

## **The Mount Soledad Cross Controversy**

The Christian cross that sits atop Mount Soledad in La Jolla, California has served as the site for Christian religious observances, including Easter services, weddings and baptisms since 1913. The land underneath the cross is a city-owned public park. When the current cross was dedicated, on Easter Sunday 1954 to “Our Lord and Savior, Jesus Christ,” it was declared a tribute to veterans of World War I, World War II, and the Korean Conflict, but no plaque was installed until decades later in 1992, several years after a 1989 lawsuit challenging the constitutionality of a Christian cross on public property was initiated. Then, a small plaque was placed at the site, and it was not until ten years after that, in 2000, that an American flag and a series of granite walls displaying individual veterans’ plaques were added. The site has long been known, and officially referred to, as “The Mt. Soledad Easter Cross,” or simply, “The Easter Cross.”

Following is a history of the Soledad Cross detailing the numerous historical facts and court rulings that clearly establish that this powerful symbol of the Christian faith is unconstitutionally placed on public property.

**The ACLU fully supports the rights of Christians and people of all faith to actively practice their religions freely**, without government constraint. We firmly believe that the right of religious expression in the public sphere is a core principle of our Constitution. We also believe that it is people of faith, and not governments, legislators, or political majorities who should be responsible for expressing religious beliefs.

We sincerely welcome the efforts of Christian leaders and others to **save the Mount Soledad Cross by moving it to a religious site**. Religion is best expressed through individuals and religious communities rather than by governments or through political bodies.

**We wish to save the Cross *and* protect our Constitution.**

### **Soledad Cross History**

- 1954 The San Diego City Council grants permission to the Mt. Soledad Memorial Association (MSMA) to reconstruct a Latin cross on Mt. Soledad. The association raises private contributions and pays for the construction of the 43-foot tall concrete cross that stands on the property today. The cross is dedicated to “Our Lord and Savior, Jesus Christ” on Easter Sunday as a tribute to veterans of World War I, World War II, and the Korean Conflict. There are no other religious symbols displayed that represent veterans who are not of the Christian faith. Since the first Easter service, the city has granted the MSMA a permit every Easter to conduct a sunrise service. No record exists of the MSMA submitting an application to conduct ceremonies on Memorial Day or Veterans Day prior to Paulson’s legal challenge; since then, veterans groups have intermittently held remembrance ceremonies on the site on those days.
- 1985 A map of the American Automobile Association of the San Diego area identifies the cross as the “Mt. Soledad Easter Cross.” Similarly, the Yellow Pages, maps, and the U.S. Department of Commerce Coast and Geodetic Survey refer to the cross as the “Easter Cross.”
- 1989 Phillip Paulson, self-described humanist and atheist, and a Vietnam War veteran, files lawsuit claiming the religious symbol’s presence on state land violated provisions of the U.S. and California constitutions prohibiting the government from favoring one religion over another. (*Murphy v. Bilbray*, 782 F. Supp. 1420, 1438)

After Paulson's suit is filed, a single small plaque recognizing the site as a memorial to veterans is placed near the cross. This becomes the first visible tribute to war veterans at the site.

- 1991 Paulson wins the case and a subsequent 9<sup>th</sup> Circuit decision (*Ellis v. City of La Mesa*, 990 F.2d 1518 (9<sup>th</sup> Cir. 1993), cert. denied, 512 U.S. 1220 (1994)), as well as a series of appeals and related filings. Federal District Court Judge Gordon Thompson, Jr. grants summary judgment permanently enjoining the presence of a cross on public property. He notes that the cross was permanently positioned inside a state park and maintained at taxpayers' expense, in violation of the California Constitution.

The City of San Diego Historical Site Board designates the cross and the surrounding park as historical sites.

