

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. CV-92-2628-G

ALVIN HOLMES, et al.,

Plaintiffs,

v.

ORDER, JUDGMENT AND
PERMANENT INJUNCTION

GOVERNOR GUY HUNT, et al.,

Defendants.

In accordance with the memorandum opinion filed this date, it is ORDERED, as follows:

1. The motion to dismiss or alternative motion for summary judgment filed by Guy Hunt, in his official capacity as governor, is denied.

2. Judgment is in favor of Alvin Holmes and the other Plaintiffs and against Guy Hunt, in his official capacity as governor, and it is Adjudged that Ala. Code § 1-2-6 (1975) permits only the state and national flags to be hoisted and flown over the Capitol dome on the occasions specified in § 1-2-6.

3. That Guy Hunt, in his official capacity as governor, is permanently enjoined from ordering or allowing the hoisting and flying of any flag, other than the state and national flags, over the Capitol dome.

4. That counsel for the parties be given immediate notice of the filing of the memorandum opinion and this Order and Judgment.

DONE and ORDERED in chambers this 4th day of
January, 1993.

William Gordon

WILLIAM GORDON
CIRCUIT JUDGE

cc: Mark Hess, Esq. (242-7191)
Richard Cohen, Esq. (264-0286) ✓
Johnny Hardwick, Esq. (265-0177)

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. CV-92-2628-G

ALVIN HOLMES, et al.,

Plaintiffs,

v.

MEMORANDUM OPINION

GOVERNOR GUY HUNT, Governor
of the State of Alabama,

Defendant.

Alvin Holmes and other state representatives of the Alabama State Legislature, in their official capacity and as taxpayers and citizens of the state (collectively, "Holmes"), filed this action against Guy Hunt in his capacity as Governor of Alabama (Hunt). Holmes seeks a declaratory judgment that hoisting and flying the confederate battle flag on top of the Alabama State Capitol dome violates Ala. Code § 1-2-6 (1975), and they request that the Court permanently enjoin Hunt from hoisting and flying the flag.

Hunt filed a motion to dismiss and motion for summary judgment. Hunt also filed an answer because the Court expedited the hearing and took the motions and the case on the merits under submission.

ISSUES TO BE DECIDED

1. Is Holmes precluded by res judicata from prosecuting this action; and, if not,
2. Does § 1-2-6 preclude hoisting and flying any

flag, other than the state flag and the national flag, on top of the Capitol dome.

CONTENTIONS OF THE PARTIES

Hunt contends that (1) the action is barred by res judicata because Holmes and others previously filed actions in the United States District Court which challenged flying the Confederate battle flag and the issue raised in this case could have been raised in those cases as a pendent state law claim; and (2) § 1-2-6 does not expressly prohibit flying the Confederate battle flag and its provisions are directory only. Holmes contends that (1) this action is not barred by res judicata because (a) the federal courts lacked jurisdiction to hear the state law claims because they were claims against the state and barred by the Eleventh Amendment¹ to the United States Constitution; and (b) they lacked standing to raise the claims in the prior federal court litigation; and (2) § 1-2-6 expressly allows only the flying of the state and national flag and the Court should construe § 1-2-6 to prohibit the flying of any other flag under the rule of statutory construction *expressio unis est exclusio alterius* (the expression of one is the exclusion of all others).

1. THE PRIOR LITIGATION

In 1976 Alvin Holmes filed suit against the then governor -- George Wallace, and others, to prohibit the flying of the Confederate flag. The action was filed by Alvin Holmes in his individual capacity and in his capacity as a representative of the Alabama State Legislature, and it was predicated on various United States statutes -- no pendent state law claim was raised. The federal district court ruled against Holmes. Holmes v. Wallace, 407 F. Supp. 493 (D. Ala. 1976), aff'd, 540 F.2d 1083 (5th Cir. 1976). In 1988 suit was filed against Governor Guy Hunt and others by the National Association For The Advancement of Colored People, Alvin Holmes and other members of the Alabama legislature. The suit again sought the removal of the Confederate battle flag from the State Capitol grounds. This action was also predicated on the violation of various United States statutes and no pendent state law claim was raised. The district court again ruled in favor of the defendants. N.A.A.C.P. v. Hunt, No. 88-V-491-N (D. Ala. 1988), aff'd, 891 F.2d 1555 (11th Cir. 1990).

