IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55852

FRANK BUONO

Plaintiff-Appellee

v.

DIRK KEMPTHORNE, Secretary of the Interior, et al.

Defendants-Appellants,

On Appeal From the United States District Court
for the Central District of California
(Civil Action No. EDCV 01-216-RT (SGLx))

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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INTRODUCTION

A cross has stood for more than seventy years atop Sunrise Rock, now in the Mojave National Preserve, as a memorial to veterans of World War I. The original cross had a plaque identifying it as a war memorial that read: "The Cross, Erected in Memory of the Dead of All Wars. Erected 1934 by Members Veterans of Foregin [sic] Wars, Death Valley Post 2884." *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002). In 2004, the year before the Supreme Court decided the Ten Commandments cases, *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), this Court held that the display of the cross on federal land violates the Establishment Clause. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) [*Buono I*]. While that appeal was pending, Congress enacted Section 8121 of the Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, 117 Stat. 1054 (Sept. 30, 2003), Add. 9, in which it ordered the Department of the Interior to transfer the land on which the cross stands to the local chapter of the Veterans of Foreign Wars ("VFW") in exchange for a parcel of privately owned land elsewhere in the Preserve. In the instant appeal, a panel of this Court held that Section 8121 cannot be executed without "running afoul" of the district court's prior injunction against the display of the cross. Slip op. at 11824.

The panel's invalidation of this Act of Congress warrants rehearing *en banc* under Fed. R. App. P. 35 and Ninth Circuit Rule 35-1. The panel opinion conflicts with well-established Supreme Court case law holding that government may accommodate religion, *e.g.*, *Van Orden*, 545 U.S. at 698-99, 704 (Breyer, J., concurring), that clear evidence is required to overcome the presumption that government officials will uphold the Constitution, *e.g.*, *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), that courts should read statutes to avoid constitutional infirmity, *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001), and that legislative expressions of a secular purpose are entitled to deference, *e.g.*, *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000). The panel opinion is also at odds with Seventh Circuit case law holding that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000); *see also Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005). This case also presents a question of exceptional importance: whether and in what circumstances the government may cure an Establishment Clause violation by transferring title to the land on which a religious symbol stands to a private entity. Therefore, rehearing *en banc* is necessary to maintain uniformity of decisions.

ARGUMENT

I. The panel opinion conflicts with well-established Supreme Court case law holding that the government may accommodate religion, that the government is presumed to act within the bounds of the Constitution, and that courts should defer to legislative expressions of a secular purpose.

In 2000, before this action commenced, Congress prohibited the National Park Service from spending federal funds to remove the cross. Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (December 21, 2000). In 2002, Congress designated the cross and the property on which it stands as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278 (January 10, 2002) [Section 8137]. Congress later enacted another provision prohibiting the spending of any federal funds to remove any World War I memorial. Pub. L. No. 107-248, § 8065(b), 116 Stat. 1519, 1551 (October 23, 2002). After the district court held that the display of the cross on federal land violates the Establishment Clause and while that judgment was on appeal, Congress enacted Section 8121, the provision at issue here. Following a remand and the district court's subsequent ruling invalidating Section 8121, the panel here concluded that Congress' line of enactments regarding the Sunrise Rock cross reveal an intent to evade the district court's injunction prohibiting the

display of the cross. Slip op. at 11822. That conclusion conflicts with well-established Supreme Court precedent.

A. The panel's conclusion conflicts with cases holding that the Establishment Clause does not require the government to show hostility toward religion or prohibit the government from accommodating religion.

The First Amendment forbids Congress from making any law "respecting an establishment of religion" or "prohibiting the free exercise thereof." U.S. Const. amend. I. The Supreme Court has often commented on the "competing values" of the two religion clauses. *McCreary*, 545 U.S. at 875; *see also, e.g., Cutter v. Wilkinson*, 125 S. Ct. 2113, 2120-21 (2005) ("While the two Clauses express complementary values, they often exert conflicting pressures."). The First Amendment does not require the government to show hostility toward religion any more than it permits the government to favor religion. *See Van Orden*, 545 U.S. at 684 (Rehnquist, C.J.) ("no constitutional requirement * * * makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence") (*quoting Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952)); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring) ("The Court has avoided drawing lines which entirely sweep away all government

recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion.").

