

No. 08-472

In The
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, et al.,
Petitioners,

v.

FRANK BUONO,
Respondent.

*On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit*

**BRIEF OF THE THOMAS MORE LAW CENTER,
REAR ADMIRAL JEREMIAH DENTON, USN (RET.),
ROBERT MARTINO, SYBIL MARTINO, JULIE
BLOOMFIELD, AND INDIVIDUAL RIGHTS
FOUNDATION AS *AMICI CURIAE*
SUPPORTING PETITIONERS**

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INTERESTS OF *AMICI CURIAE* IN THIS CASE¹

THOMAS MORE LAW CENTER is a national, nonprofit public interest law firm based in Ann Arbor, Michigan. It is dedicated to defending and promoting America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities. Because this case involves an issue of law that impacts America's Christian heritage, its resolution is a matter of significant interest to the Thomas More Law Center.

INDIVIDUAL RIGHTS FOUNDATION ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit and nonpartisan organization. The IRF is dedicated to supporting litigation involving civil rights, and protection of speech and associational rights, and it participates in educating the public about the importance of First Amendment rights and the Fourteenth Amendment's guarantee of equal protection of the law. To further its goals, IRF attorneys appear in litigation and file *amicus curiae* briefs in appellate cases involving significant First Amendment and Equal Protection issues. The IRF opposes attempts from anywhere along the political

¹The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

spectrum to undermine equality of rights, or speech or associational rights, which are fundamental components of individual rights in a free and diverse society.

JEREMIAH A. DENTON is a retired U.S. Navy Rear Admiral, a veteran of World War II, Korea, and Vietnam, a former prisoner of war (“POW”) from July 18, 1965 to February 13, 1973, and a former U.S. Senator from the State of Alabama.

Admiral Denton first came to the attention of the American public during a television interview arranged by his North Vietnamese captors in 1966. Expected to give “proper responses” to a journalist’s recitation of alleged American war atrocities, Admiral Denton affirmed his faith in his government’s position, stating, “I will support it as long as I live.” While responding to questions from his interrogator, Admiral Denton blinked his eyes in Morse Code, repeatedly spelling out the covert message “TORTURE.” His message was the first confirmation that American POWs were being mistreated.

During his nearly eight years as a POW, Admiral Denton was subjected to severe torture. He became the first American military captive to be subjected to four years of solitary confinement. Admiral Denton’s extraordinary account of his endurance and sacrifice for our country while imprisoned in North Vietnam was told in his 1976 book, *When Hell Was in Session*.

After his release in 1973, Admiral Denton continued his military career, ultimately achieving the rank of Rear Admiral. Upon retirement from the Navy, Admiral Denton was elected to the U.S. Senate,

becoming the first Republican ever elected by the popular vote to represent Alabama.

In 2008, Admiral Denton's incredible sacrifice for our country—a horrific sacrifice that is unimaginable to most Americans, including most war veterans—was honored and memorialized at the Mt. Soledad Veterans Memorial in San Diego, California.² A plaque in his honor was placed at the veterans' memorial during a ceremony held on September 19, 2008, the 2008 National POW/MIA Recognition Day. *See* App. 1a.

In 1973, during the well-televised arrival of the American POWs at Clark Air Force Base in the Philippines, Admiral Denton, a senior officer aboard the aircraft, was asked just a short time before landing to say a few words to the welcoming crowd that had gathered. His words, which were recounted by his son during the plaque-dedication ceremony at the Mt.

² The Mt. Soledad Veterans Memorial contains a large cross, which has been the subject of much litigation since 1989. *See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 126 S.Ct. 2856, 2858 (2006); *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002) (*en banc*); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993); *Paulson v. Abdelnour*, 145 Cal.App.4th 400, 433 (Cal. Ct. App. 2006); *Murphy v. Bilbray*, 782 F. Supp. 1420, 1438 (S.D. Cal. 1991). Presently, the Ninth Circuit is considering a new constitutional challenge to the memorial cross in *Jewish War Veterans v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal docketed*, No. 08-56415 (9th Cir. Aug. 27, 2008) and *Steven Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal docketed*, No. 08-56436 (9th Cir. Sept. 3, 2008). The outcome of this present case will likely have a significant impact on the question of whether the Mt. Soledad Veterans Memorial will remain intact.

