REMOVING THE STAIN WITHOUT UNDERMINING MILITARY AWARDS: REVOKING MEDALS EARNED AT WOUNDED KNEE CREEK IN 1890

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In June 2019, Rep. Debra Haaland (D-N.M.) introduced the Remove the Stain Bill, which directed revocation of the twenty Medals of Honor awarded following the Battle of Wounded Knee in 1890—an event which later became known as the Wounded Knee Massacre.[1] The matter was personal to Haaland. As a Native American, she expressed solidarity with Wounded Knee victims, maintaining that it was important "to acknowledge the genocide of our people."[2] According to Haaland, the bill was "a marker . . . it shows that our country is finally on its way to acknowledging and recognizing the atrocities committed against our Native communities."[3] Despite initial bipartisan support,[4] a version of the legislation was later removed from the annual defense bill twice due to lack of support from the Senate Armed Services Committee, which stated that revoking medals was not its prerogative.[5] As a result, the underlying issue remains unresolved, and supporters of revocation have asked that President Joe Biden take

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1. indianz, *Rep. Deb Haaland | Remove the Stain Act*, YOUTUBE (July 22, 2019), https://www.youtube.com/watch?v=3ddiW4S7n9Y; *see* Remove the Stain Act, S. 1073, 117th Cong. (2021).

2. indianz, *supra* note 1.

3. *Id.*

4. *See* H.R. 3467, 116th Cong. (2019).

5. HOUSE COMM. ON ARMED SERVS., 117TH CONG., LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY S. 1605, PUBLIC LAW 117-81, at 1038 (Comm. Print 2021), https://www.congress.gov/117/cprt/HPRT47742/CPRT-117HPRT47742.pdf [hereinafter LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY S. 1605]; HOUSE COMM. ON ARMED SERVS., 118TH CONG., LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY H.R. 7776, PUBLIC LAW 117-263, at 1916 (Comm. Print 2023), https://www.congress.gov/118/cprt/HPRT50665/CPRT-118HPRT50665.pdf [hereinafter LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY H.R. 7776].

unilateral action,[6] as well as introducing follow-on revocation bills.[7] Another option exists—one that may garner more support in both Congress and the Department of Defense (DoD). In the past, historical reviews have scrutinized award recipients to determine if they merited upgrade to the Medal of Honor or other decorations. A similar process could be utilized to recommend whether medals awarded at Wounded Knee should be revoked.

I. The Massacre and Investigation

On December 29, 1890, the U.S. Seventh Cavalry and supporting elements killed an estimated 250 Lakota Sioux during an effort to disarm the Natives.[8] Many of the Native casualties were women and young children.[9] The Army lost at least thirty soldiers who were either killed or mortally wounded.[10] The incident was precipitated by a federal Indian Affairs agent's misperception that a religious revival ceremony known as the "Ghost Dance" was actually a call for insurrection.[11] In turn, this convinced the Secretary of the Interior, the Commissioner of Indian Affairs, and, ultimately, President Benjamin Harrison that the Lakota were in a state of insurrection.[12] Harrison directed that the U.S. Army take "steps . . . to prevent any outbreak."[13] When the Seventh Cavalry attempted to disarm the Lakota, a shot rang out, touching off "bitter, close quarters fighting,"[14] which lasted for about twenty minutes.[15] The fighting then shifted to a

6. Letter from Elizabeth Warren, Senator, et al. to Joseph R. Biden, President (Nov. 2, 2021), https://www.warren.senate.gov/download/20211102-letter-to-biden-on-revoking-wounded-knee-medals-of-honor.

7. *See, e.g.*, H.R. REP. No. 117-405, at 93 (2022).

8. Jerry Green, *The Medals of Wounded Knee*, 75 NEB. HIST. 200 (1994), https://history.nebraska.gov/wp-content/uploads/2017/11/doc_publications_NH1994MedalsWKnee.pdf.

9. *Id.*

10. 1 ANNUAL REPORT OF THE SECRETARY OF WAR FOR THE YEAR 1891, at 150 (Washington, Gov't Printing Off. 1892), https://babel.hathitrust.org/cgi/pt?id=uc1.b2980312&seq=160 [hereinafter 1891 ANNUAL REPORT].

11. JEROME A. GREENE, AMERICAN CARNAGE: WOUNDED KNEE, 1890, at 97, 99 (2014).

12. Letter from Benjamin Harrison to Sec'y of War (Nov. 13, 1890), *microformed on* Nat'l Archives, Reports and Correspondence Relating to the Army Investigations of the Battle at Wounded Knee and to the Sioux Campaign of 1890-1891, roll 1, at 19 (Nat'l Archives Microfilm Pub. M983, 1974) [hereinafter Nat'l Archives, Army Investigations Microfilm], https://dds.crl.edu/item/62554/1.

13. *Id.*

14. Green, *supra* note 8, at 201.

15. Proceedings of an Investigation Made Pursuant to the Following Orders: Special Orders No. 8 and 10 (1891) [hereinafter Investigation Pursuant to Special Orders 8 & 10], *in*

ravine on the southern end of the camp, and ended only after the Army used M1875 Hotchkiss mountain guns (breech-loading cannons) to fire into the locations where Natives were seeking shelter.[16]

Major General Nelson Miles, commander of the Division of the Missouri, which included the forces at Wounded Knee, quickly relieved the commander of the Seventh Cavalry, Colonel James W. Forsyth and directed an inquiry into the incident over allegations of both friendly fire and noncombatant casualties.[17] Miles wrote to his superiors expressing his "strongest disapproval" over the killing of noncombatants[18] and reporting "200 dead and wounded noncombatants being found and scattered over a territory in extent a hundred miles north and south, and 30 miles east and west [of Wounded Knee]."[19] Privately, Miles wrote that "I have never heard of a more brutal, cold-blooded massacre than that at Wounded Knee,"[20] although he tempered his opinion in the official reports.[21] The investigation directed by Miles exonerated Colonel Forsyth and his unit[22] but nevertheless gathered detailed records of the events that allows for a review of the legality of the use of force at Wounded Knee.

Soldiers' actions at Wounded Knee were subject to Army regulations and general orders on the laws of war, specifically General Orders No. 100, known as the "Lieber Code."[23] During the Civil War, violations of the Lieber Code resulted in an estimated 3,500 prosecutions by military

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Wounded Knee Massacre: Hearings on S. 1147 & S. 2900 Before the S. Comm. on the Judiciary, 94th Cong. 117, 149 (1976) [hereinafter *1976 Hearings*], https://babel.hathitrust.org/cgi/pt?id=uc1.31822019222637&seq=123&q1=.

16. ROBERT M. UTLEY, THE LAST DAYS OF THE SIOUX NATION 217–22 (2d ed. 2004).

17. GREENE, *supra* note 11, at 319.

18. Letter from Nelson A. Miles to the Adjutant Gen. of the Army (Jan. 31, 1891), *in 1976 Hearings*, at 150, 151.

19. Letter from Nelson A. Miles, Major-Gen., to the Adjutant Gen. of the Army (Jan. 31, 1891), *in* 23 CONG. REC. 2989 (1892), https://www.govinfo.gov/content/pkg/GPO-CRECB-1892-pt3-v23/pdf/GPO-CRECB-1892-pt3-v23-23-1.pdf.

20. Letter from Nelson Miles to George W. Baird (Nov. 20, 1891), *quoted in* Green, *supra* note 8, at 201. The full letter is available in Baird Papers, WA-S901, M596, Western Americana Collection, Beinecke Rare Book and Manuscript Library, Yale University.

21. 1891 ANNUAL REPORT, *supra* note 10, at 150.

22. GREENE, supra note 11, at 322.

23. *See generally* JAMES REGAN, JUDGE ADVOCATE RECORDER'S GUIDE 204, at app. B (Washington, D.C. 1877), https://babel.hathitrust.org/cgi/pt?id=nyp.33433008571865&seq=214.

commission.[24] The Code specified that military necessity allowed "direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable*."[25] It directed commanders, "whenever admissible," to "inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences."[26] It also outlined an early version of the principle of distinction, which emphasized "the distinction between the private individual belonging to a hostile country and the hostile country itself," and stressed that "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[27]

The Army's first investigation of Wounded Knee in February 1891 was conducted by several inspectors general who were Army officers not assigned to the Seventh Cavalry. The officers were directed to, among other requirements, "ascertain whether any non-combatants were unnecessarily injured or destroyed."[28] In other words, the officers were to determine if the Army's general orders on limiting noncombatant deaths had been violated. The inspectors general found clear evidence, including a soldier's testimony,[29] that noncombatants were killed at Wounded Knee by soldiers of the Seventh Cavalry.[30] The Secretary of War agreed that these deaths were criminal in nature but, to make them less controversial, ruled that they had "[no] connection with the fight at Wounded Knee," which was demonstrably untrue and contradicted the Army's own investigation.[31]

A follow-up investigation in March 1891 confirmed that noncombatants were killed while fleeing from Wounded Knee, but it excused the deaths on

24. Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1, 3–4 (2010).

25. REGAN, *supra* note 23, at 205.

26. *Id.* at 206.

27. *Id.*

28. Investigation Pursuant to Special Orders 8 & 10, *supra* note 15, at 117.

29. Testimony of Edwin S. Godfrey, Captain, *in* Investigation Pursuant to Special Orders 8 & 10, *supra* note 15, at 123.

30. Letter from Frank D. Baldwin, Captain, to Assistant Adjutant Gen. (Jan. 21, 1891), *in 1976 Hearings*, *supra* note 15, at 140.

31. Extract of Letter from Redfield Proctor, Sec'y of War, to the Major General Commanding (Feb. 12, 1891), *microformed on* Nat'l Archives, Army Investigations Microfilm, *supra* note 12, roll 1, at 1136, https://dds.crl.edu/item/62556/2.

the basis that they were not "deliberate or intentional."[32] Therefore, the Army's commanding general concluded that "no further action is required,"[33] and the Secretary of War reported to President Benjamin Harrison that the campaign against the Lakota Sioux "was conducted in a manner deserving commendation."[34] As a result, there were no prosecutions or other tangible consequences for the soldiers under investigation. Among other contradictions, this outcome overlooked the fact that an officer had falsified testimony under oath during the inquiry by omitting that he had witnessed the intentional execution of a ten-year-old child who was fleeing from Wounded Knee.[35]

II. Dueling Public Memory

The Department of War's award of twenty Medals of Honor for actions that occurred at the Wounded Knee Massacre was part of the government's effort to influence the public memory of the event. According to one historian, awarding the medals "reinforced the emerging national consensus calling the 'Battle of Wounded Knee' 'civilization's' final triumph over 'savagery' in North America."[36] As both commemorative physical devices and symbols of distinguished conduct, the medals implicitly reinforced the Army's original narrative that Wounded Knee was predominately a consequence of "'[t]reachery' . . . practiced by the Indians, whether by a preconcerted plan, or by the actions of the Indian who fired the first shot."[37]

Soldiers of the Seventh Cavalry also erected a twenty-five-foot-tall granite monument at Fort Riley, Kansas, in memory of their fallen comrades at Wounded Knee.[38] At the monument's dedication, the orator

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32. Letter from P. D. Vroom, Major, Inspector Gen., to the Assistant Adjutant Gen. (Mar. 24, 1891), *microformed on* Nat'l Archives, Army Investigations Microfilm, *supra* note 12, roll 2, at 1142, 1144, https://dds.crl.edu/item/62556/2.

