

THE FLAGS AND SEALS OF TEXAS

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I.	INTRODUCTION	216
II.	TEXAS FLAGS	216
	<i>A. The "Zavala Flag"</i>	217
	<i>B. The 1836 National Standard</i>	221
	<i>C. The 1836 National Flag for the Naval Service</i>	224
	<i>D. The 1839 National Flag</i>	225
	<i>E. The 1835 Flag for Vessels Sailing Under Letters of Marque and Reprisal</i>	231
	<i>F. The 1839 Pilot, Revenue Service, and Coasting Trader Flags</i>	234
	<i>G. The 1985 County Sesquicentennial Flag</i>	234
	<i>H. Display of the Flag</i>	236
	<i>I. Flag Desecration Laws and Prohibitions Against Advertising</i>	237
III.	TEXAS SEALS	244
	<i>A. The Republic of Texas</i>	244
	<i>B. The State of Texas</i>	246
	<i>C. The Reverse of the State Seal</i>	249
	<i>D. Other Laws Affecting the Seal</i>	254
IV.	CONCLUSION	259

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I. INTRODUCTION

"The flag is the embodiment, not of sentiment, but of history. It represents the experiences made by men and women, the experiences of those who do and live under that flag."

Woodrow Wilson¹

"FLAG, *n.* A colored rag borne above troops and hoisted on forts and ships. It appears to serve the same purpose as certain signs that one sees on vacant lots in London—"Rubbish may be shot here.'"

Ambrose Bierce²

The power of the flag as a national symbol is all too evident in the 1990s: the constitutional debate over flag burning in the United States; the violent removal of the communist seal from the Romanian flag; and the adoption of the former czarist flag by the Russian Republic. In the United States, Texas alone possesses a flag and seal directly descended from revolution and nationhood. The distinctive feature of both the state flag and seal, the Lone Star, is famous worldwide because of the brief existence of the Republic of Texas (March 2, 1836, to December 29, 1845).³ For all the Lone Star's fame, however, there is much misinformation about it.

Historians and political scientists have written about the Lone Star, but rarely has their work reflected a legal perspective focused on the available congressional and legislative documents. This article centers on the legal basis for the creation and evolution of the *de jure*, or official, flags and seals of Texas and the laws that govern their use.

II. TEXAS FLAGS

Texas has had three official national or state flags during its existence: (1) the 1836 national standard; (2) the 1836 national flag for the naval service; and (3) the 1839 national flag that became the state flag. Some authorities erroneously claim that a Republic of Texas flag was

1. Flag Day Address (June 14, 1915), in JOHN BARTLETT, FAMILIAR QUOTATIONS 682 (Emily M. Beck ed., 15th ed. 1980).

2. THE DEVIL'S DICTIONARY 75 (Stemmer House Publishers 1978) (1906).

3. Texas was admitted into the Union on December 29, 1845, by virtue of a joint resolution of the United States Congress. *Calkin v. Cocke*, 55 U.S. (14 How.) 227, 239 (1852); Act approved Dec. 29, 1845, 9 Stat. 108. "The state government was not organized until February 16, 1846, and until that time the government and laws of the Republic were in force, to the exclusion of the state government." *Newby v. Haltaman*, 43 Tex. 314, 314-15 (1875); see TEX. CONST. of 1845, art. XIII, §§ 1-2, 6, 10. It was not until February 19, 1846, that the Lone Star Flag was lowered from the Texas capitol and the United States flag raised. The Texas Legislature has designated February nineteenth as Texas Statehood Day. Tex. H.R. Con. Res. 26, 47th Leg., R.S. 1941 Tex. Gen. Laws 1478.

designed by Lorenzo de Zavala. In addition, Texas has recognized five other de jure flags: (1) the 1835 flag for vessels sailing under letters of marque and reprisal; (2) the 1839 pilot flag; (3) the 1839 revenue service flag; (4) the 1839 coasting trader flag; and (5) the 1985 county sesquicentennial flag.

A. The "Zavala Flag"

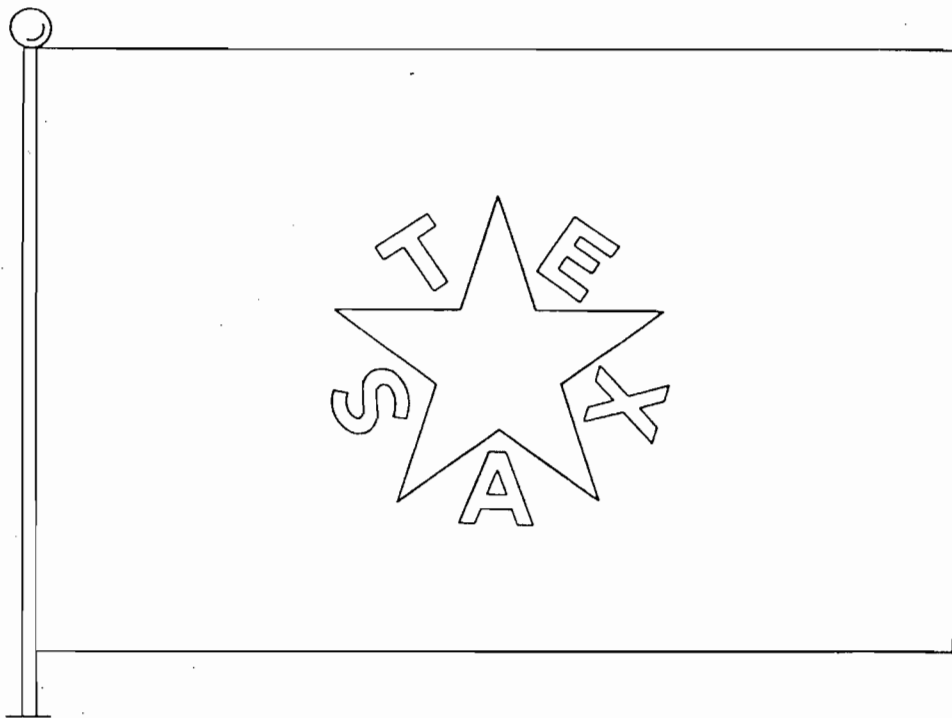


FIGURE 1. SO-CALLED "ZAVALA FLAG"

White star and white letters on blue field; reconstruction and variant of designs proposed March 1836; never adopted. © 1975 Whitney Smith. Used by permission.

The so-called "Zavala flag" (figure 1) is believed by some to be the first official flag of Texas and was allegedly adopted in March 1836 by the general convention at Washington-on-the-Brazos.⁴ This flag is usually portrayed as a blue field with a white star of five points central, with the

4. The general convention "wrote the Declaration of Independence for Texas and the Constitution of the Republic, organized the *ad interim* government, and named Sam Houston commander-in-chief of the military forces of the Republic." 1 THE HANDBOOK OF TEXAS 404 (Walter P. Webb ed., 1952).

letters T-E-X-A-S, one letter between each star point.⁵ This description, however, is inconsistent with the March 3, 1836, and March 12, 1836, journal entries of the general convention:

[Thursday, March 3, 1836]

On motion of Mr. Gazley,

Resolved, That a committee of five be appointed to devise & report to this Convention a suitable flag for the Republic of Texas.

And the question being taken thereon, was decided in the affirmative; whereupon the President appointed Messrs. Gazley, Scates, Zavala, Robertson, and Barnett of Austin, and

On motion of Mr. Houston, the President [Ellis] was added to said committee.

. . . . [Saturday, March 12, 1836]

. . . .

On motion of Mr. Scates, the Rainbow and star of five points above the western horizon; and the star of six points sinking below, was added to the flag of Mr. Zavala accepted on Friday last.

Mr. Taylor introduced the following resolution: Resolved that the word "Texas" be placed, one letter between each point of the star on the national flag.⁶

A careful study of the convention journals suggests that the "Zavala flag" is not an official Texas flag. There are no references to the general convention's acceptance of Zavala's design in the journal entries for Friday, March 4, 1836, or Friday, March 11, 1836.⁷ In addition, the journal entry for Saturday, March 12, 1836, does not state that either the motion by Mr. Scates or the motion by Mr. Taylor was adopted.⁸ Even if the general convention adopted a flag and failed to record its actions, the flag adopted was the unstated Zavala design to which was added the "[r]ainbow and star of five points above the western horizon; and the star of six points sinking below."⁹ In any event, the popular depictions of the "Zavala flag" are incorrect.

The chief source of the "Zavala flag" myth is Mamie Wynne Cox's

5. *Id.* at 606.

6. THE GENERAL CONVENTION AT WASHINGTON 21, 69 (1838), reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 841, 889 (Austin, Gammel Book Co. 1898). The March 11th date given in the journal is a printing error; the second Saturday in March 1836 was March 12th.

7. THE GENERAL CONVENTION AT WASHINGTON 21-24, 62-66 (1838), 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 841-44, 882-86 (Austin, Gammel Book Co. 1898). The March 10th date given in the journal is a printing error; the second Friday in March 1836 was March 11th.

8. THE GENERAL CONVENTION AT WASHINGTON 66-70 (1838), reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 886-90 (Austin, Gammel Book Co. 1898).

9. THE GENERAL CONVENTION AT WASHINGTON 69 (1838), reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 889 (Austin, Gammel Book Co. 1898).

The Romantic Flags of Texas.¹⁰ While this is an important work on the flags on Texas, it is erroneous in many respects. In the book Ms. Cox states that, “[t]he *Journal* [of the general convention], however, proved without a doubt that Lorenza [sic] de Zavala designed the flag that was accepted, which gives him the distinction of designing the First Official National Lone Star Flag of the Republic of Texas.”¹¹ This statement, however, is not supported by the convention journal. First, Ms. Cox claims that Scates’s motion was not adopted and that “the flag remained as designed by Zavala.”¹² This is in direct opposition to the journal, which recounts that Scates’s rainbow and star *were* added to Zavala’s design.¹³ Furthermore, the journal states that Taylor, not Zavala, introduced the resolution that the word “Texas” be placed on the flag.¹⁴ Ms. Cox attempts to explain some of these inconsistencies, and why there is no record of the flag’s adoption, by quoting letters from Zavala’s granddaughter, Adina de Zavala, and grandson, Augustine de Zavala.¹⁵ The grandchildren’s statements are contradictory and, of course, hearsay. We are, therefore, left with no record of the flag’s design or any evidence that it was even adopted. Even if we were to assume that the flag was adopted in the form of a star with “Texas” placed around it *and* that the relevant journal entries were lost, it would still not be a *de jure* flag because the Provisional Government of Texas legislated by passing decrees and ordinances, not resolutions.¹⁶

Although the “Zavala flag” is not supported by the historical record, numerous authorities have given life to this “official first flag” due to the popularity of Ms. Cox’s book.¹⁷ The fact that the Austin-based Gal-

10. MAMIE W. COX, *THE ROMANTIC FLAGS OF TEXAS* 227-233 (1936).

11. *Id.* at 230.

12. *Id.* at 230-31.

13. THE GENERAL CONVENTION AT WASHINGTON 69 (1838), *reprinted in* 1 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-1897*, at 889 (Austin, Gammel Book Co. 1898).

14. *Id.*

15. COX, *supra* note 10, at 231-32. Zavala’s grandson later failed to mention his grandfather as the designer of the alleged March 1836 flag, and he also mistakenly identified the flag as the 1839 Lone Star Flag. Aug de Zavala, *Scion of First Vice-President of Republic of Texas Sketches Her History Under Six Flags*, DALLAS MORNING NEWS, Mar. 8, 1936, at III-9. For further information on Zavala’s granddaughter, see *infra* note 17.

16. See TEX. PROVISIONAL GOV’T PLAN & POWERS art. III (1835). The *ad interim* government was specifically prohibited from exercising legislative and judicial powers. Executive ordinance adopted Mar. 16, 1836, res. 1, 1835-1836 Tex. Provisional Gov’t Ordinances & Decrees 149, *reprinted in* 1 H.P. N. GAMMEL, *THE LAWS OF TEXAS 1822-1897*, at 1053 (Austin, Gammel Book Co. 1898), *repealed by* REPUB. TEX. CONST. of 1836, sched. § 1 (existing laws inconsistent to 1836 Texas Constitution not continued in force). The government under the constitution was not established until after the Constitution was ratified on September 5, 1836.

17. DEVEREAUX D. CANNON, JR., *FLAGS OF THE CONFEDERACY: AN ILLUSTRATED HISTORY* 41-42 (1988); WILLIAM CRAMPTON, *FLAGS OF THE UNITED STATES* 47 (1989);

lery of the Republic has issued replicas of "historic" Texas flags including the "Zavala flag" is evidence that this flag has achieved a life of its own.¹⁸ The Texas Bar Historical Foundation has even contacted state district and county judges to encourage them to place these replicas in their courthouses.¹⁹ The "Zavala flag" never existed, yet the influence of Ms. Cox's work is such that this fictional flag is now displayed in bank lobbies, county courthouses, and state office buildings.

The proposition that a national flag existed before the adoption of

DAUGHTERS OF THE REPUBLIC OF TEXAS, TEXAS AND ITS FLAGS 1 (1981); WILLIAM R. FURLONG & BYRON McCANDLESS, SO PROUDLY WE HAIL: THE HISTORY OF THE UNITED STATES FLAG 193 (Harold D. Langley ed., 1981); CHARLES E. GILBERT, JR., FLAGS OF TEXAS 74-75, 78 (1989); WHITNEY SMITH, THE FLAG BOOK OF THE UNITED STATES 206-08 (rev. ed. 1975); see also L.W. Kemp, *Official Flags of the Republic of Texas*, 59 SW. HIST. Q. 487, 487 (1956). *Contra* RITA D. HABAN, HOW PROUDLY THEY WAVE: FLAGS OF THE FIFTY STATES 95 (1989) ("[t]he first official flag of the Republic of Texas [was] David G. Burnet's flag"); 1 THE HANDBOOK OF TEXAS, *supra* note 4, at 606 (erroneously stating that Zavala's design included the word "Texas," but correctly stating that no final action on the design was taken and that the Burnet flag was the first official flag of the Republic); M. Looscan, *The History and Evolution of the Texas Flag*, in 1 A COMPREHENSIVE HISTORY OF TEXAS 1685 TO 1897, at 696-97 (Dudley G. Wooten ed., Dallas, William G. Scarff 1898) ("The first 'Lone Star' flag bearing the sanction of governmental authority . . . was that adopted by President Burnet at Harrisburg, April 9, 1836, for the use of the Texas navy If any provision for a flag was devised by that convention [at Washington-on-the-Brazos], it is not generally known . . .").

One source recognizes the "Zavala flag" as the official flag of the revolutionary government without mentioning *The Romantic Flags of Texas*. JOHN E. CONNER ET AL., THE FLAGS OF TEXAS 214-16 (1964). Like Ms. Cox, the authors of *The Flags of Texas* misunderstand the convention's action in *accepting*, as opposed to *adopting*, a design for the flag. The convention, of course, could accept a report without enacting the report as law, and nowhere does the record show the convention enacted the "Zavala flag" as an official flag. One source of *The Flags of Texas's* information, an April 26, 1931, *Dallas Morning News* article, is based on patently erroneous information from Zavala's granddaughter, Adina de Zavala. Theresa M. Hunter, *Romantic Flags of the Texas Revolution*, DALLAS MORNING NEWS, Apr. 26, 1931, at feature sec. 6. Hunter's article claims that Zavala designed the Lone Star Flag! *The Flags of Texas* does state, however, that the final design of the "Zavala flag" is uncertain and that the flag was never made. CONNER ET AL., *supra*, at 216, 232.

18. The author has attempted without success to discuss the authenticity of the "Zavala flag" with Gallery of the Republic. See Letter from Charles Spain to Ted C. Pearsall, Director, Gallery of the Republic (Dec. 9, 1988) (on file with the *South Texas Law Review*).

19. State Bar of Texas, *Convention Highlights*, 54 TEX. B.J. 808, 811 (1991) (photograph of Texas Bar Historical Foundation president Bill Daniel and Gallery of the Republic director Ted C. Pearsall with the so-called "Zavala flag"); State Bar of Texas, *1991 Report of Committee on History and Traditions of the Bar*, 54 TEX. B.J. 683, 684 (1991); Angela Dorau & Cynthia Freeman, *A New Beginning for Texas' Legal Past*, 54 TEX. B.J. 316 (1991); State Bar of Texas, *1990 Report of Committee on History and Traditions of the Bar*, 53 TEX. B.J. 786 (1990).

The author has contacted the Texas Bar Historical Foundation regarding the "Zavala flag" and was told that the Foundation relies solely on the Gallery of the Republic's claim that the flag is authentic. Letter from Charles Spain to Bill Daniel, President, Texas Bar Historical Foundation (July 23, 1991); Letter from Bill Daniel to Charles Spain (Aug. 23, 1991) (both on file with the *South Texas Law Review*).

the 1836 national flag is also inconsistent with the language of the 1836 Act. The Act states “[t]hat for the future there shall be a national flag.”²⁰ The clear implication is that no national flag existed prior to the adoption of the Act. If a national flag had been adopted by the general convention or the provisional government, there would have been no need for the Texas Congress to enact the 1836 law to create a national flag, as opposed to modifying it. The Texas Constitution of 1836 provides:

That no inconvenience may arise from the adoption of this constitution, it is declared by this convention that all laws now in force in Texas, and not inconsistent with this constitution, shall remain in full force until declared void, repealed, altered, or expire[sic] by their own limitation.²¹

There is no reference to a national flag in the decrees and ordinances of the provisional government.