2. RES JUDICATA

Hunt argues that because Holmes could have raised the issue presented in this action as a pendent state law claim in either of the prior federal actions and

did not, this action is barred by res judicata. Century 21 v. Alabama Real Estate Comm'n, 401 So. 2d 764 (Ala. 1981) (plurality opinion). Holmes argues that because of the bar of the Eleventh Amendment, the federal courts lacked jurisdiction to entertain the state law claims even if they had been raised, and, therefore, because the state law claims could not have been litigated in the prior federal actions this action is not barred by res judicata.² Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682 (1948); Terrell v. City of Bessemer, 406 So. 2d 337 (Ala. 1981).

"[T]he doctrine of res judicata prohibits the relitigation of all matter which was or could have been litigated in the prior action." Century 21, 401 So. 2d at 768. The doctrine is not a mere technicality designed to bar resolution of an issue on its merits, rather it prohibits a party from splitting a cause of action and piecemealing the resolution of issues in several actions that could have been resolved in one suit.

This doctrine also "bars state litigation on a part of a claim that could have been, but was not, heard in a federal action and it bars suit in a state court on a state law claim that, under the doctrine of pendent jurisdiction, could have been joined with a claim under federal law in the federal action."

Id. (quoting 17 Wright & Miller, Federal Practice and Procedure, §4226 at 343-4 (1978)).

Therefore, the Court must determine whether Holmes could have raised this state law claim in either of the prior federal actions.³

The United State Supreme Court held in Pennhurst that a federal court is without jurisdiction to hear a pendent claim that state officials violated only state law in carrying out their official duties because it is a claim against the state which is protected by the Eleventh Amendment. The exception to this rule is when the state official acts without any authority whatsoever; however, this is a narrow and questionable exception. Pennhurst, 465 U.S. at 114 n. 25. In summary, the Supreme Court held that when a state official acts within the scope of his authority but acts erroneously, the federal courts lack jurisdiction to hear a claim that the official's actions violate only state law. On the other hand, the federal courts have pendent jurisdiction to hear a claim that the state official acted ultra vires, i.e., without any authority whatsoever, because the claim is against the officer in his individual capacity and not against the state.⁴

Hunt argues that the allegations of Holmes' complaint bring this case within the exception. Specifically, Hunt contends that Holmes must argue that

§ 1-2-6 grants Hunt no discretion over which flags can fly over the Capitol, and, therefore, Hunt's proposed action to raise the confederate flag is without any authority, i.e., ultra vires. To the contrary, Holmes argues that Hunt has general authority over the maintenance and supervision of the Capitol building and grounds by virtue of Ala. Code §§ 41-4-32, -131, -180(4) and -181 (1991), and that Hunt's "responsibilities include the flying of flags over the Capitol." Holmes' pretrial brief at p. 2. Therefore, Hunt's decision to raise the flag is within the scope of his general supervisory authority and the decision is not ultra vires.⁵

The Court holds that to find that Hunt's proposed action to raise the Confederate flag is without any authority would strain the very narrow exception recognized in Pennhurst. As Holmes contends, Hunt has general supervisory authority over the Capitol. Hunt's authority may not be as explicit as the authority of the officials in Pennhurst; however, the evidence in this case supports the Court's holding. When the Confederate flag was raised in 1963, the governor's orders were carried out through the finance department. The finance director or his designee secured the flag and he was the official directly responsible for raising the flag being raised. See testimony of Seymore Trammell.

