

unambiguous and its meaning clear, there is no occasion to resort to construction. *Lewis, Trustee, v. United States*, 92 U. S. 618, 621.

I have to advise you, therefore, that postmasters of all classes are specifically excepted from the provisions of the Retirement Act, and that persons in the classified civil service who are appointed postmasters are not entitled to the benefits nor subject to the obligations of the Retirement Act.

Respectfully,

WILLIAM J. DONOVAN,
Acting Attorney General.

To the POSTMASTER GENERAL.

NATIONAL FLAG OF THE UNITED STATES.

The placing of a fringe on the national flag, the dimensions of the flag and the arrangement of the stars in the union are matters of detail not controlled by statute, but are within the discretion of the President as Commander-in-Chief of the Army and Navy.

The desecration or improper use of the national flag outside the District of Columbia has not been made a Federal offense. This matter has been left to the States for action, but should Congress wish to assume such control it has the power under the Constitution to do so.

DEPARTMENT OF JUSTICE,
May 15, 1925.

SIR: I am in receipt of a letter from the late President Harding, dated February 15, 1923, requesting from my predecessor then in office an opinion defining precisely what is the National Flag of the United States, and what official action is proper in order to preserve the flag from desecration. Accompanying this letter is a petition from officers of the Military Order of the Loyal Legion requesting the President to obtain such an opinion.

The only statute now in force which defines the flag or regulates its design is the Act of April 4, 1818, chapter 34 (3 Stat. 415), reenacted as sections 1791 and 1792 of the Revised Statutes of the United States. Section 1791 provides that "the flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union

of the flag shall be thirty-seven stars, white in a blue field." Section 1792 provides that "on the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission." The effect of the two sections is that the number of stars now prescribed is forty-eight (48).

There is no statute which fixes the proportionate dimensions of the hoist and fly, the size of the union, or the size and arrangement of the stars in the union. These matters appear to have been regulated originally by custom. They are now controlled by Executive orders and by Army and Navy regulations. Under the statutes just quoted the legality of such Executive orders seems undoubted, for the statutes are silent on such matters of detail. In this connection I may quote from the Executive order of May 29, 1916, which constitutes the latest Presidential definition of the dimensions of the flag, and which is at present the controlling authority:

"* * * It is hereby ordered that National Flags and Union Jacks for all Departments of the Government, with the exception noted under (a), shall conform to the following proportions:

Hoist (width) of flag-----	1
Fly (length) of flag-----	1.9
Hoist (width) of union-----	$\frac{7}{8}$
Fly (length) of union-----	.76
Width of each stripe-----	$\frac{1}{8}$

"(a) Exception: The colors carried by troops, and camp colors, shall be the sizes prescribed for the Military Service (Army and Navy). * * *

"Position and size of stars: The position and size of each star for the union of the flag shall be as indicated on a plan which will be furnished to the Departments by the Navy Department. From this plan can be determined the location and size of stars for flags of any dimensions. Extra blue-prints of this plan will be furnished upon application to the Navy Department."

From the correspondence attached to the letter of President Harding, above mentioned, it would seem that doubts have been expressed in some quarters as to the propriety of

attaching a fringe of yellow silk to the colors and standards used by troops in the field. The use of such a fringe is prescribed in current Army Regulations, No. 260-10. In a circular dated March 28, 1924, The Adjutant General of the Army thus refers to the matter of the fringe:

"For a number of years there has been prescribed in Army Regulations a knotted fringe of yellow silk on the national standards of mounted regiments and on the national colors of unmounted regiments. The War Department, however, knows of no law which either requires or prohibits the placing of a fringe on the flag of the United States. No Act of Congress or Executive order has been found bearing on the question. In flag manufacture a fringe is not considered to be a part of the flag, and it is without heraldic significance. In the common use of the word it is a fringe and not a border. Ancient custom sanctions the use of fringe on the regimental colors and standards, but there seems to be no good reason or precedent for its use on other flags."

With these conclusions of The Adjutant General I am inclined to agree. The fringe does not appear to be regarded as an integral part of the flag, and its presence can not 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 itself. Under the law such additions might be open to objection as unauthorized; but the same is not necessarily true of the fringe.

The presence, therefore, of a fringe on military colors and standards does not violate any existing Act of Congress. Its use or disuse is a matter of practical policy, to be determined, in the absence of statute, by the Commander in Chief. If a fringe is used, its color and size are matters of detail which may be determined by the same authority. In the present state of the law, I see no reason for supposing that the paragraphs of the Army Regulations above mentioned are *ultra vires*, or that the statute imperatively requires the removal of fringes from all standards or colors. Conversely, if it should be decided by the Commander in Chief that the removal of fringes is desirable, there is nothing in the law which imperatively requires their retention.

(1) I am therefore of opinion that the question of a fringe may be determined by the President as Commander in Chief. The same authority may determine the dimensions of the flag and the arrangement of the stars in the union. These details are not controlled by the statute to which I have referred. Upon the propriety of such decisions, as contrasted with their legality, I do not believe it necessary to express a formal opinion.

My opinion is also requested upon a second point, namely, the propriety of official action to preserve the flag from desecration.

The present condition of the law on this subject is as follows:

Section 5 of the Act of February 20, 1905, chapter 592 (33 Stat. 724, 725) prohibits the registration of any trademark which comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof.

The Act of May 16, 1918, chapter 75 (40 Stat. 553), amending section 3 of Title I of the Espionage Act of June 15, 1917, chapter 30 (40 Stat. 217, 219), formerly provided punishment for any person who, *when the United States was at war*, uttered disloyal language concerning the flag, or language intended to bring the flag into contempt or disrespect. But this amending Act of 1918 was repealed by the joint resolution of March 3, 1921, chapter 136 (41 Stat. 1359, 1360). There is therefore at present no Federal statute punishing the desecration or abuse of the flag, either in time of peace or in time of war.

A majority of the States have passed acts designed to punish the desecration of the national flag, and to prevent its use for advertising purposes. The constitutionality of such State legislation was upheld by the Supreme Court in *Halter v. Nebraska*, 205 U. S. 34.

There is a Federal statute, similar in terms to many of the State laws, which punishes the improper use of the flag *in the District of Columbia*, Act of February 8, 1917, chapter 34 (39 Stat. 900). But there is now no Federal enactment which punishes such use outside the District. I believe that it is within the power of Congress to enact such legislation for the entire country; and my belief is supported by

the words of Mr. Justice Harlan, delivering the opinion of the Court in *Halter v. Nebraska*, above mentioned (p. 41) :

“It may be said that as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We can not yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede State laws of like character, it does not follow that in the absence of National legislation the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of National legislation, the State may exert some control in the interest of its own people.”

In other words, this matter is one of those over which Congress may exercise control if it will. But until Congress actually exercises its power, the States are free to act, and the silence of Congress, in this case at least, is not to be taken as a declaration that the States must refrain from acting.

(2) At the present time, then, the desecration or improper use of the flag outside the District of Columbia has not been made a Federal offense. The matter has been left to the States for action. Should Congress wish to assume control, it has power, under the Constitution, to do so. Whether existing conditions render such Congressional legislation necessary or desirable is a question upon which I do not now feel required to decide. It is sufficient, for this present opinion, to ascertain that the power of legislation exists.

The delay in rendering this opinion has been attributable to the fact that the papers in this case were apparently mislaid before I assumed office. The matter was only recently brought to my attention.

Respectfully,

JOHN G. SARGENT.

To the PRESIDENT.