Rather, the government may accommodate religion without violating the Establishment Clause. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394-95 (1993) (holding that use of school property for showing of religious film series would not violate Establishment Clause); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 247-53 (1990) (holding that use of school property by Christian student club would not violate Establishment Clause); *id.* at 260 (Kennedy, J., concurring in the judgment); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987) (upholding religious exemption to Title VII's prohibition against religious discrimination in employment). "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos*, 483 U.S. at 334 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)).

Justice Breyer provided the fifth vote for the majority in *Van Orden* holding that the display of a monument inscribed with the text of the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause. His

controlling concurrence emphasized that requiring the government "to purge from the public sphere all that in any way partakes of the religious" would "promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 125 S. Ct. at 699 (Breyer, J., concurring). He further observed that disallowing the display of the Ten Commandments "based primarily on the religious nature of the tablets' text" would "exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704.

In this case, by transferring the property on which the cross stands to the organization that originally erected it, Congress attempted to steer a course between the competing demands of the two First Amendment religion clauses: it avoided perpetuating what this Court held to be an establishment of religion and, at the same time, avoided sending a message of hostility to religion by tearing down a cross erected by private parties as a war memorial that stood unchallenged for almost seventy years. *Cf. Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005) (City's sale of pedestrian easement to church "does nothing to advance religion, but merely enables the LDS Church to advance itself"). The Supreme Court has observed that the Establishment Clause and Free Exercise Clause are often "in tension," and yet "'there is room for play in the joints' between them." *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz*,

397 U.S. at 669). Thus, Congress must have some latitude in choosing how to cure an Establishment Clause violation. *Cf. International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring) ("In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.").

Here, Congress effectively navigated the narrow channel between the clauses by traveling the same course that Justice Breyer followed in *Van Orden* when confronted with another longstanding, privately donated monument of religious significance on public land. The panel wrongly punished Congress's good faith effort to navigate difficult constitutional shoals.

B. The panel's conclusion conflicts with cases holding that courts should presume that the government will act within the bounds of the Constitution and that legislative expressions of a secular purpose are entitled to deference.

In *McCreary*, the Supreme Court held that the inquiry into legislative purpose under the Establishment Clause "has been a common, albeit seldom dispositive, element of our cases." 545 U.S. at 859. The Court reiterated that a legislature's stated purpose is entitled to deference, but the purpose inquiry is not a

"timid standard." *Id.* at 865. The Court explained that "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *Id.* at 874. On the merits, the Court held that the Ten Commandments display served an unconstitutional purpose when it was first put up, and no evidence supported the Petitioners' contention that the legislature's purpose had changed. *Id.* at 871-72. The Court expressly recognized, however, that the Counties' past actions did not "forever taint any effort on their part to deal with the subject matter." *Id.* at 874.

Here, in contrast, the privately erected cross reflected no illegitimate purpose *ab initio* on the government's part, and no evidence indicates any intervening illegitimate governmental purpose. The VFW erected this cross in 1934 to honor war casualties. *Buono*, 371 F.3d at 548. In 2002, Congress designated the parcel a national war memorial. Pub. L. No. 107-117, § 8137(a). Using a cross as a war memorial serves a secular governmental purpose. *See Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O'Scannlain, J., concurring); *cf. Briggs v. Mississippi*, 331 F.3d 499, 505-6 (5th Cir. 2003) (inclusion of St. Andrew's Cross on state flag satisfied purpose prong of *Lemon* test); *Friedman v. Board of County Com'rs of Bernalillo*

County, 781 F.2d 777, 789 n.2 (10th Cir. 1985) (same regarding cross in city seal). Accordingly, when the Court held this cross unconstitutional in the prior appeal, it did not question Congress' purpose in designating this cross a national war memorial.