33. Indorsement of Maj. Gen. John Schofield (Apr. 2, 1891), *in* Nat'l Archives, Army Investigations Microfilm, *supra* note 12, roll 2, at 1141, https://dds.crl.edu/item/62556/2.

34. 1891 ANNUAL REPORT, *supra* note 10, at 26.

35. Letter from E.S. Godfrey, Brigadier Gen., Retired, to Chief of the Historical Section, Army War Coll. (May 29, 1931), *in* 4 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, at 615 (Peter Cozzens ed., 2004), https://archive.org/details/eyewitnessestoin0004unse/page/614/mode/2up.

36. David W. Grua, *"In Memory of the Chief Big Foot Massacre": The Wounded Knee Survivors and the Politics of Memory*, 46 W. HIST. Q. 31, 32 (2015).

37. Report of J. Ford Kent, Major (Jan. 17, 1891), *in 1976 Hearings*, *supra* note 15, at 145.

38. *Wounded Knee Heroes: The Monument to Their Memory Dedicated*, ABILENE WKLY. REFLECTOR (Abilene, Kan.), July 27, 1893, at 5.

expressed that the soldiers in question had "clear[ed] the way for the coming of our splendid civilization," which necessitated the removal of "a savage race that had made no progress in a thousand years."[39] The Lakota were thrust into this mold and described as "a wily and savage foe" that possessed only "ignorance and barbarism."[40] The orator expressed that he did not "mourn the fate of the poor Indian and lament his wrong," for "no land belongs to any people or race . . . when the claims of a better civilization are asserted."[41]

The Lakota were also able to influence public memory, but much less forcefully because they were confined to reservations and did not possess the same tools to shape the narrative as did the government.[42] A Lakota group erected a memorial obelisk at Wounded Knee, and others engaged in writing campaigns to contest the Army's justifications for the behavior of its soldiers.[43] These efforts included recharacterizing Wounded Knee as a "massacre," which was an intentional inversion of the Army's labeling of Wounded Knee as a legitimate battle.[44] Over the years, the Lakota also made several attempts to secure reparations for Wounded Knee by requesting legislation from Congress, but all these bills failed.[45]

The Army submitted testimony on the bills seeking reparations for Wounded Knee, which downplayed any criminal actions or impropriety, even those previously documented in the investigations immediately following the incident. The Acting Secretary of War wrote in 1936 that "the military forces were completely vindicated from any blame in the affair at Wounded Knee Creek," even while paradoxically citing evidence of the killing of noncombatants in the same testimony.[46] In 1938, the Army's Office of the Chief of Staff testified to Congress that in the case of noncombatants found dead three or four miles from Wounded Knee, "there is no definite evidence that they were killed by troops,"[47] even though the Army's own investigators had concluded that they were killed by soldiers

39. *Id.*
40. *Id.*
41. *Id.*
42. Grua, *supra* note 36, at 32.
43. *Id.* at 34.
44. *Id.* at 42.
45. *Id.* at 51.
46. *Sioux Indians, Wounded Knee Massacre: Hearings on H.R. 2535 Before the H. Subcomm. on Indian Affs.*, 75th Cong. 7 (1936) (statement of Malin Craig, Acting Secretary of War).
47. *Id.* at 36 (statement of Lieutenant Colonel R. H. Brennan, Office of Chief of Staff, War Department).

and recorded sworn statements to this effect.[48] In 1975, the Acting Secretary of the Army testified to Congress that "it is reasonable to assume that a number of women and children were shot [at Wounded Knee]," and also admitted that "it is apparent that individual excesses [by the soldiers] occurred."[49] However, the Acting Secretary claimed this outcome was defensible because soldiers were "return[ing] the fire" they had received from Natives, had no "premeditated intention . . . to injure the innocent," and were "inexperienced, untested troops who were carried away in the heat of battle."[50] Further, he noted that there was "not an iota of evidence that any orders were issued . . . that there was to be any indiscriminate killing."[51] Of course, this argument ignored the fact that premeditation or unlawful orders were not required to violate the Army's directives on the use of force against noncombatants.[52]

In 1990, Congress passed a concurrent resolution on the centennial of Wounded Knee, expressing "its deep regret" on behalf of the United States over the incident, which it called "a terrible tragedy . . . resulting in the tragic death and injury of approximately 350-375 Indian men, women and children."[53] The resolution suggested designating Wounded Knee a national monument "in order to properly preserve and maintain the terrain."[54] The resolution was merely symbolic and produced no tangible changes. Wounded Knee was not designated as a national monument.[55] There were no changes to military awards given to soldiers at Wounded Knee nor was there any compensation given to the descendants of Natives who were killed or had survived Wounded Knee. However, thirty years later, in 2021, the Armed Services Committee cited the same resolution as a possible basis to consider revoking the military awards in question.[56]

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48. Letter from P. D. Vroom, Major, Inspector Gen., *supra* note 32.

49. *1976 Hearings*, *supra* note 15, at 214 (statement of Norman R. Augustine, Acting Secretary of the Army).

50. *Id.*

51. *Id.*

52. REGAN, *supra* note 23, at 205–06.

53. S. CON. RES. 153, 101st Cong. (1990).

54. *Id.*

55. Wounded Knee was listed as a National Historic Landmark in 1990. *See National Historical Landmark Nomination: Wounded Knee*, NAT'L PARK SERV.: NAT'L REGISTER OF HISTORIC PLACES, at 59, https://npgallery.nps.gov/NRHP/GetAsset/2a187162-d36f-4cd4-832c-ac8bafe42d8b.

56. LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY S. 1605, *supra* note 5, at 1038.

The Remove the Stain Bill can be seen as another chapter in the contest over public memory. It seeks to correct the history of Wounded Knee by reversing mistakes in the historical narrative—in this case, the awarding of medals for distinguished conduct when the Army had ample evidence that some conduct was anything but distinguished and, in fact, contravened general orders. The Army's current position on Wounded Knee is that "the Soldiers were following legal orders (at the time) and performed their duties with great bravery and selfless service."[57] This position plainly contradicts both the Army's own investigation of Wounded Knee as well as the long-standing scholarly consensus on the incident.[58] Indeed, it even contradicts the judgment of the Army's own historians:

> On the morning of 29 December, an effort to disarm the band led to a shot being fired. It may have been an accidental discharge as a soldier tried to confiscate a weapon, but whatever the source, it led immediately to heavy and indiscriminate firing from soldiers and some return fire from the Lakota. In the ensuing action, many Lakota men, women and children sought to escape via ravines that cut through the area. The soldiers also employed artillery despite the presence of numerous noncombatants. The main firing lasted about an hour, though intermittent shots rang out into the afternoon. When it was over, more than two hundred Lakota (perhaps as many as three hundred), including women and children, were dead. Army casualties totaled 25 killed and 39 wounded, some of whom likely were hit by friendly fire in the confused situation. A few small skirmishes ensued in the region, but by mid-January the violence was over. The Army conducted an investigation of the incident but never determined culpability.[59]

There are many clear reasons for the Army to readdress the Wounded Knee Massacre, and medal eligibility is merely one of these reasons. The

57. E-mail from Mark Haaland, Dir., Gov't Affairs, Ass'n of the U.S. Army, to author (Feb. 17, 2022) (on file with author).

58. *See* Michael A. Sievers, *The Historiography of "The Bloody Field . . . That Kept the Secret of the Everlasting Word": Wounded Knee*, 6 S.D. HIST. 33, 52 (1975) ("[M]ost writers agree that far more [women and children] than necessary died at Wounded Knee."); *id.* at 53 ("[N]o explanation, in the view of most writers, particularly professional historians, can justify the death of women and children.").

59. *Indian Wars Campaigns*, U.S. ARMY CTR. OF MIL. HIST., https://history.army.mil/html/reference/army_flag/iw.html (last visited Feb. 13, 2024).

dichotomy between the Army's version of this history and virtually all recent historiography on this incident is similar in some ways to the Army's defense of Confederate "Lost Cause" ideology, which Congress recently took steps toward removing from DoD installations.[60] As with the "Lost Cause," defending a counterfactual narrative of Wounded Knee risks alienating entire demographic populations among American society. Native Americans, for example, are particularly at risk of alienation, despite their estimated service in the military at a "higher rate than any other" racial or ethnic demographic since the 9/11 terrorist attacks.[61]

III. Statutory and Regulatory Authority for Army Medals in 1890, and Retroactive Eligibility

At the time of the Wounded Knee Massacre, the Medal of Honor was the only medal available for soldiers in the Army.[62] As a consequence, the service used it to reward many actions, including gallantry, service, and achievement.[63] Therefore, it is unsurprising that at least twenty soldiers eventually received Medals of Honor for actions at Wounded Knee[64]—although at least one of these awards was actually for actions that occurred at a different time and location.[65] The statutes governing the Army's Medal of Honor at that time, enacted in 1862 and 1863, required the medal be awarded to soldiers who "distinguish[ed] themselves by their gallantry in action, and other soldier-like qualities,"[66] or to soldiers who have "most

60. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 370, 134 Stat. 3388, 3553–54 (2021).

61. Jon Simkins & Claire Barrett, *A 'Warrior Tradition': Why Native Americans Continue Fighting for the Same Government That Tried to Wipe Them Out*, MIL. TIMES (Nov. 15, 2019), https://www.militarytimes.com/off-duty/military-culture/2019/11/15/a-warrior-tradition-why-native-americans-continue-fighting-for-the-same-government-that-tried-to-wipe-them-out/.

62. *See* REGULATIONS FOR THE ARMY OF THE UNITED STATES: 1889, at 18, para. 175 (Washington, Gov't Printing Off. 1889), https://babel.hathitrust.org/cgi/pt?id=mdp.39015035320806&seq=32 [hereinafter 1889 ARMY REGULATIONS].

63. DWIGHT S. MEARS, THE MEDAL OF HONOR: THE EVOLUTION OF AMERICA'S HIGHEST MILITARY DECORATION 20–24 (2018) [hereinafter MEARS, MEDAL OF HONOR EVOLUTION].