- 1992 The City Council votes to authorize the sale of a 15 x 15-foot parcel of land underneath the cross for \$14,500 to a pre-selected buyer, the MSMA, but then decides to put the measure up for voter approval. San Diego voters approve Proposition F, which allowed for a transfer of ownership to a nonprofit private corporation called the Mount Soledad Memorial Association (MSMA). The ballot pamphlet contains the names of four city council members and the mayor, and the ballot argument is headed, "Please, Save the Cross."
- 1993 The city then attempts to save the cross by selling the parcel of land under the cross in a no-bid sale to the MSMA for \$24,000. However, the district court found the sale unconstitutional, holding, "It is apparent to the Court that the primary purpose for the sale...was to save the Mt. Soledad cross from removal or destruction" and that such intent violates "...the 'no preference' clause [of preference for a particular religion] of the California Constitution. (*Paulson v. City of San Diego*, 1997, WL 754606 (S. D. Cal.)
- 1994 The city appeals for the case to be heard *en banc*, that is, by the entire 28-judge panel of the 9<sup>th</sup> Circuit Court of Appeals. The city is granted a hearing, but again loses by a unanimous vote. The city petitions the U.S. Supreme Court with a *Writ of Certiorari*. The Court denies a review, allowing the 9<sup>th</sup> Circuit decision to hear its appeal to stand.
- 1996 Judge Thompson calls a hearing to determine whether the city and county properly remedied their constitutional violations. The judge demands briefs from the MSMA and orders it and plaintiffs to meet with a federal magistrate for additional discovery. The remedy phase is put on hold until Judge Thompson recovers from an illness and returns to the bench.
- 1997 Judge Thompson rules that the negotiated sale of the cross site to the MSMA and the size of the plot sold violated the California Constitution by appearing to show a preference for Christians. He wrote, "Both the method of sale and the amount of land sold underneath the Mt. Soledad cross do not cure the constitutional infirmities outlined in this Court's previous Order."
- 1998 The city designs a new strategy for saving the cross, by restructuring the land sale and put the land up for bid. The "Invitation for Purchase Proposal" requires purchasers to maintain the war memorial site as it was, that is, with the cross attached. It also requires that only bidders with "experience maintaining the grounds as a historic war memorial" are eligible. The city receives five bids, and once again, the MSMA won by submitting the highest bid, \$104,000.
- 1999 Paulson's attorney, James McElroy, files a Motion to Enforce the Injunction in September, arguing that the sale of one-half acre of park land beneath the cross is a calculated attempt to frustrate the district court judge's injunction. The city continues to appeal the case, and the

ACLU joins as *amicus curiae* in support of Paulson's efforts to compel the city to implement an appropriate remedy.

- 2000 A district court judge upholds the transfer of land to the MSMA. Paulson appeals, and the ACLU joins the appeal as his co-counsel. (The 9<sup>th</sup> Circuit rules in 2002; see below.)



The memorial association adds six concentric granite walls that hold plaques to be purchased by individuals to honor a veteran's military service. An American flag, small pillars and brick pavers (bricks with individual messages) are also installed to honor community and veterans' groups and supporters of the memorial. Other than the plaque that was placed at the site subsequent to the initial lawsuit, these additions are the first icons of the site as a war memorial.

*The sign on the photo at the left reads: "Coming in 2000 A.D. The Millennium Memorial Veteran's Wall Installation"*

- 2002 The 9<sup>th</sup> Circuit Court of Appeals issues an opinion holding that the constitutional infirmities remain. (*Paulson v. City of San Diego* 294 F.3<sup>rd</sup> 1124, 1132 (9<sup>th</sup> Circuit 2002)) The en banc court ruled that the land being sold was "the site of the cross, a sectarian war memorial." The ruling continued, "In view of our holding in *Ellis* that the Mt. Soledad cross is a sectarian symbol that conveys a religious message, government conduct that operates affirmatively to preserve the cross aided a sectarian purpose: the preservation of a symbol that conveys a specifically Christian message." (*Id.* At 1132)

The city again appeals to the U.S. Supreme Court, which declines to hear the case.

- 2004 The Mount Soledad Presbyterian Church's elders vote unanimously to accept the cross if it is determined by court order that it must be moved. The senior pastor (Mark Slomka) and the head of the veterans group that owns the cross (William Kellogg) support the alternative.

