



November 18, 2011

SENT VIA FACSIMILE AND OVERNIGHT

Colonel Nicholas F. Marano, USMC
Commanding Officer, Marine Corps Base Camp Pendleton
P.O. Box 555019
Camp Pendleton, CA 92055

RE: Constitutional Basis for Memorial Topping Camp Pendleton Hill

Dear Colonel Marano:

On behalf of the American Center for Law and Justice (ACLJ) and all of our members and supporters, thank you for your service and dedication to our nation. The sacrifices that members of our military make for our country not only provide our nation's security, but also allow America to remain the greatest nation in the world. Thank you.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that a Ten Commandments monument erected and maintained by the government on its own property constitutes government speech and does not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).



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On November 11, 2011, three Marines mounted a memorial cross on top of a Camp Pendleton hill replacing a memorial cross that burned down in a 2007 brush fire.¹ The cross was intended to honor the Marines' four comrades who were killed in action in Iraq. It has come to the ACLJ's attention that certain groups are criticizing the United States Marine Corps and the Camp Pendleton Command for not censoring these individual Marines' expression of honor for their fallen comrades.² These critics claim that permitting the memorial cross is inappropriate and violates the Establishment Clause.³ These critics are wrong on both counts.

The First Amendment states, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend I. Courts have interpreted this to mean that the Government may not "endorse" one religion over another. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995)⁴ (O'Connor, J, concurring). Government conduct alleged to implicate the Establishment Clause is viewed from the perspective of a "reasonable observer" who "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* Since "[t]here is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion," it is important to remember that "[a] State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." *Id.* "[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Id.* at 779.

A determination of the validity of a particular display is based upon the entirety of the display, not just the part of it having an arguably religious meaning. It is clearly erroneous to focus analysis exclusively upon a symbol with some religious significance in isolation from the surrounding context. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("[T]he District Court plainly erred by focusing almost exclusively on the crèche."); *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 639 (6th Cir. 2005) (when the Ten Commandments are at issue, the "Constitution requires an analysis beyond the four-corners of the Ten Commandments").

Crosses are used as a widespread and universal symbol of remembrance, as Lt. Colonel John McCrae, M.D., of the Canadian Army immortalized in the poem, *In Flanders Fields*. McCrae treated many soldiers critically injured at Ypres in the Flanders region of Belgium during World War I and saw many of them die. The first stanza of his poem describes the sorrow he felt as he looked across a cemetery covered with poppies:

¹ *Marines erect cross on Veterans Day to honor fallen comrades*, L.A.TIMESBLOGS, Nov. 11, 2011 <http://latimesblogs.latimes.com/lanow/2011/11/marines-cross-camp-pendleton.html>.

² Mark Walker, *MILITARY: Atheist group objects to memorial cross at Camp Pendleton*, North County Times, Nov. 16, 2011 http://www.nctimes.com/news/local/military/military-atheist-group-objects-to-memorial-cross-at-camp-pendleton/article_1a2deffe-1b96-5c90-8c9e-66a8155bc897.html ; *see also* Military Association of Atheists and Freethinkers, *Unconstitutional Christian Monuments Mar Veterans Day*, MAAF, Nov. 14, 2011 <http://blog.militaryatheists.org/2011/11/unconstitutional-christian-monuments-mar-veterans-day/>.

³ *Id.*

⁴ In *Pinette*, the Court upheld the Constitutionality of erecting an unattended cross on public property.

IN FLANDERS FIELDS the poppies blow,
Between the crosses row on row,
That mark our place; and in the sky
The larks, still bravely singing, fly
Scarce heard amid the guns below.⁵

It is quite significant that the Argonne Cross and the Canadian Cross of Sacrifice were already prominent, well established war memorials at Arlington National Cemetery when the Marines first erected this Cross Memorial in 2003.⁶

A reasonable observer of the Memorial would certainly be aware of the fact that, “[o]f the varied types and kinds of monuments [designed to commemorate worthy deeds], one symbolic design, the cross, has been perpetuated all through the centuries.” GEORGE WILLARD BENSON, *THE CROSS: ITS HISTORY & SYMBOLISM* 82-83 (HACKER ART BOOKS 1976) (1934). Crosses “have been adapted and modified for use as modern monumental and memorial crosses. . . . all through the ages,” especially to commemorate those who have died in the military. *See id.* at 89. The cross as a symbol of sacrificing one’s life for others, is an apt recognition of the sacrifice that these fallen Marines made for their fellow Marines and their nation. In light of the universal use of crosses as symbols of honor and sacrifice, there is a key difference between proselytizing a sectarian religious message and allowing Arlington National Cemetery, the current Memorial at Camp Pendleton, and other public memorials to include crosses among other symbols of remembrance. The longstanding tradition of using crosses as symbols of commemoration and respect ensures that a reasonable person would not view the Argonne Cross, the Canadian Cross of Sacrifice, or the Memorial in this case as an attempt to proselytize.

If including a cross among other symbols upon public property *always* violates the Constitution, as critics suggests,⁷ the requisite inquiry into the history and context of a particular case would be irrational and irrelevant. The Supreme Court has recognized that “[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.” *Lynch*, 465 U.S. at 680. The Court has counseled repeatedly that the Establishment Clause does not allow the government to demonstrate such hostility toward religion. “A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.” *Lee v Weisman*, 505 U.S. 577, 598 (1992); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845-46 (1995) (“a pervasive bias or hostility to religion . . . could undermine the very neutrality the Establishment Clause requires”).

In sum, the Constitution does not prohibit honoring fallen troops through the use of an historic symbol merely because that symbol also carries religious significance. Given the memorial’s history and context, it is clear that it is not intended to proselytize for any faith. It is meant to

⁵ *In Flanders Fields*, available at <http://www.arlingtoncemetery.net/flanders.htm> (last visited Nov. 18, 2011).

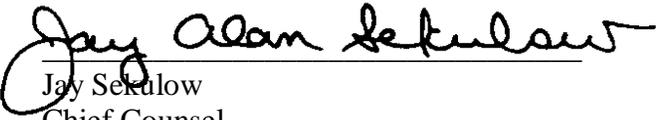
⁶ *See* Arlington National Cemetery, *Monuments and Memorials*, at <http://www.arlingtoncemetery.mil/VisitorInformation/MonumentMemorials.aspx> (last visited Nov. 18, 2011).

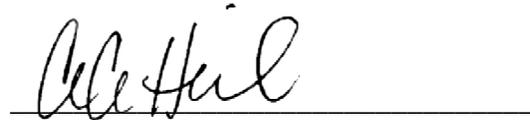
⁷ *See Unconstitutional Christian Monuments*, *supra* note 2.

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honor and commemorate the sacrifice of those who have given the ultimate sacrifice. In fact, the Constitution forbids the type of “relentless and all-pervasive attempt to exclude religion from every aspect of public life” that critics’ statements suggest. *Id.* Crosses are an apt, appropriate, and constitutionally permissible means of honoring and commemorating the sacrifice of those who have given their life for their comrades and their country.

Respectfully,


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