64. Green, *supra* note 8, at 203.

65. *See* General Orders No. 100, at 7 (Dec. 17, 1891), *in* ADJUTANT GENERAL'S OFFICE, WAR DEP'T, GENERAL ORDERS & CIRCULARS, 1891 (Washington, Gov't Printing Off. 1892) [hereinafter WAR DEP'T, 1891 GENERAL ORDERS], https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=561 (documenting that Private Martin C. Hillock was actually awarded the medal for action at White Clay Creek, which occurred the day after the events at Wounded Knee in a different location).

66. S.J. Res. 52, 12 Stat. 623, 624 (1862).

distinguished . . . themselves in action."[67] By Wounded Knee, awards for "other soldier-like qualities," had been foreclosed by regulations, so soldiers had to qualify for the medal "in action," the Army's term for combat conditions.[68]

As of 1889, the Army's regulations merely contained one sentence on the Medal of Honor: "Medals of honor will be awarded, by the President, to officers or enlisted men who have distinguished themselves in action."[69] The Army's first substantive regulations on the Medal of Honor were published in 1897, many years after Wounded Knee.[70] In the absence of implementing substantive policy, for over three decades, there was little to guide award procedure other than the law and informal precedent—and the War Department did not always follow the law. For example, during the Civil War and Indian Wars the Medal of Honor was awarded to several civilians in clear violation of the statutory requirement for the recipient to be a soldier—those medals were later revoked.[71]

The Certificate of Merit was another nascent military decoration existing in 1890. Although not yet a medal, the Certificate of Merit eventually became a medal after the Spanish American War[72] and later was made retroactively convertible into the Distinguished Service Cross, the highest gallantry award after the Medal of Honor.[73] As a result, at least five soldiers at Wounded Knee received commendations that eventually were equivalent to the Distinguished Service Cross.[74] The statute governing the Certificate of Merit specified that it be awarded to "any private soldier [who] shall so distinguish himself."[75] Army regulations published in 1889 further specified that "[c]ertificates of merit will be awarded for extraordinary acts of gallantry performed by private soldiers in the presence of the enemy."[76] The

67. Act of Mar. 3, 1863, ch. 79, 12 Stat. 744, 751.

68. 1889 ARMY REGULATIONS, *supra* note 62, at 18, para. 175.

69. *Id.*

70. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 29.

71. Dwight Mears, *'Neither an Officer Nor an Enlisted Man': Contract Surgeons' Eligibility for the Medal of Honor*, 85 J. MIL. HIST. 51 (2021) [hereinafter Mears, *'Neither an Officer Nor an Enlisted Man'*].

72. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 40.

73. Act of Mar. 5, 1934, ch. 44, 48 Stat. 396.

74. *See* General Orders No. 100, at 5–7 (Dec. 17, 1891), *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=559 (listing Sergeant J. F. Tritle, Corporal Harry W. Capron, Private Nathan Fellman, Private Richard Costner, and Private William Girdwood).

75. Act of Mar. 3, 1847, ch. 61, 9 Stat. 184, 186.

76. 1889 ARMY REGULATIONS, *supra* note 62, at 18, para. 176.

addition of the "presence of the enemy" requirement effectively narrowed the award to circumstances of gallantry in combat. Thus, while there was some nuance in the regulations for both the Medal of Honor and the Certificate of Merit, the statutory basis for both awards was distinguished conduct.

At least thirteen soldiers were also merely mentioned favorably in general orders for actions that occurred at Wounded Knee.[77] This type of secondary recognition was more common for officers, since they were ineligible for the Certificate of Merit due to its restriction to "private soldiers."[78] As with the Certificate of Merit's eventual conversion into the Distinguished Service Cross, after other military decorations were authorized by Congress in 1918, some of these medals were also made retroactively eligible to soldiers who had previously been mentioned in orders at Wounded Knee or elsewhere. Retroactive eligibility for medals authorized during World War I was permitted by both statute and regulation in cases where qualifying actions were performed before April 6, 1917, the soldier was still in the Army as of July 9, 1918, and heroism was already a part of "official records," which was seen to waive any applicable statute of limitations.[79] Under these strict requirements, at least one soldier at Wounded Knee eventually earned a Distinguished Service Cross for a mention in orders,[80] and another received a Silver Star Medal upgraded from the same.[81]

The Distinguished Service Cross was first authorized by executive order and then by Congress in 1918.[82] Army regulations for this medal required soldiers to "distinguish themselves by extraordinary heroism in connection with military operations against an armed enemy."[83] Later guidance clarified that the medal was awarded for "extraordinary heroism not

77. General Orders No. 100, at 3-6, *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=555.

78. 1889 ARMY REGULATIONS, *supra* note 62, at 18, para. 176.

79. Act of July 9, 1918, ch. 143, 40 Stat. 845, 871; Dep't of War, Reg. No. 600-45: Personnel, Award and Supply of Decorations for Individuals para. 13(c) (1922).

80. General Orders No. 3, at 5 (Feb. 28, 1925), *in* DEP'T OF WAR, GENERAL ORDERS AND BULLETINS, 1925 (1926).

81. Entry 3262: Guy H. Preston, *in* 7 GEORGE W. CULLUM, BIOGRAPHICAL REGISTER OF THE OFFICERS AND GRADUATES OF THE U.S. MILITARY ACADEMY AT WEST POINT, NEW YORK, SUPPLEMENT 1920-1930, at 275 (1931), https://babel.hathitrust.org/cgi/pt?id=uc1.b4233765&seq=301.

82. Act of July 9, 1918, ch. 143, 40 Stat. 845, 870.

83. Dep't of War, Reg. No. 600-45: Personnel, Award and Supply of Decorations for Individuals para. 8 (1922).

justifying the award of a [Medal of Honor],"[84] which placed the medal directly below the Medal of Honor in terms of prestige. The Silver Star Medal is a lesser gallantry award that falls directly below the Distinguished Service Cross.[85] At the time of inception, it was called the Citation Star or the Silver Star Device, named after the three-sixteenths of an inch device authorized by Congress in 1918.[86] The device was authorized "for each other citation of an officer or enlisted man for gallantry in action published in orders"[87] and was worn on the ribbon of the campaign medal associated with the same qualifying act of gallantry.[88] This guidance was later amended so that the device only recognized gallantry that "does not warrant the award of a medal of honor or distinguished-service cross," which ensured that it was recognized as the third highest gallantry award and did not duplicate other recognition.[89] Since not all mentions in orders explicitly recognized gallantry, Army regulations specified that, "in order to entitle the person cited to wear the silver star, the citation must show clearly and unquestionably that it is for gallantry in action . . . a citation for meritorious services, or for gallant conduct not in action, does not entitle the person cited to wear the silver star."[90] Later, in 1932, the Army unilaterally converted the device into a medal, which retained the original device authorized in 1918 to avoid running afoul of legislative authorization.[91] These two medals—the Distinguished Service Cross and Silver Star—are of lesser importance to this analysis because they did not exist in 1890 and were only available for upgrade from mentions in orders if the soldiers were still serving in 1918. Consequently, only two soldiers appear to have received either of these medals for actions at Wounded Knee under the retroactive criteria authorized in 1918. However, it is possible that other medals may have been awarded to Wounded Knee soldiers out of the public eye.

84. Dep't of the Army, Reg. No. 600-8-22: Military Awards para. 3-10 (2019).

85. *Id.* para. 3-12.

86. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 64.

87. Act of July 9, 1918, 40 Stat. at 871.

88. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 89–90.

89. Dep't of War, Reg. No. 600-45: Personnel, Award & Supply of Decorations for Individuals para. 10(b)(1) (1922); *see* Act of Jan. 24, 1920, ch. 55, 41 Stat. 398 (1920).

90. Dep't of War, Reg. No. 600-45: Personnel, Award & Supply of Decorations for Individuals para. 10(b)(1) (1922).

91. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 90.

IV. Limitations on Military Award Revocation

The authority to revoke military awards without a statutory mandate is relatively modern. At the time of the Wounded Knee Massacre, there were no statutes or regulations that permitted medal revocation and also no precedent for such an action. However, the Army soon studied the matter in response to its own lack of regulations for the Medal of Honor, which had produced hundreds of undesirable awards. In 1904, an organization called the Medal of Honor Legion asked the War Department to rescind 864 Medals of Honor that had been awarded for enlistment extensions during the Civil War.[92] In response, the Judge Advocate General of the Army ruled that Medal of Honor revocation due to later, subjective disagreement with the original award determination was unlawful if accomplished unilaterally because the awards were not covered by any recognized exceptions to the doctrine of administrative finality (also known as administrative res judicata).[93] Accordingly, in 1916, Congress authorized a review board of retired general officers to consider revoking the medals, which resulted in the revocation of 911 medals for falling below statutory thresholds.[94] Several Assistant Secretaries of the Army later restored six of the revoked medals without authority, which ran against multiple statutes requiring medal recipients to be soldiers in the Army and requiring revocation of the medals in question.[95] These were the only cases where Army Medals of Honor have ever been revoked or restored. Under more expansive interpretations of executive authority developed in later decades, the Army eventually permitted unilateral revocation of service medals in 1961 and eventually of valor decorations in 1974.[96] The Army's 1974 expansion of unilateral revocation authority encompasses Medals of Honor since it

92. *Id.* at 43.

93. Dwight Mears, *Medals "Ridiculously Given"?: The Authority to Award, Revoke, and Reinstate Military Decorations in Three Case Studies Involving Executive Clemency*, 229 MIL. L. REV. 398 (2021) [hereinafter Mears, *Medals "Ridiculously Given"?*].

94. *Id.* at 398–99.

95. *See* Mears, *'Neither an Officer Nor an Enlisted Man'*, *supra* note 71, at 60; MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 167–80 (documenting that the restorations violated the governing Medal of Honor statutes in force at the time of the original awards, the 1916 statute requiring the revocation of the Medals of Honor in question, the modern Medal of Honor statute that governed at the time of restoration, and the statutory authority of the Army's Board for Correction of Military Records).

