



June 26, 2020

Removal of Nazi Symbols and Inscriptions on Headstones of Prisoners of War in VA National Cemeteries

Overview

On May 12, 2020, the Military Religious Freedom Foundation's Founder and President, Michael L. Weinstein, called on Secretary of Veterans Affairs (VA), Robert Wilkie, to immediately remove three World War II-era headstones located in two VA national cemeteries. These prisoner-of-war (POW) headstones each bear the Iron Cross insignia, representing a Prussian and German military honor that included a swastika when awarded by Nazi Germany. Two of these headstones also have a German-language inscription that translates to "He died far from his home for Führer, people and Fatherland."

The headstones—located in Fort Douglas Post Cemetery, Utah, and in Fort Sam Houston National Cemetery, Texas—were installed during the 1940s, when hundreds of thousands of German, Italian, and Japanese POWs were held in the United States at various military installations. During this time, the U.S. military had standardized gravestones for its servicemembers but not for POWs. According to VA, approximately 1,000 of the POWs who died while in the United States were buried in military cemeteries that have since been transferred from Department of Defense (DOD) jurisdiction to the Department of Veterans Affairs. VA also said it appears that these three headstones are the only ones bearing a swastika or a Nazi Germany-related inscription.

Under article 120 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, the United States must "ensure that prisoners of war who have died in captivity are honourably buried ... and that their graves are respected, suitably maintained and marked so as to be found at any time." International law does not appear to further specify the style or content of POW grave markers.

Department of Defense Property Transfer to Department of Veterans Affairs

The National Cemetery Administration (NCA) within VA administers most national cemeteries, with 143 cemeteries under its jurisdiction. The National Park Service and Department of the Army administer 14 and 35 national veterans' cemeteries, respectively.

Fort Sam Houston National Cemetery, located in San Antonio, is one of the 143 cemeteries under VA jurisdiction and has been administered by VA for over 40 years. Established by the U.S. War Department in 1937, the cemetery remained under the Army's jurisdiction until 1973, when Congress passed P.L. 93-43, the National Cemeteries Act, which transferred Fort Sam Houston

National Cemetery and 81 other national cemeteries from DOD to VA.

More recently, the Office of the Army Cemeteries transferred certain cemeteries to NCA pursuant to Executive Order 13781 of March 13, 2017, and the VA's own agency reform plan. This plan was also included in a 2018 White House initiative, *Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations*, which endorsed consolidation of federal veterans' cemeteries. According to this initiative, the transfer from DOD to VA assures that these military cemeteries "will alleviate duplicative mission requirements and entrust operational control to an agency with more expertise in running cemeteries."

In December 2019, Fort Douglas Post Cemetery—the cemetery that contains the POW headstone with the swastika—was transferred to VA's jurisdiction. In March 2020, Vancouver Barracks Military Cemetery was transferred to Willamette National Cemetery. Six more cemeteries are to be transferred to NCA in 2020. These are the Army post cemeteries at Fort McClellan, Alabama, and the Enemy Prisoner of War Cemetery located there; Fort Worden, Washington; Fort Stevens, Oregon; Fort Devens, Massachusetts; and Benicia Arsenal, California.

Congressional Requests

On May 25, 2020, a bipartisan group of Representatives serving on the House Appropriations Committee sent a letter to VA Secretary Wilkie requesting that VA remove the gravestones or alter them to remove the "swastika-adorned headstones and messages honoring Hitler." The letter acknowledged that the cemeteries were not under VA control when the headstones were placed, but it stated that now "there is no excuse for VA to maintain these headstones instead of replacing them."

During the House Military Construction-VA Appropriations Subcommittee hearing on May 28, 2020, committee members asked Secretary Wilkie about this issue. Secretary Wilkie did not commit to removing the headstones in question but stated, "I happen to think that making sure that when people visit our cemeteries they are educated and informed of the horror is an incredibly important thing to do ... I think we can find [a] way to put this in historical context."

