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The United States Flag: Federal Law Relating to Display and Associated Questions

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Summary

This report presents, verbatim, the United States "Flag Code" as found in Title 4 of the United States Code and the section of Title 36 which designates the Star-Spangled Banner as the national anthem and how to display the flag during its rendition. The "Flag Code" includes instruction and rules on such topics as the pledge of allegiance, display and use of the flag by civilians, time and occasions for display, position and manner of display, and how to show respect for the flag. The "Code" also grants to the President the authority to modify the rules governing the flag.

The report also addresses several of the frequently asked questions concerning the flag. The subject matter of these questions includes the pledge of allegiance and the court decisions concerning it, the nature of the codifications of customs concerning the flag in the "Flag Code," display of the flag 24 hours a day, flying the flag in bad weather, flying the flag at half-staff, ornaments on the flag, destruction of worn flags, display of the U.S. flag with flags of other nations or of States, commercial use of the flag, size and proportion of the flag, and restrictions upon display of the flag by real estate associations.

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The United States Flag: Federal Law Relating to Display and Associated Questions

Background

Public concern and confusion regarding the proper respect shown to the United States flag has given rise to many questions on the law relating to the flag's handling, display, and use. Both the state governments and the federal government have enacted legislation on this subject.

On the national level the Federal Flag Code[1] provides uniform guidelines for the display of and respect shown to the flag. In addition to the Code, Congress has by statute designated the national anthem and set out the proper conduct during its presentation.[2] The Code is designed "for the use of such civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments" of the federal government.[3] Thus, the Flag Code does not prescribe any penalties for non-compliance nor does it include enforcement provisions; rather the Code functions simply as a guide to be voluntarily followed by civilians and civilian groups.

The Federal Flag Code does not purport to cover all possible situations. Although the Code empowers the President of the United States to alter, modify, repeal, or prescribe additional rules regarding the flag,[4] no federal agency has the authority to issue "official" rulings legally binding on civilians or civilian groups. Consequently, different interpretations of various provisions of the Code may continue to be made. The Flag Code itself, however, suggests a general rule by which practices involving the flag may be fairly tested: "No disrespect should be shown to the flag of the United States of America."[5] Therefore, actions not specifically included in the Code may be deemed acceptable as long as proper respect is shown.

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[1] 4 U.S.C. §§ 4-10.

[2] 36 U.S.C. § 301.

[3] 4 U.S.C. § 5.

[4] 4 U.S.C. § 10.

[5] 4 U.S.C. § 8.

In addition to the Flag Code, a separate provision contained in the Federal Criminal Code established criminal penalties for certain treatment of the flag.[6] Prior to 1989, this provision provided criminal penalties for certain acts of desecration to the flag. In response to the Supreme Court decision in *Texas v. Johnson*[7] (which held that anti-desecration statutes are unconstitutional if aimed at suppressing one type of expression), Congress enacted the Flag Protection Act of 1989 to provide criminal penalties for certain acts which violate the physical integrity of the flag.[8] This law imposed a fine and/or up to one year in prison for knowingly mutilating, defacing, physically defiling, maintaining on the floor, or trampling upon any flag of the United States. In 1990, however, the Supreme Court held that the Flag Protection Act was unconstitutional as applied to a burning of the flag in a public protest.[9]

All the states, at one time or another, have enacted laws relating to the United States flag.[10] Even though the Federal Flag Code does not provide penalties for certain conduct or may not govern certain practices, state law may do so. Therefore, it is advisable to consider applicable provisions of state law, as well as federal law, on questions of proper use of the flag.

The Flag Code — History and Text

On June 22, 1942, President Franklin D. Roosevelt approved House Joint Resolution 303 codifying the existing customs and rules governing the display and use of the flag of the United States by civilians.[11] Amendments were approved on December 22nd of that year.[12] The law included provisions of the code adopted by the National Flag Conference, held in Washington, D.C. on June 14, 1923, with certain amendments and additions. The Code was reenacted, with minor amendments, as part of the Bicentennial celebration.[13] In the 105th Congress, the Flag

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[6] 18 U.S.C. § 700.

[7] 491 U.S. 397 (1989). For further information on this case, *see, Texas v. Johnson: Flag Desecration and the First Amendment*, CRS Report for Congress, 89-394.

[8] P.L. 101-131, the Flag Protection Act of 1989, amending 18 U.S.C. § 700.