96. Mears, *Medals "Ridiculously Given"?*, *supra* note 93, at 400–02.

covers all of the service's military awards—although to date, a unilateral revocation of this medal has never occurred.[97]

Presently, all limitations on revocation of military awards are regulatory. The only potential statutory basis for revocation is the requirement for honorable service after medal qualification, which makes no mention of revocation.[98] The doctrine of administrative finality still prevents reopening adjudications for subjective disagreement, but the military has long recognized exceptions in cases where material evidence was not considered.[99] The military can revoke any previously presented military awards for various reasons—including fraud, material error, or mistake—under regulations allowing revocation "if subsequently determined facts would have prevented the original approval or presentation of the award."[100] According to DoD regulations, if the revocation is due to newly discovered misconduct, this must be under circumstances meriting separation from the military.[101]

The highest valor award ever revoked by the Army without a legislative mandate is likely the Distinguished Service Cross awarded to Major Mathew Golsteyn in 2011, which was subsequently revoked by the Secretary of the Army in 2014 after an investigation determined that Golsteyn had murdered a detainee during the same period of service.[102] Although the revocation of this medal was permissible by regulation, the action was controversial because Golsteyn's misconduct was apparently unrelated to his qualifying act of gallantry.[103] This perceived misalignment between Golsteyn's heroism and misconduct inspired several unsuccessful attempts to limit medal revocation by statute, which highlighted that there are presently no statutory limitations on revocation authority.[104]

There is also a precedent for a President revoking medals unilaterally in contravention of regulations. In 2019, President Donald Trump unilaterally revoked several achievement medals previously awarded and presented to

97. *Id.* at 398.

98. 10 U.S.C. § 1136.

99. *See* Off. of the Judge Advoc. Gen., Admin. L. Div., DAJA-AL 1978/2603, Admin. Finality 17 (June 8, 1978) (on file with author). The Army has long recognized exceptions such as "substantial new evidence," which it defines as "new facts . . . discovered which, if known at the time, would have caused a different action to be taken." *Id.* at 20.

100. *See* Mears, *Medals "Ridiculously Given"?*, *supra* note 93, at 381–429.

101. *See* Dep't of Def., Instr. 1348.33 § 8(c), DoD Mil. Decorations & Awards Program 27 (Dec. 21, 2016) (Change 5, Apr. 9, 2021).

102. Mears, *Medals "Ridiculously Given"?*, *supra* note 93, at 392.

103. *Id.* at 404.

104. *Id.* at 405.

Navy attorneys who prosecuted Chief Petty Officer Edward Gallager for murder and attempted murder.[105] President Trump subjectively disagreed with the original award determinations, claimed the medals were "ridiculously given," and announced on Twitter that "[n]ot only did [the prosecutors] lose the case, they had difficulty with respect to information that may have been obtained from opposing lawyers and for giving immunity in a totally incompetent fashion."[106] DoD regulations prohibited the revocation, but military officials nonetheless revoked the awards ostensibly because they did not want to risk removal by the President.[107] President Trump's intervention demonstrates that a President can successfully override regulations on medal revocation, although such action might later be contested either administratively or in federal court as "arbitrary, capricious or not based on substantial evidence," which is the burden of proof for an Administrative Procedure Act claim.[108]

Applied to Wounded Knee, unilateral medal revocation may be permissible in some cases because several of the medals likely violated law or policy.[109] The commission of war crimes or other unrelated misconduct may taint the period of qualifying service, or, alternatively, lawful conduct may fall below the regulatory or statutory thresholds for medals. However, the issue is complicated by the facts that Army regulations first sanctioned unilateral revocation of valor decorations some eighty-four years after Wounded Knee in a complete reversal of the Judge Advocate General's earlier precedent, and no Army Medal of Honor has ever been revoked due to misconduct. As previously mentioned, the single instance in which Army Medals of Honor were revoked fell under a 1916 act of Congress,[110] and the only prior revocation of a Distinguished Service Cross was after the subsequent discovery of concealed misconduct that materially tainted the original award.[111] The administrative history regarding such few revocations of military medals makes the unilateral revocation of all Wounded Knee medals unlikely.

105. *Id.* at 418.
106. *Id.*
107. *Id.* at 421–23.
108. *Id.* at 425–26.
109. Green, *supra* note 8, at 200–08.
110. Mears, *Medals "Ridiculously Given"?*, *supra* note 93, at 398–99.
111. *Id.* at 394–95.

V. Analysis of Various Remove the Stain Bills and Other Revocation Efforts

The first iteration of the Remove the Stain Bill, introduced between 2019 and 2021 under the leadership of Sen. Elizabeth Warren (D-Mass.), was controversial in some quarters because it conflated the modern Medal of Honor with the version of the award that existed in 1890. Specifically, the Bill claimed, incorrectly, that in order to earn the medal, "the deed of the person . . . must be so outstanding that it clearly distinguishes his gallantry beyond the call of duty from lesser forms of bravery."[112] This was the War Department's standard of extraordinary merit, which was not published in regulations until 1897,[113] and a key portion of this language was not effectively codified into law until 1918.[114] As a result, the version of the medal that existed in 1890 is materially different award from the medal existing after 1918. Earlier awards were effectively "Medal[s] of Honor in name only."[115] Accordingly, Remove the Stain was applying ex post facto criteria and retroactively enforcing regulations and law formulated decades later. While ex post facto application of law is permissible outside of criminal penalties,[116] it is nevertheless arguably inequitable in this case because Remove the Stain retroactively imposed more stringent conduct requirements than what existed in 1890.

The Remove the Stain Bill also failed to identify specific misdeeds or other particularized failure to meet award criteria and instead operated under the blanket assumption that all soldiers who received medals at Wounded Knee had "participat[ed] in the massacre of hundreds of unarmed Native Americans."[117] As a result, revocation was to be accomplished summarily without a review process for individual medal recipients, which is problematic. In the absence of evidence of misconduct, both the Army and federal courts normally apply the presumption of regularity principle,

112. S. 1073, 117th Cong. (2021); S. 3164, 116th Cong. (2020); H.R. 3467, 116th Cong. (2019).

113. Dep't of War, Reg. 177 (June 26, 1897), *in* MEDALS OF HONOR ISSUED BY THE WAR DEPARTMENT UP TO AND INCLUDING OCTOBER 31, 1897, at 8 (Washington, Gov't Printing Off. 1897), https://babel.hathitrust.org/cgi/pt?id=mdp.39015079996867&seq=12.

114. Act of July 9, 1918, ch. 143, 40 Stat. 845, 870.

115. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 203.

116. *See* U.S. CONST. art. 1, § 9, cl. 3; *id.* art. I, § 10, cl. 1. These two provisions expressly forbid ex post facto laws for federal and state jurisdictions, respectively. The Supreme Court narrowed the clauses' application to criminal law in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 393 (1798).

117. H.R. 2226, 117th Cong. (2021); S. 1073, 117th Cong. (2021); S. 3164, 116th Cong. (2020); H.R. 3467, 116th Cong. (2019).

which presumes that executive officials are lawfully discharging their duties.[118] While clear misconduct occurred at Wounded Knee which may justify waiving this presumption, it is not clear that *all* soldiers who were awarded Medals of Honor, Certificates of Merit, or other awards were guilty of misconduct. Since the Remove the Stain Bill effectively converted the presumption of regularity into a presumption of impropriety, arbitrary and inequitable revocations may result.

Another issue with the Remove the Stain Bill was the failure to verify that the twenty targeted medals actually were awarded for conduct at Wounded Knee. The Army identifies Private Marvin C. Hillock as one of the soldiers who earned the Medal of Honor at Wounded Knee, making his award one of those potentially impacted by Remove the Stain. However, Hillock's citation only listed Wounded Knee due to a clerical error, meaning that it was actually awarded for a separate engagement.[119] The Army issued the correct location and date in general orders published in 1891,[120] but the Army's later listing of Medals of Honor copied the incorrect date and location.[121] Summarily revoking that medal without review of Hillock's individual case would be demonstrably inequitable since the revocation would be entirely based on a known factual error.

The Remove the Stain Bill also failed to provide for DoD review of Wounded Knee medals prior to revocation. This most certainly was unacceptable to the Office of the Secretary of Defense (OSD), specifically the Office of the Deputy Assistant Secretary of Defense for Military Personnel Policy, which controls the policy governing revocation of military awards.[122] The OSD was likely concerned that politically directed

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118. Dep't of the Army, Reg. 15-185: Army Board for Correction of Military Records para. 2-9 (Mar. 31, 2006); Dep't of Army, Reg. 623-3, Evaluation Reporting System para. 3-37(a), 4-7(a) (June 14, 2019); United States v. Ayers, 54 M.J. 85 (C.A.A.F. 2000); United States v. Breault, 30 M.J. 833, 838 (N-M.C.M.R. 1990); United States v. Johnson, 28 C.M.R. 196, 202 (C.M.A. 1959).

119. *See* General Orders No. 100, at 7 (Dec. 17, 1891), *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=561. Private Martin Hillock was actually awarded the medal for action at White Clay Creek (also known as the Drexel Mission Fight), which occurred the day after the events at Wounded Knee in a different location. *Id.*

120. *Id.*

121. *Indian War Campaigns Medal of Honor Recipients*, U.S. ARMY, www.army.mil/medalofhonor/citations3.html (last updated Mar. 30, 2023) (choose "H" from alphabet menu, then scroll to entry for Marvin C. Hillock).

122. *Military Personnel Policy*, DEP'T OF DEF.: OFF. OF THE UNDER SEC'Y FOR PERSONNEL & READINESS, https://prhome.defense.gov/M-RA/Inside-M-RA/MPP/ (last visited Feb. 14, 2024).

revocation would lead to other medal revocations, since Wounded Knee is undoubtedly not the only instance of questionable adjudication of military awards in U.S. history. Further, without a clear precedent to determine how revocation of Wounded Knee medals would be justified, other potential revocations would be left without a benchmark. This could produce future revocations based more on political judgment than on evidence as well as arbitrary and contradictory revocations that may dilute the value of the awards and unsettle the entire military awards system. This legislative defect may have played a role in the opposition to the Bill in the Senate.[123]

Lastly, the Bill also contained several contradictory provisions, including one subsection that directed the removal of Wounded Knee soldiers' names from the Medal of Honor Roll, which is a list of pensioners.[124] Another subsection claimed that "[t]his Act shall not be construed to deny any individual any benefit from the Federal Government," despite the fact that the Medal of Honor Roll was enacted solely as a "special pension" and thus is clearly a protected benefit under the same legislation.[125] Similar confusion over the Medal of Honor Roll was originally addressed in 1917 by the Judge Advocate General of the Army, who determined that ambiguous medal revocation legislation passed in 1916 only struck names from "the Medal of Honor Circular, which contains the names of all persons to whom the medal has been awarded" and had no effect on the far more restrictive "Medal of Honor Roll" of pension recipients.[126]

Further, the Medal of Honor Roll required a pensioner to meet modern regulatory criteria for the Medal of Honor that was far more stringent than that existing in 1890, such as having "distinguished himself conspicuously by gallantry or intrepidity, at the risk of his life, above and beyond the call of duty."[127] Perhaps most significantly, the Medal of Honor Roll also required honorable discharge from the military under conditions other than retirement, and that pensioners had "attained or shall attain the age of 65

123. The Armed Services Committee routinely solicits advisory opinions from policy proponents at the Department of Defense on legislation of this type, and it is highly likely that this occurred with this provision.