B. The 1836 National Standard

The first official flag was approved by the Texas Congress on December 10, 1836: “SEC. 2. *Be it further enacted*, That for the future there shall be a national flag, to be denominated the ‘National Standard of Texas,’ the conformation of which shall be an azure ground, with a large golden star central.”²² This flag is known as David G. Burnet’s flag

20. Act approved Dec. 10, 1836, 1st Cong., R.S., § 2, 1836-1837 Repub. Tex. Laws 72, 72, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1132, 1132 (Austin, Gammel Book Co. 1898), *amended by* Act approved Jan. 25, 1839, 3d Cong., R.S., § 3, 1838-1839 Repub. Tex. Laws 87, 88, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87, 88 (Austin, Gammel Book Co. 1898), *repealed by* TEX. CONST. of 1845, art. XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force).

21. REPUB. TEX. CONST. of 1836, sched. § 1. The Congress later repealed all laws prior to September 1, 1836, except for the laws of the consultation and provisional government, and various land laws. Act approved Jan. 20, 1840, 4th Cong., R.S., § 2, 1840 Repub. Tex. Laws 3, 4, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, 106 at 177, 178 (Austin, Gammel Book Co. 1898), *repealed by* Revised Statutes, 16th Leg., R.S., § 4, 1879 Tex. Rev. Civ. Stat. 718. This law repealed all the Mexican laws except certain land laws and became effective on March 16, 1840, forty days after the adjournment of the Texas Congress. *See* Act approved Jan. 16, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 6, 6-7, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 180, 180-81 (Austin, Gammel Book Co. 1898), *amended by* Act approved Dec. 1, 1849, 3d Leg., R.S., ch. 5, 1848-1849 Tex. Gen. Laws 5, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 443 (Austin, Gammel Book Co. 1898) (laws effective sixty days after the adjournment of the legislature), *repealed by* TEX. CONST. art. XVI, § 48 (existing laws repugnant to 1876 Texas Constitution not continued in force); *see* TEX. CONST. art. III, § 39 (laws effective ninety days after the adjournment of the legislature).

22. Act approved Dec. 10, 1836, § 2, 1836-1837 Repub. Tex. Laws at 72, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1132 (Austin, Gammel Book Co. 1898).

(figure 2), named after the president of the *ad interim* government.²³

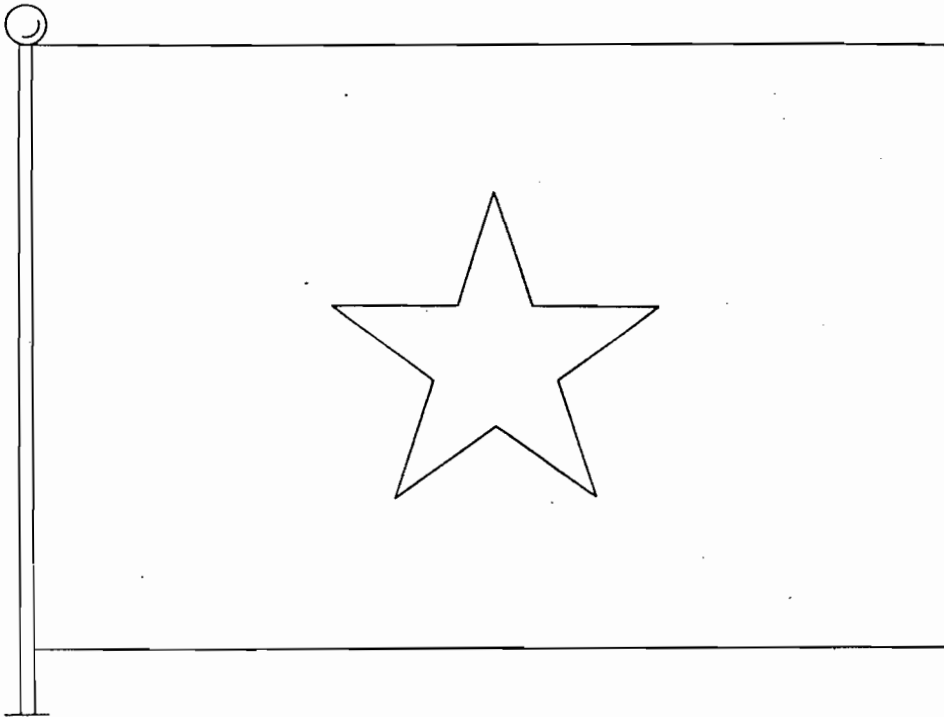


FIGURE 2. 1836 NATIONAL STANDARD/"DAVID G. BURNET'S FLAG"
Gold star on azure field; de jure national flag 10 December 1836 to 25 January 1839; war flag 25 January 1839 to 29 December 1845. © 1975 Whitney Smith. Used by permission.

President Burnet proposed the national standard and the national flag for the naval service in the following letter:

The legislative history of the Act is as follows: S.J. OF REPUB. OF TEX., 1st Cong., R.S. 53 (Nov. 14, 1836, act to establish a coat of arms introduced by Sen. William H. Wharton, read first time), 55 (Nov. 16, 1836, act to establish a coat of arms taken up, referred to select committee of four on motion of Sen. Stephen H. Everett), 61 (Nov. 24, 1836, message received from house and act laid on table), 62 (Nov. 25, 1836, read second time, rules suspended, read third time, and passed); H.J. OF REPUB. OF TEX., 1st Cong., R.S. 187-88 (Nov. 24, 1836, act establishing a national seal and standard of the Republic of Texas taken up and read first time on motion of Rep. Billingsly, read second time, words "of Texas" stricken from title on motion of Rep. Branch, rules suspended on motion of Rep. Rowe, read third time, passed, and retitled "An Act to Establish a National Seal and Standard of the Republic of Texas" on motion of Rep. Rowe).

Unfortunately there is no material in the bill file (number 522) on this Act at the State Library and Archives Commission. The author has been unsuccessful in his attempts to locate Senator Wharton's original bill, subsequent amendments, and the select committee's report, if any.

23. 1 THE HANDBOOK OF TEXAS, *supra* note 4, at 252, 606.

Executive Department
Columbia 11th Oct. 1836

To the honorable
the Senate and
the House of Representatives
Gentlemen

The 4th Section of the general provisions of the Constitution contemplates the adoption and providing of a seal for the Republic.

I have the honor to submit to the inspection of Congress, the form of a Seal, consisting of a Single Star, with the letters, REPUBLIC OF TEXAS, circular, and to recommend its adoption, as the Seal of this Republic.

I would also suggest to the consideration of Congress, the propriety of adopting and promulgating the form of a national flag, to be denominated The National Standard of Texas. And I would respectfully submit the following as a simple, emblematic and distinctive conformation, for such Standard:

GROUND, AZURE,

A LARGE GOLDEN STAR, CENTRAL

A flag for ordinary use has already been ~~previously~~ adopted by the Government ad interim and is now in use and had received much nomination ~~into~~ in the Navy and I recommend to Congress a legal sanction being given to it. Flags constitute the primary evidences of nationality to vessels on the high seas, and it is needful they should be formally adopted and made known.

The flag in use by the navy is constructed as follows:

Union, blue—Star central

Thirteen Stripes prolonged, alternate red and white.

The allusion of the 13. Stripes is emphatic, and will constitute an agreeable memorial of our common descent.

Signed,
David G. Burnet²⁴

The national standard served as the Texas flag for all purposes except for the navy until the adoption of the Lone Star Flag in 1839. From that point forward, the national standard continued as the de jure war flag until Texas achieved statehood in 1845. The national standard was not completely replaced by the 1839 Lone Star Flag because the 1839 Act was merely an amendment to the 1836 Act. The 1839 Act specifically provided that the national standard was to remain unaffected: "Be it further enacted, That the national standard of this Republic shall re-

24. REPUBLIC OF TEX., EXECUTIVE RECORD BOOK 21 (Mar. 1836 to Oct. 1836 *ad interim* government) (original in the custody of the State Library and Archives Commission); reprinted in 1 THE TEXAS SENATE: REPUBLIC TO CIVIL WAR, 1836-1861, at 12-13 (Patsy M. Spaw ed., 1990) (hereinafter EXECUTIVE RECORD BOOK).

main as was established by an act to which this is an amendment."²⁵

C. *The 1836 National Flag for the Naval Service*

The Act that established the 1836 national standard also established a war ensign:

SEC. 5. *Be it further enacted*, That the national flag for the naval service for the Republic of Texas as adopted by the president at Harrisburg on the ninth day of April, eighteen hundred and thirty-six, the conformation of which is union blue, star central, thirteen stripes prolonged, alternate red and white, be, and the same is hereby ratified and confirmed, and adopted as the future national flag for the naval service for the Republic of Texas.²⁶

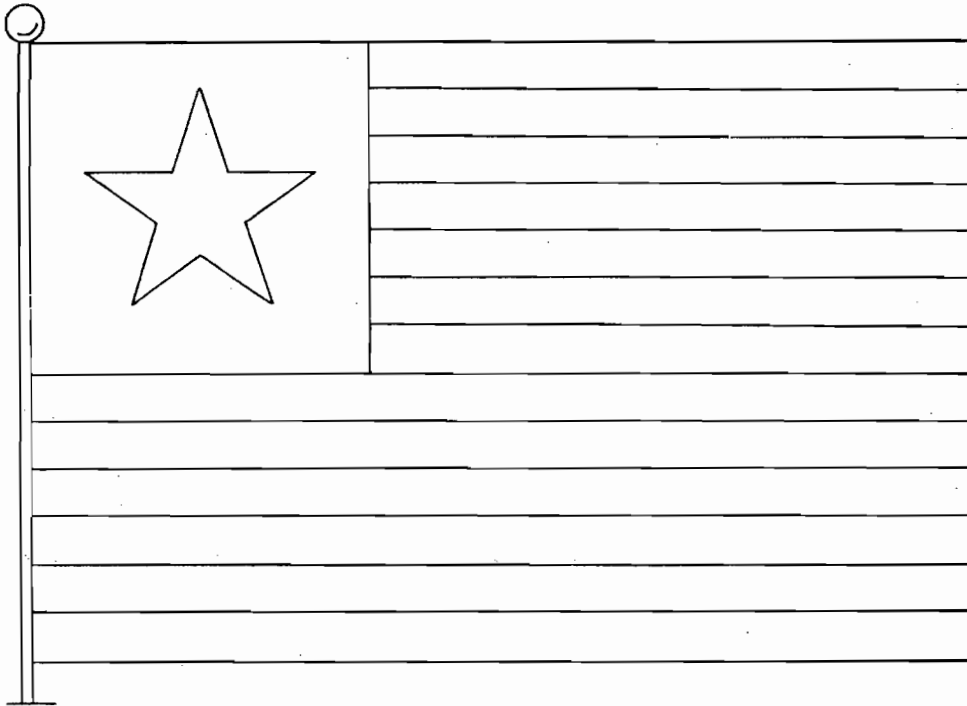


FIGURE 3. 1836 NATIONAL FLAG FOR THE NAVAL SERVICE

White star on blue union, alternating red and white stripes; de jure naval ensign 9 April 1836 to 10 December 1836 (adopted by president); 10 December 1836 to 25 January 1839 (adopted by Congress). © 1975 Whitney Smith. Used by permission.

25. Act approved Jan. 25, 1839, 3d Cong., R.S., § 5, 1838-1839 Repub. Tex. Laws 87, 88, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87, 88 (Austin, Gammel Book Co. 1898), repealed by TEX. CONST. of 1845, art. XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force).

26. Act approved Dec. 10, 1836, 1st Cong., R.S., § 5, 1836-1837 Repub. Tex. Laws 72, 72, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1132, 1132 (Austin,

This flag (figure 3), designed by President David G. Burnet, remained in use until the 1839 Lone Star Flag was adopted.

D. The 1839 National Flag

The Lone Star Flag (figure 4) was adopted by the Texas Congress in 1839:

Be it further enacted, That from and after the passage of this act, the national flag of Texas shall consist of a blue perpendicular stripe of the width of one third of the whole length of the flag, with a white star of five points in the centre thereof, and two horizontal stripes of equal breadth, the upper stripe white, the lower red, of the length of two thirds of the whole length of the flag; any thing in the act to which this is an amendment to the contrary notwithstanding.²⁷

A close reading of the 1839 Act along with its legislative history reveals that the Act implicitly repealed the 1836 national flag for the naval service. Section 5 of the Act states that the 1836 national standard shall be unaffected, but the 1836 national flag for the naval service is not mentioned.²⁸ In addition, section 4 of the 1839 Act gives the president the authority to establish a flag for the naval service;²⁹ something that would

Gammel Book Co. 1898), *implicitly repealed by* Act approved Jan. 25, 1839, 3d Cong., R.S., §§ 3-4, 1838-1839 Repub. Tex. Laws 87, 88, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87, 88 (Austin, Gammel Book Co. 1898). Despite a search of the *Executive Record Book* and the bill file, the author was unable to find President Burnet's April 9, 1836, order adopting the national flag for the naval service. See EXECUTIVE RECORD BOOK, *supra* note 24; legislative history, *supra* note 22.

Nineteenth-century British flag books and charts incorrectly depicted the 1836 naval ensign as having a blue, vertical stripe similar to the current state flag, rather than the blue union authorized by the Texas President and Congress. J.S. HOBBS, THREE HUNDRED AND SIX ILLUSTRATIONS OF THE MARITIME FLAGS OF ALL NATIONS; ARRANGED GEOGRAPHICALLY, WITH ENLARGED STANDARDS 4 (London, C. Wilson 1848); THE MARITIME FLAGS OF ALL NATIONS (London, Richard H. Laurie 1842), *reprinted in* TIMOTHY WILSON, FLAGS AT SEA 70-71 (1986). A current source incorrectly states that the 1836 war ensign was designed in 1819. WILLIAM CRAMPTON, THE COMPLETE GUIDE TO FLAGS 33 (1989).

27. Act approved Jan. 25, 1839, 3d Cong., R.S., § 3, 1838-1839 Repub. Tex. Laws 87, 88, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87, 88 (Austin, Gammel Book Co. 1898), *repealed by* Revised Statutes, 16th Leg., R.S., § 4, 1879 Tex. Rev. Civ. Stat. 718. Accompanying the original Act in the custody of the State Library and Archives Commission is a drawing by Peter Krag of the national flag and seal. See Kemp, *supra* note 17, at page following 488 (color reproduction of art, although in the original President Lamar's approval and signature are at the top and upside down).

28. Act approved Jan. 25, 1839, 3d Cong., R.S., § 5, 1838-1839 Repub. Tex. Laws at 87, 88, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87, 88 (Austin, Gammel Book Co. 1898), *repealed by* TEX. CONST. of 1845, art XIII, § 3 (existing laws repugnant to United States Constitution and 1945 Texas Constitution not continue in force).

29. Act approved Jan. 25, 1839, 3d Cong., R.S., § 4, 1838-1839 Repub. Tex. Laws 87, 88, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87, 88 (Austin, Gammel Book Co. 1898), *repealed by* TEX. CONST. of 1845, art XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force).