The La Jolla American Legion Post 275, which created the MSMA, votes unanimously to support moving the cross. The San Diego Regional Chamber of Commerce lobbies the city council to support moving the cross instead of trying to sell the property for a third time. "It's about preserving the cross and saving tax dollars on a battle that we really don't need to have," said Mitch Mitchell, the chamber's vice president of public policy.

The parties engage in settlement discussions and agree to settle the case by moving the cross to the Presbyterian church, allowing the MSMA to maintain an interest in the war memorial and replace the cross with a non-sectarian symbol that would appropriately recognize all veterans, in exchange for Paulson dismissing his suit.

The settlement terms are presented to the city council on July 20 and July 27, but the council does not accept the settlement agreement, saying it would instead condition its acceptance on another effort to "save the cross" by attempting a third sale. One of the council members who voted in favor of Proposition K gives his membership in the "Jesus Christ fan club" as the basis for his vote (*City Councilmember Charles Lewis, July 20, 2004*).

Voters reject the third attempt to sell the land by a large majority—256,745 (or 59.18%) opposed the sale to 177,062 (or 40.82%) in favor. Total votes cast: 433,807. The measure needed a 2/3 majority to pass, but fails to gain even a simple majority.

Two members of Congress, Randy Cunningham and Duncan Hunter, slip a rider into a \$300 billion appropriations bill designating the memorial a national monument, specifically requiring the continued presence of the cross. This would allow the federal government to accept a yet-to-be-offered donation of the land from the city, and directs the National Parks Service to help maintain it. A restraining order temporarily bars the transfer to the government.

- 2005 City Council rejects a proposal to give the land to the federal government, on advice from the city attorney that such a move would be unconstitutional because the city had agreed to enter into the settlement proposed in July 2004 if Proposition K failed. The mayor and several city council members instead launch a petition and referendum drive to rescind the council vote and transfer the property. The petition to put the referendum on the ballot is headed, “You Can Save Our Cross.” The council votes to rescind its earlier decision.

Paulson files a pre-election challenge in state court, claiming that the proposed transfer violates the California Constitution by favoring one religion over others.

In July 2005, voters approve Prop. A, and the city gives the land to the federal government. [The vote totals are especially important here, since many public officials are using the votes cast in this special election to demonstrate that keeping the cross on Mt. Soledad is the will of the people of San Diego. In this special election, 197,125 (or 76%) vote in favor of the land transfer and 62,373 (or 24%) opposed it. However, the **total** votes cast in this election were 259,498—just slightly above the number of “No” votes cast in the 2004 election. That is, 59,620 fewer voters favored keeping the cross on Soledad in the 2005 election than those who voted in 2004 against maintaining it there. The continued and sole use of the 2005 special election figures by San Diego city officials, congressional representatives and others is disingenuous at best.]

In October, a California Superior Court judge rules that the proposition and the transfer are unconstitutional, finding 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. Further, 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.” The city appeals this decision.

City Attorney Michael Aguirre is quoted in the *New York Times* about the cross being on public land, and comments about the cross’ placement that, “It’s clearly unconstitutional.” He adds that the case had gone on so long mainly because city officials had seen political opportunity in defying court rulings. “It’s like San Diego doesn’t recognize the need to comply with the law as a fundamental principle,” he said. (*New York Times*, “*High on a Hill Above San Diego, a Church-State Fight Plays Out*,” October 1, 2005)

- 2006 In May, Federal District Court Judge Gordon Thompson, Jr.—fifteen years after his first decision in 1991, rules, “It is now time, and perhaps long overdue for this court to enforce its initial injunction,” and gives the city 90 days to remove the cross or face a fine of \$5000 a day.

On June 28, the 9<sup>th</sup> U.S. Circuit Court of Appeals declines the third and final challenge seeking a stay of the \$5000/day fine.

The City of San Diego appeals to the U.S. Supreme Court. On July 3, Justice Kennedy issues a temporary stay of the district court’s order to give the court time to decide whether to hear the case. On July 7, he extended his temporary stay until state and federal courts can hear appeals this fall.