Hunt argues that assuming, arguendo, that the Eleventh Amendment would have prohibited the state law issue from being raised as a pendent claim in the N.A.A.C.P. action, Pennhurst was not the law when the earlier action was filed. Therefore, the state law claim could have been and should have been raised in the first action and it is now barred. The Court disagrees. As the Pennhurst court observed, the decision in Larson established that injunctive relief could not be granted by a federal court against a state official acting in his official capacity because the Eleventh Amendment bars the claim when it is alleged that the official only violated state law. Pennhurst, 465 U.S. at 113, 104 S.Ct. at 95. Larson was decided in 1948 and was the law at the time Holmes filed the first suit; therefore, the district court would have lacked jurisdiction to hear the claim based on state law grounds.

In view of the Court's holding above, it will not address the standing issue.

3. HISTORY OF THE FLAGS

A. THE REPUBLIC OF ALABAMA FLAG

Before the secession, the United States flag was used at all official proceedings in Alabama. Alabama Official and Statistical Register 1979 24, Ala. Dept.

of Archives and History (1979).

Alabama seceded from the Union on January 11, 1861.⁶ The Provisional Congress was formed on February 4, 1861. The first flag designated as an Alabama flag was presented to the secession convention in January 1861. See Appendix "A". This flag, made by ladies in Montgomery, had a blue field with two sides. On one side was the goddess of liberty with a drawn sword in her right hand and a banner with one gold star in her left hand. Above her head was the motto "Liberty Now and Forever." A cotton plant with a rattlesnake coiled beneath it was on the other side. Underneath was the motto "Noli Me Tangere" (translated "Tread Not on Me"). The Republic of Alabama flag, as it is known, was displayed in the secession convention hall, and then flew over the Capitol⁷ in Montgomery for several days, after which it was taken down when it was torn in a storm. This flag was later captured by Union troops. It was displayed for many years as a captured Confederate flag in a museum in Des Moines, Iowa, before being returned to Alabama in March 1939, when it was presented to Governor Frank Dixon before a joint session of the legislature. Senate Journal, 1939, Reg. Sess., at 896.

B. THE "STARS AND BARS"

On February 4, 1861, the Provisional Congress

convened in ^BMontgomery, Alabama. Representatives of six of seven seceding states gathered for the purpose of establishing a new government of the seceded states. Among the first order of business was the appointment of various committees, including a committee to consider adoption of a proper flag for the Confederate States of America. Journal of the Provisional Congress of the Confederate States of America, Vol. 1, 1st Sess. 40 (Montgomery, Ala. 1861). Mr. William P. Miles of South Carolina offered the resolution on February 9 for such a committee consisting of one delegate from each state. There were six delegates from the states of Alabama (John Shorter Gill), Florida, Georgia, Louisiana, Mississippi, and South Carolina. The committee advertised for proposed designs, and about 150 were received, but all of these designs were rejected. Apparently at this point, Nicola Marschall, an art teacher in Marion, Alabama, was approached by Mrs. Napoleon Lockett, also of Marion, about designing a flag.⁹ He submitted several designs which were taken to the flag committee by Governor Moore. Orren Randolph Smith of North Carolina also claimed to have been the designer of the "Stars and Bars;" however, most accounts tend to accept Marschall as the designer. The committee agreed on one of these designs late afternoon March 4, 1861. Journal of the Provisional Congress of the Confederate States of America, Vol. 1,

1st Sess. 101-102 (Montgomery, Ala. 1861). See Appendix "B", figure 1. The Congress met at 10:00 a.m. on March 5 at which time the committee made its report; however, the report was entered on record as of March 4, because they wanted it to coincide with Lincoln's presidential inauguration. Mr. Miles described the flag in his report to Congress:

[T]he flag of the Confederate States of America shall consist of a red field with a white space extending horizontally through the center, and equal in width to one-third the width of the flag. The red spaces above and below to be of the same width as the white. The union blue extending down through the white space and stopping at the lower red space. In the center of the union a circle of white stars corresponding in number with the States in the Confederacy. Id.

