

**The Mt. Soledad Latin Cross**  
**ACLU Program on Freedom of Religion and Belief**  
**August 2006**

**Introduction**

The ACLU of San Diego & Imperial Counties and the ACLU Foundation, through its Program on Freedom of Religion and Belief, filed suit in Federal Court in the Southern District of California in August 2006, to contest the Federal government's eminent domain seizure and continued display of the Mt. Soledad Latin cross in San Diego.

The ACLU is a strong defender of the right of religious organizations and individuals to express their religious beliefs in public. The ACLU is opposed, however, to the *government* sponsoring, endorsing, promoting, or financing religious symbols. The government has no right or authority to decide whose religious symbols should be promoted and whose should be ignored. The easiest resolution to the Mt. Soledad controversy, which has unfortunately become a fundraising opportunity for certain groups, is to use privately raised funds to move the cross to a religious site and thereby save the Latin cross and respect the Constitution.

The following provides a brief background description of the ACLU position on religious symbols in public places and the background of the Mt. Soledad Latin cross. For a more detailed explanation of the history of the dispute leading up to this case, see the complaint *Jewish War Veterans of the United States v. Rumsfeld*.

**The ACLU on Religious Symbols in the Public Square**

Religious symbols, including those that are displayed prominently, are an important and constitutionally protected form of religious expression in the public square in the United States. Churches, Mosques, Temples, Gurdwaras, Kingdom Halls, Zendos, and Cathedrals have a constitutionally protected right to construct religious buildings and to display symbols that are visible to the public. Families have a right to display religious symbols on their homes. Individuals and their families have the right to display religious symbols on gravestones, whether in Federal or private cemeteries. Many other forms of religious expression in the public sphere also are constitutionally protected. The public airways are filled with religious messages broadcast by preachers and televangelists. Books, magazines, and newspapers are printed and distributed by commercial and religious publishers and are delivered by the U.S. Postal Service. Missionaries and street preachers share their faith door-to-door and on public sidewalks. People have the right to wear religious symbols and attire in public, whether it is a cross, a yarmulke, a headscarf, a nun's habit, or a turban. When state property (such as, public parks, statehouse grounds, and courthouse lawns) are made available for speech in an "open public forum," religious expression has the same constitutional protections as all other forms of speech in that forum. All of these forms of religious expression may take place in public and they are all

constitutionally protected. The ACLU has and will continue to ensure that such constitutional rights for religious communities and individuals are fully protected.

The ACLU opposes, however, *governmental* promotion, endorsement, and financing of religious symbols. The question is not the permissibility of “religion in the public square” – which is constitutionally *protected* – but the *government’s* involvement in promoting religious symbols and beliefs, which is constitutionally *prohibited*. Erecting a Latin cross on the lawn of a Catholic or Lutheran Church is constitutional. But putting that same cross on the courthouse lawn on the opposite side of the street is unconstitutional. The prohibition comes not because the cross – or any other religious symbol – is disfavored. Rather, it comes from the fact that it is a deeply sacred symbol to many citizens, but not to all. The courthouse and the statehouse should represent justice for *all* American citizens and should not favor the religious beliefs and symbols of some over those of others. The decision where to place sacred symbols should not be made by bureaucrats, politicians, or temporary majorities – it should be made freely by religious communities and individuals for themselves and among themselves. It is easy for religious people to understand that the government and majorities should not be promoting religious symbols when it is a religious symbol other than their own. Some, however, seem to forget the principles of fairness and equality when it is their own preferred religious symbol that is being promoted.