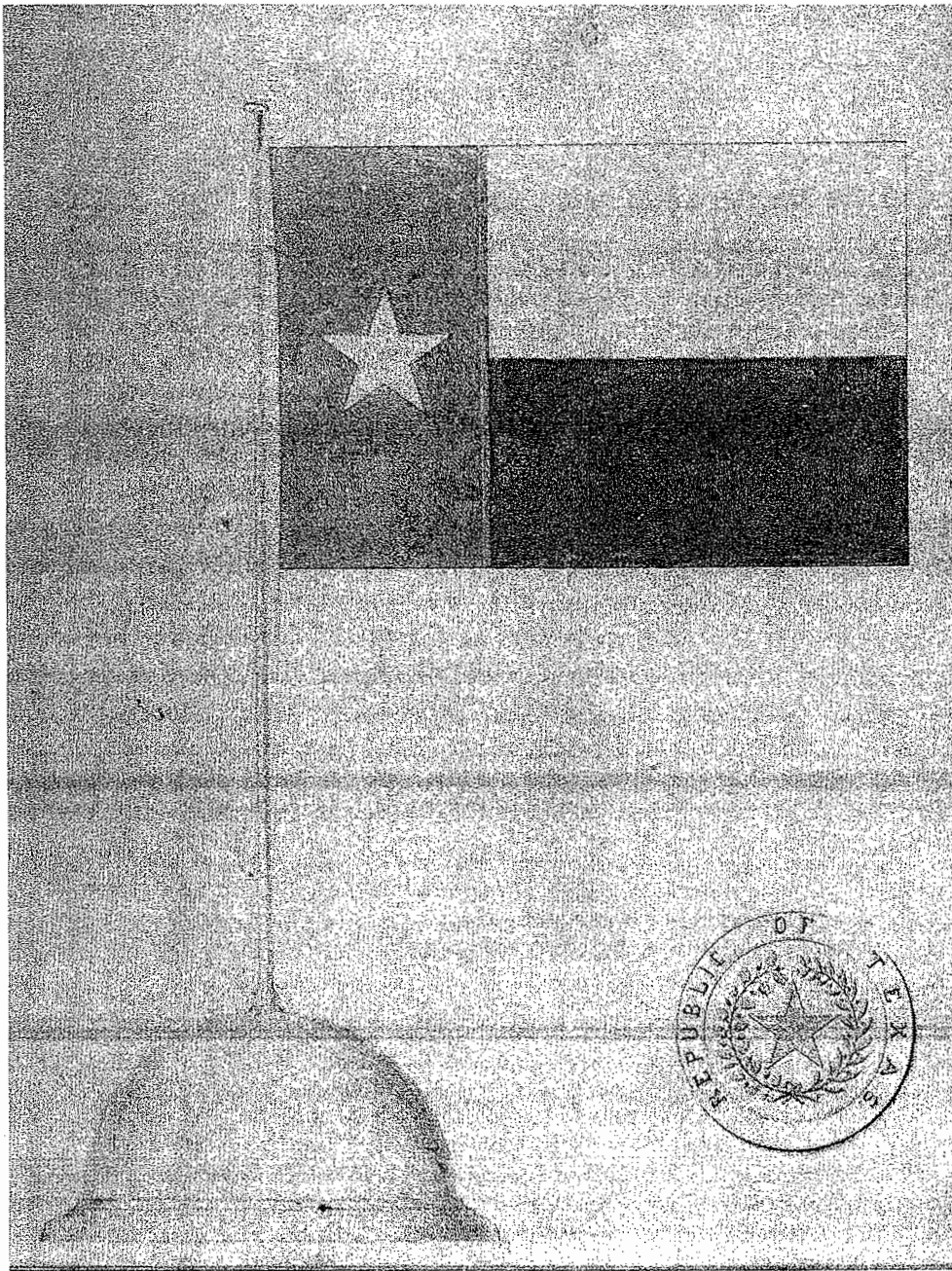


FIGURE 4. LONE STAR FLAG AND 1839 NATIONAL SEAL

Lone Star Flag—white star on vertical blue stripe, white and red horizontal stripes; de jure national and state flag 25 January 1839 to 1 September 1879; de facto state flag 1 September 1879 to 31 August 1933; de jure state flag 31 August 1933 to present (red stripe changed to “blood red” stripe; blue stripe changed to “azure blue” stripe). 1839 National Seal—25 January 1839 to 16 February 1846 (also served as interim state seal), official design. Photograph courtesy of the Archives Division—Texas State Library.

be unnecessary if the 1836 national flag for the naval service were still in existence.

Be it further enacted, That the President be, and he is hereby authorized and required to establish such signal and other auxiliary flags, for the naval, revenue and land services, also for the use of the pilots and coasting traders, as the said services may require, and he may deem necessary and expedient.³⁰

The senate committee report on the 1839 Act makes it abundantly clear that the Texas Congress intended to replace the 1836 national flag for the naval service:

The Special Committee to whom the Act amending [sic] the Act entitled "An Act adopting a National Seal and Standard for the Republic of Texas" approved on the 10th December 1836 was referred, beg leave to

Report: That they have investigated the expediency of amending [sic] the act, contemplated by the Act submitted to them, and they have come to a conviction of the necessity of so amending [sic] the Law as to change the present form of the National Seal and Standard of the Republic, from motives which must appear self evident to every reflecting mind to be of the highest importance in a national point of view.

The Committee beg leave to make Some remarks of the ground upon which their Conviction is ~~grounde~~ founded and are as follows—In the early part of the Year 1836 when the army and navy of the Republic of Texas were engaged in War against the Enemy, which resulted in the achievement of our Independence, the President *ad interim* devised the National flag and Seal, as it were in a case of emmergency [sic] adopting the flag of the United States of America, with very little alteration, which act was subsequently ratified by the Law of 10th Dec 1836.

The then adopted flag was expedient for the time being, and has in many instances been beneficial to our Navy and Merchantmen, when encountered by the enemy forces, on account of being so much blended with the flag of the United States of America but the emergency has passed, and the future prospects of Texas are of such flattering nature that the National Independence requires that her Arms, Seal, and Standard assume also an Independent character, by a form, which will not blend them with those of any other nation.

Besides these considerations, the Committee would beg leave to state, that in as much as the proposition made by this Republic in her insipient [sic] stage of political existence to the United States of America, for an annexation to the American Confederacy has been withdrawn by the Minister of this Government at the Court

30. *Id.*; see *infra* notes 50-53 and accompanying text (information on pilot, revenue service, and coasting trader flags).

of Washington, and as the wish of the majority of the people of Texas, so far as it is publicly known, is in favor of sustaining an Independent Station Among the Nations of the Earth, thereby the transition of the Single Star, into the American Constellation, and the emmerging [sic] the 13 Texian Stripes into the 26 Stripes of the United States of America inexpedient, the Committee are convinced of the necessity of adopting a Separate and Distinct Standard and Seal arms for this Republic, by so improving and embellishing the present as to fortify the Single Star with an olive and live oak branches, being emblems of Peace, and of the Materials of our strong arm of national defence in War, and indigenous to our Soil. Also the flag as proposed by the act, emblematical of Pease [sic], & friendship, or War.

All Civilized Maritime Nations have adopted the National Standard for the use of their Naval and Commercial Services of such Colours and devises as to be plainly and distinctly perceived at great distances, and have carefully guarded against any thing that would blend them with the flags of any other and specially of a neighbouring [sic] nation, to avoid any Collision in time of war, by a neutral power; this ought to be the guide to Texas also, whose flag displaying the National Arms, the Committee flatter themselves, will be known and respected far and wide, so soon as this Commerce of this Country Nation is extended with the foreign Nations, protecting the valuable productions of her rich soil, on the widely extended Ocean and in the distant ports of the habitable globe.

Therefore your Committee beg leave to offer a Substitute, amending the original act referred to them, accompanying the Same with a Specimen of the Arms, the Seal and the Standard.

Oliver Jones
Chairman³¹

The 1839 national flag continued to be the flag of Texas after Texas achieved statehood on December 29, 1845, by virtue of article XIII, section 3 of the Texas Constitution:

All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and remain in force, as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof.³²

This constitutional provision also provides an explanation for the disappearance of the 1836 national standard. Presuming that the national

31. REPUB. TEX. SENATE COMM. REPORT, 3d Cong., R.S. (Jan. 4, 1839) (available in the bill files of the Third Congress in the custody of the State Library and Archives Commission). The text of the report reprinted in Looscan, *supra* note 17, at 697-98, is not entirely faithful to the original.

32. TEX. CONST. of 1845, art. XIII, § 3.

standard was a war flag, its continued existence would be repugnant to the joint resolutions of annexation and to the new status of Texas as a state under the federal constitution. Therefore, section 2 of the 1836 Act was not continued in force after December 29, 1845. The joint resolution of the United States Congress to annex Texas specifically provided that Texas must cede to the United States "all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence."³³ As a result, Texas relinquished its military authority other than the militia to the federal government.

The current description of the Texas flag was enacted by the Legislature in 1933.³⁴ Section 1 of the Act makes it clear that the legislature considered the 1839 law as still valid:

This Act of the Legislature is not a substitute for any previous legislation pertaining to the Lone Star Flag of Texas which may have been passed by either the Republic of Texas or the Legislature of this State, but the sole purpose of this act is to clarify the description of the Texas Flag, to standardize the star in the blue field, and to outline some important rules to govern the correct use of the Texas Flag.³⁵

Even though the legislature stated that the 1933 Act was not a substitute for previous legislation, the previous legislation no longer existed. When the sixteenth legislature promulgated the Revised Civil Statutes of 1879, it provided that "all civil statutes, of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed."³⁶ Since the 1879 Revised Statutes neither included legislation concerning the flag nor expressly continued in force the 1839 Act, the 1839 flag law was repealed. Texas, therefore, had no de jure flag from the date of the repeal, September 1, 1879, to the effective date of the 1933 Act, August 31, 1933.³⁷

The 1933 description of the flag is extremely detailed and includes

33. Act approved Mar. 1, 1845, § 2, 5 Stat. 797, 798.

34. Act approved Apr. 19, 1933, 43d Leg., R.S., ch. 87, §§ 2, 4, 5, 1933 Tex. Gen. Laws 186, 186-87 (current version at TEX. REV. CIV. STAT. ANN. art. 6142a, §§ 2, 4, 5 (West 1970)).

35. Act approved Apr. 19, 1933, 43d Leg., R.S., ch. 87, § 1, 1933 Tex. Gen. Laws 186, 186 (current version at TEX. REV. CIV. STAT. ANN. art. 6142a, § 1 (West 1970)).

36. Revised Statutes, 16th Leg., R.S., § 4, 1879 Tex. Rev. Civ. Stat. 718. Similar provisions existed in the 1895, 1911, and 1925 Revised Civil Statutes. Revised Statutes, 39th Leg., R.S., § 2, 1925 Tex. Rev. Civ. Stat. 2419; Revised Statutes, 32d Leg., R.S., § 4, 1911 Tex. Rev. Civ. Stat. 1719; Revised Statutes, 24th Leg., R.S., § 4, 1895 Tex. Rev. Civ. Stat. 1103.

37. The Texas Constitution provides that all laws take effect ninety days after adjournment of the legislative session. TEX. CONST. art. III, § 39.

precise instructions for the design and location of the Lone Star. The colors of the stripes, blood red, azure blue, and white, are said to impart the "lessons of the Flag: bravery, loyalty, and purity."³⁸ Despite these specifications, there is no standard reference to define what constitutes "blood red" and "azure blue," and few Texas flags are manufactured in the official proportions (hoist to fly) of two to three. The 1933 Act does include a drawing of the flag.³⁹

The Texas Legislature has obviously found the history of the Texas flag to be confusing. The legislature in 1933 adopted a salute to the Texas flag that began, "Honor the Texas Flag of 1836."⁴⁰ It was apparently not until 1965 that the legislature realized the 1836 flag was not the Lone Star Flag and the words "of 1836" were deleted.⁴¹ In 1989 the legislature passed a resolution honoring the 150th anniversary of the Lone Star Flag, in which Lorenzo de Zavala, William B. Scates, Thomas Barnett, Sterling C. Robertson, Thomas J. Gazley, and Richard Ellis were misidentified as the committee that approved the flag allegedly designed by Dr. Charles B. Stewart.⁴² The committee listed in the resolution is the committee which debated the "Zavala flag" at the 1836 general convention.⁴³ Furthermore, the Lone Star Flag was not designed by the 1839 committee chaired by Senator Oliver Jones: the design of the flag was present in the original version of the bill introduced on December 28, 1838, by Senator William H. Wharton.⁴⁴

38. TEX. REV. CIV. STAT. ANN. art. 6142a, §§ 4-5 (West 1970). For a definition of "azure", see *infra* note 95.

39. TEX. REV. CIV. STAT. ANN. art. 6142a, § 2 (West 1970).

40. Act approved Apr. 19, 1933, 43d Leg., R.S., ch. 87, § 3, 1933 Tex. Gen. Laws 186, 187, amended by Act of Mar. 25, 1965, 59th Leg., R.S., ch. 55, 1 1965 Tex. Gen. Laws 138, amended by Act of May 29, 1989, 71st Leg., R.S., ch. 418, 1989 Tex. Gen. Laws 1566 (current version at TEX. REV. CIV. STAT. ANN. art. 6142a, § 3 (West Supp. 1992)).

41. Act of Mar. 25, 1965, 59th Leg., R.S., ch. 55, 1 1965 Tex. Gen. Laws 138, amended by Act of May 29, 1989, 71st Leg., R.S., ch. 418, 1989 Tex. Gen. Laws 1566 (current version at TEX. REV. CIV. STAT. ANN. art. 6142a, § 3 (West Supp. 1992)).

42. Tex. H.R. Con. Res. 9, 71st Leg., R.S., 1989 Tex. Gen. Laws 6268. This erroneous information apparently came from Charles Gilbert's *Flags of Texas*. GILBERT, *supra* note 17, at 80.

43. See *supra* text accompanying notes 4-21.

44. The legislative history of the Act approved January 25, 1839, is as follows: S.J. OF REPUB. OF TEX., 3d Cong., R.S. 76 (Dec. 28, 1838, introduced by Sen. William H. Wharton and read first time), 82 (Jan. 4, 1839, substitute reported by Sen. Oliver Jones, chairman of committee to which act was referred), 87 (Jan. 7, 1839, read second time, word "standard" stricken on motion of Sen. Jones, rules suspended on motion of Sen. Stephen H. Everitt, read third time, and passed), 97 (Jan. 11, 1839, substitute presented by Sen. Jones and laid on table for one day), 106 (Jan. 14, 1839, amended substitute read third time and passed); H.J. OF REPUB. OF TEX., 3d Cong., R.S. 300 (Jan. 7, 1839, house informed of senate passage), 305 (Jan. 8, 1839, read first and second times), 326 (Jan. 10, 1839, read third time and passed), 328 (Jan. 11, 1839, vote reconsidered on motion of Rep. Caldwell and laid on table), 346 (Jan. 14,

Charles Stewart's role as the designer of the Lone Star Flag is almost certainly erroneous. Mamie Wynne Cox states that Dr. Stewart was a member of the committee that drafted the 1839 Act and that he actually designed the Lone Star Flag.⁴⁵ However, Dr. Stewart's name is not mentioned in the committee report presented by Senator Jones on January 4, 1839, and Dr. Stewart was not a member of the Texas Senate during the Third Congress.⁴⁶ Ms. Cox's book also contains a photograph of Dr. Stewart's alleged original design of the Lone Star Flag.⁴⁷ This design looks suspiciously like a tracing of the Peter Krag art, including the upside down signature of President Lamar.⁴⁸ Not surprisingly, Ms. Cox makes no reference in her book to Peter Krag and his depiction of the flag and seal.

E. The 1835 Flag for Vessels Sailing Under Letters of Marque and Reprisal

Texas authorized an official privateer flag before declaring independence (figure 5):

Be it further ordained and decreed, &c., That all vessels sailing under Licenses, as Letters of Marque and Reprisal, which have been, or may be hereafter granted by the Governor and Council, or

1839, informing house of senate passage), 356 (Jan. 16, 1839, senate amendment read first time), 375 (Jan. 18, 1839, read second time), 388 (Jan. 21, 1839, read third time and passed), 404 (Jan. 23, 1839, joint committee on enrolled bills reported that bill was enrolled and presented to president for his signature and adoption).

Senator Wharton's original bill is as follows:

AN ACT

Amending the Act entitled "*An Act adopting a National Seal and Standard Flag for the Republic of Texas*" approved on the 10th December 1836.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled.* That from and after the passage of this Act, the National Great Seal of this Republic shall consist of a Single Star of five points, with an olive and live oak branches encircled and with the letters "*Republic of Texas.*"

SECTION 2. *Be it further enacted &c:* That the National Standard Flag of Texas in future shall consist of a blue perpendicular stripe of the width of one third of the whole length of the flag, with a white star of five points in the center thereof, and of two horizontal stripes of equal breadth, the upper [sic] stripe white, and the lower red, of the length [sic] of two thirds of the whole length [sic] of the flag; any thing in the act to which this is an amendment [sic], to the contrary notwithstanding.

Repub. of Tex. S.B., 3d Cong., R.S., (1838) (available in the bill files of the Third Congress in the custody of the State Library and Archives Commission).

45. COX, *supra* note 10, at 64-66; see also SMITH, *supra* note 17, at 207.

46. See REPUB. TEX. SENATE COMM. REPORT, *supra* note 31 and accompanying text.

47. COX, *supra* note 10, at frontispiece.

48. See *supra* note 27. Michael R. Green, a reference archivist at the State Library and Archives Commission, is openly skeptical of the validity of the Stewart family claims.

by the Governor, as provided in this supplementary Ordinance, or under any register or license of this Government, shall carry the flag of the Republic of the United States of Mexico, and shall have the figures 1, 8, 2, 4, cyphered in large Arabics on the white ground thereof.⁴⁹

This flag disappeared from use after the decision was made to declare independence.

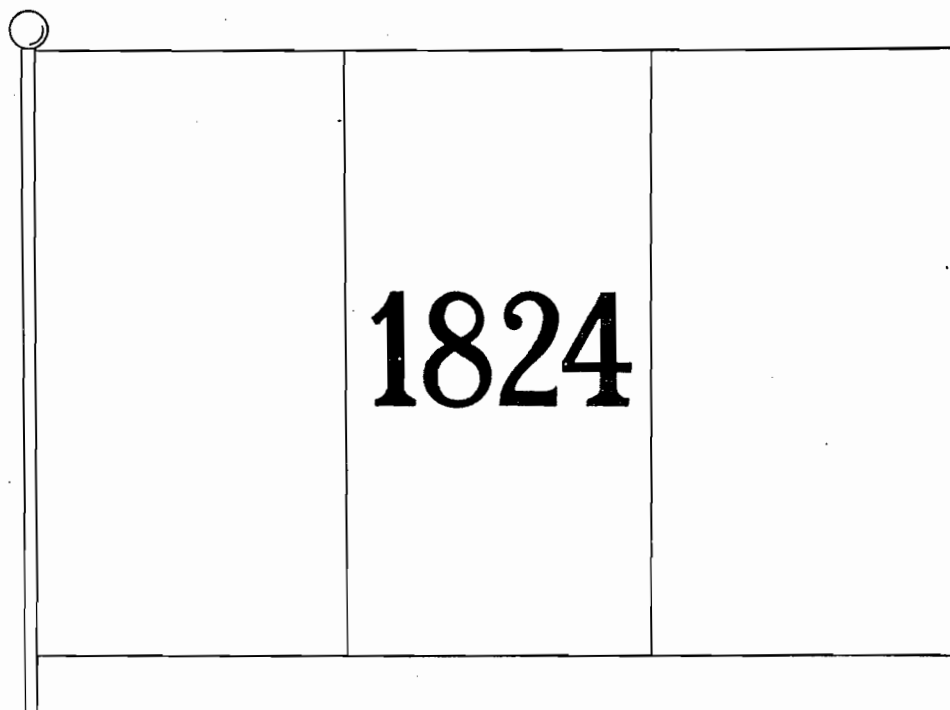


FIGURE 5. FLAG FOR VESSELS SAILING UNDER LETTERS OF MARQUE AND REPRISAL

Green, white, and red stripes; de jure privateer flag 29 November 1835 to 29 December 1845. © 1975 Whitney Smith. Used by permission.

