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FEATURE ARTICLE

**MILITARY SYMBOLISM OR
RELIGIOUS PREFERENCE?
THE MOUNT SOLEDAD
CROSS CONTROVERSY**

by JASON LEWIS

When people place crosses along federal highways, should these crosses be allowed to stand? Or, can the government legally place “In God We Trust” on currency? The United States is founded on the doctrine of separation of church and State; our government cannot promote one religion over an-

other.¹ Still, many commonplace practices exist that seem to blur this firmly-entrenched tenet.

In July 2008, the U.S. District Court for the Southern District of California addressed some of these issues in *Trunk v. City of San Diego*, permitting a 29-foot cross to remain on federal land, finding the cross to be part of a war memorial rather than an impermissible symbol of religious preference.²

The 20-year legal battle over the cross is far from over. The plaintiffs plan to appeal the *Trunk* decision to the Ninth Circuit Court of Appeals.³ Given the highly contentious nature of the case, the U.S. Supreme Court may grant certiorari.

With soldiers returning from the Iraq War, does the *Trunk* decision ensure fair representation of all veterans? Specifically, is the Latin cross inextricably tied to Christianity, or is it possible that it can take on other meanings according to the particular context?

THE FACTS BEHIND THE *TRUNK* DECISION

The U.S. District Court for the Southern District of California decided *Trunk* on July 29, 2008.⁴ The plaintiffs, the Jewish War Veterans of the United States of America and four individuals, brought suit to challenge the existence of a Latin cross on federal land.⁵ The plaintiffs claimed that the cross, among other things, impermissibly advanced one religion over another in violation of the Establishment Clause of the U.S. Constitution.⁶ The government as defendant argued that the site was a war memorial, of which the cross only played a part.⁷

The Mount Soledad cross has a long history. In 1913, private citizens first erected the cross on land owned by the City of San Diego.⁸ After a replacement cross was blown down in 1952, a group of religious and civic organizations formed the Mount Soledad Memorial Association (MSMA).⁹ The MSMA aimed to replace the second cross with a new one.¹⁰

The MSMA erected the third cross in 1954.¹¹ This cross is the subject of the current controversy. The site was officially dedicated on Easter Sunday in 1954 to fallen veterans of World Wars I and II and the Korean War.¹² Since its

erection, both religious and non-religious groups have used the site for events ranging from Easter services to weddings.¹³



Mount Soledad Veterans Memorial
San Diego, California¹⁴

In 1989, private citizens initiated suit against the City of San Diego to challenge the presence of the cross.¹⁵ The plaintiffs argued that the cross unlawfully inhibited their use of the city's park.¹⁶ Shortly thereafter, the MSMA began making changes to the memorial.¹⁷ For instance, the organization added a plaque denoting the site's status as a veterans' memorial.¹⁸ Other details were added to the site, such as plaques recognizing individual veterans.¹⁹ The religious imagery on the plaques includes crosses, the Star of David, and symbols from other religions.²⁰

In 2004, Congress passed the Consolidated Appropriations Act, recognizing the Mount Soledad site as a national veterans' memorial.²¹ Moreover, Congress agreed to accept the site as a memorial if the City of San Diego chose to donate it to the federal government.²² However, the California Superior Court

blocked the donation.²³ In 2006, while that decision was on appeal, the federal government exercised its Takings Clause powers and overtook the site.²⁴ The recent taking “directs the Secretary of Defense to enter into a memorandum of understanding with the MSMA to maintain the property as a veterans’ memorial.”²⁵

The Court in *Trunk* stated the government’s “use of religious symbolism violates the Establishment Clause if it has the purpose or effect of endorsing religious beliefs, or favoring one religion over others.”²⁶

Specifically, the Court looked to whether: (1) Congress acted with a secular purpose in taking the site; (2) whether taking the site amounted to the impermissible advancement or inhibition of one religion; and (3) whether the taking amounted to an excessive government entanglement with religion.²⁷

Ultimately the Court found for the government with respect to all three elements of its analysis.²⁸