Soledad Veterans Memorial, stirred great emotion among those in attendance at the 2008 ceremony just as they did in 1973. Admiral Denton stated, “We are honored to have had the opportunity to serve our country under difficult circumstances. We are profoundly grateful to our Commander-In-Chief and to our Nation for this day. God Bless America.”

SYBIL and ROBERT MARTINO are the parents of then Captain Michael D. Martino, USMC,³ and JULIE BLOOMFIELD is the wife of Major Gerald M. Bloomfield, II, USMC. Both Captain Martino and Major Bloomfield were Marine pilots who flew the AH-1 W Super Cobra attack helicopter. On November 2, 2005, while flying in support of security operations near Ar Ramadi, Iraq as part of Operation Iraqi Freedom, their helicopter was shot down by a surface-to-air missile. Both Marines were killed.

In May 2006, after returning from deployment in Iraq, Captain Martino’s and Major Bloomfield’s Camp Pendleton squadron sponsored a plaque-dedication ceremony at the Mt. Soledad Veterans Memorial to commemorate the fallen Marines’ heroic service and to provide a place to honor them. *See* App. 3a, 4a. Over three hundred Marines stood in line in the hot sun for over three hours to meet the Martino and Bloomfield families and to pay respect for their fallen comrades. *See* App. 5a. The emotions felt by the families and the Marines present at this ceremony are inexplicable. The dedication of those plaques at the foot of the memorial cross overlooking the country that these

³ Captain Martino was posthumously promoted to Major. *See* App. 2a.

Marines fought and died to protect provided comfort, solace, and closure for the Marines and the grieving families.

The Martino and Bloomfield families, like so many other families during time of war, have sacrificed much for our country, giving their most precious gifts—their sons, brothers, and husbands. *See* App. 6a-9a. The families were most heartened in those somber days after the squadron returned home from Iraq without their loved ones to know that their memories were preserved under the cross at Mt. Soledad. To strip this symbol from war memorials as Respondent desires here would uselessly, needlessly, and painfully desecrate these memories.

In the final analysis, whatever “harm” that Respondent will “feel” if a war memorial containing a cross remains intact pales in comparison to the real and lasting harm that dismantling such memorials will have to the families and to the sacrifices and memories of those heroes—living and dead—who are honored by them. Admiral Denton, Sybil Martino, Robert Martino, and Julie Bloomfield *will* be irreparably harmed should the government be forced to purge all war memorials of religious symbols such as a cross.

INTRODUCTION

The purpose of this brief is to provide a voice in this Court that is not often heard. It is the voice of those who will be truly harmed in a *real* way by the destruction of war memorials simply because they contain religious symbols that have long been a part of our Nation’s religious heritage.

For most *reasonable* American citizens, and particularly those who have sacrificed so much and whose sons, daughters, husbands, and wives have died defending our country, specifically including *Amici Curiae*, veterans' memorials, including those with religious symbols, provide a lasting tribute to our servicemen and servicewomen. They do not "establish" Christianity as a national religion, as Respondent contends.

From time immemorial, crosses have been used to memorialize fallen war veterans. A cross in the context of a war memorial has an undeniable historical meaning of self-sacrifice—in particular, of making the ultimate sacrifice for one's country.

War memorials provide a place where family members, friends, and comrades of our war veterans can pay tribute to their heroes' sacrifices. It is fitting that a memorial, which provides much comfort, peace, and solace for those who have sacrificed during time of war, contains a cross—a universal symbol of sacrifice. It would desecrate the memories of these war heroes to dismantle historic memorials simply because they contain a cross. Accordingly, *Amici Curiae* urge this Court to reverse the Ninth Circuit, uphold the display of the cross, and to preserve this and other such veterans' memorials for future generations.

ARGUMENT**I. THE FIRST AMENDMENT DOES NOT TOLERATE DECISIONS THAT DISFAVOR RELIGION.**

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated, without equivocation:

It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.* Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or of religion *in general*.”) (emphasis added).

Opponents of religious symbols disingenuously suggest that they merely desire neutrality. In reality, however, they often seek to use the Establishment Clause as a blunt instrument against all things

religious or related to religion in any way, including crosses used as part of national war memorials. This Court should reject such harmful and divisive claims, which seek to bring “us into war with our national traditions.”