[9] *United States v. Eichman*, 496 U.S. 310 (1990). For further information on this case, *see, United States v. Eichman, the Flag Protection Act of 1989 Held Unconstitutional*, CRS Report for Congress, 90-301. *See also, Flag Protection: A Brief History and Summary of Recent Supreme Court Decisions and Proposed Constitutional Amendment,* CRS Report for Congress 95-709.

[10] For further information on these statutes, *see*, Flag Desecration and Flag Misuse Laws in the United States, CRS Report for Congress, 95-182.

[11] P.L. 623, 77th Cong., 56 Stat. 377.

[12] P.L. 829, 77th Cong., 56 Stat. 1074.

[13] P.L. 94-344.

Code was removed from title 36 of the United States Code and recodified as part of title 4.[14]

Title 4 United States Code:

§ 4. Pledge of Allegiance to the Flag; Manner of Delivery.

The Pledge of Allegiance to the Flag: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

§ 5. Display and Use of Flag by Civilians; Codification of Rules and Customs; Definition.

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States. The flag of the United States for the purpose of this chapter shall be defined according to Sections 1 and 2 of Title 4 and Executive Order 10834 issued pursuant thereto.

§ 6. Time and Occasions for Display.

(a) It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, when a patriotic effect is desired, the flag may be displayed 24 hours a day if properly illuminated during the hours of darkness.

(b) The flag should be hoisted briskly and lowered ceremoniously.

(c) The flag should not be displayed on days when the weather is inclement, except when an all-weather flag is displayed.

(d) The flag should be displayed on all days, especially on New Year's Day, January 1; Inauguration Day, January 20; Martin Luther King Jr.'s birthday, the third Monday in January;[15] Lincoln's Birthday, February 12; Washington's Birthday, third Monday in February; Easter Sunday (variable); Mother's Day, second Sunday in May; Armed Forces Day, third Saturday in May; Memorial Day (half-staff until noon), the last Monday in May; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution

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[14] P.L. 105-225, § 300111.

[15] Martin Luther King Jr.'s birthday was added by P.L. 106-80, 113 Stat. 1285.

Day, September 17; Columbus Day, second Monday in October; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and such other days as may be proclaimed by the President of the United States; the birthdays of States (date of admission); and on State holidays.

(e) The flag should be displayed daily on or near the main administration building of every public institution.

(f) The flag should be displayed in or near every polling place on election days.

(g) The flag should be displayed during school days in or near every schoolhouse.

§ 7. Position and Manner of Display.

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of other flags, in front of the center of that line.

(a) The flag should not be displayed on a float in a parade except from a staff, or as provided in subsection (i) of this section.

(b) The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat. When the flag is displayed on a motorcar, the staff should be fixed firmly to the chassis or clamped to the right fender.

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. No person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to or in place of the flag of the United States or any Territory or possession thereof: Provided, That nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.

(d) The flag of the United States of America, when it is displayed with another flag against a wall from crossed staffs, should be on the right, the flag's own right, and its staff should be in front of the staff of the other flag.

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the

United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

(g) When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.

(h) When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, or front of a building, the union of the flag should be placed at the peak of the staff unless the flag is at half-staff. When the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag should be hoisted out, union first, from the building.

(i) When displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag's own right, that is, to the observer's left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.

(j) When the flag is displayed over the middle of the street, it should be suspended vertically with the union to the north in an east and west street or to the east in a north and south street.

(k) When used on a speaker's platform, the flag, if displayed flat, should be displayed above and behind the speaker. When displayed from a staff in a church or public auditorium, the flag of the United States of America should hold the position of superior prominence, in advance of the audience, and in the position of honor at the clergyman's or speaker's right as he faces the audience. Any other flag so displayed should be placed on the left of the clergyman or speaker or to the right of the audience.

(l) The flag should form a distinctive feature of the ceremony of unveiling a statute or monument, but it should never be used as the covering for the statute or monument.

