
**STATEMENT OF**
**REES LLOYD, VICE COMMANDER**
**DISTRICT 21**
**DEPARTMENT OF CALIFORNIA**
**THE AMERICAN LEGION**

**TO THE**

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,**
**AND PROPERTY RIGHTS**
**COMMITTEE ON JUDICIARY**
**UNITED STATES SENATE**

**ON**

**S. 3696, VETERANS MEMORIALS, BOY SCOUTS,, PUBLIC SEALS AND OTHER PUBLIC EXPRESSIONS OF RELIGION ACT OF 2006 (“PERA”)**

**AUGUST 9, 2006**

**SUPPLEMENTAL STATEMENT OF**
**REES LLOYD, COMMANDER**
**DISTRICT 21, DEPARTMENT OF CALIFORNIA**
**THE AMERICAN LEGION**

**BEFORE THE**

**SUBCOMMITTEE ON THE CONSTITUTION**
**COMMITTEE ON THE JUDICIARY**
**UNITED STATES SENATE**

Mr. Chairman and Honorable Members of the Subcommittee on the Constitution:

It was my great honor to appear before you at hearing on August 2, 2006, to offer testimony in support of passage of S. 3696, Veterans Memorials, Boy Scouts, Public Seals and Other Public Expressions of Religion Act of 2006 ("PERA"), on behalf of The American Legion, the largest wartime veterans' organization in the world with 2.7 million members.

At the conclusion of that hearing, Sen. Brownback, sponsor of S. 3696 and chairman of the Subcommittee, stated the record would be held open for seven days for the receipt of supplemental submissions. Pursuant thereto, I take the opportunity to provide this Supplemental Statement on behalf of The American Legion.

This supplemental submission is intended to provide further information and evidence on how the attorney fee shifting provisions of the Civil Rights Attorney Fees Act of 1976, 42 U.S. Code Section 1988, and the Equal Access to Justice Act (EAJA), and all other federal statutes which S. 3696 would amend to rescind the Congressionally-granted authority to judges to award attorney fees in Establishment of Religion Clause lawsuits brought against veterans memorials, the Boy Scouts, governmental seals, the public display of the Ten Commandments or other symbols of our American heritage with a religious aspect, are being used by special interests, epitomized but not limited to the ACLU, as a bludgeon to club local elected bodies -- and individual citizens who exercise the First Amendment right to seek redress of grievances through participation in such lawsuits in opposition to the ACLU – into submission and surrender to the secular cleansing demands of the ACLU and others pursuing an extremist secular agenda through the judicial branch.

First, The American Legion provides herewith actual, immediate evidence of how the attorney fee shifting provisions are being used as "a club" to intimidate not only elected bodies, but citizens, into submission by the very threat of imposition of massive attorney fees upon them. This is dramatically evidenced by the threat-letter, attached hereto as Exhibit A, dispatched by the ACLU-backed attorney for the atheist plaintiff in the Mt. Soledad National War Memorial litigation, James E. McElroy ("McElroy"), to the attorney for citizen members of San Diegans for the Mt. Soledad National War Memorial, Charles S. LiMandri, Esq., ("LiMandri") threatening to collect from those individual citizens the massive attorney fees potentially ordered on appeal – unless those citizens abandoned their appeal.

The citizens did abandon their pursuit of justice in the courts – for one reason: The terrorizing threat of imposition of court-awarded attorney fees upon them personally. They were silenced. The chilling effect on the exercise of their First Amendment rights is manifest. Even the most cursory examination of McElroy's threat-letter makes clear how the benevolently intended attorney fee award provisions of federal statutes have been corrupted and exploited into "a club" in *in terrorem* Establishment Clause litigation., as discussed in more detail below.

Second, The American Legion addresses here the points in opposition to S. 3696 submitted by the American Civil Liberties Union by letter on August 2, 2006, the date of the hearing, particularly but without limitation the claim of the ACLU that the assertion that veterans memorials at our National Cemeteries are at risk is a "red herring" and an "urban myth," on the basis, the ACLU asserts in its letter but not in its litigation, that because "families" choose religious symbols on grave markers Establishment Clause lawsuits are prevented.

The Senators are urged to note that the ACLU does not cite a single case in support of that proposition, and for good reason – no decisional law is cited supporting that proposition, as no such case exists. No court has ever so held.

Further, the Senators are urged to note that the ACLU has never taken such a position in litigation. On the contrary, it has consistently taken the position that all that is necessary for the Establishment Clause to be violated is that there is a religious symbol at a veterans memorial which is on public land, not who "chose" or placed the particular symbol nor when the memorial was established.