124. S. 1073, 117th Cong. § 3(b) (2021), https://www.congress.gov/117/bills/s1073/BILLS-117s1073is.pdf.

125. S. 1073, § 3(d); *see* An Act to Establish in the War Department and in the Navy Department, Respectively, a Roll, Designated as "the Army and Navy Medal of Honor Roll," and for Other Purposes, ch. 88, § 3, 39 Stat. 53, 54 (1916) [hereinafter "Army and Navy Medal of Honor Roll"]; 10 U.S.C. § 1134a.

126. GENERAL STAFF CORPS AND MEDALS OF HONOR, S. DOC. NO. 66-58, at 135, 139 (1919).

127. "Army and Navy Medal of Honor Roll," *supra* note 125, § 1, 39 Stat. at 53.

years."[128] The Pension Bureau's index to the Medal of Honor Roll shows that none of the Wounded Knee medal recipients were enrolled, at least up through 1924.[129] Public records suggest that only two of the Wounded Knee medal recipients were eligible for enrollment in their lifetimes.[130] Such narrow eligibility was by design, as the Roll was drafted to exclude many prior medal recipients.[131] Indeed, the Medal of Honor Roll was so restrictive in 1917 that the Judge Advocate General noted that it only included 322 names between both the Army and Navy[132]—clearly a small fraction of the over 3,000 Medal of Honor recipients accounted for by the turn of the twentieth century.[133]

The Medal of Honor Roll has since evolved to encompass most Medal of Honor recipients; since 1961 it has included military retirees and persons discharged less than honorably,[134] and since 2013 all Medal of Honor recipients qualified automatically regardless of age.[135] However, the Medal of Honor Roll still refers to a pension list and presently requires enrollees to have earned a Medal of Honor under the modern statutory criteria not

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128. *Id.*; Mears, *'Neither an Officer Nor an Enlisted Man'*, *supra* note 71, at 68.

129. Index, Medal of Honor Roll, Army & Navy, Act of April 27, 1916 (n.d.), https://perma.cc/BGB6-K974. This material is also available at RG 15, Records of the Department of Veterans Affairs, E PI-55 63, Nat'l Archives, Washington, D.C.

130. *See* Medal of Honor Roll Eligibility of Wounded Knee Medal Recipients (n.d.), https://perma.cc/6T6Z-Q3JN (collecting data gathered by the author from profiles, pension records, enlistment records, and retirement records via ANCESTRY, https://www.ancestry.com (last visited Mar. 3, 2024)). The data suggest that Wounded Knee Medal of Honor recipients who received military retirement pensions apparently included Mosheim Feaster; Ernest Garlington; John Gresham; Harris Hawthorne; Thomas Sullivan; and Frederick Toy. *Id.* Dishonorable separations apparently included John Clancy; Marvin Hillock; and Albert McMillan. *Id.* Recipients who failed to reach the age of sixty-five apparently included William Austin; John Clancy; Matthew Hamilton; George Hobday; George Loyd; Adam Neder; Jacob Trautman; James Ward; Paul Weinert; and Herman Ziegner. *Id.* Only Joshua Hartzog and Rheinhardt "Berhard" Jetter were potentially eligible for the Medal of Honor Roll, although pension records for both men show no sign either were enrolled for this pension. *Id.*

131. S. REP. No. 64-240, at 2 (1916).

132. GENERAL STAFF CORPS AND MEDALS OF HONOR, S. DOC. NO. 66-58, at 135 (1919).

133. *Report of the Chief of the Record and Pension Office*, *in* ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1901, VOL. 1, PT. 2, at 1085, 1095 (1901), https://babel.hathitrust.org/cgi/pt?id=mdp.39015035040743&seq=1169; RON OWENS, MEDAL OF HONOR: HISTORICAL FACTS AND FIGURES 25, 27, 56, 59 (2004).

134. Act of Aug. 14, 1961, Pub. L. No. 87-138, 75 Stat. 338.

135. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 767, 768 (2013).

enacted until 1918.[136] These material differences from the original Medal of Honor Roll suggest that Remove the Stain may have targeted this list in error. Ostensibly, drafters of Remove the Stain sought to remove the names of Medal of Honor recipients from the internal DoD award lists and not from the list of pensioners that was a mere subset of Medal of Honor recipients at that time. After all, it would accomplish little to strike names from a list that likely included no Medal of Honor recipients from Wounded Knee in the first place.

A condensed form of the Remove the Stain Bill was eventually added to the House version of the FY2022 National Defense Authorization Act via amendment.[137] While that version of the Bill was textually abbreviated, its methodology was identical, as it directed revocation of all Wounded Knee Medals of Honor without review and without regard to individual misconduct or lack thereof. As with its predecessor, the new Bill effectively assumed that impropriety had tainted the medals of all soldiers at Wounded Knee without regard to evidence. Likewise, the Bill also confused the Medal of Honor Roll's pension listing with the list of all Medal of Honor recipients and directed only the removal of pensioner names while claiming that no benefits would be impacted.

The Remove the Stain Bill was eventually removed from the FY2022 National Defense Authorization Act by the Senate Armed Services Committee with the explanation that "these Medals of Honor were awarded at the prerogative of the President of the United States, not the Congress."[138] This reflected concern that the Bill created a separation of powers conflict. Congress articulated statutory eligibility criteria for the medals but impermissibly encroached on executive discretion when it came to adjudicating a medal award or its revocation. The same view was echoed by South Dakota's sole member of the House of Representatives, Rep. Dusty Johnson (R-S.D.), who expressed, "I do not believe Congress had, or should have, the authority to unilaterally rescind or award military honors, regardless of the circumstances."[139] Further, the Senate Armed Services Committee encouraged the Secretary of Defense to review the Wounded

136. 10 U.S.C. § 1134a(b), (d).

137. National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong. § 585 (2021).

138. LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY S. 1605, *supra* note 5, at 1038.

139. Gabriel Pietrorazio, *Wounded Knee Massacre 'Tarnishes' Integrity of Medal of Honor*, NATIVE NEWS ONLINE (Aug. 25, 2022), https://nativenewsonline.net/currents/wounded-knee-massacre-tarnishes-integrity-of-medal-of-honor.

Knee medals.[140] While this discretionary review may have occurred, the results were never released, and DoD spokespeople responded to press inquiries with the statement that the DoD "does not discuss internal, deliberative processes."[141]

A successor to the prior year's Remove the Stain Bill was again introduced via amendment into the House version of the FY2023 National Defense Authorization Act by Rep. Kai Kahele (D-Haw.), who asserted that he was "right[ing] a historic wrong on America's native indigenous peoples."[142] An identical version was also proposed by Senator Warren for amendment to the Senate version of the FY2023 National Defense Authorization Act.[143] Because this legislation was identical to its predecessor, it contained the same drafting errors as well as a methodology that overlooked the possibility that some soldiers at Wounded Knee may have earned their decorations.[144] According to Kahele, "[w]e don't need to conduct an investigation into Wounded Knee" based on the apparent belief that atrocities clearly tainted all decorations that flowed from the incident.[145] The Bill suffered the same fate as its predecessor and was again stripped from the National Defense Authorization Act by the Senate Armed Services Committee.[146]

Remove the Stain proponents also lobbied the President starting in November 2021 to unilaterally revoke the Wounded Knee medals.[147] The same parties first sought statutory authority for revocation by introducing legislation in 2019—thus implying that a statute is a prerequisite to accomplish revocation, which substantially undercuts the argument for unilateral revocation. Remove the Stain Bill proponents argued that the

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140. LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY S. 1605, *supra* note 5, at 1038.

141. Pietrorazio, *supra* note 139.

142. Kai Kahele (@kaikahele), TWITTER (Jul. 14, 2022, 7:01 P.M.), https://web.archive.org/web/20220714190238/https://twitter.com/kaikahele/status/1547657462542544896; *see* H.R. REP. No. 117-405, at 93 (2022).

143. *Rescission of Medals of Honor Awarded for Acts at Wounded Knee Creek on December 29, 1890*, 168 CONG. REC. S5572 (daily ed. Sept. 29, 2022) (statement of Sen. Warren).

144. H. Comm. on Rules, Amendment to Rules Committee Print 117–54 Offered by Mr. Kahele of Hawaii (June 28, 2022), https://amendments-rules.house.gov/amendments/KAHELE_064_xml220704230337604.pdf.

145. Pietrorazio, *supra* note 139 (quoting Kahele).

146. LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY H.R. 7776, *supra* note 5, at 1916.

147. Letter from Elizabeth Warren, U.S. Senator, et al., *supra* note 6.

medals could be revoked under regulations permitting a new adjudication if "facts subsequently determined would have prevented original approval of the award had they been known at the time of approval."[148] They alleged that the concurrent resolution passed by the 101st Congress "acknowledged the horrendous actions of the U.S. Army at Wounded Knee—facts that were clearly not sufficiently determined or acknowledged at the time the medals were conferred."[149] According to Kahele, unilateral action under this provision was "the quickest, easiest way" to accomplish revocation.[150] However, this argument misunderstands the regulatory provision, which does not permit reopening award adjudications for reason of subjective disagreement. Rather, the regulation requires material facts to have not been originally "known at the time of approval," which is effectively the substantial new evidence exception to the doctrine of administrative finality.[151] The concurrent resolution passed by the 101st Congress introduced no facts that were unknown at the time of the Wounded Knee Massacre.[152] Senior Army leadership certainly avoided prosecuting or otherwise disincentivizing unlawful conduct at Wounded Knee, but they must have been aware of such misconduct at the time of award approval. As a result, while this conduct and the failure to police it was undeniably reprehensible, it does not reflect new material facts and thus does not fall under the substantial new evidence exception.

Ultimately, while retroactive revocation of Medals of Honor is sanctioned by DoD regulations under some circumstances, military award policy will not permit revocation of all Wounded Knee medals in the absence of evidence of fraud, material error, or impropriety in specific cases. This regulatory incompatibility makes it unlikely that the President will act unilaterally on the matter. Indeed, in 2022, the White House issued a statement that "[t]he Biden-Harris administration considers the Wounded Knee Massacre a stain on our nation's history" but took no action other than committing to further review.[153] Finally, revocation under executive authority is also inadvisable because it may set off a cycle of political reprisal that would politicize the award system and would leave any action open to reversal by a successor. After all, once the precedent is set that the

148. *Id.*
149. *Id.*
150. Pietrorazio, *supra* note 139 (quoting Kahele).
151. Off. of the Judge Advoc. Gen., *supra* note 99, at 20.
152. S. Con. Res. 153, 101st Cong. (1990).
153. Pietrorazio, *supra* note 139 (quoting a representative of the White House's National Security Council).

President can revoke any medal, nothing would prevent future executives from counteracting a given determination under the same authority since statutes of limitations would already be satisfied.[154] For this reason, revocation outside of existing regulations should only be accomplished under statutory authority, and Congress would also be wise to codify regulatory guidelines on revocation to prevent them from being circumvented.