Section 8121, in turn, serves "the undeniably appropriate secular purpose of ensuring the presence of a war memorial on the site." *Paulson v. City of San Diego*, 294 F.3d 1124, 1132 (9th Cir. 2002) (*en banc*) (City of San Diego's efforts to sell 45-foot tall war memorial cross served secular purpose). The panel here concluded to the contrary that Congress' attempt to preserve the cross through a land exchange was not a good faith effort to cure the Establishment Clause violation. But that conclusion was unsupported by any evidence that Congress's purpose has changed over the years and was contrary not only to *Paulson*, but to the long line of cases requiring clear evidence to overcome the presumption that government officials, who are sworn to uphold the Constitution, will not flout their obligations. *E.g.*, *Favish*, 541 U.S. at 174; *St. Cyr*, 533 U.S. at 300 n.12; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or

usurp power constitutionally forbidden it.").

The panel also ignored the Supreme Court's admonition that legislative expressions of a secular purpose are entitled to deference, *Santa Fe Independent School Dist.*, 530 U.S. at 308; *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987), and that analysis under the Establishment Clause must focus on the purpose of the legislation, not the motives underlying it, *Mergens*, 496 U.S. at 249; *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002). The land exchange legislation, like the legislation that designated the parcel a war memorial, serves the obvious secular purpose of honoring the nation's veterans of World War I. The panel acted contrary to binding Supreme Court precedent when it questioned Congress' motives in enacting this legislation.

II. The panel erroneously rejected the Seventh Circuit's conclusion that "a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."

In *Freedom from Religion*, the Seventh Circuit held that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." 203 F.3d at 491. The court reasoned that the owner of a parcel is presumably responsible for any expressive conduct on its property. *Id.* While governmental speech endorsing religion is prohibited by the Establishment Clause, private speech endorsing religion is protected by the

Free Speech and Free Exercise clauses. *Id.* The "facial result" of transferring the property into private hands, therefore, was to transfer the challenged religious expression "from a public seller onto a private buyer." 203 F.3d at 491. "In short, [*Freedom from Religion*] authorized an alternative to removal - a sale that did not involve 'unusual circumstances.'" *Mercier*, 395 F.3d at 702.

The panel here rejected the Seventh Circuit's conclusion that the sale of real property on which a religious symbol stands ends an Establishment Clause violation. Slip op. at 11816 n.13. The panel characterized the Seventh Circuit's holding as a "presumption." *Id.* The Seventh Circuit, however, did not identify its holding as a presumption, but rather as a rule of law that flows directly from the well-established premise that "there is 'a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Freedom from Religion*, 203 F.3d at 491 (quoting *Mergens*, 496 U.S. at 250) (emphasis in original).

Contrary to the panel's conclusion, the Seventh Circuit's holding is consistent with Supreme Court precedent requiring a fact-specific inquiry in Establishment Clause cases. In fact, the Seventh Circuit "emphasized the case-by-case nature of a court's review of an alleged Establishment Clause

violation." *Mercier*, 395 F.3d at 702 (citing *Santa Fe Independent School Dist.*, 530 U.S. at 315). That court did not adhere to any "formalistic standard" that might "invite[] manipulation," but instead looked to the form and substance of the sale "to determine whether government action endorsing religion has actually ceased." *Freedom from Religion*, 203 F.3d at 491. The Seventh Circuit's analysis in *Freedom from Religion* and *Mercier* was appropriately fact-specific.

The panel also noted that two "public function" cases "suggest" that transferring control "from public to private hands" does not presumptively cure a constitutional violation. Slip op. at 11816 n.13 (citing *Evans v. Newton*, 382 U.S. 296, 301 (1966); *Terry v. Adams*, 345 U.S. 461, 469 (1953)). Those cases, however, did not concern the transfer of religious *speech* from public to private mouths by way of alienation of title to real property. Rather, they concerned the transfer of *governmental functions* from the government to private individuals. "That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations" *Evans*, 382 U.S. at 299. Section 8121 would not transfer any governmental function to the VFW. Moreover, *Evans* and *Terry* concerned efforts to insulate government-sponsored segregation from challenge under the Fourteenth Amendment by

transferring trusteeship of a public park in *Evans* and organization of political primaries in *Terry* to private parties. Analogizing those cases to Congress' good-faith effort to comply with the district court's injunction while at the same time avoiding dishonoring the memories of the fallen service members who have been commemorated on Sunrise Rock for more than seventy years is beyond the pale. The Seventh Circuit's holding is entirely consistent with Supreme Court precedent, and the panel erred in rejecting it.