That is exactly the position taken in the Mt. Soledad National War Memorial litigation, and in the Mojave Desert World War I Veterans Memorial case (*Buono vs. Norton,* 371 F.3d 543 (9th Cir., 2004)).

The American Legion urges the Senators, therefore, that the reforms of S. 3696 are absolutely necessary, the legislation is narrowly drawn to affect only those cases in which the claim of injury is based upon taking offense at the presence of a symbol of our American heritage with a religious aspect, and that neither damages nor attorney fees are appropriate in such cases which are adequately remedied by injunctive and declaratory relief, and receipt of actual costs of litigation, e.g., filing fees and other costs, but not award of attorney fees.

**I. THERE CAN BE NO DISPUTE THE ATTORNEY FEE PROVISIONS OF CURRENT LAW ARE BEING USED AS A COERCIVE "CLUB"**

At hearing of the Subcommittee on August 2, 2006, The American Legion affirmatively charged that the attorney fee shifting provisions which Congress authorized in benevolently intended federal law, including 42 U.S. Code Section 1988 and the Equal Access to Justice Act, are being used as an *in terrorem* device to bludgeon local elected bodies into surrender to the secular cleansing demands of the ACLU and others in Establishment Clause litigation. Matt Staver, founder of Liberty Counsel, also so testified, as did the representative of ACLJ.

Ultimately, there was no dispute by any witness at hearing that the attorney fee shifting provisions are being used as "a club" to coerce submission.

More particularly, Senator Brownback questioned those testifying against passage of S. 3696, if they would agree that in fact the attorney fee provisions are being used as "a club."

Marc Stern, General Counsel for the American Jewish Congress, opposing the bill and otherwise defending the ACLU, admitted, under Senator Brownback's courteous probing, that "Yes," they are being used as "a club." Law professor Ms. Roberts, also opposed to the bill, also agreed that the fee provisions are being used as "a club."

However, Mr. Stern, while conceding the attorney fee provisions are being used as "a club," argued that "they are being used by both sides," as if that fact, if true, would, somehow, legitimate use of the fee provisions as "a club."

If the fee provisions are being used as a "club," as those for S. 2696 affirmatively alleged and as opponents conceded is true, then the Senators are urged to note whom the "club" is being used against: Taxpayers. Indeed, unbeknownst to most Americans, the ACLU is reaping literally

millions of dollars in taxpayer-paid attorney fees in Establishment Clause cases, although the taxpayers do not have an effective voice in such litigation.

This becomes particularly egregious when it is realized that the ACLU, the primary source of Establishment Clause litigation, requests and receives taxpayer-paid attorney fees, and threatens to impose attorney fees on defendants if surrender to ACLU's demands is not forthcoming, does not incur in fact actual attorney fees. On the contrary, all ACLU lawsuits are handled by staff attorneys or by volunteer cooperating attorneys who cannot receive attorney fees under the ACLU's own policies. Nor do the clients of the ACLU, many times "mascot plaintiffs" used to advance ACLU's secularly cleansing agenda, incur any attorney fees. Although it is known to all judges in all such cases that the ACLU has not incurred any actual attorney fees, as far as is known not a single judge has simply denied ACLU's request for attorney fees on the basis that no attorney fee obligations have been incurred.

Thus, the taxpayer-paid attorney fee awards ordered by the courts are pure profit, and pure profiteering, by the ACLU. Perhaps the most blatant example of this is the $2,000,000 attorney fee award to the ACLU against the Dover School Board in the recent Intelligent Design case in which the pro bono law firm represented to the court and publicly that it was waiving all attorney fees. Notwithstanding, the judge assessed $2,000,000 in attorney fees against the school board. (These cases, and other examples, were discussed in The American Legion's initial written testimony, and at hearing.)

The American Legion has also affirmatively alleged that the attorney fee provisions are being used to trammel and chill the exercise of First Amendment rights of veterans and other citizens to participate in Establishment Clause cases in opposition to the ACLU and others, and to effectively seek redress from elected bodies, who cannot fairly consider their arguments as those elected bodies are intimidated into surrender by the threat of attorney fees.

Stark evidence of the use of the attorney fee provisions to threaten, terrorize, and coerce citizens into surrender to the intolerant and extremist demands of the ACLU and other counsel in Establishment Clause cases is manifest in Exhibit A hereto, the threat letter of the atheist plaintiff's counsel in the Mt. Soledad National War Memorial litigation in which citizens are attempting to overturn the court order nullifying the special election in which 76% of the San Diego voters voted to turn the Mt. Soledad site over to the federal government.