### **The Origins of the “Latin Cross”**

The Latin cross (*crux immissa*) is to many of the world’s Christians a venerated symbol associated with the passion and death of Jesus Christ. Although the Latin cross is the most widely recognized symbol of Christianity, it is not a symbol revered or even accepted by all Christians. Eastern Orthodox Christians employ other forms of a cross. The bars of the Greek Orthodox cross (*crux quadrata*) are of equal length. The Patriarchal cross has an extended vertical bar and three horizontal bars. The Russian Orthodox cross has three horizontal bars, with the lowest attached at a distinctive angle. The cross of the Coptic Orthodox Church (*crux ansata*) resembles the Latin cross but has a loop at the top and was presumably appropriated from the ankh symbol of ancient Egypt. Outside of Orthodoxy, several other forms of the cross as a Christian symbol have appeared in history, including the Celtic cross (in the shape of the Latin cross but with a circle encompassing the bars) where they intersect and also the T-shaped Tau cross (*crux comissa*), which is believed by many (but not all) Christians to be the actual form of the cross on which Jesus was crucified.

The origins of the Latin cross as a sacred symbol are not entirely clear. During the earliest years of Christianity, when it was illegal to practice the faith and when worship took place underground, Christians would most typically use a fish (the Greek word for fish is *ichthus*, which is an anagram of the Greek for “Jesus Christ, Son of God, Saviour”). Also used as a symbol of early Christianity was the Chi-Rho monogram, which is an “X” superimposed over a “P” (signifying the first two letters, in Greek, of “Cristos”), a symbol that continues to be used by the Roman Catholic Church. Other symbols used by Christians in the catacombs of Rome included the Greek trident (signifying the Holy Trinity), a small ship (signifying Jesus as a fisher

of men), and an anchor. Some early Christians appropriated the swastika (*crux gammata*), which was a sacred symbol in India and the Near East.

The first open use of the cross as a symbol of Christianity appears to have begun when the Emperor Constantine (who was not at the time Christian) used it as a symbol to lead his non-Christian troops into battle. When Constantine was victorious in war, he attributed the victory in part to the miraculous power of the cross. The pagan Emperor's embrace of the cross resulted in Christians no longer needing to hide the symbols of their faith and the Emperor's approval of the cross gave it increased legitimacy during the Fourth Century. The cross under which Constantine conquered probably was in the shape of the Greek Orthodox cross. The earliest archeological findings suggest that Christians used the Greek cross before the Latin cross. The origins of the Latin cross itself as a revered symbol seem to derive from Roman Catholic Church tradition. It has long been part of Catholic teaching (while disputed by others as apocryphal) that Helena, the mother of Emperor Constantine, traveled to Jerusalem, found the original "True Cross" intact and that parts of it were shipped to Rome where they were found to have miraculous powers.

While the Latin cross has been the dominant form of the cross in Europe for hundreds of years (as well as in the former colonies of European powers), it is not a universal symbol of Christianity, even in the West. The Latin cross was most dramatically seen outside Europe on the shields of the Crusaders. Although Lutherans (called the "Evangelical Church" in Germany) appropriated the Latin cross that had been traditional for hundreds of years in Europe, they accused Roman Catholics of being superstitious and of wrongly attributing miraculous powers to it. Other Protestant Christians, particularly those associated with the Reformed (or Calvinist) traditions, objected to religious symbols entirely, including the cross, as "graven images" that were forbidden by the Ten Commandments. The first Puritan settlers in Massachusetts, for example, rejected the cross as a symbol that violated their strict reading of the Bible. American Revolutionary soldiers fought and died under the stars and stripes and not under the crosses of St. James and St. George on the English flag. (The Confederate States of America temporarily resurrected the idea of putting a cross on the flag.) Prior to the twentieth century, most churches in the United States associated with the Reformed tradition did not use the cross.

Many Christian denominations, albeit a minority, still do not employ any form of the cross as a symbol of their religion. The Jehovah's Witnesses, based upon their strict reading of the Bible, believe that Christ was crucified on a stake and not a cross. For many Christians, the vital message of Jesus Christ was not his death, but his teachings and his resurrection and they, like the earliest Christians, do not use the cross as a symbol of their faith. And, of course, there are many American citizens of non-Christian beliefs, including Jews, Muslims, Zoroastrians, Hindus, Buddhists, Zains, Sikhs, and non-believers – many of whom are veterans and have given their lives for their country – do not see any form of cross as being a symbol of their religions or their beliefs.