Although the plaintiffs argued the dialogue surrounding the taking demonstrated an impermissible purpose, the Court chose to focus on the taking resolution’s legislative history.²⁹ It pointed to Congress’ findings of the “long history and tradition of memorializing members of the Armed Forces who die in battle with a cross or other religious emblem of their faith.”³⁰

The Court also noted that Congress found the memorial cross “‘fully integrated’ as the centerpiece of the ‘multi-faceted’ veterans’ memorial ‘that is replete with secular symbols.’”³¹

As to the second issue, the Court ruled the site did not advance or inhibit one religion over another.³² The Court stressed that the cross could not be considered in isolation from its context; it pointed to the various secular symbols accompanying the cross to signify the site’s war-memorial purpose.³³

Moreover, the Court cited numerous current national landmarks such as the National Cathedral that featured permissible religious symbolism.³⁴ “That these familiar national landmarks were first recognized and are perhaps still seen as primarily religious sites,” the decision stated, “neither abrogates their secular symbolism nor renders them ‘off limits’ to government support.”³⁵

Finding the third excessive-entanglement prong satisfied for similar reasons, Judge Burns held that the government did not violate the Establishment Clause when it took and maintained the Mount Soledad site.³⁶

WHAT ARE THE IMPLICATIONS OF *TRUNK*?

While no specific numbers have been compiled, the MSMA states that “thousands” of people gather at the site to honor war veterans.³⁷ Conversely, others, despite their veteran status, do not feel welcome at the site.³⁸

Plaintiff Steve Trunk, a Vietnam veteran, states the Mount Soledad site “sends a message that only Christian war veterans are being honored or remembered.”³⁹

Maurice Eis, a member of the Jewish War Veterans of the United States of America, states that he “enjoyed frequently visiting the memorial on Mount Soledad, regardless of the presence of the cross, until the site was designated as a veterans’ memorial.”⁴⁰

According to James McElroy, a trial attorney representing the plaintiffs, the presence of the cross on public land runs deeper for some Jewish people in the area.⁴¹

McElroy explains, “La Jolla, the community in San Diego where the cross stands, actively discriminated against Jews when the cross was erected in about 1954. For instance, the main social club in La Jolla had written rules prohibiting Jews from joining. The owners of this club are the same people that helped to build and promote the cross.”⁴²

“Today, the cross represents and reminds [Jews] of the fact that La Jolla was a very anti-Semitic area,” McElroy says.⁴³

Others, however, see Mount Soledad as a gathering place to recognize the veterans, despite the presence of the cross.⁴⁴

William Kellogg, President of MSMA, states the site “is a community resource to honor veterans. We have many different kinds of people that come to the site to [pay their respects].”⁴⁵

Congressman Duncan Hunter of California, an original supporter of the federal government's taking of the site, believes "[t]he protection of this historic veterans' memorial is an issue of high importance to not just the visitors and residents of San Diego, but all veterans nationwide."⁴⁶

"The transfer of the [Mount] Soledad Veterans Memorial will ensure that our citizens, visitors and veterans can continue to visit this popular site and honor the servicemen and women who have served our country so valiantly," Hunter added.⁴⁷

Still, McElroy argues that the cross' sheer size sends a strong message of favoritism.⁴⁸

"You really have to see the cross to understand what we're talking about," McElroy said.⁴⁹ "The cross is big enough to be visible from many points of San Diego, including the major freeway which carries over a quarter million cars a day within view of the cross. The fact that it's sitting on government land tells people that the government is favoring one religion over another."⁵⁰

WHAT DOES THE FUTURE HOLD?

The legal battle over the cross seems far from over.