(m) The flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day. On Memorial Day, the flag should be displayed at half-staff until noon only, then raised to the top of the staff. By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a state, territory, or possession, as a mark of respect to their memory. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, or in accordance with recognized customs or practices not inconsistent with law. In the event of the death of a present or former official of the government of any state, territory, or possession of the United States or the death of a member of the Armed Forces from any State, territory, or possession of the United States,

the Governor of that State, territory, or possession may proclaim that the National flag shall be flown at half-staff, and the same authority is provided to the Mayor of the District of Columbia with respect to present or former officials of the District of Columbia and members of the Armed Forces from the District of Columbia. When the Governor of a State, territory, or possession, or the Mayor of the District of Columbia, issues a proclamation under the preceding sentence that the National flag be flown at half-staff in that State, territory, or possession or in the District of Columbia because of the death of a member of the Armed Forces, the National flag flown at any Federal installation or facility in the area covered by that proclamation shall be flown at half-staff consistent with that proclamation. The flag shall be flown at half-staff thirty days from the death of the President or a former President; ten days from the day of death of the Vice-President, the Chief Justice or a retired Chief Justice of the United States or the Speaker of the House of Representatives; from the day of death until interment of an Associate Justice of the Supreme Court, a Secretary of an executive or military department, a former Vice-President, or the Governor of a state, territory, or possession; and on the day of death and the following day for a Member of Congress. The flag shall be flown at half-staff on Peace Officers Memorial Day, unless that day is also Armed Forces Day. As used in this subsection —

(1) The term "half-staff" means the position of the flag when it is one-half the distance between the top and bottom of the staff;

(2) the term "executive or military department" means any agency listed under Sections 101 and 102 of Title 5, United States Code; and

(3) the term "Member of Congress" means a Senator, a Representative, a Delegate, or the Resident Commissioner from Puerto Rico.

(n) When the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground.

(o) When the flag is suspended across a corridor or lobby in a building with only one main entrance, it should be suspended vertically with the union of the flag to the observer's left upon entering. If the building has more than one main entrance, the flag should be suspended vertically near the center of the corridor or lobby with the union to the north, when entrances are to the east and west or to the east when entrances are to the north and south. If there are entrances in more than two directions, the union should be to the east.

§ 8. Respect for Flag.

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, state flags, and organization or institutional flags are to be dipped as a mark of honor.

(a) The flag should never be displayed with union down, except as a signal of dire distress in instances of extreme danger to life or property.

(b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise.

(c) The flag should never be carried flat or horizontally, but always aloft and free.

(d) The flag should never be used as wearing apparel, bedding, or drapery. It should never be festooned, drawn back, nor up, in folds, but always allowed to fall free. Bunting of blue, white, and red, always arranged with the blue above, the white in the middle, and the red below, should be used for covering a speaker's desk, draping in front of the platform, and for a decoration in general.

(e) The flag should never be fastened, displayed, used, or stored in such a manner as to permit it to be easily torn, soiled, or damaged in any way.

(f) The flag should never be used as a covering for a ceiling.

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

(h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. The flag represents a living country and is itself considered a living thing. Therefore, the lapel flag pin being a replica, should be worn on the left lapel near the heart.

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

§ 9. Conduct During Hoisting, Lowering or Passing of Flag.

During the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in review, all persons present except those in uniform should face the flag and stand at attention with the right hand over the heart. Those present in uniform should render the military salute. When not in uniform, men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Aliens should stand at attention. The salute to the flag in a moving column should be rendered at the moment the flag passes.

§ 10. Modification of Rules and Customs by President.

Any rule or custom pertaining to the display of the flag of the United States of America, set forth herein, may be altered, modified, or repealed, or additional rules with respect thereto may be prescribed, by the Commander-in-Chief of the Armed Forces of the United States, whenever he deems it to be appropriate or desirable; and any such alteration or additional rule shall be set forth in a proclamation.

Title 36 United States Code:

§ 301. National Anthem.

(a) Designation. — The composition consisting of the words and music known as the Star-Spangled Banner is the national anthem.

(b) Conduct During Playing. — During a rendition of the national anthem —

(1) when the flag is displayed —

(A) all present except those in uniform should stand at attention facing the flag with the right hand over the heart;

(B) men not in uniform should remove their headdress with their right hand and hold the headdress at the left shoulder, the hand being over the heart; and

(C) individuals in uniform should give the military salute at the first note of the anthem and maintain that position until the last note.

(2) When the flag is not displayed, all present should face toward the music and act in the same manner they would if the flag were displayed.

Frequently Asked Questions on Flag Display, Use, and Associated Matters

Pledge of Allegiance

The Pledge of Allegiance is set forth in 4 U.S.C. § 4. In 1954, Congress added to the "Pledge of Allegiance" the phrase "under God" after "nation".[16] Questions about the "Pledge of Allegiance" usually involve practices and requirements of local and state statutes mandating participation in the recitation of the "Pledge" in some manner (e.g., flag salute and pledge, standing quietly, standing at attention) in schools. Provisions involving compulsory participation in "Pledge" activities are usually attacked as violations of the free speech clause of the First Amendment or the free exercise of religion clause.