49. Ordinance passed Nov. 29, 1835, § 2, 1835-1836 Tex. Provisional Gov't Ordinances & Decrees 38, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 942 (Austin, Gammel Book Co. 1898), repealed by TEX. CONST. of 1845, art. XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force); see U.S. CONST. art. I, § 8, cl. 11 (empowering Congress to grant letters of marque and reprisal), § 10, cl. 1 (prohibiting states from granting letters of marque and reprisal). The numbers "1824" in the flag refer to the Mexican Constitution of October 4, 1824, at which time Texas was part of the State of Coahuila and Texas.

The provisional government was authorized to legislate before independence by virtue of the Plan and Powers of the Provisional Government of Texas. TEX. PROVISIONAL GOV'T PLAN & POWERS art. III (1835). This ordinance continued in effect after Texas declared independence. See *supra* note 21 and accompanying text.

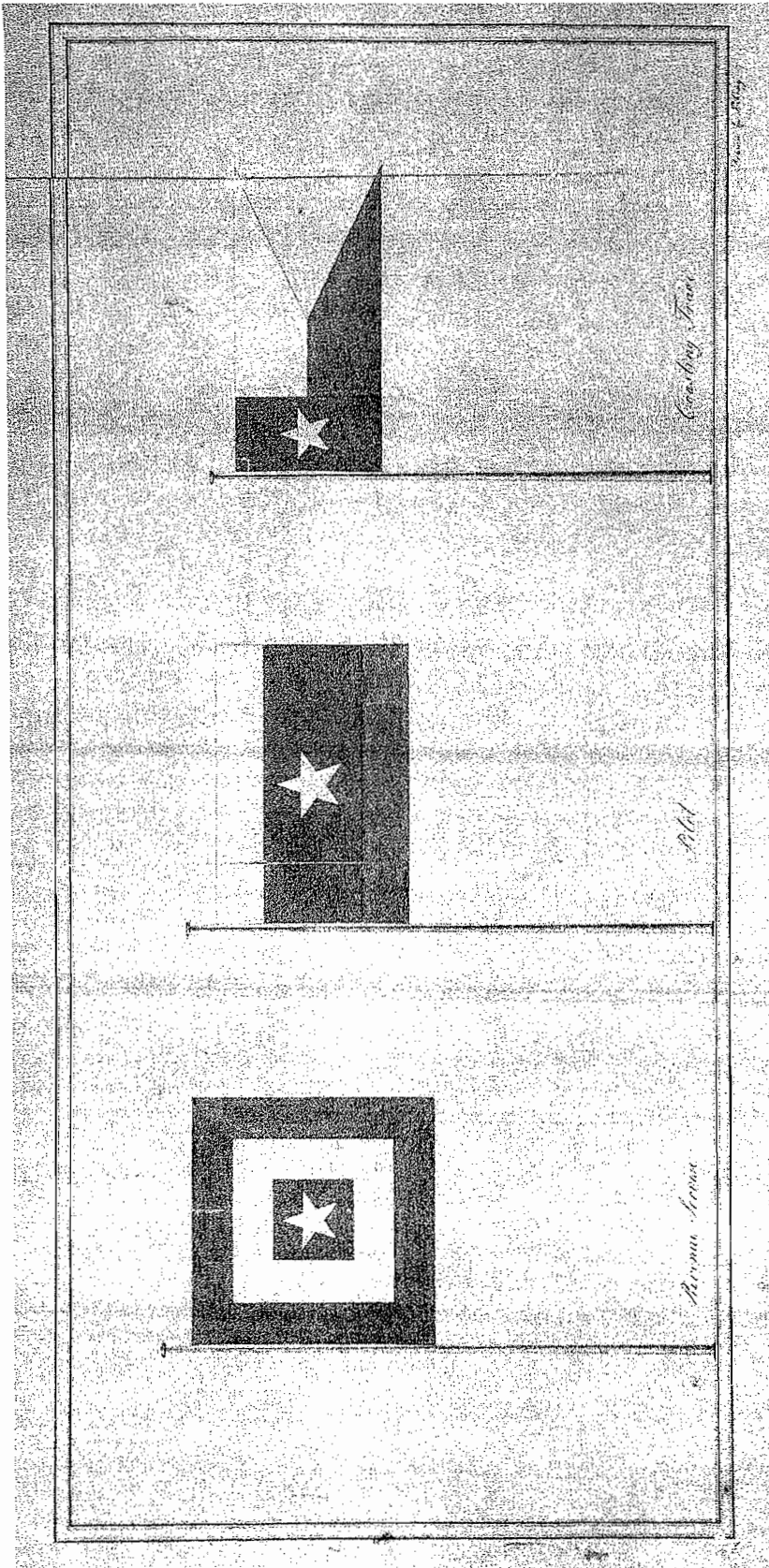


FIGURE 6. REVENUE SERVICE, PILOT, AND COASTING TRADER FLAGS

Revenue service flag—white star on blue square surrounded by white and red squares, pilot flag—white star on blue stripe with white stripe above and red stripe below, coasting trader flag—white star on vertical blue stripe with swallowtail white and red horizontal stripes; de jure naval auxiliary flags 25 January 1839 to 29 December 1845. Photograph courtesy of the Archives Division—Texas State Library.

F. *The 1839 Pilot, Revenue Service, and Coasting Trader Flags*

The pilot, revenue service, and coasting trader flags (figure 6) were established by section 4 of the 1839 Act.⁵⁰ The pilot flag has been erroneously portrayed as the Texas national flag at sea or the Texas merchant flag.⁵¹ These three flags were only auxiliary flags, similar to the United States Coast Guard ensign, and were never meant to replace the 1839 Lone Star Flag for use at sea. An 1841 act regulating the coasting trade did not recognize any separate merchant flag or civil ensign, and stated that "no merchant vessel shall be permitted to assume the Flag of this Republic, unless owned by a citizen or citizens of the same."⁵² The 1841 Act repeatedly speaks of the "flag of the Republic" or the "Texian flag," referring to the single national flag approved in 1839.⁵³ The pilot, revenue service, and coasting trader flags apparently disappeared with the advent of statehood.

G. *The 1985 County Sesquicentennial Flag*

Certainly the oddest Texas flag is the official county flag for the Texas sesquicentennial celebrated in 1986 (figure 7). This flag was designed by Mrs. Joydelle G. Wolfram for Falls County, and subsequently recognized by the legislature.⁵⁴

50. Act approved Jan. 25, 1839, § 4, 1838-1839 Repub. Tex. Laws 87, 88, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87, 88 (Austin, Gammel Book Co. 1898), repealed by TEX. CONST. of 1845, art XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force). Accompanying the original Act in the custody of the State Library and Archives Commission is Peter Krag's drawing of the three flags.

51. CANNON, *supra* note 17, at 44; CRAMPTON, *supra* note 17, at 47; SMITH, *supra* note 17, at 207, 212-13.

52. Act approved Jan. 4, 1841, 5th Cong., R.S., § 1, 1840-1841 Repub. Tex. Laws 15, 15, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 479, 479 (Austin, Gammel Book Co. 1898), repealed by TEX. CONST. of 1845, art. XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force).

53. Act approved Jan. 4, 1841, 5th Cong., R.S., 1840-1841 Repub. Tex. Laws 15, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 479 (Austin, Gammel Book Co. 1898), repealed by TEX. CONST. of 1845, art XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force).

The term "Texian" refers to the Mexican and Republican periods of Texas history. 2 THE HANDBOOK OF TEXAS 768 (Walter P. Webb ed., 1952).

54. Tex. S. Con. Res. 48, 69th Leg., R.S., 1985 Tex. Gen. Laws 3400 (effective June 8, 1985); Tex. H.R. Con. Res. 52, 69th Leg., R.S., 1985 Tex. Gen. Laws 3501 (effective Feb. 28, 1985).

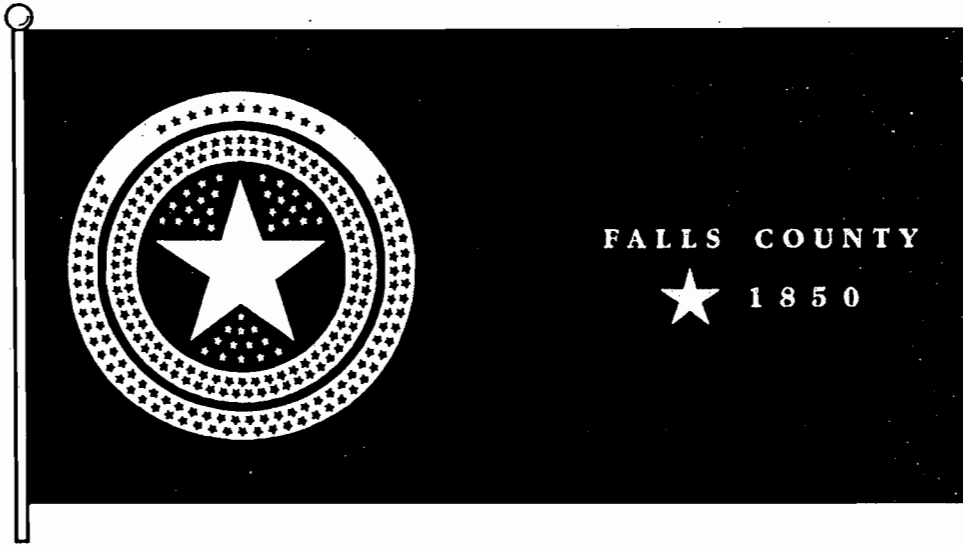


FIGURE 7. SESQUICENTENNIAL COUNTY FLAG

Large white star on royal blue field, surrounded by two white arcs and 254 gold, red, blue, and green stars; 28 February 1985; use by counties optional.

This busy flag is described in the senate concurrent resolution as follows:

WHEREAS, The flag, with a background of royal blue, exhibits a large white Lone Star on its left half; and

WHEREAS, Smaller stars surrounding the Lone Star, which represent the 254 counties of Texas, are grouped by color according to the comparative date of each county's creation; and

WHEREAS, Immediately adjacent to the Lone Star are 37 gold stars, 12 each between its top point and the points to either side, and another 13 between its bottom two points, all in representation of those counties that were created during Texas's period as a republic; and

WHEREAS, Around the Lone Star and the gold stars is a ring of white containing 115 red stars in representation of those counties that were created after statehood but prior to the Civil War; and

WHEREAS, Outside the first ring is another ring, also white, containing along its bottom and left and right sides an arc of 91 blue stars in representation of those counties that were created through the remainder of the 19th Century; and

WHEREAS, A shorter arc of 11 green stars, located along the top of the outer ring, represents those counties that have been created more recently, since the beginning of the 20th Century; and

WHEREAS, The other half of the flag, to the right of the design, depicts the name of the county with the date of its creation and an appropriately colored star; and

WHEREAS, Display of the flag by counties would not be inconsistent with their display of the state sesquicentennial flag as authorized by the Texas 1986 Sesquicentennial Commission; and

WHEREAS, flying the county flag would further honor the proud history of the state's 254 counties; now, therefore, be it

RESOLVED, That the 69th Legislature of the State of Texas hereby designate as an official county flag for the Texas sesquicentennial, for counties choosing to adopt and fly it, the design incorporated in the sesquicentennial county flag for Falls County⁵⁵

A cynic might wonder why Greer, Santa Fe, and Worth Counties, which are no longer part of Texas, are not represented by stars with slashes through them.⁵⁶

H. *Display of the Flag*

Texas has other laws and resolutions affecting flag usage in addition to those already mentioned. The legislature has declared Texas Independence Day, March 2nd, to be Texas Flag Day.⁵⁷ The 1933 flag statute contains rules governing the use of the flag,⁵⁸ which was presumably based on the uniform code of flag etiquette drafted in 1923 by various patriotic and civic organizations including the American Legion and the Daughters of the American Revolution.⁵⁹ The Texas rules were amended in 1977 to allow for display of the flag at night and in inclement weather, and to allow the flag to be carried horizontally when necessary.⁶⁰ This last change was presumably made to validate the practice of displaying a huge Texas flag on the field at football games played by The

55. Tex. S. Con. Res. 48, 69th Leg., R.S., 1985 Tex. Gen. Laws 3400. The house of representatives concurrent resolution is virtually identical. For a photograph of the Falls County flag, see TEX. NAT'L DISPATCH, Aug. 1984, at 3 (official newspaper of Texas 1986 Sesquicentennial Commission).

56. See generally Ralph H. Brock, *A Lawyer's Look at the Boundaries of Texas* (pts. 1 & 3), 50 TEX. B.J. 1098 (1987) (Greer County lost to Oklahoma after dispute over which fork of Red River, Prairie Dog Town Fork or North Fork, constituted the northern boundary of Texas), 51 TEX. B.J. 136 (1988) (Santa Fe and Worth Counties ceded to United States as part of Compromise of 1850).

57. Tex. H.R. Con. Res. 6, 34th Leg., R.S. 1915 Tex. Gen. Laws 276.

58. Act approved Apr. 19, 1933, 43d Leg., R.S., ch. 87, § 6, 1933 Tex. Gen. Laws 186, 189, amended by Act of May 12, 1977, 65th Leg., R.S., ch. 272, 1977 Tex. Gen. Laws 728 (current version at TEX. REV. CIV. STAT. ANN. art. 6142a, § 6 (West Supp. 1992)).

59. See FURLONG & MCCANDLESS, *supra* note 17, at 215; SMITH, *supra* note 17, at 80. The 1923 uniform code of flag etiquette was the basis for the United States flag code. FURLONG & MCCANDLESS, *supra* note 17, at 216; see Act approved June 22, 1942, ch. 435, 56 Stat. 377, amended by Act approved Dec. 22, 1942, ch. 806, 56 Stat. 1074, amended by Act approved July 9, 1953, ch. 183, 67 Stat. 142, amended by Act approved July 7, 1976, Pub. L. No. 94-344, 90 Stat. 810 (codified at 36 U.S.C. §§ 173-178 (1988)).

60. Act of May 12, 1977, 65th Leg., R.S., ch. 272, 1977 Tex. Gen. Laws 728 (current version at TEX. REV. CIV. STAT. ANN. art. 6142a, § 6 (West Supp. 1992)).

University of Texas at Austin. In addition, all public schools and educational institutions are required to fly the flag on regular school days, and everyone is requested to fly the flag during Texas Week (the week which contains March 2).⁶¹ The symbolism of the state and national flags must also be taught to Texas children in elementary school.⁶²

A separate statute passed in 1955 requires that the Texas flag occupy the position of honor when it is displayed within the state.⁶³ The only flag that can take precedence over the Texas flag is the United States flag.⁶⁴ This law makes sense in the context of American federalism in which the states are sovereigns subservient only to the federal government. The law fails to state explicitly, however, that it does not apply to any practice of the federal government which accords the flag of another country or a federal department or agency a greater position of honor than the Texas flag.⁶⁵

I. Flag Desecration Laws and Prohibitions Against Advertising

Texas passed its first flag protection act in 1913.⁶⁶ The Act prohibited the use of "any imitation, label, trade-mark, design, device, imprint or form of the flag of the State of Texas for the purpose of advertising or giving publicity to any goods, wares or merchandise, or any commercial undertaking, or for any trade or commercial purpose."⁶⁷ The fine for

61. Texas Education Code, 61st Leg., R.S., ch. 889, sec. 1, § 2.02, 1969 Tex. Gen. Laws 2735, 2737 (current version at TEX. EDUC. CODE ANN. § 2.02 (West 1991)) (flying flag at schools); Tex. S. Con. Res. 8, 42d Leg., 3d C.S., 1932 Tex. Gen. & Spec. Laws 131 (current version at TEX. REV. CIV. STAT. ANN. art. 6144a (West 1970)) (flying flag during Texas Week). The 1932 concurrent resolution should not have been placed in *Texas Revised Civil Statutes Annotated*. See *infra* text accompanying notes 113-114.

62. Tex. Dept. of Educ., 9 Tex. Reg. 3321, 3337 (1984) (effective June 21, 1984) (codified at Tex. Dept. of Educ., 19 TEX. ADMIN. CODE § 75.29(c)(3)), *repealed by* Tex. Dept. of Educ., 16 Tex. Reg. 5957, *adopted* 16 Tex. Reg. 7011 (1991) (effective Dec. 23, 1991); Tex. Dept. of Educ., 16 Tex. Reg. 5957, 6020, *adopted* 16 Tex. Reg. 7089 (1991) (effective Dec. 23, 1991) (to be codified at Tex. Dept. of Educ., 19 TEX. ADMIN. CODE § 75.32(c)(3)) (social studies curriculum for second grade).