However, the Provisional Congress never took any formal action to adopt the "Stars and Bars." Thus, the flag remained a widely used, but unofficial flag.

There was a great desire to have a national flag during Lincoln's inauguration, and in anticipation of the committee's report, Hon. Alexander D. Clitheral had one hastily prepared from the model. The first "Stars and Bars" rose over the Capitol in Montgomery on March 4, 1861. Miss Letitia Christian Tyler, granddaughter of former President John Tyler who was a member of the Provisional Congress, raised the flag.¹⁰

This flag was first used on the battlefield at the first Battle of Manassas (Battle of Bull Run) on July

21, 1861. The Stars and Bars proved to be a poor battle flag, because it was easily confused on the battlefield with the "Stars and Stripes".

C. THE BATTLE FLAG

In September 1861, Generals Pierre G.T. Beauregard, J.E. Johnston, and G.W. Smith met to discuss selecting a battle flag.¹¹ The design they chose had a red field with a blue St. Andrew's cross edged in white with white stars. The flag, designed by Beauregard, was originally to be rectangular, but the generals opted for a square shape at the suggestion of General Johnston, so the flags would be easier to carry and would not be torn by trees and troops' bayonets. See Appendix "B", figure 2.

The battle flag was adopted by the Confederate army, and copies were soon distributed to army units. However, it was never officially recognized as either a battle flag or a national flag. In its square shape, it was the flag of the Confederate army, but in its rectangular shape without the white border, it was the Confederate Naval Jack, which was created May 26, 1863, by Secretary of the Navy, Stephen R. Mallory,¹² so it could be flown sideways as a sign of distress. See Appendix "B", figure 3.

Other nicknames for the battle flag included "The Battle Flag of the Potomac", "Beauregard's Flag", "The

Confederate Cross", and "The Southern Cross". Though other flags were used by the Confederates on the battlefield, this battle flag came to represent the southern cause to most people. Its design was later incorporated into the two official flags which were later adopted by the Confederate Congress, and army units continued to use it as a battle flag even after the adoption of official flags. One authority accounts that this battle flag:

[I]ed both army and navy through many glorious victories, and became so dear to thousands of soldiers that they would follow it through fire and blood. It is the only Confederate flag that thousands of the enlisted men ever saw. But on its last battlefield it ceased to have a place in the world, it was not the flag of the Confederates,¹³ but simply the battle flag of the soldier.

At the Confederate Veteran's Reunion held in Chattanooga, Tennessee in 1890, it was adopted as their badge. The square battle flag appeared on UCV's letterhead.

D. THE FIRST NATIONAL FLAG

The Congress of the Confederate States of America began the search for a new flag to replace the Stars and Bars. On February 14, 1862, the Provisional Congress had approved a resolution "that the decision of a flag for the permanent Government be left to the Congress under that Government about to assemble" in

Richmond, Virginia." Journal of the Provisional Congress of the Confederate States of America, Vol. 1, 5th Sess. 823 (Richmond, Va. 1862). On February 25, the committee on the flag design was appointed. House Journal, First Congress of the Confederate States of America, Vol. 2, 1st Sess. 21-22 (Richmond, Va. 1862). It was not until May that the committee reported with a design that was adopted after some discussion. See Appendix "B", figure 4. The design which was eventually approved and adopted on May 1, 1863 was described, as follows:

The field to be white, the length double the width of the flag, with the union (now used as the battle flag) to be a square of two-thirds the width of the flag, having the ground red, thereon a saltier of blue, bordered with white and emblazoned with mullets or five-pointed stars, corresponding in number to that of the confederate states.

House Journal, First Congress of the Confederate States of America, Vol. 6, 3rd Sess. 477 (Richmond, Va. 1863).

The Congress also adopted a resolution on that day:

Resolved, That the Doorkeeper of the House be authorized to have made a Confederate flag, after the model of the flag adopted by Congress this day, and that the same be raised over the Capitol at twelve meridian on the first day of the next session of Congress; the expenses of making said flag to be paid out of the contingent fund of the House.