III. The panel's holding that, after the land exchange, the government will continue to control the property, fails to follow Supreme Court case law requiring courts to interpret federal statutes to avoid constitutional infirmity.

Section 8121 provides that if "the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." Pub. L. No. 108-87, § 8121(e). The panel read that clause as *automatically* requiring reversion of the property to the government if the VFW takes down the cross. Slip op. at 11813-14, 11820. As the district court recognized, however, the determination of whether the VFW has ceased to maintain a war memorial on the property will be in the Secretary's discretion. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1179 (C.D. Cal. 2005). Nothing in section 8121 requires the VFW to continue to display the cross. While

Section 8137 designated the cross itself as the memorial, Section 8121 explicitly transfers only "a parcel of real property" and directs the VFW to maintain that "conveyed property" as "a" war memorial, not "the" war memorial. Pub. L. No. 108-87, § 8121(a), (e) ("The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I"). Indeed, Section 8121 does not mention the cross or require the inclusion of any particular items in the war memorial. If the VFW nonetheless chooses to maintain a cross on the premises, that will be the result of the independent action of a private party who is not before the Court and whose actions cannot be attributed to the government. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) ("no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement").

At most, the reversionary clause is ambiguous, and the panel should have read it to avoid constitutional infirmity. *St. Cyr*, 533 U.S. at 299-300. Likewise, the court should have presumed that a future Secretary of the Interior would exercise his or her discretion to interpret this provision consistent with the First Amendment. *See Favish*, 541 U.S. at 174 ("there is a presumption of legitimacy

accorded to the Government's official conduct"); *cf. Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005) (right of reentry does not render plaza a public forum).

Section 8121 also provides that "[n]otwithstanding the conveyance of the property * * *, the Secretary shall continue to carry out the responsibilities" in Section 8137 of the 2002 appropriations act, which, among other things, required Interior to acquire a replica of the original plaque. Pub. L. Nos. 108-87, § 8121(a), 107-117, § 8137(a). The panel found that that provision would establish continuing federal control over the property after the land exchange. Slip op. at 11819. To the contrary, the replica provision does not require any ongoing federal involvement in the memorial. The Park Service can install a replica sign before the land exchange is complete.[1] Thus, that provision does not give the Park Service continuing control over the property, and, again, the panel should have interpreted the statute to avoid constitutional infirmity. *St. Cyr*, 533 U.S. at 299-300.

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1. The United States explained its Brief of Appellant at pages 37-40 that, to the extent that Section 8121 required Interior to fulfill its prior obligation under Section 8137 to obtain a replica of the original cross, the agency does not intend to fulfill that mandate, given the injunction barring the display of a cross on Sunrise Rock. Since that provision is not at issue here, the panel should not have interpreted it to undermine the legitimacy of Congress' decision to convey this land to the VFW.

Finally, the panel's finding that the Park Service would retain management authority over this property even after it is privately owned was erroneously based on statutes that govern the management of *federal* land, but do not purport to give the Park Service authority to manage *private* land. *See, e.g.*, 16 U.S.C. § 1 ("The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified"). Therefore, the panel's decision was wrong and contrary to binding precedent.

IV. The panel erroneously rejected the Seventh Circuit's conclusion that, in an effort to cure an Establishment Clause violation, conveying public land on which a religious monument stands to the private group that first installed the monument is both permissible and sensible.

The panel held that the method of effectuating the land exchange further demonstrates that the government was attempting to circumvent the district court's injunction. Slip op. at 11822. In particular, the panel criticized Congress' decision to transfer the memorial to the VFW, the organization the originally erected a cross on the site in 1934. That criticism is in conflict with the Seventh Circuit, which, as the panel recognized, has twice held that conveying public land on which a religious monument stands to the private group that first installed the monument is both permissible and sensible. *Mercier*, 395 F.3d at 703; *Freedom from Religion*, 203 F.3d at 492.

The panel also observed that the land exchange was outside normal agency procedures and "authorized by a provision buried in an appropriations bill." Slip op. at 11821. The panel failed to recognize, however, that congressionally mandated land exchanges are not unusual, *e.g.*, Pub. L. No. 108-43, 117 Stat. 841 (2003), and the inclusion of this enactment in an omnibus bill does not undermine its entitlement to a presumption of constitutionality, *cf. Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992) ("although repeals by implication are especially disfavored in the appropriations context, Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly") (citations omitted); *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (appropriations act rider was not constitutionally suspect on basis that it was targeted at single controversy).