VI. Precedent for and Benefits of Historical Reviews

In 2019, retired Marine Corps Major General James Livingston made public comments in reaction to the Remove the Stain Bill.[155] Livingston's views carried weight as he was a Medal of Honor recipient for gallantry during the Vietnam War.[156] The general was not against "history [being] relooked" at Wounded Knee, but instead took issue with who would make the judgment on revocation.[157] In Livingston's view, "[t]he notion of politicians doing that, just bothers me to no end" because it meant that revocation was beholden to officials with clear conflicts of interest.[158] Instead, he proposed that "an unbiased body of historians . . . , people who are smart about what transpired, can reexamine [the Wounded Knee Massacre] and make a determination."[159]

Fortunately, a methodology does exist to draw upon historical expertise in advising the DoD on military awards that may have been impacted by racism or other discrimination. In 1992, Secretary of the Army John Shannon requested an independent historical review to "study the process by which the Medal of Honor had been awarded to soldiers during World War II" and, in the case of African American servicemen, "to determine whether the processing of those recommendations had been proper under

154. The statute of limitations on recommending and awarding Medals of Honor and Distinguished Service Crosses at 10 U.S.C. § 7274(b) would be satisfied by the original awards being timely, so medals revoked by executive authority could be reinstated without bills of relief. In contrast, if revocation were accomplished legislatively, awards could not be lawfully reinstated without statutory waivers.

155. Schuyler Kropf, *Let Historians, Not Politicians, Decide Medal of Honor Recall from Wounded Knee*, POST & COURIER (Charleston, S.C.) (Sept. 14, 2020), https://www.postandcourier.com/politics/let-historians-not-politicians-decide-medal-of-honor-recall-from-wounded-knee/article_e950eec8-15df-11ea-a510-1feddcb9a31c.html.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

public law and War Department regulations."[160] The resulting historical review was conducted by scholars from Shaw University in Raleigh, North Carolina.[161] The review was a reaction to public pressure from Black servicemen, their families, and Congress, who believed the Army should "make restitution" for the "racism [which] pervaded the Army and affected the awarding of medals."[162] Specifically, the Army asked the scholars to "study the process by which the Medal of Honor had been awarded to soldiers during World War II" and to "determine whether the processing of [black soldiers] for the Medal . . . had been proper under public law and War Department regulations."[163] Midway through the study, the Army also asked the team to compile a list of lower award recommendations and determine if they ought to have been originally approved as Medals of Honor.[164] The historical team ultimately identified nine African American servicemen who had received the Distinguished Service Cross and one other soldier whose company commander testified that he had been recommended for a Medal of Honor.[165] An Army decorations board reviewed these findings and recommended that seven of the ten soldiers receive Medals of Honor, which were awarded by President Bill Clinton in 1997 after Congress waived the statute of limitations in 1996.[166]

In 1996, Congress also directed another retroactive review of military awards to address discrimination against Asian American and Native American Pacific Islander servicemembers during World War II.[167] As before, the Army tasked a historical team with identifying any Distinguished Services Crosses that were awarded to these ethnicities. The main difference in this case was that the Armed Services Committee directed the military services to conduct the review themselves and waived the statute of limitations preemptively, whereas the earlier historical review originated with the Army. In this case, the Army relied upon civilian

160. ELLIOTT V. CONVERSE ET AL., THE EXCLUSION OF BLACK SOLDIERS FROM THE MEDAL OF HONOR IN WORLD WAR II: THE STUDY COMMISSIONED BY THE UNITED STATES ARMY TO INVESTIGATE RACIAL BIAS IN THE AWARDING OF THE NATION'S HIGHEST MILITARY DECORATION 3, 16 (1997).

161. *Id.* at 17.

162. *Id.* at 16.

163. *Id.*

164. *Id.* at 19.

165. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 195.

166. *Id.*; *see* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2529 (1996).

167. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 312 (1996).

historians under the Command History Office of the Defense Language Institute in Monterey, California. This team used the prior review of African American servicemembers as a model and completed its review in 1998.[168] The historical review ultimately submitted a larger number of names than the previous review simply because the Asian American and Native American Pacific Islander servicemembers received a greater number of Distinguished Services Crosses that could be documented: 104.[169] The Army ultimately recommended upgrading twenty-two of these awards to the Medal of Honor.[170]

Congress authorized a third medal review in 2019 for African American, Asian American, Hispanic American, Jewish American, and Native American veterans who were awarded the Distinguished Services Cross, Navy Cross, or Croix de Guerre with Palm during World War I.[171] In this case, the Armed Services Committee encouraged consideration of historical evidence gathered by the Valor Medals Review Task Force led by scholars at Park University in Parkville, Missouri.[172] This historical review is ongoing but has so far identified at least 200 former servicemembers for award reconsideration.[173]

The justification for using historical reviews to address past discrimination in military awards is similar to the judicial doctrine providing a remedy for discrimination under "systemic disparate treatment" in employment through which an employer uses an openly discriminatory policy or when discrimination occurs as part of a widespread pattern or practice.[174] Discrimination was structural during the timeframes covered by all the historical reviews since explicit racial segregation was statutory during those periods. This systemic discrimination justified the presumption, in the absence of direct evidence, that discrimination had tainted the military awards process. In these cases, the remedy was to reconsider presumptively tainted awards for upgrade to the Medal of Honor outside of the normal statute of limitations.

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168. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 196.

169. Letter from Command Historian, Def. Language Inst., to Military Awards Branch (Sept. 30, 1998) (on file with author).

170. James C. McNaughton et al., *"Incontestable Proof Will Be Exacted": Historians, Asian Americans, and the Medal of Honor*, PUB. HISTORIAN, Fall 2002, at 11, 32.

171. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 582, 133 Stat. 1198, 1412–14 (2019).

172. H. R. REP. No. 116-333, at 1245 (2019) (Conf. Rep.).

173. *Valor Medals Review Project*, PARK UNIV.: GEORGE S. ROBB CENTRE, https://gsr.park.edu/valor-medals-review-project/. (last visited Feb. 14, 2024).

174. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 195.

Authorizing a historical review under statutory authority to recommend revocation of medals differs from these earlier precedents in some respects—particularly the outcome—but ultimately would employ a similar methodology. After all, racism pervaded the time of the Wounded Knee Massacre and affected Native Americans as much as or more than any other racial or ethnic group in American society. During this period, the U.S. government had forced Native Americans lacking citizenship or effective representation onto reservations where they could be controlled and forced to acquire white culture. It is likely that racial prejudices and stereotypes influenced some soldiers' decisions to violate use of force rules at Wounded Knee, and the failure of military officials and politicians to prosecute these offenses. As with the earlier reviews that resulted in medal upgrades based on the reasonable presumption that racism had tainted the awards process, the award actions at Wounded Knee justify reconsideration for potential downgrade for similar reasons. This should be an outside historical review that would gather evidence and provide a rationale to justify any revocations. However, the ultimate decision to recommend revocation would still rest with the Army, following the precedent set by earlier historical reviews and granting appropriate discretion to the DoD to make its own determination.

There are several advantages in using an outside historical review to recommend Wounded Knee medal revocations. First, the Army lacks the funding and qualified personnel to conduct this work on its own. As a matter of policy, in reviews of Medal of Honor submissions, historians at the Army's Center of Military History (CMH) "do not research unit records at the National Archives to verify the specific actions."[175] This is expressly "[d]ue to resource and time constraints."[176] The Center only "conduct[s] a cursory review for document authenticity" and "a brief review of outside material—typically secondary sources."[177] As a result, CMH provides "[n]o specific . . . recommendation [on the merits of the award]."[178] In contrast, outside scholars that are specialists on Native American studies or Native American history can provide more expertise than Army historians. Outside scholars can also produce recommendations at no cost to the government.

An outside historical review would also cure several perceived defects of the Remove the Stain Bill or the unilateral revocation efforts. First, the

175. Ctr. of Mil. Hist. Info., U.S. Army Center of Military History (CMH) Review of Medal of Honor Recommendation Packets (Jan. 23, 2008) (on file with author).

176. *Id.*

177. *Id.*

178. *Id.*

review would ensure that revocation is guided by scholarly expertise rather than by political judgment. This methodology would evaluate Wounded Knee medals under law and regulations in force in 1890 (or criteria that were applied retroactively in the case of mentions in orders which were later upgraded), which would ensure that modern criteria are not imposed retroactively in an ex post facto manner. Further, the review would examine particularized evidence of individual soldiers' conduct to judge medal qualification, which would ensure that any recommended revocation is not arbitrary or capricious. In contrast with the Remove the Stain Bill, the review would recommend non-binding revocations to the Army, which permits the Senior Army Decorations Board and ultimately the Secretary of the Army to decide the merits of medal revocation. While theoretically, the review could result in no revocations of Wounded Knee medals, that outcome is unlikely because the review would be backed by a statutory mandate, which would effectively convey that maintaining the status quo is unacceptable. It is likely, however, that some Wounded Knee medals would not be revoked under this methodology. The review would not necessarily exonerate any soldiers retaining their medals. In many cases, failure to revoke a medal would indicate only the absence of evidence justifying revocation. Finally, backing the historical review with statutory authority ensures that any resulting revocations are relatively permanent, since they could only be undone by another statutory waiver.

VII. Potential Bases for Revocation of Wounded Knee Medals

Given reports of indiscriminate killings of many noncombatants who were attempting to escape[179] and recommendations based on actions that appear unremarkable rather than distinguished, some of the medals awarded at Wounded Knee may fall below existing statutory thresholds for distinguished conduct. Actions also may have occurred outside of an authorized conflict, meaning they were potentially unlawful at that time. Given that the Army produced a detailed investigation soon after Wounded Knee, the extensive evidence it gathered permits a new historical review that would take into account the award criteria that existed in 1890.

179. Green, *supra* note 8, at 204–06.

A. Distinguished Conduct/Prohibited Conduct Threshold

Had senior military and political leaders been less captive to racial bias and other prejudices in 1891, they likely would have acted on investigative reports that avoidable noncombatant deaths had occurred at Wounded Knee and not condoned such misconduct. Among many possible actions, the Army might have determined that, if a given soldier violated the Lieber Code at Wounded Knee, then their conduct was not overall "distinguished" as required by regulations and statutes governing the Medal of Honor and the Certificate of Merit.[180] Indeed, similar condemnation had previously occurred after the Sand Creek Massacre of 1864, where U.S. volunteers under military authority had slaughtered friendly Cheyenne and Arapaho women and children without provocation.[181] In that case, the War Department concluded that the soldiers' conduct was "wholly unauthorized and criminal" and declined to award any medals.[182]

Medals of Honor and Certificates of Merit were awarded to several artillerymen who may have unnecessarily killed noncombatants at Wounded Knee.[183] One of these soldiers, Corporal Paul H. Weinert, received the Medal of Honor for his "gallantry and enterprise in action against hostile Sioux Indians."[184] Weinert later attested that he continued firing his M1875 Hotchkiss mountain gun into the ravine full of commingled combatants and noncombatants even after being directed by an officer "to come back" and that he "expected a court-martial" for disobedience.[185] Weinert stated that he resolved to "make [the Natives] pay" and continued firing into the ravine until "everything was quiet at the

180. 1889 ARMY REGULATIONS, *supra* note 62, at 18, para. 175; Act of Mar. 3, 1863, ch. 79, 12 Stat. 744, 751.