Department of Veterans Affairs' Response

Initially, a VA spokesperson stated that the VA did not intend to "change the posture of previous administrations by disturbing those gravesites." However, on June 1, 2020,

VA announced that it will begin the official review process prescribed by Section 106 of the National Historic Preservation Act (NHPA; 54 U.S.C §§ 300101 et seq.) to inform its determination of the best way to replace these headstones with proper historical markers. In addition, VA announced it will propose that these headstones be preserved in the NCA's History Collection. Also, VA stated it will "install interpretive signs at all VA national cemeteries where foreign enemy prisoners of war are interred in order to provide historical context about how non-U.S. service members from World War I and World War II were interred and buried on American soil."

National Historic Preservation Act Requirements

Among its various provisions, the NHPA requires federal agencies, prior to expending federal funds or granting a license to any undertaking over which they have direct or indirect jurisdiction, to consider the effects of the undertaking on historic properties (54 U.S.C. § 306108). This process, commonly known as a Section 106 review, is found in Section 106 of the NHPA.

The obligation to comply with the Section 106 requirement occurs when agencies determine both that a proposed federal action constitutes an "undertaking," and that the undertaking has the potential to affect an historic property. Federal regulations define an *undertaking* as

a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

Under the NHPA, historic properties include any prehistoric or historic districts, sites, buildings, structures, or objects that are listed or eligible for listing on the National Register of Historic Places (National Register). The National Register serves as the United States' "official list" of properties significant in "American history, architecture, archeology, engineering and culture" (54 U.S.C. § 302101). Regulations for eligibility and listing on the National Register can be found at 36 C.F.R. Part 60.

As noted above, all three headstones bearing the Iron Cross insignia are located in national cemeteries. According to the National Park Service, which administers the National Register, "[a]ll national cemeteries are considered exceptionally significant as a result of their Congressional designation as nationally significant places of burial and commemoration," and therefore meet the criteria for listing in the National Register. Accordingly, because the headstones are located in national cemeteries and considered "historic properties," if the VA removes the headstones or funds their removal, then that action appears to be an undertaking within the meaning of the NHPA. VA is therefore likely subject to Section 106 process requirements for considering the effects of that action.

Section 106 Process

The NHPA authorizes the Advisory Council on Historic Preservation (Advisory Council) to oversee Section 106's implementation. The NHPA-created Advisory Council is an independent agency consisting of federal, state, and tribal government members, as well as experts in historic preservation and members of the public. Through its authority under the NHPA, the Advisory Council promulgated regulations for the Section 106 process at 36 C.F.R. Part 800.

When a federal agency finds its project is an "undertaking" under the NHPA, it must initiate the Section 106 process by identifying the appropriate consulting parties. Consultation is the backbone of the Section 106 process, and it requires an agency to solicit input from outside parties when considering potential impacts to historic properties. Consulting parties vary depending on the federal action, but may include the relevant state, tribal, or federal historic preservation offices, the Advisory Council, and other stakeholders as appropriate. In addition, the agency is required to seek the views of the public during a Section 106 review. According to the regulations, "the views of the public are essential to informed Federal decision-making in the section 106 process. The agency official shall seek and consider the views of the public" (36 C.F.R. § 800.2(d)).

Through the consultation process, agencies are to make a determination as to whether the undertaking adversely affects the historic properties identified. When historic properties are adversely affected, the agency and consulting parties may enter into a binding Memorandum of Agreement (MOA). The MOA "govern[s] the undertaking and all of its parts," including how the agency will address adverse effects. If the parties are unable to agree on a resolution of adverse effects, they may follow specified procedures for terminating consultation (36 C.F.R. §800.7(a)).

Although the NHPA requires agencies to implement certain processes before undertaking a project affecting historic properties, it does not prohibit agencies from completing those projects. Several courts have explained that the NHPA is "a procedural statute requiring government agencies to 'stop, look, and listen' before proceeding with agency action." (See, for example, *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 607 (9th Cir. 2010).) In other words, although the VA may be required to comply with the NHPA's process for first considering the impact of removing the headstones bearing the Iron Cross insignia, the NHPA would not prevent the VA from proceeding with the removals even if this action were found to adversely affect historic properties.

Heather M. Salazar, Coordinator, Analyst in Veterans Policy

Mark K. DeSantis, Analyst in Natural Resources Policy

Barbara Salazar Torreón, Senior Research Librarian

Mainon A. Schwartz, Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.