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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90-1-0-10343

ADDENDUM

Pub. L. No. 106-554, § 133, 114 Stat. 2763, 2763A-230 (signed December 21, 2000)

Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278 (signed January 10, 2002)

Pub. L. No. 107-248, § 8065(b), 116 Stat. 1519, 1551 (signed October 23, 2002)

Pub. L. No. 108-87, § 8121, 117 Stat. 1054, 1100 (signed September 30, 2003)

Slip Opinion

*Public Law 106–554
106th Congress

An Act

Making consolidated appropriations for the fiscal year ending September 30, 2001, and for other purposes.

Dec. 21, 2000
[H.R. 4577]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated Appropriations Act, 2001. Incorporation by reference.

SECTION 1. (a) The provisions of the following bills of the 106th Congress are hereby enacted into law:

(1) H.R. 5656, as introduced on December 14, 2000.
(2) H.R. 5657, as introduced on December 14, 2000.
(3) H.R. 5658, as introduced on December 14, 2000.
(4) H.R. 5666, as introduced on December 15, 2000, except that the text of H.R. 5666, as so enacted, shall not include section 123 (relating to the enactment of H.R. 4904).
(5) H.R. 5660, as introduced on December 14, 2000.
(6) H.R. 5661, as introduced on December 14, 2000.
(7) H.R. 5662, as introduced on December 14, 2000.
(8) H.R. 5663, as introduced on December 14, 2000.
(9) H.R. 5667, as introduced on December 15, 2000.

Publication. 1 USC 112 note.

(b) In publishing this Act in slip form and in the United States Statutes at Large pursuant to section 112 of title 1, United States Code, the Archivist of the United States shall include after the date of approval at the end appendixes setting forth the texts of the bills referred to in subsection (a) of this section and the text of any other bill enacted into law by reference by reason of the enactment of this Act.

SEC. 2. (a) Notwithstanding Rule 3 of the Budget Scorekeeping Guidelines set forth in the joint explanatory statement of the committee of conference accompanying Conference Report 105–217, legislation enacted in section 505 of the Department of Transportation and Related Agencies Appropriations Act, 2001, section 312 of the Legislative Branch Appropriations Act, 2001, titles X and XI of H.R. 5548 (106th Congress) as enacted by H.R. 4942 (106th Congress), division B of H.R. 5666 (106th Congress) as enacted by this Act, and sections 1(a)(5) through 1(a)(9) of this Act that would have been estimated by the Office of Management and Budget as changing direct spending or receipts under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 were it included in an Act other than an appropriations Act shall be treated as direct spending or receipts legislation, as appropriate, under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(b) In preparing the final sequestration report required by section 254(f)(3) of the Balanced Budget and Emergency Deficit Control Act of 1985 for fiscal year 2001, in addition to the information required by that section, the Director of the Office of Management and Budget shall change any balance of direct spending

* See Endnote on 114 Stat. 2764.

a final rule to reduce during the 2000–2001 or 2001–2002 winter seasons the use of snowmobiles below current use patterns at a unit in the National Park System: *Provided*, That nothing in this section shall be interpreted as amending any requirement of the Clean Air Act: *Provided further*, That nothing in this section shall preclude the Secretary from taking emergency actions related to snowmobile use in any National Park based on authorities which existed to permit such emergency actions as of the date of enactment of this Act.

SEC. 129. The Secretary of the Interior shall extend until March 31, 2001, the "Extension of Standstill Agreement," entered into on November 22, 1999, by the United States of America and the holders of interests in seven campsite leases in Biscayne Bay, Miami-Dade County, Florida collectively known as "Stiltsville".

SEC. 130. The Secretary of the Interior is authorized to make a grant of $1,300,000 to the State of Minnesota or its political subdivision from funds available to the National Park Service under the heading "Land Acquisition and State Assistance" in Public Law 106–291 to cover the cost of acquisition of land in Lower Phalen Creek near St. Paul, Minnesota in the Mississippi National River and Recreation Area.