Ironically, the day before the Subcommittee's hearing on S. 3696, the Senate unanimously passed the Mt. Soledad Veterans Memorial Protection Act, which would federalize the veterans memorial site and put it under the control of the Department of Defense.

The threat letter to the citizen litigants in the Mt. Soledad case deserves careful consideration. (The threat letter is in the court records of the Court of Appeal, State of California, Fourth Appellate District, Division One, Appeal No. D047702, San Diego County Superior Court No. GIC849667, appeal from the decision of Hon. Patricia Yim Cowett, *Paulson v. Charles Abdelnour, etc., San Diegans For The Mt. Soledad National War Memorial,* Real Party in Interest and Appellants; *Mike Shelby,* Intervenor and Appellant.)

James E. McElroy, ACLU-backed attorney for the atheist plaintiff, Paulson, begins his threat letter to Charles S. LiMandri, and Robert P. Ottilie, attorneys for the citizen appellants, in this way:

"As you may have heard, Judge Cowett ordered the City to pay approximately $275,000 in attorney's fees for this last, rather futile attempt to save the Cross by transferring it to the Federal Government. I believe this order gives us some guidance as to the exposure of your clients for fees on appeal." (Exhibit A, page 1, paragraph 1).

McElroy continues (page 1, paragraph 3):

"Please advise your clients that if they choose to pursue this appeal, they will in all likelihood be forced to pay Mr. Paulson's fees. Those fees may well be in excess of $300,000…You should also advise your clients, perhaps by copy of this letter, that any fees award is 'joint and several' among and between them meaning for example, if $300,000 were awarded, that entire amount could be collected against any one of them. Also, the full amount of the judgment for any fees awarded can be recorded against all of them."

Can anyone doubt that such a threat would have a chilling effect on the exercise of the First Amendment right to participate in the litigation? Is this cold-blooded threat to impose attorney fees on citizens who would dare to oppose the ACLU or this ACLU-backed attorney what Senate and House intended when Congress authorized the courts to award attorney fees under 42 U.S. Code Section 1988, the EAJA, or any federal statute?

The threat letter (at page 3) references the victims of this threat of imposition of attorney fees, i.e., "the Dewhursts and Mr. Steele" and "Mr. Thalheimer and Mr. Shelby."

Who are these citizens so threatened: Philip Thalheimer, President of the San Diegans for the Mt. Soledad National War Memorial, is the Jewish son of Holocaust survivors. Dr. John Steel is a former Navy fighter pilot, later a Navy Medical Officer. The "Dewhursts" are the sons of the man who built the original memorial, a labor in which they participated with their father as children; Mike Shelby is a citizen daring to intervene in the case to advocate in support of the memorial.

All of them had and have sincere interest in preservation of the Mt. Soledad National War Memorial, and a First Amendment right to seek redress in the judicial branch in this litigation. All of them had to withdraw from the litigation because of the naked threat of collection of court-ordered attorney fees from them personally, perhaps "$300,000," as Attorney McElroy threatened, clubbing them into retreat from the litigation.

This is how the benevolently intended attorney fee provisions that Congress authorized the courts to order are being used. It is an abuse which Congress never intended, and which Congress should cure by passage of S.3696.

## II. THE ACLU'S ARGUMENTS AGAINST S. 3696 ARE SELF-SERVING, MISLEADING, AND SPECIOUS.

Although it did not appear to testify at hearing, having its position advocated by the American Jewish Congress instead, the ACLU submitted a letter of opposition to S. 3696, dated the same day as the hearing, which letter was cited at the hearing by the American Jewish Congress. The American Legion, which did not have the opportunity to address the ACLU's points at hearing, addresses them briefly here, as follows:

### A. S. 3696 Does Not 'Shut The Courthouse Doors."

ACLU, without ever once in its opposition acknowledging that it has sought and received literally millions in court ordered attorney fee "awards" in Establishment Clause cases, without the ACLU in fact incurring any actual attorney fee obligations, makes certain "sky is falling" arguments in purported defense of others, ignoring its own self-interest in preserving the attorney fee provisions by which it has so profited.

ACLU argues first, that "S. 3696 Shuts the Courthouse Doors." That is, of course, patently false: There is nothing in S. 3696 that prevents ACLU, or anyone else, from filing Establishment Clause lawsuits. S. 3696 merely reverts to the American rule that each side will pay its own

attorney fees. This was the rule, of course, until the Civil Rights Attorney Fees Act of 1976, 42 U.S. Code Section 1988, and many if not most of the leading cases under the Establishment Clause were fully litigated before that time, without burdening tax payers with the ACLU's attorney fees.

