
20 quite clear that the commander retains authority to --
21 and can control the time and place of the protests, and
22 of course makes it clear that people who are barred
23 can't come back.

24 So on that point, with respect to the
25 constitutional avoidance argument, I think, as the Chief

1 Justice pointed out, it needs to be a serious
2 constitutional doubt. And I think what this Court has
3 said in Virginia v. Hicks puts any of those doubts to
4 rest. The Court said in that case that the First
5 Amendment permits, quote, "the punishment of a person
6 who has, pursuant to lawful regulation, been banned from
7 a public park" --- so I think a fortiori a military base
8 -- "after vandalizing it and who ignores that ban in
9 order to take part in a political demonstration."

10 The Court -- so the Court I think has
11 already settled this.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

15 (Whereupon, at 11:03 a.m., the case in the
16 above-entitled matter was submitted.)

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