SEC. 131. Notwithstanding any provision of law or regulation, funds appropriated in Public Law 106–291 for a cooperative agreement for management of George Washington's Boyhood Home, Ferry Farm, shall be transferred to the George Washington's Fredericksburg Foundation, Inc. (formerly known as Kenmore Association, Inc.) immediately upon signing of the cooperative agreement.

SEC. 132. During the period beginning on the date of the enactment of this Act and ending on June 1, 2001, funds made available to the Secretary of the Interior may not be used to pay salaries or expenses related to the issuance of a request for proposal related to a light rail system to service Grand Canyon National Park.

SEC. 133. None of the funds in this or any other Act may be used by the Secretary of the Interior to remove the five-foot-tall white cross located within the boundary of the Mojave National Preserve in southern California first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15.

SEC. 134. Section 6(g) of the Chesapeake and Ohio Canal Development Act (16 U.S.C. 410y–4(g)) is amended by striking "thirty" and inserting "40".

SEC. 135. Funds provided in Public Law 106–291 for Federal land acquisition by the National Park Service in Fiscal Year 2001 for Brandywine Battlefield, Ice Age National Scenic Trail, Mississippi National River and Recreation Area, Shenandoah National Heritage Area, Fallen Timbers Battlefield and Fort Miamis National Historic Site may be used for a grant to a State, local government, or to a land management entity for the acquisition of lands without regard to any restriction on the use of Federal land acquisition funds provided through the Land and Water Conservation Act of 1965.

SEC. 136. Notwithstanding any other provision of law, in accordance with title IV—Wildland Fire Emergency Appropriations, Public Law 106–291, from the $35,000,000 provided for community and private land fire assistance, the Secretary of Agriculture, may use

Public Law 107–117
107th Congress

An Act

Jan. 10, 2002
[H.R. 3338]

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2002, and for other purposes.

Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002. Department of Defense Appropriations Act, 2002.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2002, for military functions administered by the Department of Defense, and for other purposes, namely:

DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS, 2002

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $23,752,384,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $19,551,484,000.

MILITARY PERSONNEL, MARINE CORPS

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel

7622 arising out of the collision involving the U.S.S. GREENEVILLE and the EHIME MARU, in any amount and without regard to the monetary limitations in subsections (a) and (b) of that section: *Provided*, That such payments shall be made from funds available to the Department of the Navy for operation and maintenance.

42 USC 429 note.

SEC. 8134. Notwithstanding section 229(a) of the Social Security Act, no wages shall be deemed to have been paid to any individual pursuant to that section in any calendar year after 2001.

SEC. 8135. The total amount appropriated in this Act is hereby reduced by $105,000,000 to reflect fact-of-life changes in utilities costs, to be derived as follows:

"Operation and Maintenance, Army", $34,700,000;
"Operation and Maintenance, Navy", $8,800,000;
"Operation and Maintenance, Marine Corps", $7,200,000;
"Operation and Maintenance, Air Force", $28,800,000;
"Operation and Maintenance, Defense-Wide", $4,500,000;
"Operation and Maintenance, Army Reserve", $2,700,000;
"Operation and Maintenance, Army National Guard", $2,700,000;
"Operation and Maintenance, Air National Guard", $3,400,000;
"Defense Working Capital Funds", $7,100,000; and
"Defense Health Program", $5,100,000.

SEC. 8136. (a) Of the total amount appropriated for "Operation and Maintenance, Air Force", $2,100,000, to remain available until expended, shall be available to the Secretary of the Air Force only for the purpose of making a grant in the amount of $2,100,000 to the Lafayette Escadrille Memorial Foundation, Inc., to be used to perform the repair, restoration, and preservation of the structure, plaza, and surrounding grounds of the Lafayette Escadrille Memorial in Marnes la-Coguette, France.

(b) The Secretary shall require as a condition of the grant—

(1) that the funds provided through the grant be used only for costs associated with such repair, restoration, and preservation; and

(2) that none of those funds may be used for remuneration of any entity or individual associated with fund raising for the project to carry out such repair, restoration, and preservation.

California.
16 USC 431 note.

SEC. 8137. (a) DESIGNATION OF NATIONAL MEMORIAL.—The five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.