## **The History of the Mt. Soledad Latin Cross in San Diego**

The first cross in San Diego, came, of course, with the Spanish conquistadores who arrived in San Diego Bay in 1543 under the banner of the Latin cross of the Roman Catholic Church.

In the modern era, the City of San Diego first took possession of Mt. Soledad, an 822-foot high hill, in the nineteenth century. In 1916, the San Diego City Council dedicated the property on which the Latin cross rests, as well as 170 adjoining acres of property, as the Mt. Soledad Nature Park. Although most of the 170-acre parcel is undeveloped and maintained in its natural state, the top of the mountain has been cleared. Between 1913 and 1934, several crosses were erected atop Mt. Soledad.

In 1952, the City Council authorized a private entity, the Mt. Soledad Memorial Association (“Association”), to erect and maintain a sizeable Latin cross on top of Mt. Soledad. The Cross was designed to replace predecessor crosses that were previously built on top of Mt. Soledad but that were no longer standing. Between 1952 and 1954, a 43-foot high Latin cross made of steel-reinforced concrete (in an early-1950s “modern” style) was erected on the summit of Mt. Soledad, giving the cross easy visibility for several miles throughout the area known as La Jolla, including the Interstate highway that passes nearby. There are no other religious symbols that are similarly visible. The United States government, by act of Congress, attempted to seize the land through eminent domain in August 2006. Prior to that time, the property on which the Latin cross is now located, belonged to the city of San Diego. The ACLU brought the case on behalf of the Jewish War Veterans of the United States and three individuals, Richard Smith, Mina Sagheb, and Judith Copland.

On April 18, 1954, the Association dedicated the Latin cross during a Christian religious ceremony held on Easter Sunday. During that ceremony, the Latin cross was explicitly dedicated to “Our Lord and Savior Jesus Christ” in an Association dedication bulletin. (Every annual publication of the Thomas Brothers Map for the San Diego area from 1954 to 1989 – the year the government’s display of the Latin cross was first challenged in court – presented a geographic legal description of the location as the “Mt. Soledad Easter Cross.”) Throughout the past fifty years, the Latin cross has served not only as a religious symbol but also as the site of numerous religious events, such as weddings, baptisms, and Easter sunrise services.

During the first 38 years of its existence, there was no placard or marker indicating the presence of a veterans memorial either on Mt. Soledad Natural Park or at the site of the Latin cross. *The Association installed such a marker with a “Veterans” memorial inscription only in 1992, after the onset of litigation challenging the constitutionality of the display of the Latin cross on City-owned property.* No other religious symbols of comparable size or stature are present at Mt. Soledad to moderate the sectarian Christian message conveyed by the Latin cross, which towers above the rest of the memorial.

In 1989, a private individual sued the City of San Diego in Federal Court over the Latin cross’s presence atop Mt. Soledad, alleging that it violated the “No Preference” Clause of the California Constitution as well as the Establishment Clause of the United States Constitution.

The Federal District Court found that “[w]here . . . the Latin cross appears as a permanent, salient symbol on public property and on a public imprimatur, California’s constitution will not permit it to continue to stand.” *Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991). The Court ordered the City to remove the Latin cross, and gave the City three months to comply with its order. On appeal, the Ninth Circuit upheld the district court’s determination and concluded that, even assuming the Mt. Soledad Latin cross could properly be characterized as war memorial, it is “[a] sectarian war memorial [that] carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion.” *Ellis v. City of La Mesa*, 990 F.2d 1518, 1527 (9th Cir. 1993).

In October 1994, the City made its first attempt to remedy the constitutional violation via a ballot initiative in which it urged voters to “SAVE THE CROSS ON MOUNT SOLEDAD,” not by the constitutionally permissible means of moving it to a non-governmental site, but by authorizing a no-bid sale of a 222-square foot parcel of land under the Latin cross to the Association. The Federal Court once again declared the sale invalid under the No Preference Clause as well as article XVI of the California Constitution, which “strictly prohibits any governmental support for religious purposes.” The Court reasoned that it was readily apparent that “the primary purpose for the sale . . . was to save the Mt. Soledad cross from removal and/or destruction,” and that the City “clearly show[ed] a governmental preference for the Christian religion” by “tak[ing] the position of trying to ‘save’ such a preeminent Christian symbol.” *Murphy v. Bilbray*, Nos. 90-134 GT, 89-820 GT, 1997 WL 754604, at \*\* 9-11 (S.D. Cal. Sept. 18, 1997). Following this decision, the Association sold the 222 square foot parcel back to the City.”