63. Act of Apr. 6, 1955, 54th Leg., R.S., ch. 77, 1955 Tex. Gen. Laws 361 (current version at TEX. REV. CIV. STAT. ANN. art. 6142b (West 1970)).

64. *Id.*

65. The Supremacy Clause of the United States Constitution mandates that federal law supersedes Texas law. U.S. CONST. art. VI, cl. 2. A custom of the federal government not embodied in a law, regulation, or executive order would not supersede Texas law, but it seems unlikely that the federal practice would be challenged.

66. Act approved Mar. 6, 1913, 33d Leg., R.S., ch. 14, 1913 Tex. Gen. Laws 28, *repealed by* Act approved Aug. 19, 1913, 33d Leg., 1st C.S., ch. 19, § 2a, 1913 Tex. Gen. & Spec. Laws 28, 28.

67. Act approved Mar. 6, 1913, 33d Leg., R.S., ch. 14, § 1, 1913 Tex. Gen. Laws 28, 28, *repealed by* Act approved Aug. 19, 1913, 33d Leg., 1st C.S., ch. 19, § 2a, 1913 Tex. Gen. & Spec. Laws 28, 28.

violating the Act was a fine between fifty and one hundred dollars.⁶⁸ It was also unlawful to "offer or expose for sale any article or commodity of commerce bearing the imitation, design, imprint or form of the flag of the State of Texas."⁶⁹ The fine for this violation of the Act was a fine between twenty-five and fifty dollars.⁷⁰ In August 1913, the legislature repealed this Act and passed a new law.⁷¹ The August 1913 law was substantially identical except that it exempted fraternal and patriotic organizations from its effect.⁷² Although codified twice since 1913, this law is still in effect today.⁷³ Currently use of the state flag on alcoholic-beverage labels and advertisements is regulated,⁷⁴ as is use of the state flag by private investigators and private security officers.⁷⁵

68. *Id.*

69. Act approved Mar. 6, 1913, 33d Leg., R.S., ch. 14, § 2, 1913 Tex. Gen. Laws 28, 28, repealed by Act approved Aug. 19, 1913, 33d Leg., 1st C.S., ch. 19, § 2a, 1913 Tex. Gen. & Spec. Laws 28, 28.

70. *Id.*

71. Act approved Aug. 19, 1913, 33d Leg., 1st C.S., ch. 19, 1913 Tex. Gen. & Spec. Laws 28, repealed and codified by Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 1, arts. 150, 151, § 3, art. 1, 1925 Tex. Crim. Stat. 2, 31 (codification), 181 (repealer), repealed and recodified by Business & Commerce Code, 60th Leg., R.S., ch. 785, sec. 1, § 17.07, sec. 3(a), 1967 Tex. Gen. Laws 2343, 2583 (codification), 2619 (repealer) (current version at TEX. BUS. & COM. CODE ANN. § 17.07 (West 1987)). The August 19, 1913 Act did not prohibit the use of the Texas flag in advertising until July 1, 1914, yet it repealed the March 1913 Act on November 17, 1913. The August 1913 Act, therefore, had the doubtless unintended effect of allowing persons to use the flag in advertising from November 17, 1913, to June 30, 1914.

There is one attorney general opinion that interprets former Penal Code article 150. Op. Tex. Att'y Gen. No. O-3597 (1941) (private detective using state seal on business cards and car doors does not violate article 150 as law only prohibits use of Texas flag for advertising).

72. Act approved Aug. 19, 1913, § 1a, 1913 Tex. Gen. & Spec. Laws at 28.

73. TEX. BUS. & COM. CODE ANN. § 17.07 (West 1987). The Texas Department of Agriculture comes close to violating at least the spirit of this law with its "Taste of Texas emblem" (figure 8), defined as "[a] flag-shaped emblem bearing the words 'Taste of Texas' so colored as to closely model the flag of the state of Texas." Tex. Dep't of Agric., 9 Tex. Reg. 536, 562 (emerg. rule), proposed 9 Tex. Reg. 563, adopted 9 Tex. Reg. 1881 (1984) (effective Apr. 16, 1984), amended by Tex. Dep't of Agric., 14 Tex. Reg. 5301, adopted 14 Tex. Reg. 6251 (1989) (effective Dec. 11, 1989) (codified at Tex. Dep't of Agric., 4 TEX. ADMIN. CODE § 17.51 (Supp. 1991-1992)). This concern was raised when the rule was proposed but was eventually rejected. Tex. Dep't of Agric., 9 Tex. Reg. 1881 (1984).

74. Tex. Alco. Bev. Comm'n, 16 TEX. ADMIN. CODE §§ 45.18(b)(7), .28(g) (1988) (effective Jan. 1, 1976) (prohibiting use of United States and Texas flags on distilled-spirits labels and advertisements). *But cf.* Tex. Alco. Bev. Comm'n, 16 TEX. ADMIN. CODE §§ 45.52, .55(a) (1988) (effective Jan. 1, 1976) (prohibiting use of United States flag on wine labels and advertisements); Tex. Alco. Bev. Comm'n, 16 TEX. ADMIN. CODE §§ 45.82(d), .90(g) (1988) (effective Jan. 1, 1976) (prohibiting misleading use of flags on malt-beverage labels and advertisements).

75. Tex. Bd. of Private Invest. & Private Sec. Agencies, 7 Tex. Reg. 1511, 1512 (1982) (effective Apr. 26, 1982) (codified at Tex. Bd. of Private Invest. & Private Sec. Agencies, 22 TEX. ADMIN. CODE § 423.1(h)), repealed by Tex. Bd. of Private Invest. & Private Sec. Agencies, 9 Tex. Reg. 1471 (1984) (effective Mar. 26, 1984); Tex. Bd. of Private Invest. & Private Sec. Agencies, 8 Tex. Reg. 5096, 5097, adopted 9 Tex. Reg. 1471 (1984) (effective Mar. 26,



FIGURE 8. TASTE OF TEXAS EMBLEM

16 April 1984 to present, official design.

The first flag desecration act was passed in 1917.⁷⁶ Prohibited conduct was very broad:

Any person who in any manner, for exhibition or display, shall after this Act takes effect, place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature, upon any flag, standard, color or ensign of the United States, or State flag of this State or ensign, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which after this Act takes effect, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall after the first day of September, 1917, expose to public view, manu-

1984) (codified at Tex. Bd. of Private Invest. & Private Sec. Agencies, 22 TEX. ADMIN. CODE § 423.1(e) (Supp. 1991-1992)) (prohibiting the use of state flag by private investigators and private security officers except for identification and license items prepared or issued by the board).

76. Act approved Mar. 29, 1917, 35th Leg., R.S., ch. 123, 1917 Tex. Gen. Laws 320, amended by Act approved Oct. 16, 1917, 35th Leg., 3d C.S., ch. 22, 1917 Tex. Gen. Laws 81, civil provisions repealed and codified by Revised Statutes, 39th Leg., R.S., § 1, arts. 6139-6142, § 2, 1925 Tex. Rev. Civ. Stat. 2, 1747-48 (codification), 2419 (repealer) (current version of civil provisions at TEX. REV. CIV. STAT. ANN. arts. 6139-6142 (West 1970)), criminal provisions repealed and codified by Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 1, arts. 148, 149, § 3, art. 1, 1925 Tex. Crim. Stat. 2, 30-31 (codification), 181 (repealer), criminal provisions repealed by Penal Code, 63d Leg., R.S., ch. 399, § 3(a), 1973 Tex. Gen. Laws 883, 991.

There is one attorney general opinion that interprets former Penal Code article 148. Op. Tex. Att'y Gen. No. O-2520 (1940) (picture showing Betsy Ross making the first American flag and displaying the words "Bottle of Pearl [Beer] Please, San Antonio Brewing Association—Established 1886" violates article 148).

facture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which after this Act takes effect, shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance, on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine, not exceeding one hundred dollars or by imprisonment for not more than thirty days or both, in the discretion of the court; and shall also forfeit a penalty of fifty dollars for each such offence, to be recovered with costs in a civil action or suit, in any court having jurisdiction, and such action or suit may be brought by and in the name of any citizen of this State⁷⁷

The State and its citizens were apparently more eager to enforce this law than the legislature expected. Less than two months after it became effective, the Act was amended so that it did not apply to:

any Act permitted by the Statutes of the United States of America, or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant or commission of appointment to office, ornamental picture, article of jewelry or stationery for use in correspondence, or any of which shall be printed, painted, or placed said flag, disconnected from any advertisement.⁷⁸

Although the criminal provisions of this law were repealed and replaced,

77. Act approved Mar. 29, 1917, § 1, 1917 Tex. Gen. Laws at 320. This Act is almost identical to a law passed by Congress that was applicable only to the District of Columbia. Act approved Feb. 8, 1917, ch. 34, 39 Stat. 900, *repealed and codified by* Act approved July 30, 1947, ch. 389, sec. 1, § 3, sec. 2, 61 Stat. 641, 642 (codification), 645 (repealer), *amended by* Act approved July 5, 1968, Pub. L. No. 90-381, sec. 3, 82 Stat. 291, 292 (codified at 4 U.S.C. § 3 (1988)).

78. Act approved Oct. 16, 1917, 35th Leg., 3d C.S., ch. 22, § 1, 1917 Tex. Gen. Laws 81, 82, *civil provisions repealed and codified by* Revised Civil Statutes, 39th Leg., R.S., § 1, art. 6142, § 2, 1925 Tex. Rev. Civ. Stat. 2, 1748 (codification), 2419 (repealer) (current version of civil provisions at TEX. REV. CIV. STAT. ANN. art. 6142 (West 1970)), *criminal provisions repealed and codified by* Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 1, art. 149, § 3, art. 1, 1925 Tex. Crim. Stat. 2, 31 (codification), 181 (repealer), *criminal provisions repealed by* Penal Code, 63d Leg., R.S., ch. 399, § 3(a), 1973 Tex. Gen. Laws 883, 991.

Section 2 of the October 1917 Act stated that "the construction of that [March 1917] law has been more strict than was contemplated when passed." Act approved Oct. 16, 1917, 35th Leg., 3d C.S., ch. 22, § 2, 1917 Tex. Gen. Laws 81, 83, *civil provisions repealed by* Revised Civil Statutes, 39th Leg., R.S., § 2, 1925 Tex. Rev. Civ. Stat. 2, 2419, *criminal provisions repealed by* Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 3, art. 1, 1925 Tex. Crim. Stat. 2, 181. One suspects that the original Act was met by howls of protest.

the civil provisions were left off the list of laws to be repealed by the 1973 Penal Code and are still in effect.⁷⁹

During World War I, Texas passed the so-called "Disloyalty Act":⁸⁰

SECTION 1. If any person shall, at any time or place within this State, during the time the United States of America is at war with any other nation, use any language in the presence and hearing of another person, . . . of and concerning any flag, standard, color, or ensign of the United States of America, or any imitation thereof, . . . which language is disloyal to the United States of America, or abusive in character, and calculated to bring into disrepute . . . any flag, standard, color, or ensign of the United States of America, or any imitation thereof, or the flag, standard, color, or ensign, or the uniform of any officer of the army of the United States of America, or is of such nature as to be reasonably calculated to provoke a breach of the peace, if said in the presence and hearing of a citizen of the United States of America, shall be deemed guilty of a felony, and shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than twenty-five years.

SEC. 2. Any person who shall, at any time or place within this State, during the time the United States is at war with any other nation, or nations, commit to writing or printing, or both writing and printing, by letters, words, signs, figures, or any other manner, and in any language, anything of and concerning . . . any flag, standard, color, or ensign of the United States, or any imitation thereof, . . . which is abusive in character, or disloyal to the United States, and reasonably calculated to bring into disrepute . . . any flag, standard, color, or ensign of the United States, or that of any of its officers, and reasonably calculated to provoke a breach of the peace if written to or in the presence of any citizen of the United States, or if said in the presence and hearing of any citizen of the United States shall be deemed guilty of a felony, and shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than twenty-five years.

SEC. 3. Any person who shall, within this State, publicly or privately, mutilate, deface, defile, defy, tramp upon, or cast contempt upon, either by words or acts, any flag, standard, color, or ensign of the United States, or that of any of its officers, or on any

79. TEX. REV. CIV. STAT. ANN. arts. 6139-6142 (West 1970); see Seth S. Searcy III & James R. Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 42.09 (West 1989). The proposed 1970 revision of the Penal Code placed articles 6139 to 6142 of the Revised Statutes on the list of statutes to be repealed, but the 1973 Penal Code failed to repeal them. TEX. PENAL CODE app. A, tbl. 3 (State Bar of Tex. Comm. on Revision of the Penal Code, Final Draft 1970); Searcy & Patterson, *supra*.

80. Act of Mar. 11, 1918, 35th Leg., 4th C.S., ch. 8, 1918 Tex. Gen. & Spec. Laws 12, repealed and codified by Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 1, arts. 152-156, § 3, art. 1, 1925 Tex. Crim. Stat. 2, 31-33 (codification), 181 (repealer), repealed by Penal Code, 63d Leg., R.S., ch. 399, § 3(a), 1973 Tex. Gen. Laws 883, 991.

imitation of either of them, shall be deemed guilty of a felony, and shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than twenty-five years.

SEC. 4. Any person who, during the existence of the war between the United States and any other nation, or nations, shall knowingly, within this State, display, or have in his possession for any purpose whatsoever, any flag, standard, color, or ensign, or coat of arms of any nation with which the United States is at war, or any imitation thereof, or that of any State, subdivision, city, or municipality of any such nation, shall be deemed guilty of a felony, and shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than twenty-five years.⁸¹

In 1920, the Court of Criminal Appeals of Texas held that section 1 of the Disloyalty Act violated the free speech provision of the Texas Constitution.⁸² Section 1 was held unconstitutional because it prohibited disloyal language per se, without requiring that the language be uttered under circumstances reasonably calculated to provoke a breach of the peace.⁸³ That same court in 1971, however, upheld a conviction for flag burning brought under the provisions of article 152 of the 1925 Penal Code, formerly section 3 of the Disloyalty Act.⁸⁴

The most famous law affecting the flag is former section 42.09 of the

81. Act of Mar. 11, 1918, 35th Leg., 4th C.S., ch. 8, §§ 1-4, 1918 Tex. Gen. & Spec. Laws 12, 13-14, *repealed and codified by* Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 1, arts. 152-156, § 3, art. 1, 1925 Tex. Crim. Stat. 2, 31-33 (codification), 181 (repealer), *repealed by* Penal Code, 63d Leg., R.S., ch. 399, § 3(a), 1973 Tex. Gen. Laws 883, 991. Note that the flag desecration provisions of section 3 did not require the existence of a state of war as a prerequisite for an offense.

82. *Ex parte Meckel*, 87 Tex. Crim. 120, 220 S.W. 81 (1920); *see generally* TEX. CONST. art. I, § 8. The court of criminal appeals is the highest appellate court in Texas for criminal matters.

83. *Meckel*, 220 S.W. at 84.

84. *Deeds v. State*, 474 S.W.2d 718 (Tex. Crim. App. 1971) (burning American flag in public park in Dallas); *see generally* Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 1, art. 152, 1925 Tex. Crim. Stat. 2, 32, *repealed by* Penal Code, 63d Leg., R.S., ch. 399, § 3, 1973 Tex. Gen. Laws 883, 991. Other appellate decisions upholding convictions for flag desecration are *Renn v. State*, 495 S.W.2d 922 (Tex. Crim. App. 1973) (displaying American flag on which the stars were replaced by a peace sign), *overruled on other grounds by* *Burrell v. State*, 526 S.W.2d 799, 804 (Tex. Crim. App. 1975); *Van Slyke v. State*, 489 S.W.2d 590 (Tex. Crim. App. 1973) (stomping on, blowing nose on, and masturbating with an American flag), *appeal dismissed*, 418 U.S. 907 (1974); *Holland v. State*, 489 S.W.2d 594 (Tex. Crim. App. 1973) (companion case to *Van Slyke*); *Case v. State*, 489 S.W.2d 593 (Tex. Crim. App. 1973) (companion case to *Van Slyke*); and *Delorme v. State*, 488 S.W.2d 808 (Tex. Crim. App. 1973) (wearing American flag on pants).

The court of criminal appeals in *Delorme* noted that the severity of the penalty in article 152 (2 to 25 years) was far greater than in other jurisdictions, but stated that the penalty was a matter for the legislature to consider, not the courts. *Delorme*, 488 S.W.2d at 811 n.3.

1973 Penal Code, the flag desecration statute.⁸⁵ The law stated that:

(a) A person commits an offense if he intentionally or knowingly desecrates:

(3) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.⁸⁶

This statute was declared unconstitutional under the federal constitution by both the Court of Criminal Appeals of Texas and the United States Supreme Court in the celebrated flag burning case, *Johnson v. State*.⁸⁷

The legislature responded to the *Johnson* decision by enacting a new flag desecration statute.⁸⁸ This law attempts to circumvent the *Johnson* opinion by removing the requirement that the act of desecration must

85. Penal Code, 63d Leg., R.S., ch. 399, sec. 1, § 42.09, 1973 Tex. Gen. Laws 883, 957, amended by Act of May 29, 1989, 71st Leg., R.S., ch. 1253, § 2, 1989 Tex. Gen. Laws 5055, 5056, amended by Act of July 17, 1989, 71st Leg., 1st C.S., ch. 27, § 2, 1989 Tex. Gen. Laws 94, 94 (deleting provision relating to desecration of a state or national flag), repealed by Act of Aug. 25, 1991, 72d Leg., 2d C.S., ch. 10, § 11.17, 1991 Tex. Gen. Laws 180, 207 (repeal effective Sept. 1, 1994).

