

LAW REVIEW 19065

July 2019

The Bladensburg Memorial Is Safe because the Supreme Court Reversed the Fourth Circuit.

By Captain Samuel F. Wright, JAGC, USN (Ret.)¹

[Update on Sam Wright](#)

9.0—Miscellaneous

American Legion v. American Humanist Association, 2019 U.S. LEXIS 4182 (June 20, 2019).

Facts of the Memorial

This is a fascinating lawsuit about the constitutionality of the “Bladensburg Memorial” (hereinafter “Memorial”), which is a 40-foot-high Latin Cross located in the median at the intersection of Maryland Route 450 and U.S. Route 1 in Bladensburg, Prince George’s County, Maryland, very close to our nation’s capital.² Readers who live in the National Capital Area have probably passed by the Memorial many times.

The base of the Memorial lists the names of the 49 men from Prince George’s County who made the ultimate sacrifice in The Great War, as World War I was then known. The base includes these words: “This Memorial Cross Dedicated to the heroes of Prince George’s County who lost their lives in the great war for the liberty of the world.” The base also includes a quotation from President Woodrow Wilson and the words “valor endurance courage devotion.” The American flag flies on one side of the cross.

¹ BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

² The facts stated in this article come directly from the district court opinion.

The initial effort to finance and build the Memorial began in late 1918, immediately after the war ended on November 11. Citizens of Prince George's County organized the Prince George's County Memorial Committee (PG Committee) to raise funds to build a memorial to the county's war dead. The PG Committee's pledge sheets included the following statement:

We the citizens of Maryland, trusting in God, the supreme ruler of the universe, pledge faith in our brothers who gave their all in the World War to make the world safe for democracy. Their mortal bodies have turned to dust, but their spirit lives to guide us through life in the way of godliness, justice, and liberty.

With our motto, "one God, one country, and one flag," we contribute to this memorial cross commemorating the memory of those who have not died in vain.

The groundbreaking ceremony was held on September 28, 1919. Secretary of the Navy Josephus Daniels was the principal speaker. The Marine Band played and the "Star Spangled Banner" was sung.³

The initial fundraising effort by the PG Committee fell short, and the Snyder-Farmer Post of the American Legion stepped in to complete the task. The post completed the fundraising and construction and held a dedication ceremony on July 12, 1925. United States Representative Stephen Gambrill of Maryland's 5th Congressional District gave the keynote address, and his address included these words:

You men of Prince George's County fought for the sacred right of all to live in peace and security and by the token of this cross, symbolic of Calvary, let us keep fresh the memory of our boys who died for a righteous cause.

In 1935, due to increased traffic on the roads surrounding the Memorial, the Maryland state legislature "authorized and directed" the State Roads Commission "to investigate the ownership and possessory rights" of the area surrounding the Memorial and to acquire the land "by purchase or condemnation." Plaintiffs contend that the tract of land in question was *adjacent* to the Memorial but did not include the Memorial itself - they maintain that the Memorial has always been owned by a government entity.

Defendants assert that the Snyder-Farmer Post owned the Memorial and the land on which it sat. The record is not entirely clear as to exactly what land was transferred and when. Ultimately, the State Roads Commission obtained title to the tract mentioned in the state statute and conveyed it to the Commission by deed in 1960. On March 1, 1961, to resolve any ambiguities, the Snyder-Farmer Post transferred and assigned to the Commission all its right, title and interest in the Memorial and the land on which it sits.

³ The "Star Spangled Banner" did not become the National Anthem until almost 12 years later, on March 3, 1931.

The Commission assumed the obligation of maintaining, repairing and otherwise caring for the Memorial, but the Snyder-Farmer Post reserved the right to hold memorial services to departed veterans and other ceremonies upon the parcel on appropriate dates and occasions. The Commission continues to own the Memorial and the land on which it sits.

The Memorial now sits amidst additional monuments as part of Veterans Memorial Park. The National Park Service placed among the memorials a "Star-Spangled Banner National Historic Trail Marker" highlighting the Memorial and the other monuments in the park. In 1944, local American Legion posts dedicated a World War II memorial across the street from the Memorial honoring the men and women of Prince George's County who died in that war. Nearby, a plaque and tree commemorate the lives lost at Pearl Harbor. Following a joint public-private effort, a memorial to veterans of Korea and Vietnam was dedicated on July 4, 1983. In 2006, an arcing stone walkway bordered by a granite ledge and a garden was built in the park to remember lives lost on September 11th.

In 2010, the Town of Bladensburg and the Anacostia Trails Heritage Area, Inc. convened a task force to explore ideas for monuments and events to commemorate the 200th anniversary of the War of 1812 and the Battle of Bladensburg. Currently, there is a War of 1812 memorial just north of the Memorial, and the Commission is in the process of installing two thirty-eight-foot-tall statues of soldiers representing the British Army and the defending American forces of the Battle of Bladensburg. Finally, Veterans Memorial Park includes a flag display of the American flag, the Maryland flag, and the Prince George's County flag.

Numerous events and gatherings have been held at the Memorial and Veterans Memorial Park, mostly in commemoration of Memorial Day or Veterans Day. An invocation and benediction are often included. Local posts of the American Legion have hosted many of the Memorial Day and Veterans Day programs at the Memorial and in the surrounding park, which often feature local government officials and representatives of other veterans' organizations. The Town, through organizations such as the Bladensburg Patriotic Committee and the Bladensburg Promotional Committee, also has held events in conjunction with Memorial Day, Veterans Day, the Fourth of July, and in remembrance of September 11th at the Memorial or in the surrounding park.