After this decision, the City published a notice soliciting bids on about a half-acre of land in Mt. Soledad Park, and expressly stated that the sale of the parcel was “for the purpose of maintaining a historic war memorial.” To this end, the City established a bidding process that required applicants to explain their plans for “maint[aining] a historic war memorial on the site.” Subsequently, the City announced that it accepted the Association’s bid as the winning bid. The Ninth Circuit, sitting en banc, invalidated this sale as well, finding that it “was structured to provide a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the [C]ross” and accordingly violated the California Constitution. *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002) (en banc), *cert. denied*, 538 U.S. 978 (2003).

Following the Ninth Circuit’s decision, a dispute arose in the Federal Court as to who actually owned the Latin cross. On October 12, 2004, the Federal Court ruled that the City of San Diego — and not the Association — owned the land under and around the Latin cross. The Court further implored the parties to “[s]ettle this case! It’s time to move the cross from public land to private land and comply with the laws of our great country instead of trying to find sneaky ways to get around them to pander to a certain group or to satisfy an out-of-state group’s religious agenda.”

The parties engaged in extensive settlement discussions over the course of several weeks and agreed to settle the case by moving the Latin cross 1,000 yards to a nearby church. Under the terms of the possible settlement, the Association would be allowed to maintain an interest in

the Mt. Soledad property and war memorial, and the Latin cross would be replaced with a non-sectarian symbol that would appropriately recognize all veterans in exchange for an end to litigation. These settlement terms would be perfectly acceptable to Plaintiffs here and would have preserved the continued existence of the Latin cross — but in a constitutional way. The settlement terms were presented to the City Council on July 20 and 27, 2004. But instead of accepting the settlement outright, the Council attempted one last sale to the highest bidder, who alone could decide whether to keep, remove, or replace the Latin cross. At the public meeting of the City Council, the Mayor and four of five Council members, who voted to put the proposition (known as Proposition K) on the ballot over strong Association and prominent veterans-group opposition, expressly stated that the reason for their vote was to allow the Latin cross to remain on Mt. Soledad. One Councilmember even cited his membership in the “Jesus Christ fan club” as a reason for his vote.

On November 2, 2004, a substantial majority of San Diego voters – over 250,000 in total – rejected Proposition K and directed the City Attorney to enter into the settlement agreement.

### **The Intervention of (former) Congressman Randy “Duke” Cunningham and the Federal Government**

Undeterred by the will of San Diego voters and the Federal Court’s prior exhortation to settle the case consistently with constitutional requirements, the City refused to comply with the binding ordinance. Instead, with the active encouragement of the Thomas More Law Center (“Thomas More”), an advocacy group whose stated mission is the “promotion of the religious freedoms of Christians” and the protection of “Christians and their beliefs in the public square,” the City began its ongoing campaign to circumvent its constitutional obligations.<sup>1</sup>

After San Diego voters overwhelmingly rejected Proposition K, Thomas More sought to scuttle the binding settlement agreement and secure the intervention of the federal government — all to save the Latin cross as a religious symbol.