Id. at 485.

The white flag with the battle flag for its canton was also known as the "The Stainless Banner", "White Man's Flag", and "Jackson's Flag" (because it draped the casket of Stonewall Jackson).

This flag was used from May 1863 until March 1865, though many armies continued to use the battle flag as well. "The Stainless Banner" was easily mistaken as a flag of truce in battle because it often hung limply with only the white showing. The white field also soiled easily.

E. THE SECOND NATIONAL FLAG

To remedy the problems with the first national flag, Major Arthur L. Rogers of the Confederate Artillery proposed changing the proportions of the national flag (to a squarer, but still rectangular shape) and adding a red stripe at the fly. See Appendix "B", figure 5. On March 4, 1865, the Congress officially approved such a flag:

The width two-thirds of its length, with the union (now used as the battle flag) to be in width three-fifths of the width of the flag, and so proportioned as to leave the length of the field on the side of the union twice the width of the field side below it; to have the ground red and a broad blue saltier thereon, bordered with white and emblazoned with mullets or five-pointed stars corresponding in number to that of the Confederate States; the field to be white except the out half from the union to be a red bar extending the width of the flag.

S.137, Journal of the Second Congress of the

Confederate States of America, Vol. 4, 1st Sess. (Richmond, Va. 1864-65). (Introduced Dec. 13, 1864 and reported enrolled March 4, 1865).

Though this was an official national flag, few copies were made because the war ended the next month.

F. THE ALABAMA FLAG

Alabama was readmitted to the Union in 1868, but did not adopt a state flag until 1895. House Bill 1051 to establish a state flag was first introduced into the House of Representatives by John W. A. Sanford, Jr. on January 29, 1895, at which time it was referred to a committee. H.R. 1051, House Journal, 1894-95 Sess. 666. House Bill 1051 passed in the House on February 6, 1895, 52 yeas and 5 nays. *Id.* at 856. The bill was accepted and signed by the president of the senate on February 15, 1895, and it was apparently signed by the governor on February 16, 1895, as authorities report this as the date when Alabama adopted the official flag of the State of Alabama.¹⁴ The Montgomery Daily Advertiser reported the adoption of¹⁵ the State Flag on February 17, 1895, and there was a message from the governor on February 18, 1895, that House Bill 1051 had been approved. House Journal, 1894-95 Sess. 1048.

The Court's research of the legislative journals and other historical documents did not disclose any other reports or discussions regarding the design of

the flag. However, the Court has examined historical reports of the background of Representative Sanford and the Court has also examined some of his personal papers for the purpose of attempting to discover the symbolism which he attached to the design of the flag.

The Alabama Historical Quarterly reported that Representative Sanford (hereinafter, Sanford) was influenced to introduce the bill to establish a state flag by his father, who had served in the Confederate Army. Peter A. Brannon The Flags and Birthday of Alabama, 17 Ala. Hist. Q. 154 (1955). Biographical sketches of Sanford indicate that he was a states rights democrat who supported the secession of the southern states in 1861, and he had also served in the Confederate Army as a private, and was promoted to captain, lieutenant colonel and then colonel. RLIN Bibliographic Record no. ALAZ91-A762, Ala. Dept. of Archives and History. See also, 4 Thomas M. Owen, History of Alabama and Dictionary of Alabama Biography 1500-01 (1921). A review of his personal papers at the Archives building shows that he was involved in the United Confederate Veterans and the United Daughters of the Confederacy. John William Augustine Sanford, Jr., papers, (1754-1917), (on file with the Ala. Dept. of Archives and History).¹⁶ However, in reviewing his personal correspondence for 1895, there was no mention of the flag bill. Id. He was known to everyone as

"General Sanford" in his correspondence. The Alabama Historical Quarterly further stated that General Sanford "endeavored to preserve in permanent form the more distinctive features of the Confederate battle flag." Brannon, supra, at 154.