(b) LEGAL DESCRIPTION.—The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of the property to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.

(c) REINSTALLATION OF MEMORIAL PLAQUE.—The Secretary of the Interior shall use not more than $10,000 of funds available

for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.

SEC. 8138. In addition to the amounts provided elsewhere in this Act, the amount of $4,200,000 is hereby appropriated to the Department of Defense for "Operation and Maintenance, Navy". Such amount shall be used by the Secretary of the Navy only to make a grant in the amount of $4,200,000 to the U.S.S. Alabama Battleship Foundation, a nonprofit organization established under the laws of the State of Alabama, to be available only for the preservation of the former U.S.S. ALABAMA (ex BB–60) as a museum and memorial.

SEC. 8139. In addition to the amounts provided elsewhere in this Act, the amount of $4,250,000 is hereby appropriated to the Department of Defense for "Operation and Maintenance, Navy". Such amount shall be used by the Secretary of the Navy only to make a grant in the amount of $4,250,000 to the Intrepid Sea-Air-Space Foundation only for the preservation of the former U.S.S. INTREPID (CV 11) as a museum and memorial.

SEC. 8140. In addition to the amounts provided elsewhere in this Act, the amount of $6,000,000 is hereby appropriated to the Department of Defense for "Operation and Maintenance, Air Force". Such amount shall be used by the Secretary of the Air Force only to make a grant in the amount of $6,000,000 to the Medical Lake School District, Washington State school district number 326, for relocation of the Fairchild Air Force Base Elementary School within the boundary of Fairchild Air Force Base, Washington.

SEC. 8141. In addition to the amounts provided elsewhere in this Act, the amount of $3,500,000 is hereby appropriated to the Department of Defense for "Operation and Maintenance, Navy". Such amount shall be used by the Secretary of the Navy only to make a grant in the amount of $3,500,000 to the Central Kitsap School District, Washington State school district number 401, for the purchase and installation of equipment for a special needs learning center to meet the needs of Department of Defense special needs students at Submarine Base Bangor, Washington.

SEC. 8142. (a) In addition to amounts provided elsewhere in this Act, the amount of $8,500,000 is hereby appropriated for "Operation and Maintenance, Defense-Wide", to be available to the Secretary of Defense only for the purpose of making a grant for the purpose specified in section 8156 of the Department of Defense Appropriations Act, 2001 (Public Law 106–259; 114 Stat. 707), as amended by subsection (b). Such grant shall be made not later than 90 days after the date of the enactment of this Act. Deadline.

(b) Section 8156 of the Department of Defense Appropriations Act, 2001 (Public Law 106–259; 114 Stat. 707), is amended by striking the comma after "California" the first place it appears and all that follows through "96–8867)".

SEC. 8143. (a) ACTIVITIES UNDER FORMERLY UTILIZED SITES REMEDIAL ACTION PROGRAM.—Subject to subsections (b) through (e) of section 611 of Public Law 106–60 (113 Stat. 502; 10 U.S.C. 2701 note), the Secretary of the Army, acting through the Chief of Engineers, under the Formerly Utilized Sites Remedial Action Program shall undertake the functions and activities specified in subsection (a) of such section in order to—

Public Law 107–248
107th Congress

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2003, and for other purposes.

Oct. 23, 2002
[H.R. 5010]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2003, for military functions administered by the Department of Defense, and for other purposes, namely:

Department of Defense Appropriations Act, 2003.

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $26,855,017,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $21,927,628,000.

MILITARY PERSONNEL, MARINE CORPS

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Marine Corps on active duty (except

that is not contiguous with another State, individuals who are residents of such State and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills: *Provided,* That the Secretary of Defense may waive the requirements of this section, on a case-by-case basis, in the interest of national security.

SEC. 8065. (a) None of the funds made available in this or any other Act may be used to pay the salary of any officer or employee of the Department of Defense who approves or implements the transfer of administrative responsibilities or budgetary resources of any program, project, or activity financed by this Act to the jurisdiction of another Federal agency not financed by this Act without the express authorization of Congress: *Provided,* That this limitation shall not apply to transfers of funds expressly provided for in Defense Appropriations Acts, or provisions of Acts providing supplemental appropriations for the Department of Defense.