Unfortunately, accepting Respondent’s distorted view of the law would pave the road for removing all religious imagery or references from official recognition. Banned from public use would be the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian Trinity), “In God We Trust” on our coinage, religious stamps the U.S. Postal Service issues at Christmas and Easter, the many white crosses marking the grave sites of our Nation’s fallen veterans buried at national cemeteries, the numerous war memorials containing crosses, and even the names of our cities, such as Los Angeles, San Francisco, and Corpus Christi, and all official signs and symbols on which these names appear. The pernicious effect of Respondent’s argument is clear. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an “untutored devotion to the concept of neutrality” can lead to “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious”).

Contrary to Respondent’s claims, throughout its decisions, this Court has consistently described the Establishment Clause as forbidding decisions that tend to “disapprove,” “inhibit,” or evince “hostility” toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (“disapprove”); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (“inhibi[t]”); *Lynch*, 465 U.S. at 673

(“hostility”); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (noting that our Constitution prohibits government action that “foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires”); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Establishment Clause “forbids an official purpose to disapprove of a particular religion or of religion in general”); *Board of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O’Connor, J., concurring) (“The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools.”). Respondent’s argument, therefore, is the antithesis of religious tolerance required by our Constitution.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), for example, a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol, this Court rejected arguments advanced by Respondent in this case. Most significantly, Justice Breyer, in his concurring opinion, which provided the narrowest grounds for the decision, stated,

[The removal of the religious symbol], based primarily on the religious nature of the tablets’ text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based

divisiveness that the Establishment Clause seeks to avoid.

Id. at 704.

Here, Respondent seeks to foment “religiously based divisiveness” contrary to the neutrality and accommodation principles required by our Constitution.

Fortunately, the significance of the *Van Orden* decision has not gone unnoticed by the lower federal courts. For example, in *ACLU v. Mercer County*, 432 F.3d 624 (6th Cir. 2005), a recent Sixth Circuit case upholding the public display of the Ten Commandments in light of the *Van Orden* decision, the court stated, “Our concern is that of the reasonable person. And the ACLU, an organization whose mission is ‘to ensure that . . . the government [is kept] out of the religion business,’ does not embody the reasonable person.” *Id.* at 638 (quoting ACLU website).

The Sixth Circuit stated further:

[T]he ACLU makes repeated reference to “the separation of church and state.” This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation’s history is replete with governmental acknowledgment and in some cases, accommodation of religion.

Id. at 638-39 (citations omitted).

In addition to the Sixth Circuit, other federal courts, including the Ninth Circuit, have decided cases in favor of the public display of religious symbols following *Van Orden*. See, e.g., *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008); *ACLU v. Plattsmouth*, 419 F.3d 772 (7th Cir. 2005) (*en banc*); *ACLU v. Board of Comm’r of Lucas County*, 444 F. Supp. 2d 805, 815 (N.D. Ohio 2006) (making the following, pertinent observation, “Since *Van Orden*, federal courts have uniformly permitted public displays of Ten Commandments monuments”); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983 (D. N.D. 2005); *Russelburg v. Gibson County*, No. 3:03-CV-149, 2005 WL 2175527 (S.D. Ind. Sept. 7, 2005).

Respondent also desires this Court to accept the shopworn and demonstrably false claim that the public display of a cross is *per se* unconstitutional and therefore anything the government does short of destroying or removing it is unconstitutional. This argument was recently rejected by the Tenth Circuit in *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), a case in which the court upheld against an Establishment Clause challenge the display of various Latin crosses on public property. In doing so, the court noted that it would be “folly” to adopt the rule that Respondent proposes here. *Id.* at 1022; see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding the public display of a Latin cross); (see also photographs of crosses on gravesites at Arlington National Cemetery at App. 10a-12a).

As the California appellate court aptly explained in a case addressing the Mt. Soledad Veterans Memorial:

[T]here is no argument presented or any authority cited to us standing for the proposition that the City may transfer the Mount Soledad site only if the cross is removed. We would have serious concerns respecting the prohibition of hostility to religion embedded in article I, section 4 of our Constitution and the federal establishment clause if, prior to otherwise divesting itself of land on which religious artifacts or icons rest, a government entity were required to remove or destroy them.

Paulson, 145 Cal. App. 4th at 420.

While it is true that a cross is a religious symbol, it is also true that it is a symbol that conveys the unmistakable secular message of suffering and ultimate sacrifice. This is particularly true in the context of a veterans' memorial. Thus, it is proper and accurate to describe such memorials as secular veterans' memorials, particularly in light of the history of such memorials.