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[16] P.L. 396, 83rd Cong., 68 Stat. 249.

In 1943, the Supreme Court held that a state-required compulsory flag salute-Pledge of Allegiance violated the First Amendment rights of members of the Jehovah's Witnesses religious group.[17] In 2002, a three-judge panel of the Ninth Circuit had held both the 1954 federal statute adding the words "under God" to the Pledge of Allegiance and a California school district policy requiring teachers to lead willing school children in reciting the pledge each school day to violate the Establishment Clause of the First Amendment.[18] A subsequent modification eliminated the holding regarding the federal statute but retained the ruling holding that the California statute coerces children into participating in a religious exercise.[19] The Supreme Court, on Flag Day 2004, reversed the Ninth Circuit, finding that Newdow lacked standing to challenge the school district's policy.[20]

Nature of Codification of Customs and Rules

The Flag Code is a codification of customs and rules established for the use of certain civilians and civilian groups. No penalty or punishment is specified in the Flag Code for display of the flag of the United States in a manner other than as suggested. Cases which have construed the former 36 U.S.C. § 175[21] have concluded that the Flag Code does not proscribe conduct, but is merely declaratory and advisory.[22]

Display of the Flag 24 Hours a Day

There is no absolute prohibition in federal law on flying the flag twenty-four hours a day. The Flag Code states:

> It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, when a patriotic effect is desired, the flag may be displayed 24 hours a day if properly illuminated during hours of darkness.[23]

There are eight sites in the United States where the flag is flown day and night under specific legal authority: Fort McHenry National Monument, Baltimore,

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[17] *See, West Virginia Board of Education v. Barnett,* 319 U.S. 624 (1943).

[18] *Newdow* v. *U.S.*, 292 F.3rd 597 (9th Cir. 2002). For a full discussion of this case, see CRS Report RS21250, *The Constitutionality of Including the Phrase "Under God" in the Pledge of Allegiance*.

[19] *Newdow* v. *U.S. Congress,* 328 F.3rd 746 (9th Cir. 2003).

[20] *Elk Grove Unified School District* v. *Newdow,* 542 U.S.1 (2004).

[21] Now codified at 4 U.S.C. § 7.

[22] *See e.g., Homes v. Wallace,* 407 F. Supp. 493 (M.D. Ala.), aff'd without published opinion, 540 F.2d 1083 (5th Cir. 1976); and *State of Delaware ex. rel Trader v. Hodsdon,* 265 F. Supp. 308 (D. Del. 1967); *see also N.A.A.C.P. v. Hunt,* 891 F.2d 1555 (11th Cir. 1990).

[23] 4 U.S.C. § 6(a).

Maryland;[24] Flag House Square, Baltimore, Maryland;[25] the United States Marine Corps Iwo Jima Memorial, Arlington, Virginia;[26] Lexington, Massachusetts;[27] the White House;[28] the Washington Monument;[29] United States Customs ports of entry;[30] and Valley Forge State Park, Pennsylvania.[31] The reports that accompanied these official acts indicate that the specific authority was intended only as a form of tribute to certain historic sites rather than as exceptions to the general rule of the Code.

As a matter of custom, and without specific statutory or official authorization, the flag is flown at night at many other sites, including the United States Capitol. It would seem that display of the flag in a respectful manner with appropriate lighting does not violate the spirit of the Flag Code since the dignity accorded to the flag is preserved by lighting that prevents its being enveloped in darkness.

Flying the Flag During Inclement Weather

The Flag Code states:

> The flag should not be displayed on days when the weather is inclement, except when an all weather flag is displayed.[32]

The language of this section reflects the now-popular use of flags made of synthetic fabrics that can withstand unfavorable weather conditions. It is not considered disrespectful to fly such a flag even during prolonged periods of inclement weather. However, since the section speaks in terms of "days when the weather is inclement," it apparently does not contemplate that on an otherwise fair day, the flag should be lowered during brief periods of precipitation.

Flying the Flag at Half-Staff

The Flag Code sets out detailed instructions on flying the flag at half-staff on Memorial Day and as a mark of respect to the memory of certain recently deceased public officials.[33] This section embodies the substance of Presidential Proclamation

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[24] Proclamation No. 2795, July 2, 1948, 62 Stat. 1526.