(b) None of the funds in this or any other Act may be used to dismantle national memorials commemorating United States participation in World War I.

SEC. 8066. (a) LIMITATION ON TRANSFER OF DEFENSE ARTICLES AND SERVICES.—Notwithstanding any other provision of law, none of the funds available to the Department of Defense for the current fiscal year may be obligated or expended to transfer to another nation or an international organization any defense articles or services (other than intelligence services) for use in the activities described in subsection (b) unless the congressional defense committees, the Committee on International Relations of the House of Representatives, and the Committee on Foreign Relations of the Senate are notified 15 days in advance of such transfer. Notice.

(b) COVERED ACTIVITIES.—This section applies to— Applicability.

(1) any international peacekeeping or peace-enforcement operation under the authority of chapter VI or chapter VII of the United Nations Charter under the authority of a United Nations Security Council resolution; and

(2) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation.

(c) REQUIRED NOTICE.—A notice under subsection (a) shall include the following:

(1) A description of the equipment, supplies, or services to be transferred.

(2) A statement of the value of the equipment, supplies, or services to be transferred.

(3) In the case of a proposed transfer of equipment or supplies—

(A) a statement of whether the inventory requirements of all elements of the Armed Forces (including the reserve components) for the type of equipment or supplies to be transferred have been met; and

(B) a statement of whether the items proposed to be transferred will have to be replaced and, if so, how the President proposes to provide funds for such replacement.

SEC. 8067. To the extent authorized by subchapter VI of chapter 148 of title 10, United States Code, the Secretary of Defense may issue loan guarantees in support of United States defense exports not otherwise provided for: *Provided,* That the total contingent liability of the United States for guarantees issued under the

Public Law 108–87
108th Congress

An Act

Sept. 30, 2003
[H.R. 2658]

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2004, and for other purposes.

Department of Defense Appropriations Act, 2004.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2004, for military functions administered by the Department of Defense, and for other purposes, namely:

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty, (except members of reserve components provided for elsewhere), cadets, and aviation cadets; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,247,667,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $23,217,298,000.

MILITARY PERSONNEL, MARINE CORPS

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Marine Corps on active duty (except

civilian officials whose participation directly contributes to the education and training of these foreign students.

16 USC 410aaa–56 note, 431 note.

SEC. 8121. (a) EXCHANGE REQUIRED.—In exchange for the private property described in subsection (b), the Secretary of the Interior shall convey to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E (in this section referred to as the "recipient"), all right, title, and interest of the United States in and to a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107–117; 115 Stat. 2278)) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war. Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.

(b) CONSIDERATION.—As consideration for the property to be conveyed by the Secretary under subsection (a), Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569–051–44, and located in the west ½ of the northeast ¼ of the northwest ¼ of the northwest ¼ of section 11, township 14 north, range 15 east, San Bernardino base and meridian.

(c) EQUAL VALUE EXCHANGE; APPRAISAL.—The values of the properties to be exchanged under this section shall be equal or equalized as provided in subsection (d). The value of the properties shall be determined through an appraisal performed by a qualified appraiser in conformance with the Uniform Appraisal Standards for Federal Land Acquisitions (Department of Justice, December 2000).

(d) CASH EQUALIZATION.—Any difference in the value of the properties to be exchanged under this section shall be equalized through the making of a cash equalization payment. The Secretary shall deposit any cash equalization payment received by the Secretary under this subsection in the Land and Water Conservation Fund.

(e) REVERSIONARY CLAUSE.—The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.

(f) BOUNDARY ADJUSTMENT; ADMINISTRATION OF ACQUIRED LAND.—The boundaries of the Mojave National Preserve shall be adjusted to reflect the land exchange required by this section. The property acquired by the Secretary under this section shall become part of the Mojave National Preserve and be administered in accordance with the laws, rules, and regulations generally applicable to the Mojave National Preserve.

SEC. 8122. None of the funds appropriated or made available in this Act shall be used to reduce or disestablish the operation of the 53rd Weather Reconnaissance Squadron of the Air Force Reserve, if such action would reduce the WC–130 Weather Reconnaissance mission below the levels funded in this Act: *Provided,* That the Air Force shall allow the 53rd Weather Reconnaissance