86. *Id.* At the time former section 42.09 of the Penal Code was in effect, a Class A misdemeanor was punishable by a fine not to exceed \$2,000.00 and/or confinement in jail for a term not to exceed one year. Penal Code, 63d Leg., R.S., ch. 399, sec. 1, § 12.21, 1973 Tex. Gen. Laws 883, 907, amended by Act of May 2, 1991, 72d Leg., R.S., ch. 108, sec. 1, § 12.21, 1991 Tex. Gen. Laws 681, 681, repealed by Act of Aug. 25, 1991, 72d Leg., 2d C.S., ch. 10, § 11.17, 1991 Tex. Gen. Laws 180, 207 (repeal effective Sept. 1, 1994) (current version at TEX. PENAL CODE ANN. § 12.21 (West Supp. 1992)) (fine currently may not exceed \$3000.00).

87. 755 S.W.2d 92 (Tex. Crim. App. 1988), *aff'd sub nom.* Texas v. Johnson, 491 U.S. 397 (1989). In holding that the statute was unconstitutional, the court of criminal appeals stated that its previous holding in *Deeds v. State* was no longer good authority. *Johnson*, 755 S.W.2d at 94; *Deeds*, 474 S.W.2d 718 (Tex. Crim. App. 1971).

It is interesting to note that the trial-court judge who presided over the *Deeds* trial, John C. Vance, is the same judge who wrote the court of appeals opinion in *Johnson*. The Dallas Court of Appeals affirmed *Johnson*'s conviction for flag desecration, but was reversed by the court of criminal appeals. *Johnson v. State*, 706 S.W.2d 120 (Tex. App.—Dallas 1986), *rev'd*, 755 S.W.2d 92 (Tex. Crim. App. 1988), *aff'd sub nom.* Texas v. Johnson, 491 U.S. 397 (1989). Justice Vance later became criminal district attorney of Dallas County and in that position he unsuccessfully appealed the court of criminal appeals decision in *Johnson* to the United States Supreme Court.

The legislature registered its strong opposition to the United States Supreme Court's opinion in *Johnson* by petitioning the Congress to propose an amendment to the Constitution to protect "the American flag and 50 state flags from wilful desecration." Tex. H.R. Con. Res. 18, 71st Leg., 1st C.S., 1989 Tex. Gen. Laws 154, 155.

88. Act of July 17, 1989, 71st Leg., 1st C.S., ch. 27, § 1, 1989 Tex. Gen. Laws 94, 94, repealed by Act of Aug. 25, 1991, 72d Leg., 2d C.S., ch. 10, § 11.17, 1991 Tex. Gen. Laws 180, 207 (repeal effective Sept. 1, 1994) (current version at TEX. PENAL CODE ANN. § 42.14 (West Supp. 1992)).

“seriously offend one or more persons likely to observe or discover” the action.⁸⁹ The current law states as follows:

(a) A person commits an offense if the person intentionally or knowingly damages, defaces, mutilates, or burns the flag of the United States or the State of Texas.

(b) In this section, “flag” means an emblem, banner, or other standard or a copy of an emblem, standard, or banner that is an official or commonly recognized depiction of the flag of the United States or of this state and is capable of being flown from a staff of any character or size. The term does not include a representation of a flag on a written or printed document, a periodical, stationery, a painting or photograph, or an article of clothing or jewelry.

(c) It is an exception to the application of this section that the act that would otherwise constitute an offense is done in conformity with statutes of the United States or of this state relating to the proper disposal of damaged flags.

(d) An offense under this section is a Class A misdemeanor.⁹⁰

This new law is almost certainly unconstitutional in light of the United States Supreme Court’s decision in a 1990 flag desecration case, *United States v. Eichman*.⁹¹

III. TEXAS SEALS

A. *The Republic of Texas*

There is no reference to an official seal in the records of the Provisional Government of Texas. The general convention, however, did adopt an emblem for the Republic:

Mr. Childress introduced the following resolution: Resolved that a single star of five points, either of gold or silver, be adopted as the peculiar emblem of this republic: & that every officer & soldier of the army and members of this convention, and all friends of Texas, be requested to wear it on their hats or bosoms: which was adopted.⁹²

89. See *supra* text accompanying note 86.

90. Act of July 17, 1989, § 1, 1989 Tex. Gen. Laws at 94. For the punishment for a Class A misdemeanor see *supra* note 86.

91. 110 S. Ct. 2404 (1990) (construing the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (1988 & Supp. I 1989))).

92. THE GENERAL CONVENTION AT WASHINGTON 70 (1838), reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 890 (Austin, Gammel Book Co. 1898).

The five-pointed star was not an element in the government seal of the State of Coahuila and Texas: “The seal shall contain, within the figure of an elipses [sic], the eagle upon a nopal, crowned with the cap of liberty, with lines diverging therefrom, representing rays of light; the border of the oval bearing the following inscription: ‘Executive Department of the State of Coahuila and Texas.’” Laws and Decrees, State of Coahuila and Texas, Decree no. 19, art. 54 (1825), translated in LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 25, 32

The Texas Constitution of 1836 implies there was no pre-existing seal because it states that “[t]he president shall make use of his private seal until a seal of the republic shall be provided.”⁹³

The Texas Congress provided for a seal in 1836 (figure 9):

*Be it enacted by the senate and house of representatives of the republic of Texas, in congress assembled, That for the future the national seal of this republic shall consist of a single star, with the letters “Republic of Texas,” circular on said seal, which said seal shall also be circular.*⁹⁴

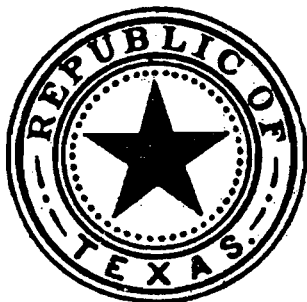


FIGURE 9. 1836 NATIONAL SEAL

10 December 1836 to 25 January 1839, design varies.

This seal currently is used on publications of the Texas State Historical Association.

The Texas Congress acted in 1839 to establish a national arms and to modify the national seal (see *supra* figure 4):

Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That from and after the passage of this act, the national arms of the Republic of Texas be, and the same is hereby declared to be a white star of

(J.P. Kimball trans. 1839), reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 135, 142 (Austin, Gammel Book Co. 1898).

93. REPUB. TEX. CONST. of 1836, general provisions § 4. Even though an actual seal did not exist, the 1836 Texas Constitution provided that “[t]here shall be a seal of the republic, which shall be kept by the president, and used by him officially; it shall be called the great seal of the republic of Texas.” *Id.* at art. VI, § 8.

94. Act approved Dec. 10, 1836, 1st Cong., R.S., § 1, 1836-1837 Repub. Tex. Laws 72, 72, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1132, 1132 (Austin, Gammel Book Co. 1898), amended by Act approved Jan. 25, 1839, 3d Cong., R.S., § 2, 1838-1839 Repub. Tex. Laws 87, 88, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87, 88 (Austin, Gammel Book Co. 1898), repealed by TEX. CONST. of 1845, art. XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force); see also TEX. CONST. of 1845, art. V, § 14 (state seal). For the legislative history of the Act, see *supra* note 22.

five points, on an azure ground, encircled by an olive and live oak branches.

Sec. 2. Be it further enacted, That the national great seal of this Republic shall, from and after the passage of this act, bear the arms of this nation as declared by the first section of this act, and the letters "Republic of Texas."⁹⁵

B. *The State of Texas*

The original state constitution included a description of the seal; however, it omitted the provision that the star be on an azure ground: "There shall be a seal of the State, which shall be kept by the Governor and used by him officially. The said seal shall be a star of five points, encircled by an olive and live oak branches, and the words 'the State of Texas.'"⁹⁶ With minor variations in capitalization and punctuation, this same description of the seal has appeared in all of the succeeding constitutions.⁹⁷ The current constitution provides that the seal shall be kept "by the secretary of state, and used by him officially under the direction of the governor."⁹⁸ The law requires that a duplicate seal be stored in a

95. Act approved Jan. 25, 1839, 3d Cong., R.S., §§ 1-2, 1838-1839 Repub. Tex. Laws 87, 87-88, reprinted in 2 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-1897*, at 87, 87-88 (Austin, Gammel Book Co. 1898), § 1 repealed by Revised Statutes, 16th Leg., R.S., § 4, 1879 Tex. Rev. Civ. Stat. 718, § 2 repealed by TEX. CONST. of 1845, art. XIII, § 3 (existing laws repugnant to United States Constitution and 1845 Texas Constitution not continued in force); see also TEX. CONST. of 1845, art. V, § 14 (state seal). Accompanying the original Act, in the custody of the State Library and Archives Commission, is a drawing by Peter Krag of the national flag and seal. See Kemp, *supra* note 17, at page following 488 (color reproduction of art, although in the original President Lamar's approval and signature are at the top and upside down).

The word "azure" in heraldry simply means blue, not any particular shade of blue. See RICHARD S. PATTERSON & RICHARDSON DOUGALL, *THE EAGLE AND THE SHIELD: A HISTORY OF THE GREAT SHIELD OF THE UNITED STATES* 548-50 (1976).

Mamie Wynne Cox erroneously states that the seal was altered on January 7, 1839, and that the changes adopted on January 25, 1839, included the letters T-E-X-A-S between the points of the Lone Star. COX, *supra* note 10, at 300-01.

96. TEX. CONST. of 1845, art. V, § 14. The 1845 Texas Constitution went into effect on the date of the state government's organization, February 16, 1846. TEX. CONST. of 1845, art. XIII, § 6. The 1839 national seal, therefore, served as the state seal from December 29, 1845, to February 16, 1846.

97. TEX. CONST. of 1869, art. IV, § 18; TEX. CONST. of 1866, art. V, § 14; TEX. CONST. of 1861, art. V, § 14.

98. TEX. CONST. art. IV, § 19; see Tex. Sec'y of State, 10 Tex. Reg. 4562 (1985), adopted 11 Tex. Reg. 126 (1986) (effective Jan. 24, 1986), repealed in part and amended in part by Tex. Sec'y of State, 11 Tex. Reg. 2408 (emerg. rule), proposed 11 Tex. Reg. 2412, adopted 11 Tex. Reg. 3258 (1986) (effective July 29, 1986), amended by Tex. Sec'y of State, 12 Tex. Reg. 1807 (emerg. rule), proposed 12 Tex. Reg. 1809, adopted 12 Tex. Reg. 2566 (1987) (effective Aug. 24, 1987), amended by Tex. Sec'y of State, 15 Tex. Reg. 4427 (emerg. rule), proposed 15 Tex. Reg. 4429, adopted 15 Tex. Reg. 6187 (1990) (effective Nov. 7, 1990) (codified at Tex. Sec'y of State, 1 TEX. ADMIN. CODE § 71.40 (Supp. 1991-1992)) (definition of seal).

facility designed to withstand blast, fire, water, and other destructive forces.⁹⁹ A number of different representations of the seal have appeared on publications issued by the secretary of state throughout the years.

In November 1946, the National Guard Bureau advised all states that the Air Force wanted state national guard aircraft to bear identifying insignia on the fuselage. The Texas adjutant general had the design of the seal thoroughly researched and requested that Mr. Octavio Martinez prepare an eighteen and three-fourths inch realization of the seal in 1956. Five copies of this design were later executed by Mr. Henry W. Schlattner in 1960 and presented to Governor Price Daniel, the Battleship *Texas*, the Texas Memorial Museum, and both houses of the Texas Legislature in a joint session on April 5, 1961 (figure 10).¹⁰⁰

In April 1991 Secretary of State John Hannah, Jr., appointed the Texas State Seal Advisory Committee to formulate recommendations on the design of the state seal in response to the concerns of several state agencies about a lack of uniformity in the seal's appearance. The members of this committee are the author, committee chair; Donna D. Darling, committee cochair, Texas Water Development Board; Michael R. Green, Texas State Library and Archives Commission; Randy Jennings, Texas Rehabilitation Commission; Guy Joyner, Office of the Secretary of State; Shari Massingill, Texas Department of Health; Colonel John C.L. Scribner, Adjutant General's Department; Kimberly T. Sutton, Office of the Secretary of State; Ron Tyler, Texas State Historical Association; Juan Vega, Texas Water Development Board; and Douglas Young, State Preservation Board. The committee researched the history of the state seal and recommended that the Texas Memorial Museum's 1960 watercolor by Henry W. Schlattner be used as a model.¹⁰¹ In January 1992, the committee recommended that the secretary of state adopt official art for the state seal (figure 11) and state arms (figure 12), both designed by Juan Vega. If this recommendation is accepted by the secretary of state,

99. Preservation of Essential Records Act, 59th Leg., R.S., ch. 548, § 12, 1 1965 Tex. Gen. Laws 1161, 1163, *repealed and codified by* Act of Apr. 30, 1987, 70th Leg., R.S., ch. 147, sec. 1, § 441.059(a); sec. 6(a), 1987 Tex. Gen. Laws 316, 493 (codification), 534 (repealer) (current version at TEX. GOV'T CODE ANN. § 441.059(a) (West 1990)).

100. Tex. H.R. Con. Res. 49, 57th Leg., R.S., 1961 Tex. Gen. Laws 1264 (calling a joint session of the legislature to receive framed seals from the Texas Heritage Foundation and the Adjutant General's Department); H.J. OF TEX., 57th Leg., R.S. 956 (1961) (text of Major General K.L. Berry's speech to joint session of the legislature). For photographs of the presentations to Governor Daniel, the Texas Memorial Museum, and the Texas House of Representatives, see 3 TEX. HERITAGE 106, 111, 113 (1961). A color photograph of the Schlattner art appears in TEXAS LEGISLATIVE COUNCIL, THE TEXAS CAPITOL: SYMBOL OF ACCOMPLISHMENT 63 (4th ed. 1986).

101. See generally Lynn Ashby, *It's a Great Seal but Which Seal*, HOUSTON POST, July 21, 1991, at C1.



FIGURE 10. SCHLATTNER ART FOR STATE SEAL
1960. Photograph courtesy of the Texas Memorial Museum, accession
number 1746.

the state arms will regain official recognition for the first time since it was inadvertently repealed in 1879.¹⁰²

Some question exists about whether the state seal should be denominated "The Great Seal of Texas." The constitution refers to the seal as the "seal of the State" or "State seal," while some statutes refer to the

102. See *supra* note 95. The description of the old national arms is the only source for the azure background of the state seal. The 1839 law defined the national arms, then defined the national seal as bearing the arms with the letters "Republic of Texas." Act approved Jan. 25, 1839, §§ 1-2, 1838-1839 Repub. Tex. Laws at 87-88, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 87-88 (Austin, Gammel Book Co. 1898).



FIGURE 11. STATE SEAL

16 February 1846 to present, proposed official design. © State of Texas. Used by permission.

“great seal”.¹⁰³ The better view is to refer to it simply as the “state seal” because this is what the seal is called in all of the state constitutions and because the Supreme Court of Texas has defined the words “great seal” to mean the seal of a nation, not a state.¹⁰⁴

C. *The Reverse of the State Seal*

A design for the reverse of the state seal was proposed by the

103. TEX. CONST. art. IV, § 19; *see, e.g.*, Act of Apr. 17, 1969, 61st Leg., R.S., ch. 111, 1969 Tex. Gen. Laws 282 (current version at TEX. REV. CIV. STAT. ANN. art. 6144h, § 7(a) (West 1970)) (Texas Distinguished Service Medal).

104. *Phillips v. Lyons*, 1 Tex. 392, 394-95 (1846). *See supra* notes 93, 96, 97 and accompanying text; *infra* note 116.



FIGURE 12. STATE ARMS

Proposed official design. © 1992 State of Texas. Used by permission.