The Alabama Historical Quarterly also states that the legislature intended to make the flag as much as possible like the battle flag without using the actual colors, and that the colors chosen were intended "to conform with the colors of the state university, red and white." Id. at 155. It is to be pointed out, however, that while the article does not offer any support for its interpretation, this source is helpful in determining the historical significance of the flag's design.¹⁷

4. FLAGS FLYING OVER THE CAPITOL SINCE 1895

The 1895 Act creating a state flag ordered that the flag be flown over the Capitol, but other flags have also flown over the Capitol since the adoption of the Alabama flag.

The Alabama Department of Archives and History (ADAH) compiled a summary of events regarding the flying of flags over the Capitol.¹⁸ According to the ADAH, the "Stars and Bars" flag was raised over the Capitol February 15, 1915 by Confederate veterans and descendants in a silent film re-enactment of the

formation of the Confederacy. The ADAH further reports that on April 6, 1918, the first anniversary of America's entrance in World War I, the American flag was raised on a flag pole located on the south lawn of the Capitol; also many photographs of the Capitol in the first half of the Twentieth Century show no flag flying over the dome, but in the late 1930's, the United States flag was flown over the Capitol at least some of the time when the legislature was not in session.¹⁹

On March 4, 1961, the "Stars and Bars" (not the battle flag) was again raised over the Capitol in a ceremony sponsored by the Sons of Confederate Veterans and the United Daughters of the Confederacy as part of the Civil War Centennial. The flag was raised at 3:30 p.m., just as it was a century earlier, this time by Miss Jule Gunter, great-grandniece of the original flag-raiser. "7-Star Flag of Secession Raised Again", Montgomery Advertiser, March 5, 1961, at 1A. The flag²⁰ was apparently removed at the end of the celebration.

It was not until 1963 that another Confederate flag flew over the state Capitol. The Confederate Naval Jack was raised on April 25, 1963, the day then Attorney General Robert Kennedy met Governor Wallace inside the Capitol. The Birmingham News reported the Confederate flag flew just below Alabama's state flag on the dome. Stars and Bars Flies as RFK, Wallace

Meet, Birmingham News, April 25, 1963, at 1A.

During this period, the American flag was still being flown from the flag pole on the south lawn, with the Alabama flag and the Confederate Naval Jack on the dome. In 1975, Representative Alvin Holmes filed suit to require that the American flag be flown from the highest position. The Federal district court held that the Flag Code suggests, but does not require, the American flag to be flown from the highest position. Holmes v. Wallace, 407 F. Supp. 493 (D. Ala. 1976). This ruling was affirmed by the Fifth Circuit. Holmes, 540 F.2d 1083 (5th Cir. 1976). However, Governor George Wallace subsequently made the decision to fly the United States flag from the highest point on the dome. Thereafter, the American flag flew from the highest point on the dome, with the Alabama flag directly below it, then the Confederate Naval Jack.

5. THE MERITS

Ala. Code § 1-2-6 provides, as follows:

The flag of the state shall be hoisted on the dome of the Capitol when the two houses of the legislature are in session, and shall be used by the state on all occasions when it may be necessary or customary to display a flag, except when, in the opinion of the governor, the national flag should be displayed. 21

Section 1-2-6 has never been considered by any court. The state had no state flag until the enactment of

House Bill 1051 in 1895. Did the 1895 legislature intend for only the state and national flags to be flown on the Capitol dome? This is the issue to be decided.²²

Hunt argues that § 1-2-6 does not expressly prohibit flying the Confederate flag (and the Court assumes any other flag) and that the section is directory only. Holmes argues that § 1-2-6 expressly provides that only the state and national flags can be flown, and that applying the statutory rule of construction *expressio unis est exclusio alterius*, the Court must conclude that the section precludes the flying of any other flags. Holmes further argues that because no flag, other than the state and national flag, has flown from 1895 until 1963, except on two ceremonial occasions,²³ this history evidences that former governors interpreted § 1-2-6 to mean that only the state and national flags could be flown.²⁴ Hunt also embraces this argument, but he argues to the contrary that because former governors allowed the flag to be flown on the two ceremonial occasions; that a former governor raised the Confederate flag in 1963; that it was flown since that time, then history indicates that the governors' practical interpretation of § 1-2-6 was that it did not prohibit them from flying the Confederate flag.