[25] P.L. 319, 83rd Cong., 68 Stat. 35.

[26] Proclamation No. 3418, June 12, 1961, 75 Stat. 1068.

[27] P.L. 89-355,, 79 Stat. 1294.

[28] Proclamation No. 4000, Sept. 4, 1970, 84 Stat. 2243.

[29] Proclamation No. 4064, July 10, 1971, 85 Stat. 916.

[30] Proclamation No. 4131, May 9, 1972, 86 Stat. 1633.

[31] P.L. 94-53, 89 Stat. 259.

[32] 4 U.S.C. § 6(c).

[33] 4 U.S.C. § 7(m).

No. 3044,[34] entitled "Display of Flag at Half-Staff Upon Death of Certain Officials and Former Officials."

The section provides that the President shall order the flag flown at half-staff for stipulated periods "upon the death of principal figures of the United States Government and the Governor of a state, territory, or possession." After the death of other officials or foreign dignitaries, the flag may be flown at half-staff according to Presidential instructions or in accordance with recognized custom not inconsistent with law. In addition, the Governor of a state, territory, or possession, or the Mayor of the District of Columbia, may direct that the national flag be flown at half-staff, in the event of the death of a present or former official of the respective government or in the event of the death of a member of the Armed Forces from that jurisdiction.[35]

Presidents also have ordered the flag to be flown at half-staff on the death of leading citizens, not covered by law, as a mark of official tribute to their service to the United States. Martin Luther King, Jr. is among those who have been so honored.

Again, the provisions of the Flag Code on flying the flag at half-staff are, like all the Code's provisions, a guide only. They do not apply, as a matter of law, to the display of the flag at half-staff by private individuals and organizations. No federal restrictions or court decisions are known that limit such an individual's lowering his own flag or that make such display alone a form of desecration.

Ornaments on Flag Staffs, Fringes on Flag

The Flag Code is silent as to ornaments (finials) for flagstaffs. We know of no law or regulation which restricts the use of a finial on the staff. The eagle finial is used not only by the President, the Vice-President, and many other federal agencies, but also by many civilian organizations and private citizens. The selection of the type finial used is a matter of preference of the individual or organization.

The placing of a fringe on the flag is optional with the person or organization, and no Act of Congress or Executive Order either requires or prohibits the practice. Fringe is used on indoor flags only, as fringe on flags used outdoors would deteriorate rapidly. The fringe on a flag is considered an "honorable enrichment only" and its official use by the Army dates from 1895. A 1925 Attorney General's Opinion states:

> The fringe does not appear to be regarded as an integral part of the flag, and its presence cannot be said to constitute an unauthorized addition to the design prescribed by statute. An external fringe is to be distinguished from letters, words, or emblematic designs printed or superimposed upon the body of the flag

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[34] March 1, 1954, 68 Stat. C32.

[35] In 2007, P.L. 110-41, added the Mayor of the District of Columbia to this provision and authorized the Governors and the Mayor to issue proclamations to lower the flag to half-staff in honor of members of the Armed Forces from their jurisdiction.

itself. Under the law, such additions might be open to objection as unauthorized; but the same is not necessarily true of the fringe.[36]

Destruction of Worn Flags

The Flag Code states:

> The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.[37]

The act is silent on procedures for burning a flag. It would seem that any procedure which is in good taste and shows no disrespect to the flag would be appropriate. The Flag Protection Act of 1989,[38] struck down albeit on grounds unrelated to this specific point,[39] prohibited *inter alia* "knowingly" burning of a flag of the United States, but excepted from prohibition "any conduct consisting of disposal of a flag when it has become worn or soiled."

Display of United States Flag with Flags of Other Nations or of States

The Flag Code sets out rules for position and manner of display of the flag in 4 U.S.C. § 7. The question as to the propriety of flying the flag of another nation at an equal level with that of the flag of the U.S. is not clear from the face of the statute. Section 7 contains two subsections on point and these provisions appear to be contradictory. Subsection 7(c) states:

> (c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. No person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to or in place of the flag of the United States or any Territory or possession thereof: Provided, That nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.[40]

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[36] 34 Op. Atty. Gen. 483.

[37] 4 U.S.C. § 8(k).

[38] P.L. 101-131.

[39] See, *United States v. Eichman*, 496 U.S. 310 (1990).

[40] 4 U.S.C. § 7(c).