Daughters of the Republic of Texas, and this design was adopted by the legislature in 1961 (figure 13). The seal's reverse is described as:

a shield, the upper half of which is divided in two parts; on the left stands the famous cannon of the first battle of the Texas Revolution at Gonzales, well-remembered for the Texans' use of the flag bearing the words "Come and Take it"; on the right is depicted "Vince's Bridge," which Deaf Smith destroyed during the Battle of San Jacinto, a move which has been named by military tacticians as strategic to victory for the Texans. The shield is circled by the same wreath of live oak and olive now used in the Great Seal of Texas. Circling the shield are unfurled the flags of France, Spain, and Mexico, the Republic of Texas, the Confederate States of America, and the United States. Above the shield is emblazoned the motto, "Remember the Alamo," and beneath it are the words, "Texas One and Indivisible." Over all hangs the golden Lone Star,

symbolic of Texas as a Republic and as a State¹⁰⁵

This design took effect on August 26, 1961.¹⁰⁶

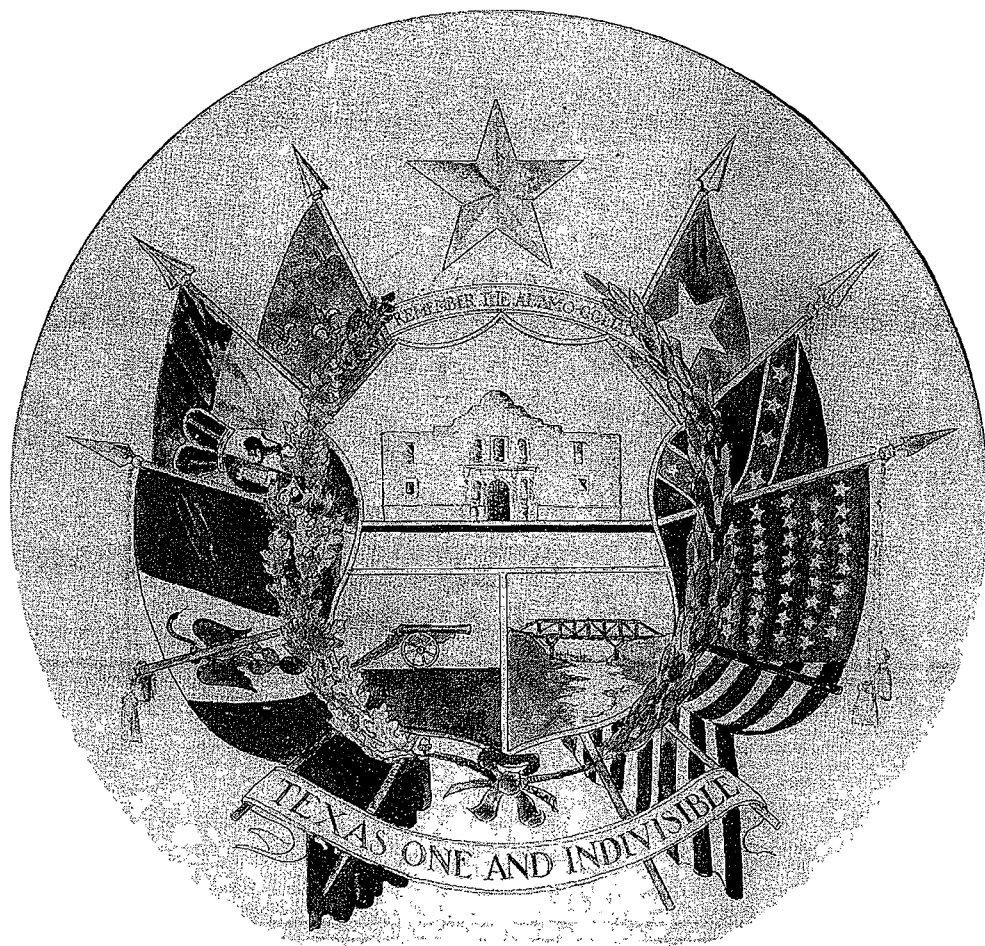


FIGURE 13. REVERSE OF STATE SEAL

26 August 1961 to 14 June 1991, official design. Photograph courtesy of the State Preservation Board.

The official art for the reverse of the state seal that was adopted in

105. Tex. H.R. Con. Res. 2, 57th Leg., 2d C.S., 1961 Tex. Gen. Laws 521; see Tex. Sec'y of State, 11 Tex. Reg. 2408 (emerg. rule), *proposed* 11 Tex. Reg. 2412, *adopted* 11 Tex. Reg. 3258 (1986) (effective July 29, 1986), *amended by* Tex. Sec'y of State, 12 Tex. Reg. 1807 (emerg. rule), *proposed* 12 Tex. Reg. 1809, *adopted* 12 Tex. Reg. 2566 (1987) (effective Aug. 24, 1987), (codified at Tex. Sec'y of State, 1 TEX. ADMIN. CODE § 71.40) (Supp. 1991-1992)) (definition of reverse of seal). A color photograph of the art appears in TEXAS LEGISLATIVE COUNCIL, *supra* note 100. *amended by* Tex. Sec'y of State, 15 Tex. Reg. 4427 (emerg. rule), *proposed* 15 Tex. Reg. 4429, *adopted* 15 Tex. Reg. 6187 (1990) (effective Nov. 7, 1990).

106. The Texas Constitution provides that resolutions take effect when the governor signs them. TEX. CONST. art. IV, § 15.

1961 differs in several respects from the resolution's description. The art depicts the Alamo in the upper half of the shield, although the resolution states that the upper half contains the cannon at Gonzales and Vince's Bridge. In fact, the resolution does not include the Alamo in the shield and fails to describe the shield's lower half. The motto in the art is "Remember the Alamo-Goliad," adding the word "Goliad."

The flags circling the shield as depicted in 1961 include: (1) the banner of France as it appeared before the reign of Charles V (1364-1380) (the proper flag would be the circa 1643-1790 state flag); (2) the 1793-1931 state flag of Spain; (3) the 1823 flag of Mexico with its imperial eagle (as opposed to the current Aztec eagle); (4) the Lone Star Flag of Texas (although the location of the star makes this look like the flag of Chile); (5) the naval jack of the Confederate States of America (the proper flag would be either the Stars and Bars or one of the two official flags of the Confederacy, the Stainless Banner and the version containing a red bar in the fly); and (6) the forty-eight star United States flag (as opposed to either the official fifty star flag or the 1846-1847 twenty-eight star flag).¹⁰⁷

Four other problems with the reverse of the state seal adopted in 1961 are: the depiction of the live oak wreath; the cannon; the position of the United States flag; and the golden Lone Star, which supposedly symbolizes Texas as a republic and as a state. First, the official art depicts a wreath of post oak, not live oak, a problem with many of the designs of the obverse, or front, of the state seal. Second, the cannon depicted looks very different from the actual cannon displayed in the Daughters of the Republic of Texas museum in Gonzales, which is much shorter and has solid, rather than spoked, wheels. Third, the forty-eight star United States flag is shown, which was obsolete in 1961, and the flag is not shown in the proper position of honor, i.e., to the observer's top left-center, assuming the artist intended to depict the official fifty star flag.¹⁰⁸ Finally, with the exception of the 1836 national standard, the Lone Star on the flag and seal has always been white.

In 1991 the legislature adopted a revised design for the reverse of the state seal to eliminate the errors and omissions previously described:

RESOLVED, That the design for the reverse side of the Great Seal of Texas shall consist of a shield, the lower half of which is

107. See SMITH, note 17, at 12-13, 16 n.* (France); 8-9 (Spain); 25 (Mexico); 212-13 (Texas); 264-65, 272-73 (Confederate States of America); 282 (United States).

108. See 36 U.S.C. § 175(c) (1988) ("No other flag or pennant should be placed above or, if on the same level, to the right [the observer's left] of the flag of the United States of America."). The current fifty star flag became official on July 4, 1960. Exec. Order No. 10,834, § 31, 3 C.F.R. 367, 369 (1959-1963), *reprinted in* 4 U.S.C. § 1 app. at 411, 412 (1988).

divided into two parts; on the shield's lower left is a depiction of the cannon of the Battle at Gonzales; on the shield's lower right is a depiction of Vince's Bridge; on the upper half of the shield is a depiction of the Alamo; the shield is circled by live oak and olive branches, and the unfurled flags of the Kingdom of France, the Kingdom of Spain, the United Mexican States, the Republic of Texas, the Confederate States of America, and the United States of America; above the shield is emblazoned the motto, "REMEMBER THE ALAMO", and beneath the shield are the words, "TEXAS ONE AND INDIVISIBLE"; over the entire shield, centered between the flags, is a white five-pointed star¹⁰⁹

The revised design was adopted at the request of the State Preservation Board, based on the recommendations of the Texas State Seal Advisory Committee.¹¹⁰ The revision was necessary because the reverse of the state seal will be rendered in stone on the rotunda floor of the underground expansion of the Texas Capitol. The legislature established the description of the reverse of the state seal as the official design, rather than adopting specific art as was done in 1961. This design took effect on June 14, 1991.¹¹¹ In January 1992, the Texas State Seal Advisory Committee recommended that the secretary of state adopt official art for the reverse of the state seal (figure 14).¹¹² Alfred Znamierowski painted the first draft of the art for the reverse under the supervision of Whitney Smith, executive director of the Flag Research Center, and Douglas Young of the State Preservation Board completed the proposed official art.

Technically the design of the seal's reverse is not a law because it was passed by the legislature in the form of a concurrent resolution and not as a bill.¹¹³ For this reason, the West Publishing Company did not include the 1961 description of the seal's reverse in *Texas Revised Civil Statutes Annotated*.¹¹⁴ The design is an expression of the legislature's will, but it does not have the effect of law.

109. Tex. S. Con. Res. 159, 72d Leg., R.S., 1991 Tex. Gen. Laws 3369, 3369.

110. See *supra* note 101 and accompanying text. Besides various aesthetic considerations, the committee was particularly concerned about the inclusion of the confederate naval jack in the 1961 official design. This flag is both controversial and historically incorrect, so the committee recommended that the revised design merely refer to the flag of the Confederate States of America, thus allowing the artist to substitute the Stars and Bars for the naval jack.

111. See *supra* note 106.

112. See *supra* note 101 and accompanying text, note 110.

113. See TEX. CONST. art. III, § 30.

114. Letter from Richard J. Grambling, Associate Editor, West Publishing Company, to Charles Spain (July 12, 1988) (on file with the *South Texas Law Review*).

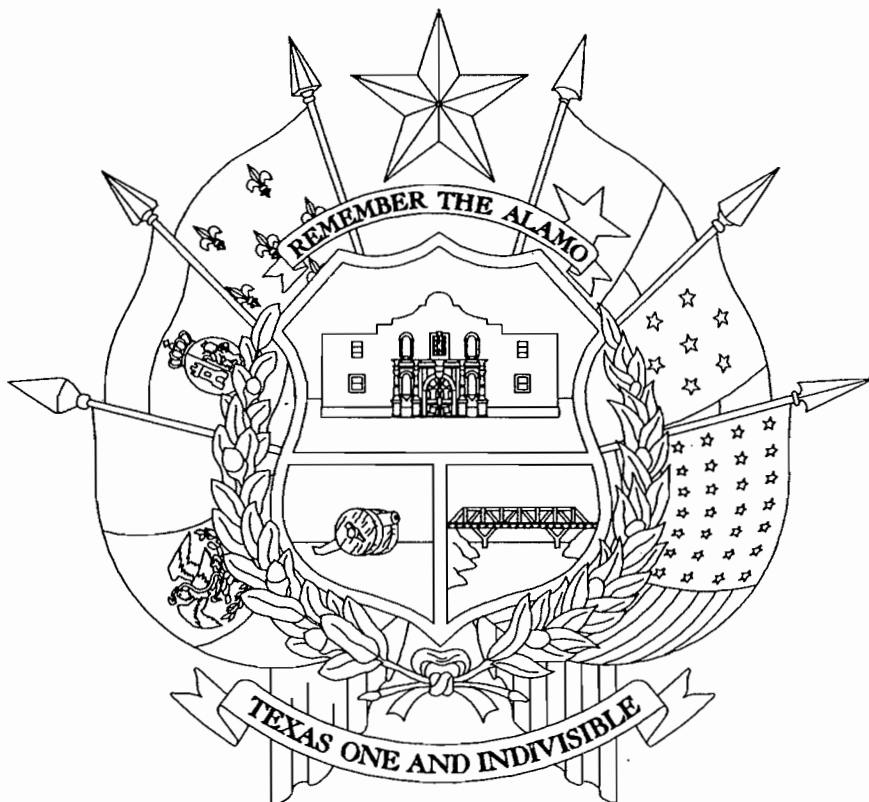


FIGURE 14. REVERSE OF STATE SEAL

14 June 1991 to present, proposed official design. © 1992 State of Texas. Used by permission.

D. Other Laws Affecting the Seal

State law requires that the seal be affixed to numerous documents. Patents for land from the state must be under both the state seal and the general land office seal.¹¹⁵ All commissions issued in the name and by

115. Act approved May 12, 1846, 1st Leg., R.S., § 7, 1846 Tex. Gen. Laws 232, 234, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1538, 1540 (Austin, Gammel Book Co. 1898), repealed and codified by Revised Statutes, 16th Leg., R.S., § 1, art. 3952, 1879 Tex. Rev. Civ. Stat. 2, 565 (codification), 718 (repealer), repealed and recodified by Revised Statutes, 24th Leg., R.S., § 1, art. 4175, 1895 Tex. Rev. Civ. Stat. 1, 821 (codification), 1103 (repealer), repealed and recodified by Revised Statutes, 32d Leg., R.S., § 1, art. 5361, 1911 Tex. Rev. Civ. Stat. 2, 1118 (codification), 1719 (repealer), repealed and recodified by Revised Statutes, 39th Leg., R.S., § 1, art. 5404, 1925 Tex. Rev. Civ. Stat. 2, 1523 (codification), 2419 (repealer), repealed and recodified by Natural Resources Code, 65th Leg., R.S., ch. 871, sec. 1, § 51.243(a), sec. 2(a)(1), 1977 Tex. Gen. Laws 2345, 2436 (codification), 2689 (repealer) (current version at TEX. NAT. RES. CODE ANN. § 51.243(a) (West 1978)); see Act of Apr. 29, 1943, 48th Leg., R.S., ch. 247, § 1, 1943 Tex. Gen. Laws 368, 369 (current version at

the authority of the state must be sealed, including commissions for the state military service.¹¹⁶ Executive acts of the governor in criminal cases are required to pass under the state seal, including remissions of fines, reprieves, commutations of punishment, and pardons.¹¹⁷ The state seal is required to be used on state bonds,¹¹⁸ branch pilot's commissions,¹¹⁹ and many other miscellaneous matters.¹²⁰ Finally, the secretary of state is

TEX. REV. CIV. STAT. ANN. art. 5421c-6 (West 1962)) (ratifying and validating certain patents).

116. TEX. CONST. art. IV, § 20 (use of state seal on commissions in general); Act presented Apr. 15, 1905, 29th Leg., R.S., ch. 104, § 35, 1905 Tex. Gen. Laws 167, 175, *repealed and codified* by Revised Statutes, 32d Leg., R.S., § 1, art. 5803, § 4, 1911 Tex. Rev. Civ. Stat. 2, 1234 (codification), 1719 (repealer), *repealed and recodified* by Revised Statutes, 39th Leg., R.S., § 1, art. 5801, § 2, 1925 Tex. Rev. Civ. Stat. 2, 1636 (codification), 2419 (repealer), *repealed and recodified* by Act of Apr. 25, 1963, 58th Leg., R.S., ch. 112, sec. 1, art. 5782, § 2, sec. 3, 1963 Tex. Gen. Laws 209, 214 (codification), 267 (repealer), *repealed and recodified* by Act of Apr. 30, 1987, 70th Leg., R.S., ch. 147, sec. 1, § 431.008, sec. 6, 1987 Tex. Gen. Laws 316, 417 (codification), 534 (repealer), *amended* by Act of Apr. 5, 1989, 71st Leg., R.S., ch. 13, § 1, 1989 Tex. Gen. Laws 291, 291 (current version at TEX. GOV'T CODE ANN. § 431.008 (West 1990)) (use of state seal on military commissions).

The 1836 Texas Constitution provides that "[a]ll grants and commissions shall be in the name and by the authority of the Republic of Texas, and shall sealed with the great seal, and signed by the President." REPUB. TEX. CONST. of 1836, art. VI, § 9. The 1845 Texas Constitution contains a similar provision: "All commissions shall be in the name and by the authority of the State of Texas, be sealed with the State seal, signed by the Governor and attested by the Secretary of State." TEX. CONST. of 1845, art. V, § 15; *see also* TEX. CONST. of 1869, art. IV, § 19; TEX. CONST. of 1866, art. V, § 15; TEX. CONST. of 1861, art. V, § 15.

117. Penal Code and Code of Criminal Procedure, 16th Leg., R.S., § 2, art. 987, 1879 Tex. Crim. Stat. 1, 116, *repealed and recodified* by Penal Code and Code of Criminal Procedure, 1895, 24th Leg., R.S., § 2, art. 1022, § 3, 1895 Tex. Crim. Stat. 2, 138 (codification), 182 (repealer), *implicitly repealed and recodified* by Penal Code and Code of Criminal Procedure, 32d Leg., R.S., § 2, art. 1057, 1911 Tex. Crim. Stat. 1, 288, *repealed and recodified* by Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 2, art. 958, § 3, art. 1, 1925 Tex. Crim. Stat. 2, 150 (codification), 181 (repealer), *repealed and recodified* by Code of Criminal Procedure, 59th Leg., R.S., ch. 722, sec. 1, arts. 48.03, 54.02, § 1(a), 2 1965 Tex. Gen. Laws 317, 538 (codification), 563 (repealer) (current version at TEX. CODE CRIM. PROC. ANN. art. 48.03 (West 1979)).

118. TEX. REV. CIV. STAT. ANN. art. 2606a, § 1 (West 1965) (1934 refunding bonds); TEX. REV. CIV. STAT. ANN. art. 4413(501), § 3.31 (West Supp. 1992) (Texas Housing Bonds); TEX. AGRIC. CODE ANN. § 252.051(g) (West 1982) (farm and ranch security bonds); TEX. EDUC. CODE ANN. § 52.11(h) (West 1987) (student loan bonds); TEX. GOV'T CODE ANN. § 465.025(d) (West Supp. 1992) (Texas National Research Laboratory Commission bonds); TEX. NAT. RES. CODE ANN. § 161.116(b) (West 1978) (Veterans Land Board bonds); TEX. NAT. RES. CODE ANN. § 162.036(b) (West Supp. 1992) (veterans housing assistance program bonds); TEX. PARKS & WILD. CODE ANN. § 21.013(c) (West 1991) (park development bonds); TEX. WATER CODE ANN. § 17.023 (West 1988) (water development bonds).