Finally, Respondent and others who oppose the display of religious symbols in the public square would have this Court completely ignore the interests of *Amici Curiae* and the countless other family members, friends, and comrades of our veterans who will be greatly harmed should this court adopt Respondent's erroneous and divisive view of our Constitution. It would be a mistake for this Court to do so. Indeed, *Amici Curiae* strongly urge this Court to consider the attached photograph of Mrs. Martino hugging the

casket of her son at the conclusion of the funeral service held on *federal* land by *federal* officials at Arlington National Cemetery. *See* App. 6a; *see also* App. 13a-15a. The memory of her son is now preserved at the Mt. Soledad Veterans Memorial—a memory that this and other litigants seek to callously destroy by invoking, of all things, the First Amendment.

In the final analysis, gone are the days of the ill-conceived threats to tear down our Nation’s history and religious heritage based on a tortured view of the Establishment Clause. This Court should reject this most recent effort by affirming the permissible use of religious symbols in our Nation’s memorials.

II. THE FIRST AMENDMENT PERMITS ACKNOWLEDGMENT OF RELIGION, BUT FORBIDS HOSTILITY TOWARD ANY.

“We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion’s role in American life. *Van Orden*, 545 U.S. at 685-86 (quoting *Lynch*, 465 U.S. at 674). Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, the printing on our currency of the national motto, “In God We Trust,” the display of the crèche during Christmas, *see Lynch*, 465 U.S. at 675-77, 686, and representations of the Ten Commandments on government property. *Van Orden*, 545 U.S. at 677; *see*

also *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

In *Lynch*, this Court concluded its recitation of examples of government recognition of religion by stating,

One cannot look at even this brief resume [of historical examples] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has “follow[ed] the best of our traditions” and “respect[ed] the religious nature of our people.” [*Zorach*, 343 U.S. at 314].

465 U.S. at 677-78.

As recently noted by this Court, “Recognition of the role of God in our Nation’s heritage has also been reflected in our decisions. We have acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion.” *Van Orden*, 545 U.S. at 687 (internal quotations and citations omitted); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in judgment) (“Examples of patriotic invocations of God and official acknowledgments of religion’s role in our Nation’s history abound.”); *id.* at 35-36 (O’Connor, J., concurring in the judgment) (“It is unsurprising that a Nation founded by religious

refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.”); *Lynch*, 465 U.S. at 675 (“Our history is replete with official references to the value and invocation of Divine guidance.”).

The use of religious symbols has long been a part of government and remains so today. *See, e.g., Van Orden*, 545 U.S. at 688 (“[A]cknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America.”). Attempts to suppress this recognition and historical acknowledgment—as illustrated by Respondent’s arguments in this case—are the antithesis of the value of religious tolerance that underlies the Establishment Clause. *See, e.g., Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) (“What a strange notion, that a Constitution which itself gives ‘religion in general’ preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.”).

Thus, while the use of religious symbols is a permissible way to acknowledge that we are a religious people with a long and rich religious heritage, decisions that are hostile toward religion—such as the one pressed for by Respondent here—do not enjoy such a favorable history. *See Lynch*, 465 U.S. at 673 (stating that the Constitution “forbids hostility toward any” religion) (internal punctuation, quotations, and citations omitted); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (acknowledging “that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general”).

Accordingly, a reasonable observer would know that while the cross is a religious symbol, it is also a universal symbol of self-sacrifice—and in the context of a war veterans’ memorial, the cross is a symbol of the ultimate sacrifice made for one’s country. The reasonable observer would know that crosses are frequently used to memorialize fallen warriors, and not only on individual graves. For example, large memorial crosses are displayed on federal property at Arlington National Cemetery (the Argonne Memorial and Canadian Cross of Sacrifice) and Gettysburg National Military Park (Irish Brigade Monument), and municipal property at the Taos Plaza (a cross memorializing soldiers of the Bataan Death March of World War II).

A reasonable observer would know that, historically, the cross has been used as a generic grave marker for fallen soldiers, even when the religious beliefs of the individual honored by the cross were unknown. For example, it is commonly known that there are thousands of crosses marking the gravesites of fallen United States soldiers at places such as Flanders Field in the Netherlands (World War I) and Normandy, France (World War II). The striking image of a sea of white crosses conveys the powerful, secular message of ultimate sacrifice, not simply Christianity. Thus, a reasonable observer would conclude that this memorial is not about religion; it is about remembering our veterans who have sacrificed for this country. It is about a national veterans’ memorial that stands as a symbol of patriotism.