On November 10, 2004, Thomas More sent a letter to Representative Randy “Duke” Cunningham, a Congressman from San Diego and a member of the powerful House Appropriations Committee, to solicit his help in convincing the federal government to override the San Diego referendum and corresponding settlement agreement by declaring the Latin cross

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<sup>1</sup> As Chancellor of England under Henry VIII, Sir Thomas More played an active role in arresting, interrogating, and prosecuting Protestants – Roman Catholicism then being the established state religion. When Henry VIII abandoned Roman Catholicism and replaced it with Anglicanism, More was arrested and tried for treason for refusing to accept Henry as the head of the established Church. It was from experiences such as these that the American constitutional founders were led to reject establishments of religion. The Thomas More website notably does not declare that it is on a mission to defend “the Establishment Clause of the American Constitution,” but rather their version of the “Christian faith” which leads them, as with Sir Thomas More and Henry VIII, to use the state to advance their personal religious beliefs. The Thomas More Law Center is the same law firm that has promoted the unconstitutional advancement of intelligent design in public schools and that unsuccessfully defended the Dover Pennsylvania School Board when it followed the Center’s advice. The Center is playing a similar role in San Diego where it is promotes not the neutrality preferred by the founders, but government endorsement of particular religious beliefs and symbols – just as did Henry VIII and Sir Thomas More.

a national war memorial. In so doing, Thomas More made clear that the principal reason for taking such action was because “religion and morality are the foundation of our country” and the Mt. Soledad Latin cross was “one of the most visible symbols of [our Christian faith].”

Acknowledging that there was “unfortunately” a local initiative whereby San Diego voters overwhelmingly agreed to resolve the matter by entering into a settlement agreement, Thomas More nonetheless asserted that “the culture war will continue to be fought on many fronts” no matter what. Accordingly, Thomas More asked Representative Cunningham to “save the Cross” and help “preserve this ... religious landmark” by declaring it a national war memorial.

Less than a month later, during the night of November 21, 2004, Representative Cunningham inserted an eleventh-hour rider into the voluminous \$388 billion Fiscal Year 2005 Omnibus Appropriations Act (Pub. L. No. 108-447). The rider, which few had seen before Representative Cunningham inserted it into the appropriations bill, (1) designated the Mt. Soledad Veterans Memorial a national veterans memorial; (2) authorized the Department of the Interior to accept the donation of the Memorial from the City of San Diego; and (3) directed the National Park Service to enter into a memorandum of understanding with the Association for the maintenance and administration of the memorial. Pub. L. No. 108-447, § 116, 118 Stat. 3346, codified at 16 U.S.C. § 431 note (2004). Representative Cunningham acknowledged that he had not asked for a written legal opinion from an attorney on whether the bill would allow the Latin cross to remain at its current location, and that he was trying to “save the Cross” as a religious landmark. Thomas More hailed Cunningham’s effort as “an act of God.” At the same time that Representative Cunningham was being praised by Thomas More for his efforts as “an act of God” to save the cross, he was abusing his political office by accepting bribes. Cunningham subsequently pled guilty to this crime and is now serving time in a Federal penitentiary.

With the exception of Thomas More, however, all parties to the long-running dispute acknowledged that Representative Cunningham’s proposed legislation would not solve the constitutional problem that the California state and federal courts had unanimously reaffirmed multiple times over the preceding thirteen years. On December 8, 2004, President Bush signed the omnibus appropriation bill, with Representative Cunningham’s rider intact, into law. Soon thereafter, Thomas More and Representative Cunningham successfully pressed San Diego Mayor Dick Murphy to add the proposed federalization of the Latin cross by way of donation promptly to the City Council Agenda. Prior to the City Council meeting, however, San Diego City Attorney Michael Aguirre issued a formal legal opinion that the federalization of the Latin cross by way of donation would be a violation of the California Constitution and fall far short of a remedy that would be deemed acceptable by the California state and federal courts. Mr. Aguirre’s opinion further observed that, “based on current case law, such a transaction would also violate the federal Constitution and . . . provide fodder for additional legal proceedings against the City.”

On March 8, 2005, after a six-hour public hearing, the San Diego City Council voted against donating the Latin cross to the federal government. Soon after the City Council’s decision, Thomas More and others, spurred on by Rep. Cunningham and Mayor Murphy, spearheaded a petition and referendum drive under the aegis of a Thomas More-affiliated group

called “San Diegans for the Mt. Soledad National War Memorial” to rescind the Council vote. This wide-ranging and well-financed effort included 75 paid signature gatherers, massive fundraising efforts, and a petition written by Thomas More that began with the proposition, “You Can Save Our Cross.” Press reports described sermons from the Latin cross site and other public and religious venues, including events at Qualcomm Stadium and Cox Arena on Easter Sunday, that urged civil disobedience to flout the original Court order and save the Latin cross.

