



MYTHS AND REALITES: GRAVESTONES AND MARKERS ARE NOT IN DANGER

Proponents of numerous court-stripping and attorney's fee measures argue that the federal government must respond to recent judicial opinions with extreme statutory measures denying access to the courts. These bills include the Constitution Restoration Act of 2005 (H.R. 1070), the Pledge Protection Act (H.R. 2389) as well as the Public Expression of Religion Act (PERA)(H.R. 2679). Proponents of these measures falsely and disingenuously argue that without legislative action, the removal of religious symbols from personal gravestones, including grave markers in Arlington Cemetery will be next. **Not only is this untrue, but the ACLU position is exactly the opposite.**

The ACLU vigorously defends people's freedom to choose their religion under the Free Exercise Clause of the First Amendment to the U.S. Constitution. Furthermore, the ACLU would defend the first amendment rights of all veteran Americans and service members to display the religious symbol of their choosing on their grave. Therefore, the vehement attacks on the ACLU claiming that gravestones and markers at federal cemeteries, including Arlington Cemetery, are in danger is *patently false and misleading*, serving as nothing more than a red-herring to the constitutional issues at stake. These bills only serve to slam shut the courthouse doors to religious minorities by insulating all religious claims from federal litigation and denying just compensation for their claims.

ACLU advocates a more inclusive policy regarding religious symbols on gravestones, which in no way endangers religious symbols in Arlington Cemetery. Proponents of PERA, for example, state that unless the bill is passed and courts are stripped of their jurisdiction to hear Establishment Clause cases, gravestones and markers at Arlington Cemetery are in danger. This fictitious argument is used only to distract from the real constitutional issues raised in this and in other bills, since such gravestones are entirely constitutional and opposition to such bills does not endanger them.

Current federal law allows for individuals buried at Arlington National Cemetery to request a headstone of their choice.¹ There are currently over 35 approved religious symbols.² However, the Department of Veterans Affairs currently has a complicated process of approval of religious symbols to be placed on gravestones. The Department should not serve as an obstacle to one's freedom to express their religion and if anything, the ACLU would advocate for a more

¹ 38 U.S.C. § 2306(a)-(c).

² Arlington National Cemetery Authorized Emblems, *available at* http://www.arlingtoncemetery.org/funeral_information/authorized_emblems.html (last visited July 11, 2006)

open policy of inclusion of all religious symbols. Such a policy by the Department would ensure all American service members and veterans have the right to practice their religion freely.

Religious symbols on personal gravestones are constitutional, unlike permanent, government-sponsored religious displays on government-owned property. Religious symbols on personal gravestones are vastly different from government-sponsored religious or sectarian displays on government-owned property. The former is a cherished individual right of expression. The latter should be to honor the sacrifices of all Americans regardless of their religious beliefs. The majority of recent cases involve permanent religious or sectarian displays in publicly owned parks, plazas or civic buildings. Courts have routinely found permanent religious displays, such as Latin crosses, in violation of one's religious liberty when placed on Federal property.³

When a sectarian religious symbol is on Federal property, the Government essentially sanctions that particular religion. Indeed, in a related context, Justice Kennedy has noted – in an opinion joined by Chief Justice Rehnquist, Justice Scalia, and Justice White – that it would be an “extreme” case if government powers were used to display permanently a Latin cross on government property:

Symbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case. I doubt not, for example, that *the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall*. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.⁴

Similarly, in *Buono v. Norton*, the Ninth Circuit held that an eight-foot tall cross on federal property in the Mojave Desert violated the Establishment Clause.⁵ However, these religious displays are different from gravestones since such displays are essentially religious memorials sanctioned by the government. Religious symbols on gravestones are the choice of the individual service member, falling within their First Amendment right to freely express their religion. These decisions should be left in the hands of individuals, families, and religious communities, and not in the hands of governments or pressure groups.

Memorials should be erected in honor of *all* veterans who served their country, not only for some veterans. Obtrusive, permanent religious displays on government property focusing on the Latin cross, for example, ignore the diversity of religion and the wide array of religious beliefs held by veterans and service members. Even within the Christian faith, many sects do not recognize the Latin cross as their preferred religious symbol. The ACLU maintains that such religious memorials constitute excessive government entanglement with religion in violation of the Establishment Clause.

³ *Buono v. Norton*, 371 F. 3d 543 (9th Cir. 2004). Courts have also found a 51-foot Latin cross in a public park to clearly represent government endorsement of Christianity. *See* Separation of Church and State Committee v. City of Eugene Lane County, State of Oregon, 93 F. 3d 617, 619 (9th Cir. 1996).

⁴ *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 661 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part) (emphasis added)..

⁵ *Buono v. Norton*, *supra* note 2.

In contrast, gravestones and the symbols placed upon them are the choice of individual service members and their families. The government is not imposing a particular religion or symbol upon the gravestones, as individuals and family members are able to choose which symbol, if any, to place upon their gravestone. The Department of Veterans Affairs must ensure that all religious symbols are accepted in order to protect individual rights under the First Amendment. Therefore, bills such as PERA are not needed to protect religious symbols on gravestones and markers. They are not in jeopardy, since the freedom to choose one's religious symbol is entirely constitutional.

If you have any further questions, please do not hesitate to contact Terri Schroeder, Senior Lobbyist, at 202-675-2324 or tshroeder@dcaclu.org