The ACLU claims that S. 3696 allows only "injunctive relief." This is incorrect; it allows declaratory as well as injunctive relief. Further, it does not eliminate actual costs of litigation, e.g., filing fees and other costs; it merely eliminates attorney fees.

The ACLU makes the rather astounding argument that "[t]he elimination of attorneys' fees for Establishment Clause cases would deter attorneys from taking cases…thereby leaving injured parties without representation…effectively leav[ing] religious minorities unable to obtain counsel."

This is remarkable in that it is the ACLU, which is, in fact, far and away, the entity filing the most Establishment Clause cases in the nation. ACLU's assertion implies that it will cease to provide counsel to those needing it simply because the ACLU cannot collect taxpayer-paid attorney fees – even though the ACLU incurs no actual attorney fees in the first place, since the litigation is carried out by staff or pro bono attorneys. There is no evidence that anyone with a legitimate claim would go without counsel when in the modern era the nation abounds with public interest law firms, and the ACLU has been manifestly fanatical in secular cleansing litigation, including in the remote Mojave Desert against the veterans memorial there about which no one complained for over six decades. (*Buono vs. Norton.)*

**B. S. 3696 Does Not Deny "Just Compensation." It Prevents Taxpayer Abuse**

The ACLU argues in this concerning receipt of taxpayer-paid attorney fees that "S. 3696 Denies Just Compensation." Did Congress really intend by the fee shifting federal statutes not to benefit the poor, but to ensure "just compensation" for lawyers? Are these *de facto* Lawyer Enrichment Acts? Did Congress intend to become the employer of lawyers, with the aim of providing "just compensation" at the expense of unwitting and unwilling taxpayers? Is the ACLU justly compensation when it receives $950,00 to drive the Boy Scouts out of San Diego's Balboa Park, or $500,000 in the Ten Commandments Case in Alabama, or $63,000 to destroy the Mojave Desert Veterans Memorial, or $2,000,000 in the Dover Intelligent Design case when it, in fact, incurred no actual attorney fees in any of those cases? That is not just compensation; that is profiteering at taxpayer expense.

**C. Veterans Memorials At Veterans' Cemeteries Are At Risk**

ACLU claims to the Senate in remarkable fashion that assertion that veterans memorials at Veterans' Cemeteries are at risk of Establishment Clause attack is but a "red herring" and an "urban myth." (Why "urban" is unexplained.)

ACLU makes this claim, first, by stating:

"[R]eligious symnbols on soldiers' grave markers in military cemeteries (including Arlington National Cemetery) are entirely constitutional."

While The American Legion welcomes the ACLU's taking such a position, and intends to hold the ACLU to it, there is no decision ever so holding, any time, anywhere, as far as is known.

The ACLU continues: "Religious symbols on personal gravestones are vastly different from government-sponsored religious symbols or sectarian religious symbols on government-owned property. Gravestones and the symbols placed upon them are the choice of individual service members and their families. The ACLU would in fact vigorously defend the first amendment rights of all veteran Americans and service members to display the religious symbol of their choosing on their gravestones."

This is all very welcome, but it has serious defects:

First, ACLU cites no legal authority holding that a religious symbols on public land are immune from Establishment Clause attack because or a an individual, or a family, chose to have a religious symbol on public land. Diligent research has revealed no such case. The ACLU cites no legal authority in support of this proposition – because there is none.

Second, the ACLU has never taken the position in actual litigation the position it now takes to oppose S. 3696 as unnecessary. On the contrary, the ACLU has consistently taken the position that all that matters is that the religious symbol is on public land. Period. No matter that a government actor did not choose the symbol, nor when the symbol was erected, e.g., prior to the land going from private to public hands.

The Senate need to look no further than ACLU's attack on the Mojave Desert Veterans Memorial in *Buono vs. Norton,* and the attack on the Mt. Soledad National War Memorial by an atheist represented by an ACLU-backed attorney.

In the Mojave Desert Veterans Memorial case, the religious symbol honoring veterans, a Cross, was erected by private parties, veterans, to honor their comrade veterans. The Cross on a rock outcrop eleven miles off the highway in the desert was put up in 1934, some six decades

before it was incorporated into the Mojave Desert Preserve in the Clinton Administration in or about 1994. The government didn't choose or erect the Cross as a tribute; the government inherited it. That did not matter to the ACLU. Indeed, when Congress passed land-swap legislation, which would put the one-acre memorial site into private hands in exchange for five acres of land for the public, the ACLU ran back to the U.S. District Court to insist by motion that Congress was defying the Court's order to destroy the Cross. The Court ordered Congress not to transfer the land, and ordered the Executive Branch to destroy the Cross. That order is on appeal.