In the final analysis, a memorial cross does not convey an impermissible message of endorsement of religion to an informed, reasonable observer. Rather,

such memorials convey an unmistakably American message of patriotism and self-sacrifice. To dismantle this or any other historic memorial simply because it contains a cross would desecrate the memories and the sacrifices of our war veterans and cause incalculable harm to these veterans and their families, friends, and comrades. Thus, this Court should reject Respondent's misguided efforts to destroy a national landmark and treasure based on a flawed view of the Constitution. Accepting Respondent's view will cause real and palpable harm.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision and affirm the longstanding use of crosses and other religious symbols as part of our Nation's memorials.

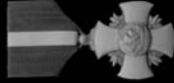
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APPENDIX

JEREMIAH ANDREW DENTON JR.
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 U. S. Navy
 World War II - Korea - Vietnam
 Prisoner of War 18 JUL 1965 - 13 FEB 1973





Navy Cross




Defense Distinguished Service

MEDALS-RIBBONS: Navy Distinguished Service, Silver Star w/2 Stars, Distinguished Flying Cross, Bronze Star w/4 Stars, Purple Heart w/1 Star, Air Medal w/1 Star, Combat Action, ...
 Cold War veteran, multiple attack alpha strike leader, exemplified extraordinary and sustained valor leading prisoner resistance against exploitation by Communist captors.


Warrior, Statesman, Humanitarian

USS Independence CV-62



U. S. Naval Academy
 Class of 1947



2a



3a



MICHAEL D. "MARTINI" MARTINO

Captain

U. S. Marine Corps
Southwest Asia

Operation Iraqi Freedom
Killed in Action 2 Nov 2005



Naval Aviator

MEDALS-RIBBONS: Purple Heart, Air Medal - Individual w/Combat "V" and 1 Strike/Flight Award, Commendation w/Combat "V", Combat Action, Unit Commendation w/1 Star, Meritorious Unit Commendation, National Defense Service w/1 Star, Iraq Campaign, Global War on Terrorism Expeditionary and Service, Sea Service Deployment w/1 Star

On his second Iraq tour, "Martini" made the ultimate sacrifice in support of security and stabilization operations flying "Gunshot 66" in the Al Anbar Province.

Posthumously promoted to Major.