The events generally follow the same format and include a presentation of colors, the national anthem, an invocation, a keynote speaker (typically a veteran, military, local government, or American Legion official), songs or readings, the laying of a wreath or flowers, a benediction, and a reception. Local American Legion posts, the Town, the Commission, and other government entities have also hosted rededications and other patriotic ceremonies at the Memorial. Although Defendants and the American Legion contend that no religious services have been held at the Memorial, Plaintiffs point to a *Washington Post* column indicating that there were at least three Sunday religious services held at the Memorial in 1931.

While the Memorial was built with private donations, the Commission has devoted resources over the years to maintain and illuminate it. Bladensburg Rotarians funded the installation of

lights to illuminate the cross in 1965. The Commission funds routine maintenance and lighting of the Memorial and has spent at least \$117,000 on the Memorial, including \$100,000 on significant renovations in 1985. In 2008, the Commission budgeted an additional \$100,000 for further repairs to the Memorial that has not yet been entirely spent.

Initiation of this lawsuit

The plaintiffs in this lawsuit are Steven Lowe, Fred Edwards, Bishop McNeill, and the American Humanist Association (AHA).⁴ They filed this lawsuit on February 25, 2014, in the United States District Court for the District of Maryland. They contend that the use of public property and funds for the Memorial violates the “Establishment Clause” of the First Amendment. The First Amendment reads as follows:

Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁵

The plaintiffs named the Maryland-National Capital Park and Planning Commission (hereinafter “the Commission”) as the sole defendant. On its website, the Commission identifies itself as follows:

The Maryland-National Capital Park and Planning Commission (M-NCPPC) is a bi-county agency empowered by the State of Maryland in 1927 to acquire, develop, maintain and administer a regional system of parks within Montgomery and Prince George’s Counties, and to provide land use planning for the physical development of Prince George’s and Montgomery Counties. In addition, the agency gained responsibility for the public recreation program in Prince George’s County in 1970.⁶

In their complaint, the plaintiffs sought a declaratory judgment, an injunction, nominal damages, attorney fees, and costs. It is unclear what the injunction might provide, if the plaintiffs prevail. The concern is that it might require that the Memorial be destroyed.

⁴ On its website, <https://americanhumanist.org>, the AHA states its mission as: “We work tirelessly in the courts, legislatures, and communities to defend civil liberties, secular governance, and scientific integrity.” AHA is a national organization with its headquarters in Washington, DC.

⁵ United States Constitution, Amendment 1 (emphasis supplied). The First Amendment was among the first ten amendments that were ratified on December 15, 1791, very quickly after the Federal Government was established under the Constitution. These ten amendments are referred to collectively as the “Bill of Rights.” As originally understood, the Bill of Rights only applied to the Federal Government, not the states. The ratification of the 14th Amendment on July 9, 1868 applied most of the terms of the Bill of Rights, including the First Amendment, to the states.

⁶ See www.mncppc.org/27/About-us.

The American Legion, the American Legion Department of Maryland, and the American Legion Colmar Manor Post 131 intervened in the lawsuit as defendants, seeking to preserve the Memorial. The Colmar Manor Post is apparently the successor to the Snyder-Farmer post that took over the fundraising and completed the Memorial.

The District Court upheld the constitutionality of the Memorial, but the plaintiffs appealed and a three-judge panel of the United States Court of Appeals for the 4th Circuit⁷ reversed the District Court, on a 2-1 vote. The 4th Circuit granted rehearing en banc, and a majority of all the active 4th Circuit judges voted to uphold the panel decision.⁸ It began to appear that the Bladensburg Memorial might be destroyed or moved.

The American Legion intervened in the case as a defendant and applied to the Supreme Court for a writ of certiorari (discretionary review). The final appellate step in our federal appellate system is to apply for certiorari, which is denied in more than 99% of the cases where it is sought. Certiorari is granted if four or more of the Court's nine Justices vote for it during a conference to consider certiorari petitions. If certiorari fails to get at least four votes, it is denied, and the decision of the Court of Appeals is final. The Supreme Court granted certiorari.⁹

The parties and various amici¹⁰ wrote and filed briefs and the Supreme Court held oral argument. The decision was released near the end of the 2018-19 term, on 6/20/2019.

Seven of the nine Justices voted to reverse the 4th Circuit and save the Bladensburg Memorial, but among those seven Justices there were two opinions and four concurrences. Justice Ruth Bader Ginsburg wrote a dissenting opinion and was joined by Justice Sonia Sotomayor.

Justice Samuel Alito wrote the "decision of the Court" which was joined, but only in part, by Chief Justice John Roberts, Justice Stephen Breyer, Justice Elena Kagan, and Justice Brett Kavanaugh. Justice Clarence Thomas and Justice Neil Gorsuch concurred in the result, and each wrote his own concurring opinion.

The Supreme Court's "Establishment of Religion" jurisprudence remains muddled, but the bottom line is that the beautiful and historic Bladensburg Memorial has survived.

⁷ The 4th Circuit is the federal appellate court that sits in Richmond and hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

⁸ Please see Law Review 18023 (March 2018) for a detailed discussion of the proceedings in the district court and the 4th Circuit.

⁹ 586 U.S. ____ (2016).

¹⁰ Friends of the Court.