At a May 17, 2005 meeting to consider the petition, two City Council members, while expressing misgivings about the mounting legal costs the City was incurring, agreed to switch their initial vote and to send the issue back to the voters. The Council accordingly voted 6-3 to allow a public referendum, Proposition A, on the Latin cross. The vote on Proposition A was scheduled to coincide with the July 26, 2005 special election to replace Mayor Murphy. After the City Council’s vote was announced, Latin cross supporters sang “Onward Christian Soldiers” in the Council chamber.

In a separate case brought in California State Courts challenging Proposition A, Judge Cowett issued a 35-page final decision on October 7, 2005, striking it down as unconstitutional. *Paulson v. Abdelnour*, No. GIC-849667 (Cal. Sup. Ct. Oct. 7, 2005). The decision recounts the extensive legal history of the dispute and the consistent and unequivocal rulings by state and federal courts over the years. Based on “the consistent, repeated, and numerous references to saving the Cross as the basis for deciding whether to donate the memorial to the United States,” Judge Cowett held that “one conclusion is inescapable: this transfer is again an unconstitutional preference of the Christian religion to the exclusion of other religions and non-religious beliefs in violation of the No Preference Clause of the California Constitution.” *Id.* at 28. In addition, Judge Cowett ruled that the City’s attempt “to go so far as to transfer away valuable land for no compensation for the purpose of saving the cross is also an unconstitutional aid to the Christian religion in violation of the California Constitution.” *Id.*

Judge Cowett likewise observed that maintaining the Latin cross as a part of a national veterans memorial would “run[] afoul of the Establishment Clause of the United States Constitution.” *Id.* Judge Cowett concluded: “Even today, it still can be said that at best the Mt. Soledad Memorial has a secondary secular purpose (or at worst is but a sham secular purpose) and that the predominant purpose of the memorial is a religious purpose.” Judge Cowett concluded by stating Judge Thompson’s initial pronouncement back in 1991 – that if the City “truly wish[ed] to honor the war dead, then it should do so other than with the Latin cross which it has permitted to stand atop Mt. Soledad” — “still stands the test of time and history as related to this cross.”

After an additional ruling by the Federal Court, Mayor Sanders and certain organizations lobbied President Bush and the U.S. Congress to help them evade the effects of the California Constitution by condemning and effectuating a taking of the Mt. Soledad Latin cross by the federal government. On May 10, 2006, Congressman Duncan Hunter, who assumed leadership on the Latin cross issue in Congress after Rep. Cunningham was incarcerated for the crimes of bribery and tax evasion, asked the President to “use the authority found in 40 U.S.C. 3113 to begin immediate condemnation proceedings” concerning the Latin cross.



On June 27, 2006, Rep. Hunter introduced a bill to “effectuate the purpose” of Rep. Cunningham’s previous bill from 2004. The new proposal declares that “there is hereby vested in the United States all right, title, and interest in and to, and the right to immediate possession of, the Mt. Soledad Veterans Memorial in San Diego, California.” The bill directs the United States to pay “just compensation to any owner of the property.” The bill states that upon acquisition of the memorial by the United States, “the Secretary of Defense shall manage the property and shall enter into a memorandum of understanding with the Mt. Soledad Memorial Association for the continued maintenance of the Mt. Soledad Veterans Memorial by the Association.”

### **Conclusion**

The American veterans who gave their lives for their country did so under the banner of the American flag, as properly commemorated by the Iwo Jima Memorial, not as crusaders under the banner of the cross. As a religious symbol, the Latin cross should be sacred. But when politicians and interest groups use the government to promote the cross, they profane it. Those who truly want the Mt. Soledad Latin cross to be saved – rather than to be used as fodder in culture wars – have a perfectly constitutional option available: move the cross to a prominent, visible, *religious* site.