Semper Fi
with pride and love, you are missed

5a



6a



7a



8a



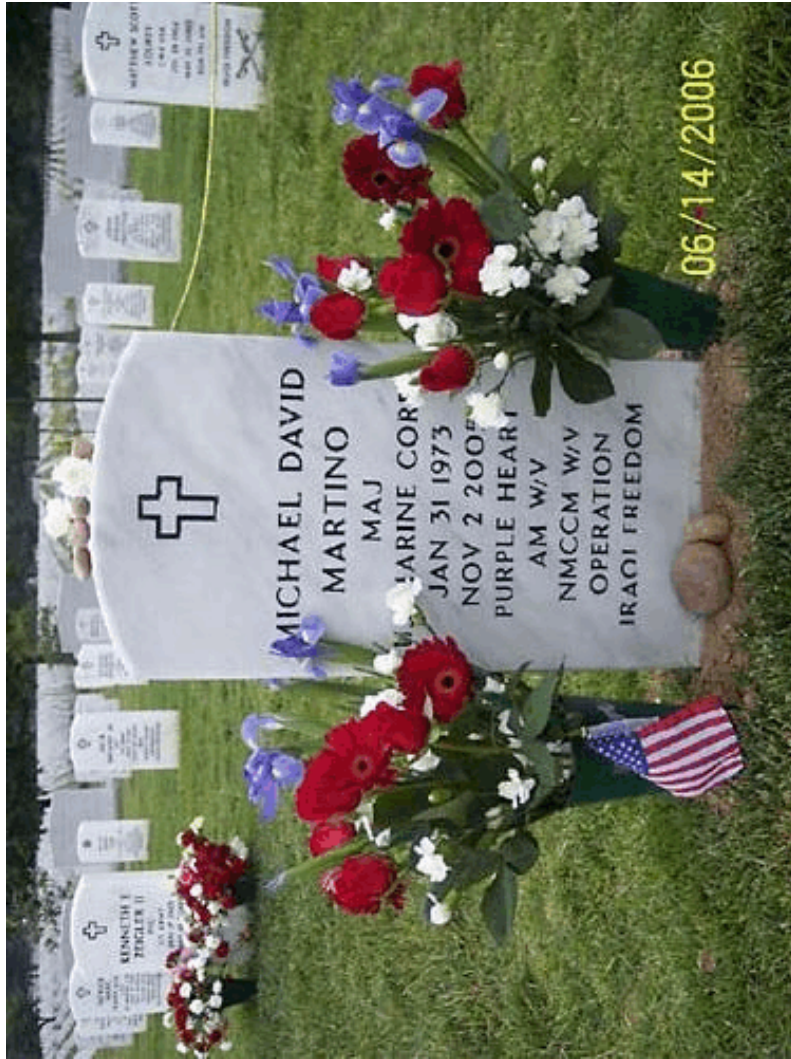
9a



10a



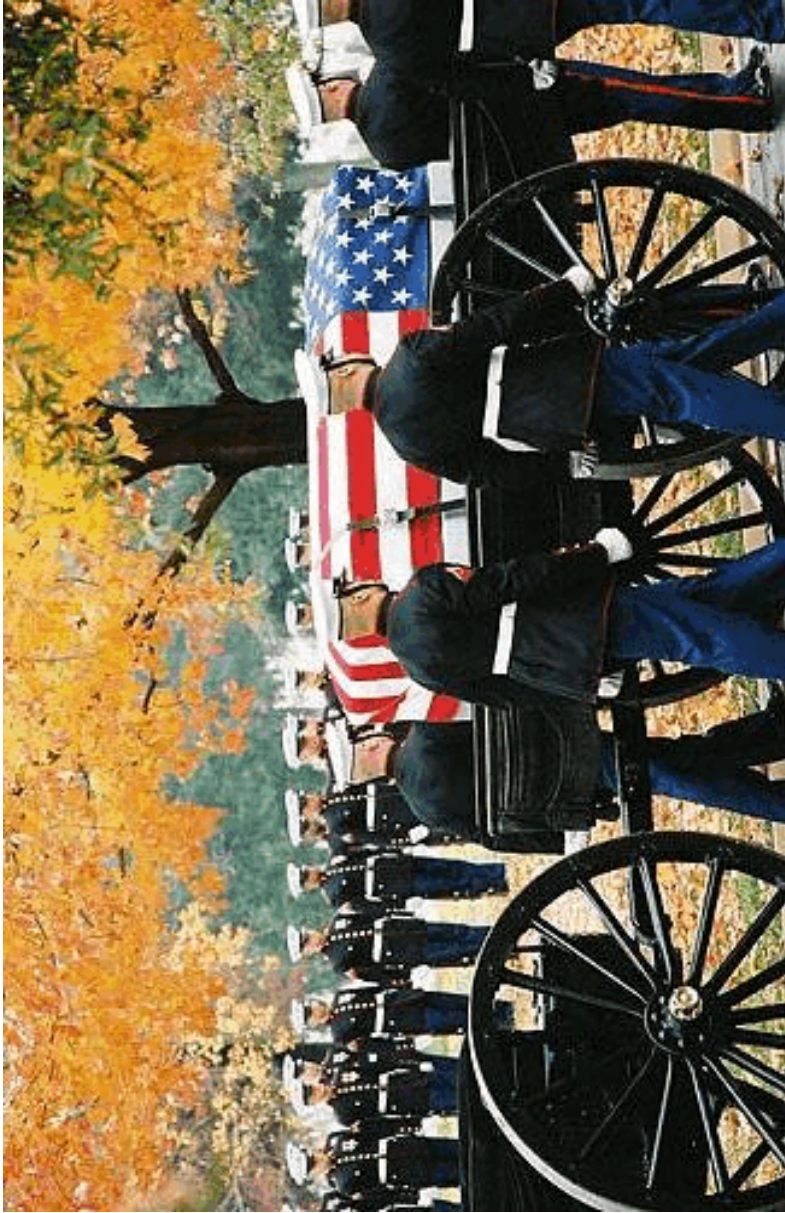
11a



12a



13a



14a



15a