In the Mt. Soledad National War Memorial case, a Cross was first placed atop Mt. Soledad by private parties in 1913 when it was private land. That Cross was destroyed by the elements. It was replaced by private parties, who did so again when the second Cross was destroyed. The land went from private to public possession after the Cross had been standing for many years. More than a half-century ago the war memorial was constructed, with a Cross still atop Mt. Soledad, as had been true since 1913. Today, cascading walls at Mt. Soledad bear plaques honoring those who gave their lives in defense of American freedom, in what is unmistakably designed not to advance religion but to honor the service and sacrifice of veterans. But all that has mattered in that case was that the cross was on public land; not who put it there, not when it was established.

Thus, the ACLU takes a position in opposition to S. 3696, which it never has taken in litigation.

Further, the ACLU is not the only entity bringing secular-cleansing lawsuits. There is nothing to stop anyone from mounting an attack on our veterans' memorials at veterans' cemeteries, and then demanding attorney fees from taxpayers if they prevail.

**D. Memorials At Veterans Cemeteries Are Manifestly At Risk**

The ACLU ignores the fact, and the Congress should not, that there are separate memorials to veterans at almost all, if not all, National Cemeteries, and state and local veterans cemeteries.

Those memorials are not "chosen by families." They are on public land and they contain religious words or symbols about which ACLU otherwise sues with alacrity in secular-cleansing fanaticism, e.g., the Mojave Desert Veterans Memorial case.

A striking example is the U.S. National POW/MIA Memorial at Riverside National Cemetery in California. Sculpted by veteran and American Legion Member Lewis Lee Millett,

Jr., whose father, Col. Lewis Lee Millett received the Congressional Medal of Honor in the Korean War, the centerpiece of the National POW/MIA Memorial is a dramatic figure of a prisoner of war, on his knees, bound, looking heavenward. Artist Millett – who waived the entire $100,000 commission so the funds could be used to complete the Memorial, engraved a prayer in the base on the statue:

"I look not to the ground, for I have no shame. I look not to the horizon, for they never came. I look to God. I look to God…"

There are similar, separately standing memorials at our veterans' cemeteries.

They are all at risk of Establishment Clause attack by secular extremists, including but not limited to the ACLU.

Congress can, and should shield our veterans' memorials and veterans' cemeteries, in the most effective way – take away jurisdiction over veterans memorials and veterans cemeteries from the courts.

Failing that, at the very minimum, the Senate should pass S. 3696 to prevent those who would bring lawsuits against our veterans memorials and cemeteries from being rewarded with taxpayer-paid attorney fees for such desecration..

**E. Nothing In The Law Prevents Terrorists In Our Midst From Following ACLU Precedents To Sue Veterans' Memorials And Then Demand Attorney Fees**

Veterans and other Americans have been informed by Homeland Security and other federal agencies that there are terrorists, and terrorist sympathizers in our midst, including jihadists like those who attacked America on September 11, 2001.

Simply stated, there is nothing in the law, unless S. 3696 becomes law, that prevents any one of those terrorists, sympathizers, or jihadists in our midst from using mascot plaintiffs following ACLU precedents like that in the Mojave Desert Veterans Memorial case (*Buono vs. Norton),* to bring Establishment Clause lawsuits against our veterans memorials, including our veterans cemeteries, and then to demand taxpayer-paid attorney fees therefore, as does the ACLU. The Courts cannot hand taxpayer-paid attorney fees to the ACLU, and deny them to America-hating fanatics in our midst.

Congress should prevent such abuse by passing the reform legislation, S. 3696.

Finally, The American Legion desires to stand in defense of our veterans' memorials and veterans' cemeteries in opposition to Establishment Clause lawsuits. However, absent passage of

S. 3696, to do so as parties to the litigation would place our members, all wartime veterans, at risk of having to pay the attorney fees of the ACLU or other prevailing entity, as the ACLU-backed attorney threatened individuals in the Mt. Soledad National War Memorial litigation. There is a need for a level playing field which will allow all Americans to participate in such cases, and that cannot be achieved as long as benevolently intended attorney fee provisions can be used as "a club," as even the opponents of S. 3696 admit is the present case.

I thank the Subcommittee for the opportunity to present this supplemental written testimony on behalf of The American Legion.