The general rule is that "grants of power are

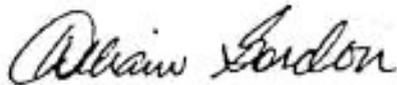
strictly construed, [and] such provisions are generally mandatory in the sense that the power granted can be exercised only in N. Singer, Sutherland Statutory Construction § 57.17 (5th Ed. Temporary Pamphlet). Section 1-2-6 provides that two flags may be flown, and it speaks to the occasions when they shall and may be flown. It is reasonable to assume that had the 1895 legislature intended that a symbol of the Confederacy be raised over the Capitol, it would have adopted a different flag, or it would have provided that the Confederate National flag or any one of the other flags from the period of the war between the states be flown. The legislature did not so provide and in applying the rule of statutory construction *expressio unis est exclusio alterius*, the Court concludes that the legislature did not intend for any flag, other than the state and national flags, to be flown over the Capitol.

Insofar as the contemporaneous or practical construction placed on § 1-2-6 by former governors is concerned, the Court holds that the practical construction employed shortly after the enactment of House Bill 1051 and for a period of approximately 67 years is the more reliable. The fact that another flag was raised on two ceremonial occasions does not suggest otherwise. It is just as important to note that these flags were lowered after only briefly flying, which indicates that the governors did not construe § 1-2-6

to allow them to fly these flags permanently. Indeed, Hunt has placed no practical interpretation on § 1-2-6. In deposition, he testified that he probably would not have raised the flag had Governor Wallace not raised it in 1963. Hunt deposition at pp. 12-13.

Based on the foregoing, the Court holds that § 1-2-6 allows only the state and national flags to be hoisted and flown over the Capitol dome, and the Court further holds that the injunction will be issued.

DONE and ORDERED in chambers this 4th day of January, 1993.



WILLIAM GORDON
CIRCUIT JUDGE

cc: Mark Hess, Esq.
Richard Cohen, Esq. ✓
Johnny Hardwick, Esq.

ENDNOTES

1. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens of any foreign state. The "Eleventh Amendment" also bars a suit against the state brought by a citizen of that state. Hans v. Louisiana, 134 U.S. 1 (1890).

2. In oral argument Holmes also contended that there are other persons not in privity with Holmes who could file an action and it would not be barred by res judicata. Therefore, the Court should decide the issue to prevent the filing of another action. The Court knows of no important state law question exception to the doctrine of res judicata; therefore, the Court find this argument to be without merit.

3. Holmes does not contend that the federal courts could have abstained from deciding this state law issue which had never been considered by the courts of this state. See Restatement (Second) of Judgments, §25 cmt. e (1980), adopted by the court in Terrell v. City of Bessemer, 406 So.2d 337, 339 (Ala. 1981), and Holmes does not argue the non-binding effect of a federal court's interpretation of a state statute on a state court. See 20 Am. Jur. 2d Courts §§ 214, 225 (1965). Therefore the Court has not considered these issues.

4. See Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law: Substance and Procedure, § 2.12 (2d ed. 1992).

5. See Hunt deposition at pages 4 - 5 and 28.

6. Mysie A. Chesser, Our Southern Flags 14 (1948); see also, Peleg D. Harrison, The Stars and Stripes and Other American Flags 317 (1906).

7. There does not appear to have been a flag pole over the dome of the Capitol when the Republic of Alabama flag was flown in 1861; see infra note 10.

8. Alabama, Florida, Georgia, Louisiana, Mississippi and South Carolina. Texas, the seventh state, had not yet approved secession.

9. It is reported that Marschall also designed the grey troop uniforms at Mrs. Lockett's request. Chesser, supra note 6 at 19.