Subsection 7(g) states:

> (g) When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.[41]

The wording of § 7(g) is identical to that of the original Flag Code enacted in 1942.[42] The second sentence of § 7(c) prohibiting flying international flags equal in height to the flag of the United States was not in the original Flag Code. This provision was added in 1953.[43] The legislative history of this amendment clearly states that is purpose was to "make it an offense against the United States to display the flag of the United Nations or any other national or international flag equal to, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any possession or territory thereof,...."[44] The only exception recognized is at the headquarters of the United Nations.

When a statute contains apparently contradictory provisions, the rules of statutory construction first mandate an attempt to interpret the provisions so both can be given effect. If this proves futile, the usual rule is to give effect to the latest in time. The reasoning is that this represents the most recent statement of the will of the legislature. Following this second rule of construction would lead to the conclusion that flying a flag of another nation at the same height as the flag of the United States may not be proper etiquette under the Federal Flag Code, but this creates no right of action in private individuals.[45]

When the United States flag is displayed with the flags of states of the union or municipalities and not with the flags of other nations, the federal flag, which represents all states, should be flown above and at the center of the other flags.[46]

Where there is only one flag pole, the federal flag should be displayed above state or municipal flags.[47]

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[41] 4 U.S.C. § 7(g).

[42] P.L. 623, § 3(g), 77th Cong., 56 Stat. 377, 378.

[43] P.L. 107, 83rd Cong., 67 Stat. 142.

[44] S. Rept No. 258, 83rd Cong., 1st Sess. (1953).

[45] *See*, for example, *Holmes* v. *Wallace*, 407 F. Supp.493 (M.D. Ala.1976), *aff'd* without op., 540 F.2d 1083 (5th Cir. 1976).

[46] 4 U.S.C. § 7(e).

[47] 4 U.S.C. § 7(f).

Use of the Flag in Jewelry, Commercial Products, Wearing Apparel, and Advertising

The Flag Code addresses the impropriety of using the flag as an article of personal adornment, a design on items of temporary use, and item of clothing.[48] The evident purpose of these suggested restraints is to limit the commercial or common usage of the flag and, thus, maintain its dignity. The 1976 amendments to the Code recognized the wearing of a flag patch or pin on the left side (near the heart) of uniforms of military personnel, firemen, policemen, and members of patriotic organizations.[49] The Code also states that the flag should never be used for advertising purposes in any manner whatsoever.[50]

While wearing the colors may be in poor taste and offensive to many, it is important to remember that the Flag Code is intended as a guide to be followed on a purely voluntary basis to insure proper respect for the flag. It is, at least, questionable whether statutes placing civil or criminal penalties on the wearing of clothing bearing or resembling a flag could be constitutionally enforced in light of Supreme Court decisions in the area of flag desecration.[51]

In the past, the Supreme Court has held that states may restrict use of pictures of the flag on commercial products.[52] There is a federal criminal prohibition on the use of the flag for advertising purposes in the District of Columbia.[53] While commercial speech does not receive the full protection of the First Amendment,[54] the status of these statutes and cases can not be taken for granted in light of *Eichman* and *Johnson*.

Restrictions on Size and Proportions of the Flag

Questions on size and dimensions usually arise in the context of the display of huge flags. The Flag Code is silent on recommendations for proper flag size and dimensions. Regulations governing size and dimensions and other requirements for flags authorized for federal executive agencies can be found in Executive Order No. 10834.[55] These regulations provide that the length of the flag should be 1.9 times the width.

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[48] 4 U.S.C. § 8(i) & (j).

[49] P.L. 94-344, § 1(16).

[50] 4 U.S.C. § 8(i).

[51] *See, United States v. Eichman,* 496 U.S. 310 (1990) and *Texas* v. *Johnson*, 491 U.S. 397 (1989).

[52] *See, e.g., Halter v. Nebraska,* 205 U.S. 34 (1907).

[53] 4 U.S.C. § 3.

[54] *See, e.g., Central Hudson Gas and Electric Co. V. PSC,* 447 U.S. 557 (1980).

[55] Aug. 21, 1959, 29 F.R. 6865; *see* 4 U.S.C. §§ 1-2.

Restrictions on Display of the Flag by Real Estate Associations

The Freedom to Display the American Flag Act of 2005[56] prohibits a condominium, cooperative, or real estate management association from adopting or enforcing any policy or agreement that would restrict or prevent a member of the association from displaying the flag in accordance with the Federal Flag Code on residential property to which the member has a separate ownership interest.

[56] P.L. 109-243.