The plaintiffs plan to file an appeal to the Ninth Circuit.⁵¹ McElroy feels confident the Ninth Circuit will respond more favorably to the plaintiffs' arguments.⁵²

"The Ninth Circuit has already decided in our favor regarding this cross on numerous occasions in the past, and there is another case involving a similar cross on federal land that the Ninth Circuit recently ruled unconstitutional," McElroy said.⁵³ "We hope that an appeal will prove successful."⁵⁴

Others that favor protecting the Mount Soledad site are fearful that the Ninth Circuit may rule in favor of the plaintiffs.⁵⁵

Congressman Jeff Sessions of Alabama, an original supporter of the bill to transfer Mount Soledad to the government, expressed concern over the Ninth Circuit.⁵⁶

“[T]he Ninth Circuit is the most activist circuit in the country and we continue to have problems with them. [It is] reversed by the U.S. Supreme Court more often than any other circuit.”⁵⁷

Besides litigation, McElroy stated that a solution is readily available.⁵⁸

“There are other options for the location of the cross,” McElroy said.⁵⁹ “The government would only have to move the cross 1,000 yards to a nearby church. Instead of spending millions on litigation, the move would cost less than \$50,000. Everyone who enjoys the cross will still be able to enjoy it in almost its same location.”⁶⁰

For now, it appears that the cross will stay on federal land. Nevertheless, with an impending appeal in the Ninth Circuit early next year, the battle over the government’s role in exhibiting religious symbolism is far from settled.

NOTES

1 U.S. CONST. amend. I.

2 *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1224 (S.D. Cal. 2008).

3 Randal C. Archibold, *Federal Judge Says Cross Can Stay on San Diego Hill*, THE N.Y. TIMES, August 1, 2008, available at <http://www.nytimes.com/2008/08/01/us/01statue.html?>

4 *Trunk*, 568 F. Supp. 2d at 1199.

5 *Trunk*, 568 F. Supp. 2d at 1202.

6 *Id.*

7 *Id.* at 1216.

8 *Id.* at 1202.

9 *Id.* at 1203.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*, n.3 (providing the site as <http://www.lajollalight.com/content/img/f241532/soledad.jpg>).

15 *Id.*; See *Murphy v. Bilbray*, 782 F. Supp. 1420, 1422 (S.D. Cal. 1991).

16 *Murphy*, 782 F. Supp. at 1426.

17 *Trunk*, 568 F. Supp. 2d at 1203.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 1204; Public Law 108-447, 118 Stat. 2809, 3346 (2004).

22 *Trunk*, 568 F. Supp. 2d at 1204.

23 *Id.*

- 24 *Id.*
- 25 *Id.*; Public Law 109-272, 120 Stat. 771 (2006).
- 26 *Trunk*, 568 F. Supp. 2d at 1205.
- 27 *Id.* at 1205-06. Moreover, the Court also employed another six-factor test; the test contained similar analysis to its first test. *See Id.* at 1218.
- 28 *Id.* at 1218.
- 29 *Id.* at 1208-09.
- 30 *Id.* at 1209.
- 31 *Id.*
- 32 *Id.* at 1218.
- 33 *Id.* at 1217.
- 34 *Id.* at 1214.
- 35 *Id.*
- 36 *Id.* at 1224.
- 37 Mount Soledad Memorial Association, <http://www.soledadmemorial.com/> (last accessed on November 30, 2008).
- 38 *Trunk*, 568 F. Supp. 2d at 1205.
- 39 *Id.*
- 40 *Id.*
- 41 Telephone Interview with James McElroy, Trial Attorney, Law Offices of James McElroy (October 16, 2008).
- 42 *Id.*
- 43 *Id.*
- 44 Telephone Interview with William Kellogg, President of MSMA, Mount Soledad Memorial Association (November 8, 2008).
- 45 *Id.*
- 46 Press Release, Congressman Duncan Hunter, Hunter Sends Letter of Support to Mayor on Mount Soledad Cross Transfer (March 8, 2005), *available at* http://www.house.gov/hunter/news_prior_2006/mount.soledad.release.html.
- 47 *Id.*
- 48 James McElroy Interview, *supra* note 41.
- 49 *Id.*
- 50 *Id.*
- 51 Randal C. Archibold, *supra* note 3.
- 52 James McElroy Interview, *supra* note 41.
- 53 *Id.*
- 54 *Id.*
- 55 Mount Soledad Veterans' Memorial: Hearing on H.R. 5683 Before the Senate (2006) (statement of Senator Jeff Sessions).
- 56 *Id.*
- 57 *Id.*
- 58 James McElroy Interview, *supra* note 41.
- 59 *Id.*
- 60 *Id.*