119. TEX. WATER CODE AUX. LAWS art. 8253 (West 1992); Houston Pilots Licensing and Regulatory Act, TEX. WATER CODE AUX. LAWS art. 8280a, § 4.06 (West 1992); Galveston County Pilots Licensing and Regulatory Act, TEX. WATER CODE AUX. LAWS art. 8280b, § 4.06(a) (West 1992); Brazoria County Pilots Licensing and Regulatory Act, TEX. WATER CODE AUX. LAWS art. 8280c, § 4.06(a) (West 1992).

120. The Securities Act, TEX. REV. CIV. STAT. ANN. art. 581-30 (West 1964) (securities

required to affix the seal to all official documents issued from his office.¹²¹

certificate under state seal constitutes prima facie evidence of compliance with act) (*see* State Secs. Bd., 7 TEX. ADMIN. CODE § 127.3 (1988) (effective Jan. 1, 1976) ("state seal" as used in section 30 of The Securities Act includes seal of State Securities Board)); The Public Facility Corporation Act, TEX. REV. CIV. STAT. ANN. art. 717s, § 4.058 (West Supp. 1992) (certificate of secretary of state under state seal); Texas Non-Profit Corporation Act, TEX. REV. CIV. STAT. ANN. art. 1396-9.06(A) (West 1980) (certificate of secretary of state under state seal); Electric Cooperative Corporation Act, TEX. REV. CIV. STAT. ANN. art. 1528b, § 8 (West 1980) (copy of articles of incorporation); Telephone Cooperative Act, TEX. REV. CIV. STAT. ANN. art. 1528c, § 7 (West 1980) (copy of articles of incorporation); TEX. REV. CIV. STAT. ANN. art. 6265 (West 1926) (certificate of articles of incorporation for railroad); TEX. AGRIC. CODE ANN. § 201.048(d) (West 1982) (certificate of organization for soil and water conservation district); TEX. BUS. CORP. ACT ANN. art. 9.05 (West 1980) (certificate of secretary of state under state seal); Uniform Criminal Extradition Act, TEX. CODE CRIM. PROC. ANN. art. 51.13, §§ 7, 22 (West 1979) (warrant of arrest); Health Facilities Development Act, TEX. HEALTH & SAFETY CODE ANN. § 221.104 (West 1992) (certificate of secretary of state under state seal); TEX. HEALTH & SAFETY CODE ANN. § 345.063(b) (West 1992) (bedding stamps); Tex. Dep't of Agric., 4 TEX. ADMIN. CODE § 21.11(c) (1989) (certified seed labels); Tex. Bd. of Barber Exam., 22 TEX. ADMIN. CODE §§ 51.36(b) (enrollment application), .37(a) (student certificate), .69 (physician's health certificate), .70 (class A registered barber's certificate), .71 (teacher's certificate), .73 (manicurist's certificate), .74 (journeyman barber's permit), .75 (assistant barber's certificate), .76 (licensed barber college certificate), .79 (barber shop permit) (1989); Tex. Dep't of Health, 25 TEX. ADMIN. CODE § 181.1 (Supp. 1991-1992) (certified copy of record on file with Bureau of Vital Statistics).

121. Act approved May 9, 1846, 1st Leg., R.S., § 3, 1846 Tex. Gen. Laws 189, 189, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1495, 1495 (Austin, Gammel Book Co. 1898), repealed and codified by Revised Statutes, 16th Leg., R.S., § 1, art. 2721, § 4, 1879 Tex. Rev. Civ. Stat. 2, 394 (codification), 718 (repealer), repealed and recodified by Revised Statutes, 24th Leg., R.S., § 1, art. 2803, § 4, 1895 Tex. Rev. Civ. Stat. 1, 545 (codification), 1103 (repealer), repealed and recodified by Revised Statutes, 32d Leg., R.S., § 1, art. 4305, § 4, 1911 Tex. Rev. Civ. Stat. 2, 875 (codification), 1719 (repealer), repealed and recodified by Revised Statutes, 39th Leg., R.S., § 1, art. 4331, § 2, 1925 Tex. Rev. Civ. Stat. 2, 1153 (codification), 2419 (repealer), amended by Act of May 1, 1981, 67th Leg., R.S., ch. 128, § 1, 1981 Tex. Gen. Laws 322, 322, repealed and recodified by Act of Apr. 30, 1987, 70th Leg., R.S., ch. 147, sec. 1, § 405.017, sec. 6, 1987 Tex. Gen. Laws 316, 364 (codification), 534 (repealer), amended by Act of May 25, 1989, 71st Leg., R.S., ch. 297, § 5, 1989 Tex. Gen. Laws 1255, 1256 (current version at TEX. GOV'T CODE ANN. § 405.017 (West 1990)); *see* Tex. Sec'y of State, 1 TEX. ADMIN. CODE § 71.8(b) (1988) (effective Jan. 1, 1976) (certification under state seal of document on file in office of secretary of state); *see also* Act approved Mar. 20, 1848, 2d Leg., R.S., ch. 131, § 1, 1847-1848 Tex. Gen. Laws 184, 184, reprinted in 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 184, 184 (Austin, Gammel Book Co. 1898) (state officers including secretary of state to furnish copies of papers, documents, or records, or with a certificate "attested by the seals of their respective offices," certifying to any facts contained therein), repealed and codified by Revised Statutes, 16th Leg., R.S., § 1, art. 2372, § 4, 1879 Tex. Rev. Civ. Stat. 2, 346 (codification), 718 (repealer), repealed and recodified by Revised Statutes, 24th Leg., R.S., § 1, art. 2436, § 4, 1895 Tex. Rev. Civ. Stat. 1, 481 (codification), 1103 (repealer), repealed and recodified by Revised Statutes, 32d Leg., R.S., § 1, art. 3833, § 4, 1911 Tex. Rev. Civ. Stat. 2, 786 (codification), 1719 (repealer), repealed and recodified by Revised Statutes, 39th Leg., R.S., § 1, art. 3913, § 2, 1925 Tex. Rev. Civ. Stat. 2, 1050 (codification), 2419 (repealer) (state officers including secretary of state to furnish copies of papers, documents, or records, or with a certificate "under seal," certifying to any facts contained therein), amended by Act of May 10, 1961, 57th Leg., R.S., ch. 222, § 1, 1961 Tex. Gen.

All documents deposited with the secretary of state and affixed with the state seal must be arranged and preserved.¹²² A facsimile of the seal may be printed, engraved, or stamped on public securities, contracts, checks, or similar documents that must be sealed. Use of a facsimile seal with intent to defraud on a public security, eligible contract, instrument of payment, or a certificate of assessment is punishable by confinement in the penitentiary for two to seven years.¹²³ It is a Class A misdemeanor for a person other than a political officeholder knowingly to use a representation of the state seal in political advertising.¹²⁴

Private use of the state seal is regulated. The seal may be used for commercial purposes only if a license is obtained from the secretary of state and royalties are paid.¹²⁵ These regulations do not apply to state

Laws 449, 449, amended by Act of May 28, 1965, 59th Leg., R.S., ch. 446, § 1, 1 1965 Tex. Gen. Laws 909, 909 (current version at TEX. REV. CIV. STAT. ANN. art. 3913 (West 1966)).

122. Act approved May 9, 1846, 1st Leg., R.S., § 3, 1846 Tex. Gen. Laws 189, 189, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1495, 1495 (Austin, Gammel Book Co. 1898), repealed and codified by Revised Statutes, 16th Leg., R.S., § 1, art. 2721, § 4, 1879 Tex. Rev. Civ. Stat. 2, 394 (codification), 718 (repealer), repealed and recodified by Revised Statutes, 24th Leg., R.S., § 1, art. 2803, § 4, 1895 Tex. Rev. Civ. Stat. 1, 545 (codification), 1103 (repealer), repealed and recodified by Revised Statutes, 32d Leg., R.S., § 1, art. 4305, § 4, 1911 Tex. Rev. Civ. Stat. 2, 875 (codification), 1719 (repealer), repealed and recodified by Revised Statutes, 39th Leg., R.S., § 1, art. 4331, § 2, 1925 Tex. Rev. Civ. Stat. 2, 1153 (codification), 2419 (repealer), amended by Act of May 1, 1981, 67th Leg., R.S., ch. 128, § 1, 1981 Tex. Gen. Laws 322, 322, repealed and recodified by Act of Apr. 30, 1987, 70th Leg., R.S., ch. 147, sec. 1, § 405.011, sec. 6, 1987 Tex. Gen. Laws 316, 363 (codification), 534 (repealer), amended by Act of May 25, 1989, 71st Leg., R.S., ch. 297, § 3, 1989 Tex. Gen. Laws 1255, 1256 (current version at TEX. GOV'T CODE ANN. § 405.011 (West 1990)).

123. Texas Uniform Facsimile Signature of Public Officials Act, 57th Leg., R.S., ch. 204, §§ 3 (facsimile seal), 4 (penalty), 1961 Tex. Gen. Laws 406, 406-07, amended by Act of May 11, 1967, 60th Leg., R.S., ch. 290, sec. 1, §§ 3-4, 1967 Tex. Gen. Laws 701, 702; amended by Act of May 20, 1981, 67th Leg., R.S., ch. 246, sec. 2, §§ 3-4, 1981 Tex. Gen. Laws 623, 624 (current version at TEX. REV. CIV. STAT. ANN. art. 717j-1, § 3 (West Supp. 1992)).

124. Act of May 31, 1987, 70th Leg., R.S., ch. 899, sec. 1, § 255.006, 1987 Tex. Gen. Laws 2995, 3027 (current version at TEX. ELEC. CODE ANN. § 255.006 (West Supp. 1992)). For the punishment for a Class A misdemeanor see *supra* note 86.

125. Act of May 10, 1955, 54th Leg., R.S., ch. 350, 1955 Tex. Gen. Laws 898, repealed and codified by Business & Commerce Code, 60th Leg., R.S., ch. 785, sec. 1, § 17.08, sec. 4(c), 1967 Tex. Gen. Laws 2343, 2583 (codification), 2620 (repealer), amended by Act of May 25, 1985, 69th Leg., R.S., ch. 811, § 10, 1985 Tex. Gen. Laws 2860, 2862 (current version at TEX. BUS. & COM. CODE ANN. § 17.08 (West 1987)); Tex. Sec'y of State, 10 Tex. Reg. 4562 (1985), adopted 11 Tex. Reg. 126 (1986) (effective Jan. 24, 1986), repealed in part and amended in part by Tex. Sec'y of State, 11 Tex. Reg. 2408 (emerg. rule), proposed 11 Tex. Reg. 2412, adopted 11 Tex. Reg. 3258 (1986) (effective July 29, 1986), amended by Tex. Sec'y of State, 12 Tex. Reg. 1807 (emerg. rule), proposed 12 Tex. Reg. 1809, adopted 12 Tex. Reg. 2566 (1987) (effective Aug. 24, 1987), amended by Tex. Sec'y of State, 15 Tex. Reg. 4427 (emerg. rule), proposed 15 Tex. Reg. 4429, adopted 15 Tex. Reg. 6187 (1990) (effective Nov. 7, 1990) (codified at Tex. Sec'y of State, 1 TEX. ADMIN. CODE §§ 71.40-48 (1988 & Supp. 1991-1992)).

Two attorney general opinions exist interpreting the 1955 law. Op. Tex. Att'y Gen. Nos. WW-1355 (1962) (1955 law does not prohibit use of the state seal on stationary mailed by a

agencies or officials who use the seal (including the reverse) for official or political purposes, but they are encouraged to submit renditions of the seal to the secretary of state to achieve uniformity.¹²⁶ Use of the state seal on alcoholic-beverage labels and advertisements is regulated,¹²⁷ as is use of the state seal by private investigators and private security officers.¹²⁸

The state seal appears in three other contexts. The legislature has authorized the minting of gold and silver state coins bearing the seal.¹²⁹ The seal is also displayed on the Texas Distinguished Service Medal, which is awarded to citizens who have achieved conspicuous success while rendering outstanding service to the state.¹³⁰ Finally, all state aircraft except those used for law enforcement purposes must be marked with the state seal on each side of the aircraft's vertical stabilizer.¹³¹

A few statutes refer to the secretary of state's seal.¹³² These statutes

state official for the purpose of campaigning), H-694 (1975) (sheriff or constable may not send an eviction notice on stationary containing the state seal); *see also* Op. Tex. Att'y Gen. No. O-3597, *supra* note 71.

126. Tex. Sec'y of State, 11 Tex. Reg. 2408 (emerg. rule), *proposed* 11 Tex. Reg. 2412, *adopted* 11 Tex. Reg. 3258 (1986) (effective July 29, 1986) (codified at Tex. Sec'y of State, 1 TEX. ADMIN. CODE § 71.42 (1988)).

127. Tex. Alco. Bev. Comm'n, 16 TEX. ADMIN. CODE §§ 45.18(b)(7), .28(g) (1988) (effective Jan. 1, 1976) (prohibiting use of United States and Texas seals on distilled-spirits labels and advertisements). *But cf.* Tex. Alco. Bev. Comm'n, 16 TEX. ADMIN. CODE §§ 45.52, .55(a) (1988) (effective Jan. 1, 1976) (no prohibition on use of seals on wine labels and advertisements); Tex. Alco. Bev. Comm'n, 16 TEX. ADMIN. CODE §§ 45.82(d), .90(g) (1988) (effective Jan. 1, 1976) (prohibiting misleading use of seals on malt-beverage labels and advertisements).

128. Tex. Bd. of Private Invest. & Private Sec. Agencies, 7 Tex. Reg. 1511, 1512 (1982) (effective Apr. 26, 1982) (codified at Tex. Bd. of Private Invest. & Private Sec. Agencies, 22 TEX. ADMIN. CODE § 423.1(g)), *repealed by* Tex. Bd. of Private Invest. & Private Sec. Agencies, 9 Tex. Reg. 1471 (1984) (effective Mar. 26, 1984); Tex. Bd. of Private Invest. & Private Sec. Agencies, 8 Tex. Reg. 5096, 5097, *adopted* 9 Tex. Reg. 1471 (1984) (effective Mar. 26, 1984) (codified at Tex. Bd. of Private Invest. & Private Sec. Agencies, 22 TEX. ADMIN. CODE § 423.1(d) (Supp. 1991-1992)) (prohibiting the use of state seal by private investigators and private security officers except for identification and license items prepared or issued by the board).

129. State Purchasing and General Services Act, 70th Leg., R.S., ch. 910, sec. 1, § 11.05, 1987 Tex. Gen. Laws 3083, 3083 (current version at TEX. REV. CIV. STAT. ANN. art. 601b, § 11.05 (West Supp. 1992)).

130. TEX. REV. CIV. STAT. ANN. art. 6144h, § 7(a) (West 1970).

131. State Aircraft Pooling Act, 70th Leg., R.S., ch. 335, sec. 1, § 9A, 1987 Tex. Gen. Laws 1750, 1750 (current version at TEX. REV. CIV. STAT. ANN. art. 4413(34b), § 9A (West Supp. 1992)).

132. TEX. REV. CIV. STAT. ANN. art. 4012 (West 1966) (free or reduced transportation for officers of adjutant general or state rangers with certificate of secretary of state under seal); TEX. REV. CIV. STAT. ANN. art. 4512b, § 5 (West 1976) (certified copy of chiropractic examiners board register with hand and seal of secretary of state); TEX. REV. CIV. STAT. ANN. art. 4582b, § 2(E)(2) (West Supp. 1992) (list of licensed funeral directors, embalmers, and funeral establishments under hand and seal of secretary of state); TEX. REV. CIV. STAT. ANN. art. 5154a, § 5 (West 1987) (labor union organizer's card to be attested by secretary of state's seal

should refer to the state seal, because the secretary of state does not have a seal of office similar to that used by other officeholders like the comptroller of public accounts.¹³³

IV. CONCLUSION

Texans are rightfully proud of their short but eventful history. The Lone Star is a visible link to that past and a reminder of the days of the republic. Unfortunately, many of the laws dealing with the flag and seal are outdated, inaccurate, and sometimes downright ridiculous. The legislature should consider revising the laws that affect these venerable symbols prior to the placement of the laws into the Government Code as part of the state's continuing statutory revision program.¹³⁴

of office); TEX. REV. CIV. STAT. ANN. art. 6528 (West Supp. 1992) (railroad bonds to be indorsed by secretary of state under his seal of office); TEX. EDUC. CODE ANN. § 88.204 (West 1991) (sale by Texas A&M University of title to experimental station must be attested by secretary of state under his official seal); TEX. TAX CODE ANN. § 171.355(d) (West 1982) (secretary of state's certification of receipt of service of process under secretary's official seal).

133. See TEX. GOV'T CODE ANN. § 403.011 (1990) (comptroller's seal); Letter from Guy Joyner, Staff Attorney, Office of the Secretary of State, to Charles Spain (Dec. 13, 1991) (on file with the *South Texas Law Review*) (no seal for office of the secretary of state).

134. See TEX. GOV'T CODE ANN. § 323.007 (West 1988).