10. Contemporary sketches indicate that the flag was flown from a flag pole erected beside the clock. Flags Over the Capitol: A Summary of Major Events, Ala. Dept. of Archives and History [hereinafter Summary].

11. Chesser, supra note at 6; see also, Whitney Smith, The Flag Book of the United States 267 (rev. ed.).

12. Smith, supra note 12, at 268; David C. Roller and Robert W. Twyman, eds., The Encyclopedia of Southern History at 275 (1979).

13. Chesser, supra note 6 at 29.

14. See, e.g. Alabama Official and Statistical Register 1979 23, Ala. Dept. of Archives and History (1979).

15. Daily Advertiser, Feb. 17, 1895, at 13.

16. ADAH's files indicated the Sanford papers cover the years 1754-1917; however, John Sanford, Jr. lived from 1825-1913, and the Court concludes that these papers also include those of John Sanford, Sr.

17. The same conclusion is reached in the Alabama Official and Statistical Register, 1979, 23.

18. Summary, supra note 10.

19. Id.

20. Dr. Bridges, Director of the Alabama Department of Archives and History, testified that the flag did not remain up an appreciable length of time.

21. The language "except when, in the opinion of the governor, the national flag should be displayed", was not part of H.B. 1051; it was added to the 1896 codification by the Code Commissioner.

22. This issue is not be confused with the issue, as framed, in determining whether this action is barred by the doctrine of res judicata. Ala. Code § 1-2-6 (1975) is a limitation of the governors' discretionary authority.

23. Dr. Bridges testified that in 1914 the Confederate National Flag was raised and flown for a very brief period. The Court's research indicates that the "Stars and Bars" was raised on February 15, 1915 by the Confederate Veterans and descendants in a silent

film re-enactment of the formation of the Confederacy.

24. See Ex parte Darnell, 262 Ala. 71, 76 So.2d 770 (Ala. 1955) ("[C]ontemporaneous construction placed [on a statute] by the officers authorized to administer the law is entitled to favorable consideration and there is a strong presumption of its correctness, where such has been followed for a long time). See 2B N. Singer, Sutherland Statutory Construction §§ 49.03 and 49.04 (5th Ed. 1992).



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a.



b.



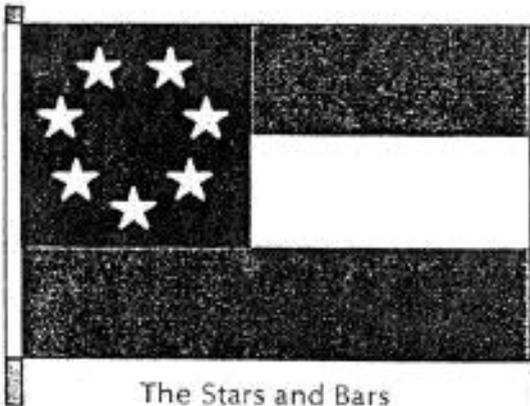
c.

FLAGS
of the
CONFEDERATE STATES OF AMERICA



The Battle Flag

FIGURE 2



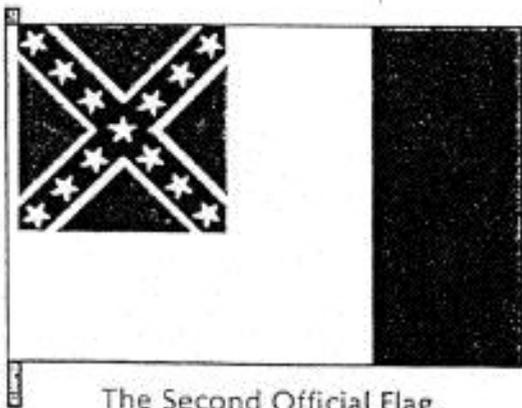
The Stars and Bars

FIGURE 1



The First Official Flag

FIGURE 4



The Second Official Flag

FIGURE 5



The Battle Flag and Naval Jack

FIGURE 3