

## Policy Memorandum

To: City of Madison Park Commission  
From: Kasey F. Reese  
Date: May 10, 2017  
Re: The Confederate Flag Policy

In recent years, various symbols of expression have gone under intense scrutiny by public opinion. In a study conducted by Cornell University, over 55% of Americans believe symbols of the Confederacy should be removed from government-owned property.<sup>1</sup> Regardless of public opinion, freedom of speech is a fundamental right affirmed by the United States Constitution. The current city policy presents a unique case regarding free speech:

### **Background**

In the Forest Hill Cemetery in Madison, Wisconsin, rests the bodies of Confederate prisoners of war. For 139 years, no municipal policy prevented an individual from flying the Confederate flag over their gravesites. In 2001, however, the City of Madison, owner of the cemetery, adopted the "Confederate Flag Policy." In August of 2016, the City Attorney submitted a formal opinion indicating that the policy is outdated and should be changed and now the City of Madison is considering a revision of this policy.<sup>2</sup>

### **The Policy**

The standing policy permits the "Official Flag of the Confederacy" or the "Bonnie Blue Flag" to be flown at the Confederate plot only on Memorial Day and/or Veterans Day. For 363 days, these flags are not permitted at the Confederate rest. This policy applies to both the city-owned flagpole at the gravesite and for individual flags placed at the headstones.

### **Policy Analysis And Proposal**

Regardless of the legality, the standing policy is poor policy. Municipal cemeteries are public places for all citizens to be buried, and they represent the diverse interests, opinions, and ideas of the community. Instituting any form of flag restriction diminishes the public's ability to express those diverse interests because the placement of commemorative objects, forms of reverence, would be regulated and restricted. The best option is to remove gravesite flag regulations because this policy affirms, rather than denies, the ability of citizens to commemorate the dead.

### **Legal Considerations**

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<sup>1</sup> <https://ropercenter.cornell.edu/public-opinion-on-the-confederate-flag-and-the-civil-war/>

<sup>2</sup> <https://www.cityofmadison.com/attorney/documents/2016opinions/Opinion2016-002.pdf>

The current policy singles out flags associated with the Confederacy. However, as established in *Spence v. State of Washington*, flags are a protected form of speech. Any limitations on actions designated as free speech must be reasonable and content-neutral to clear the court's scrutiny.<sup>3</sup> Madison's policy is not content-neutral because the Confederate flag is the explicit focus of the limitation. No confines on other flags or symbols exist.

*Griffin v. VA* challenged a similar flag policy at Point Pleasant National Veterans Cemetery. The court found that *broad* flag restrictions are constitutional because a cemetery is a non-public forum and owners have the ability to establish "reasonable and content neutral" restrictions, to fulfill the "purpose of the relevant forum."<sup>4</sup> Broad policies restricting the display of flags are constitutional when the restrictions are impartial and representative of the cemetery's designated mission.

Unlike the Point Pleasant cemetery, whose mission is to honor American soldiers, a municipal cemetery may honor both American veterans and private citizens. The mission is much broader in scope and represents a much more diverse set of interests.

## **Conclusion**

When combining both policy considerations and legal reasoning, eliminating gravesite flag regulations is a better policy to adopt. Foremost, the current policy is not content neutral, which contradicts the standards set forth by the courts for non-public forums. Eliminating gravesite flag regulations strengthens the ability of diverse citizens to commemorate the dead, which aligns more closely with the mission of a municipal cemetery.

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<sup>3</sup> <https://fas.org/sgp/crs/misc/95-815.pdf>

<sup>4</sup> *Griffin v. Department of Veterans Affairs*, 274 F. 3d 818 United States Court of Appeals, Fourth Circuit