On July 19, a bill introduced by Rep. Duncan Hunter seizing the cross and its surrounding property by eminent domain for the federal government passed in the House; the Senate passed the bill on August 1, 2006, and President Bush signed H.R. 5683 into law on August 14, 2006.

On August 24, 2006, the ACLU, the Jewish War Veterans, and several local residents filed suit against the U.S. government and Defense Secretary Donald Rumsfeld, charging that the continued display of the Mt. Soledad Latin cross on federally owned land unlawfully entangles the government with religion.

2007 In October, the ACLU filed a Motion for Summary Judgment in federal district court in *Jewish War Veterans of the United States of America, Inc. et al. v. Robert F. Gates*, requesting the court to hold unconstitutional the federal government's taking and continued display of the Mount Soledad Cross, and to enjoin the continued display of the Cross on federal land. [NB: Current Secretary of Defense Robert F. Gates was automatically substituted for former Secretary of Defense Donald H. Rumsfeld.]

2008 At a hearing on April 14, 2008, U.S. District Court Judge Larry Burns heard arguments on why the federal government violates the First Amendment by taking, maintaining, and displaying the cross on government land. The court ruled on July 29, 2008 for the government. The ACLU appealed that ruling to the Ninth Circuit.

On January 5, 2009, the ACLU filed its opening brief, and the court received amicus briefs in support of and in opposition to our position. The government's brief is due March 13, 2009, and the ACLU's reply brief is due March 27, 2009.

Case is argued December 9, 2009. Soon after the argument, the court issued an order placing it on hold pending the Supreme Court's decision in *Salazar v. Buono* (the Mojave Desert cross case).

2010 The Supreme Court decides *Buono* on April 28, 2010. The next day, the ACLU wrote to the Ninth Circuit to explain that *Buono* does not affect this case because it did not address standing to challenge Establishment Clause violations on the merits of government sponsorship of a Latin cross.

On August 23, 2010, we submitted a supplemental letter calling the court's attention to a recent Tenth Circuit case, *American Atheists, Inc. v. Duncan*, which held that it was unconstitutional for a state to sponsor roadside crosses commemorating the death of state troopers.

2011 On January 4, 2011, the Ninth Circuit ruled in our favor that the federal government is violating the First Amendment by sponsoring the display of the Mt. Soledad Cross on public land. The opinion, written by Judge Margaret McKeown, affirmed that "in adopting the First Amendment, the Founders were prescient in recognizing that, without eschewing religion, neither can the government be seen as favoring one religion over another. The balance is subtle but fundamental to freedom of religion."

2012 The U.S. Supreme Court declined to hear the case, and remanded it back to district court. A federal judge in 2013 ruled from the bench upholding the Ninth Circuit's ruling and ordering that the cross must come down.

2014 The U.S. Supreme Court declined to hear an appeal of the district court's ruling.

The ACLU files a brief on December 15, 2014, the President signed the National Defense Authorization Act for Fiscal Year 2015 (NDAA), one section of which requires the Secretary of Defense to convey the Memorial to MSMA upon payment of appropriate compensation as determined by the Secretary. The Ninth Circuit then stayed the appeal.

- 2015 On July 17, 2015, the Department of Defense conveyed the cross and underlying land to MSMA for \$1.4 million. The appeal remains on hold.
- 2016 A historic settlement is reached that preserves the Ninth Circuit's previous ruling that the federal government was violating the First Amendment by sponsoring the display of the Mt. Soledad Cross on public land (and in light of a 2012 U.S. Supreme Court decision that permitted the transfer of a cross on federal land in the Mojave Desert to a private veterans group), the ACLU accepted an appropriate settlement to accept the sale of the land beneath the cross to the Mount Soledad Memorial Association for \$1.4 million. The settlement includes the award of attorneys' fees to the lawyers who worked for years on the case.

The ACLU hopes that the substantial attorneys' fees award paid by the federal defendants will help deter other government officials from meddling with religion in the future. We are pleased that the government has recognized that it should stop playing favorites with religion and that the cross now sits on private property rather than government land.