181. ARI KELMAN, A MISPLACED MASSACRE: STRUGGLING OVER THE MEMORY OF SAND CREEK 24–25 (1st paperback ed. 2015). Some readers may access this content free of charge via their educational institution, at ACLS HUMANITIES EBOOK, https://www.fulcrum.org/concern/monographs/ff365591t (last visited Feb. 14, 2024).

182. A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 294 (Washington, Gov't Printing Off. 1880), https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t9571gg91&seq=318.

183. Corporal Paul Weinert, Musician John Clancy, Second Lieutenant Harry Hawthorne, and Private Joshua Hartzog were all assigned or attached to Battery E, 1st U.S. Artillery.

184. General Orders No. 100, at 6 (Dec. 17, 1891), *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=560.

185. 2 DEEDS OF VALOR: HOW AMERICA'S HEROES WON THE MEDAL OF HONOR 325 (Walter F. Beyer & Oscar F. Keydel compilers, 1902), https://babel.hathitrust.org/cgi/pt?id=mdp.39015027038424&seq=353.

other end of the line."[186] A historical review panel may conclude that Weinert's actions were unjustified under the criterion of military necessity required by the Lieber Code[187] because he continued firing at noncombatants even after there was no longer any apparent military advantage to be gained by doing so. This standard might be the basis to conclude that Weinert's actions at Wounded Knee were not overall distinguished as required by statute at that time. Weinert apparently violated the Army's general orders on the use of force and therefore was arguably undeserving of the Medal of Honor.

Similarly, Second Lieutenant Harry L. Hawthorne was an artilleryman and platoon leader attached to the battery present at Wounded Knee.[188] He earned a Medal of Honor in part for the "effect with which he handled and served his [artillery] guns in action against hostile Sioux Indians."[189] Hawthorne took offense to an editorial criticizing the firing of the M1875 Hotchkiss mountain guns "long after resistance had ceased [at Wounded Knee]."[190] In his rebuttal, he admitted that the mountain guns continued firing at Natives—who he repeatedly referred to as "savages"—well after "cease firing" had sounded, but he claimed that this was necessary because "resistance had not ceased."[191] Hawthorne also acknowledged that the continued firing of the battery "may have killed or wounded a few non-combatants," but he rationalized that this was entirely appropriate because "no woman nor child was knowingly injured [by the artillery]."[192] It seems that the lieutenant was justifying these deaths on the basis of having no specific intent to target noncombatants as well as on the basis of military necessity. However, the general order in question did not merely prohibit killing noncombatants intentionally; rather, it only permitted collateral damage that was "incidentally *unavoidable*."[193] Hawthorne arguably violated the Army's general orders on the use of force since he continued firing after a ceasefire and used munitions that foreseeably killed both combatants and noncombatants indiscriminately. As with Corporal Weinert,

186. *Id.*

187. REGAN, *supra* note 23, at 205.

188. General Orders No. 100, at 4, *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=558.

189. *Id.*

190. H. L. Hawthorne, *The Sioux Campaign of 1890-91*, 19 J. MIL. SERV. INST. U.S. 185, 186 (1896), https://babel.hathitrust.org/cgi/pt?id=chi.096667777&seq=914.

191. *Id.*

192. *Id.*

193. REGAN, *supra* note 23, at 205.

this might be the basis to conclude that Hawthorne intentionally avoided preserving noncombatant life, and, therefore, his actions at Wounded Knee were not overall distinguished as required by statutes governing the Medal of Honor.

The case of another Medal of Honor recipient, First Lieutenant John C. Gresham, might have a different outcome under this category of analysis considering the officer's adherence to Army directives. Gresham received his medal for having "voluntarily led a party into a ravine to dislodge Sioux Indians concealed therein" during which time he was wounded.[194] Gresham's award recommendation noted that he "worked carefully, patiently and coolly, up the ravine, searching among the dead and wounded, brought out Nineteen women and children, [and] disarmed some wounded men."[195] This account suggests that he accomplished his duty while balancing military necessity with the Army's general orders regarding the use of force. He preserved numerous noncombatant lives and chose to disarm some combatants rather than kill them. Gresham easily could have denied quarter to both combatants and noncombatants in the same manner of several of his comrades and likely would have suffered no consequences. Other testimony corroborates this account and several others thus demonstrating that several officers halted firing to save groups of noncombatants in the same ravine. In fact, one of these efforts reportedly entailed a half-hour of negotiation.[196] Such testimony suggests that the soldiers, or at least their commissioned officers, were aware of the general orders instructing them to preserve noncombatant life. There was a clear spectrum of compliance with these directives.

Two recipients of the Certificate of Merit might also retain their awards under this standard of evaluation. Privates Richard Costner and William Girdwood, both Hospital Corps members who enlisted solely to perform medical functions,[197] were recognized for actions at both Wounded Knee and White Clay Creek, an engagement which occurred the day following

194. *John Channing Gresham*, CONG. MEDAL OF HONOR SOC'Y, https://www.cmohs.org/recipients/john-c-gresham (last visited Feb. 13, 2024); *see* General Orders No. 100, at 4 (Dec. 17, 1891), *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=558.

195. Letter from Captain Charles Varnum to Adjutant, 7th Cavalry, Adjutant General's Off., Principal Record Div., Record Group: 94 (Feb. 14, 1891) (on file with the Nat'l Archives, Washington D.C.).

196. Investigation Pursuant to Special Orders 8 & 10, *supra* note 15, at 119–27; UTLEY, *supra* note 16, at 225–26.

197. An Act to Organize the Hospital Corps of the Army of the United States, to Define Its Duty and Fix Its Pay, ch. 311, § 5, 24 Stat. 435, 435 (1887).

Wounded Knee. The two soldiers took an abandoned ambulance wagon and "assisted in carrying an officer, who lay wounded on the skirmish line, off the field" while under "a sharp fire."[198] Thus, both members, apparently voluntarily, placed their own lives at risk, since the action was performed under fire. Further, the men were not traditional combatants, since it appears that they played only a medical role at Wounded Knee. If this account is accurate, revoking their Certificates of Merit (equivalent to Distinguished Service Crosses) would be highly inequitable since the soldiers committed no apparent impropriety and went well beyond the requirements of their normal duties. Their actions arguably met both the statutory and regulatory requirements of "distinguished" conduct and "extraordinary acts of gallantry . . . in the presence of the enemy."[199]

The sole Distinguished Service Cross resulting from a mention in orders at Wounded Knee might also survive this analysis. Captain John Van R. Hoff, an assistant surgeon at Wounded Knee, was mentioned in orders for his "conspicuous bravery and coolness under fire in caring for the wounded,"[200] which was later upgraded to the Distinguished Service Cross in 1925.[201] Since Hoff received the Distinguished Service Cross due to his original mention in orders meeting the criteria for this medal, his eligibility was on this basis rather than the criteria of the Certificate of Merit that entitled other Wounded Knee soldiers to the Distinguished Service Cross. His citation appears to facially satisfy period requirements for soldiers to "distinguish themselves by extraordinary heroism in connection with military operations against an armed enemy"[202] since he risked his life to administer medical aid. Further, like the two Hospital Corps members, Hoff's medical specialty likely meant that he never participated in hostile actions against the Lakota Sioux, so he is an unlikely candidate for disqualification based on misconduct.

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198. OFFICIAL ARMY REGISTER FOR MARCH, 1891, at 381 (Washington, Adjutant General's Off. 1891), https://babel.hathitrust.org/cgi/pt?id=uc1.b2985607&seq=385; *see* General Orders No. 100, at 7 (Dec. 17, 1891), *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=558.

199. 1889 ARMY REGULATIONS, *supra* note 62, at 18, para. 175; Act of Mar. 3, 1847, ch. 61, 9 Stat. 184, 186.

200. General Orders No. 100, at 3, *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=557.

201. General Orders No. 3, at 5 (Feb. 28, 1925), *in* WAR DEP'T, GENERAL ORDERS AND BULLETINS, 1925 (1926).

202. Dep't of War, Reg. No. 600-45: Personnel, Award and Supply of Decorations for Individuals para. 8 (Mar. 9, 1922).

Prohibited conduct is perhaps the strongest justification for revocation advanced in this article because it falls within current Army regulations that stipulate "actions . . . not compatible with continued military service" are grounds for retroactive medal revocation under existing statutory authority.[203] It is notable that these regulations did not exist in 1890, and it appears that no Medal of Honor or Certificate of Merit recipients were expelled from the service or suffered any judicial or non-judicial consequences due to actions at Wounded Knee. However, had the soldiers been implicated in crimes and prosecuted, the Army may have denied them medals even in the absence of a regulatory requirement to do so.

Revocation under a new statutory mandate would supersede regulatory requirements not based in statute, meaning that revocation could occur in other situations. This will be discussed in the following section.

B. Distinguished Conduct/Conduct Not Distinguished Threshold

Another route to possible disqualification of Medals of Honor and Certificates of Merit awarded at Wounded Knee concerns soldiers that were recommended for actions that simply fell below regulatory and statutory requirements for distinguished conduct—even if there is no evidence that impropriety tainted such actions. Regulatory guidelines in 1890 did not specify precise thresholds for what conduct might be "distinguished," largely delegating this determination to recommending or approving officials.[204] Webster's 1890 dictionary defined the term as "[s]eparated from others by superior or extraordinary qualities; whence, eminent; extraordinary; transcendent; noted; famous; celebrated."[205]

Another firm precedent exists for determining whether some actions in this period were distinguished or not, since all War Department awards of the Medal of Honor between 1861 and 1916 were reviewed for statutory ineligibility by a review board under a 1916 congressional mandate.[206] Notably, the review board identified some 870 Medals of Honor which rewarded the reenlistment of Civil War soldiers.[207] The review board

203. Dep't of Army, Reg. No. 600-8-22, Military Awards para. 1-30(b) (Mar. 5, 2019).

204. 1889 ARMY REGULATIONS, *supra* note 62, at 18, para. 175.

205. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 354 (Chicago, Donohue & Henneberry 1890), https://babel.hathitrust.org/cgi/pt?id=uiug.30112003974265&seq=388.

206. An Act for Making Further and More Effectual Provision for the National Defense, and for Other Purposes, ch. 134, § 122, 39 Stat. 166, 214 (1916).

207. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 55; GENERAL STAFF CORPS AND MEDALS OF HONOR, S. DOC. NO. 66-58, at 113 (1919).

determined these enlistment extensions objectively fell below the requirements for distinguished conduct, and called them "pusillanimous."[208] Further, "carrying dispatches," "picking up shells and extinguishing burning fuses," "bringing off the colors" during the surrender of a post, "extinguishing a fire in a Government storehouse," and serving as "the so-called [President] Lincoln body guard" all were determined to fall beneath this same threshold of distinguished conduct.[209] As a result, the Army revoked all of those awards in 1917, a total of 911 medals.[210]

One of the Medals of Honor for actions at Wounded Knee was awarded in part for extending an enlistment. First Sergeant Jacob Trautman received the medal for having "killed a hostile Indian at close quarters" and also for "remain[ing] to the close of the campaign" despite being "entitled to retirement from service."[211] While the 1916 review board did not rescind Trautman's medal, it apparently did not consider the available evidence underlying the award. Instead, the board relied on recorders who summarized the cases under review rather than looking at primary sources—a methodology adopted to save time due to the large number of medals to be reviewed.[212] As a result, the review board's summary of Trautman's file merely repeated his citation, which did not clearly convey that an enlistment extension was material to his recommendation or award of the medal.[213] In hindsight, a more thorough methodology employed by the board might have resulted in revocation under the 1916 statute. After all, preserving Trautman's medal contradicted the rationale used to rescind other medals under the same review board.

Another soldier at Wounded Knee, Private Matthew H. Hamilton, received the Medal of Honor for "rounding up and bringing to the skirmish line a stampeded pack mule."[214] It appears that the 1916 review board considered only the award citation, which was "bravery in action."[215] Thus,

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208. S. DOC. NO. 66-58, at 113.

209. *Id.* at 134.

210. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 56.

211. *Jacob Trautman*, CONG. MEDAL OF HONOR SOC'Y, https://www.cmohs.org/recipients/jacob-trautman (last visited Feb. 13, 2024).

212. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 55; S. DOC. NO. 66-58, at 421.

213. *See* S. DOC. NO. 66-58, at 421.

214. Claire Barrett, *Congress Members Propose Rescinding Medals of Honor for Wounded Knee*, HISTORYNET.COM (July 1, 2020), https://www.historynet.com/twenty-soldiers-could-have-their-medals-of-honor-rescinded-for-their-roles-at-wounded-knee.htm.

215. A search of both Hamilton's name and the date and location failed to include any more than the citation for his medal. *See* S. DOC. NO. 66-58, at 193.

as with the prior case of First Sergeant Trautman, the recorders' failure to enumerate the actual reason for the award probably resulted in the board bypassing this case, since it would not have possessed enough information to reconsider the original determination of whether that action was distinguished. On its face, rounding up a pack mule may be comparable to "carrying dispatches" or "picking up shells and extinguishing burning fuses," which were other actions the board determined to be undistinguished.[216]

This pathway to revocation is weaker than cases of serious misconduct, since misconduct meriting expulsion is likely the only authority under current Army regulations that would sanction retroactive Wounded Knee medal revocations.[217] The actions of the soldiers in question under this analysis were apparently fully known to award authorities at the time of award approval, meaning that they are unlikely to fall under circumstances where "facts subsequently determined would have prevented original approval of the award if they had been known at the time of approval."[218] Since regulations do not provide other grounds for revocation, these cases would likely require a statutory mandate as a prerequisite for reopening the awards. The Army medal revocations in 1917 are an administrative precedent for this type of revocation as all 911 medals revoked under that review failed to satisfy statutory criteria and were not based on misconduct.[219] The determinations of this prior review could be used as a benchmark to guide similar revocations for conduct that is undistinguished.

C. Threshold for Conduct "In Action"

It is also possible that the Wounded Knee Massacre itself may not have occurred "in action" or "in the presence of the enemy" within the laws and legal doctrines that governed in 1890, which covered not only military awards but also the lawful use of force. Existing legal doctrines afforded Indian War engagements parity with foreign conflicts only if they rose to the level of general hostility or insurrection such that Native Americans were "assimilated with the enemy."[220] Decades prior to Wounded Knee, the Judge Advocate General of the Army ruled that, absent such a determination of hostility, soldiers had a duty to protect Native Americans

216. *Id.* at 134.

217. Dep't of Army, Reg. No. 600-8-22, Military Awards para. 1-30(b) (Mar. 5, 2019).

218. *Id.* at para. 1-30(a).

219. MEARS, MEDAL OF HONOR EVOLUTION, *supra* note 63, at 55–56.

220. A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, *supra* note 182, at 293.

since they were "subject to the sovereignty of the United States" and were "entitled, as repentant wards, to the protection of the government."[221] If this assimilation to an enemy state did not occur, then the Judge Advocate General opined that "acts of violence committed against [Native Americans] as if they were enemies, are not acts of legitimate warfare but crimes."[222]

A federal Indian Affairs agent's misperception that a ceremony known as the "Ghost Dance" was actually a call for insurrection led to the events at Wounded Knee.[223] The government's belief that the Natives were hostile was clearly mistaken, a fact later acknowledged by the Army's commanding general, Major General John Schofield.[224] When soldiers of the Seventh Cavalry arrested Chief Big Foot (or Spotted Elk) and his band of Lakota immediately prior to Wounded Knee, the surrender was peaceful.[225] As a result, the Lakota had already submitted to military authority when Wounded Knee occurred; therefore, the Lakota were not then hostile to the United States.[226] When violence unexpectedly erupted, many Natives who had been disarmed then rearmed themselves and fought in self-defense.[227] This extraordinary combination of events might be the basis to conclude that Wounded Knee was not truly "in action" or "in the presence of the enemy" for the purposes of both assimilation to foreign war as well as the existing Medal of Honor or Certificate of Merit statutes and regulations in 1890.[228]

It is also possible that some of the medals awarded for action at Wounded Knee did not occur under active fire, which may be a basis to conclude that they were unlawful or against regulations even if Wounded Knee was considered "in action" for the purposes of military awards. This approach may apply to the case of Second Lieutenant Guy H. Preston of the Ninth Cavalry, whose mention in orders was later upgraded to the Silver Star Medal after this decoration was authorized in 1918.[229] Preston was cited in orders "[f]or courage and endurance in carrying . . . an important dispatch during the action against hostile Sioux Indians at Wounded Knee

221. *Id.*
222. *Id.*
223. GREENE, *supra* note 11, at 99.
224. 1891 ANNUAL REPORT, *supra* note 10, at 56.
225. *Id.* at 150.
226. GREENE, *supra* note 11, at 228–30.
227. *Id.*
228. Act of Mar. 3, 1863, ch. 79, 12 Stat. 744, 751.
229. CULLUM, *supra* note 81, at 275.

Creek, South Dakota, from the battle-field to the Pine Ridge Indian Agency, over a road exposed to the enemy."[230] A careful reading of the citation suggests that Preston's qualifying conduct occurred "during" the action at Wounded Knee but not actually at Wounded Knee, and that his route on horseback was on a route merely "exposed" to the enemy, which implies he was not actually engaged by a hostile force.[231] Thus, after reviewing other evidence in the case, a review panel might conclude that Preston did not actually experience hostilities that would qualify as occurring "in action," a prerequisite for the Silver Star Medal under both law and regulation.[232]

Such a pathway to revocation is likely the weakest discussed in this analysis because the Army had clearly, even if mistakenly, designated the Natives involved as hostile, and most soldiers decorated at Wounded Knee appear to have been under fire during the actions that led to medal recommendations. The Army's commanding general later described the Lakota Sioux as having "meditated a general uprising"[233] and the division commander expressed that they were "in armed hostility and defiant of the civil authorities."[234] It is also unclear whether the doctrines governing Indian War legality were intended to apply to military award eligibility either at that time or in a retroactive manner. As a result, this pathway for medal revocation is not clearly sanctioned under Army regulations[235] and has never been used to revoke medals in the past. Further, the fact that the awards in question were already approved and presented shifts the evidentiary burden in a retroactive inquiry to those seeking revocation. Accordingly, in the absence of evidence of specific misconduct, both the Army and federal courts normally apply the presumption of regularity principle, which presumes that the soldiers in question were lawfully discharging their duties.[236]

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230. General Orders No. 100, at 4 (Dec. 17, 1891), *in* WAR DEP'T, 1891 GENERAL ORDERS, *supra* note 65, https://babel.hathitrust.org/cgi/pt?id=uc1.b3017076&seq=558.

231. *Id.*

232. Act of July 9, 1918, ch. 143, 40 Stat. 845, 871; Dep't of War, Reg. No. 600-45: Personnel, Award and Supply of Decorations for Individuals para. 10(b)(1) (Mar. 9, 1922).

233. 1891 ANNUAL REPORT, *supra* note 10, at 56.

234. *Id.* at 145.

235. Dep't of Army, Reg. No. 600-8-22, Military Awards para. 1-30 (Mar. 5, 2019).

236. Dep't of Army, Reg. No. 15-185: Army Board for Correction of Military Records para. 2-9 (Mar. 31, 2006); Dep't of Army, Reg. No. 623-3, Evaluation Reporting System para. 3-37(a), 4-7(a) (June 14, 2019); United States v. Ayers, 54 M.J. 85 (C.A.A.F. 2000); United States v. Breault, 30 M.J. 833, 838 (N-M.C.M.R. 1990); United States v. Johnson, 28 C.M.R. 196, 202 (C.M.A. 1959).

VIII. Conclusion

Legislative proposals to revoke medals that flowed from the Wounded Knee Massacre have yet to bear fruit. This is ostensibly because all versions of the Remove the Stain Bill contained no process of review to guard against arbitrary or capricious revocation and simply directed blanket revocation in a fashion that raised separation of powers implications. Absent a review process or DoD participation, medal revocation is substantially a political judgment that may produce negative ripple effects across the entire military awards system. This may explain why revocation proposals have engendered resistance among military leaders and policymakers who might otherwise agree that medals should never have been awarded to individuals who killed noncombatants at Wounded Knee.

A historical review along the lines of the methodology discussed in this article would address many of the perceived defects of the Remove the Stain Bill, by ensuring that medal revocations only occur based on evidence available in individual cases, operate under statutes and regulations of the time, are not arbitrary or ex post facto, and involve appropriate executive discretion. A review would also guard against the possibility that some of the Wounded Knee medals might have recognized legitimate qualifying actions within an engagement that was otherwise tainted by unlawful conduct or were mistakenly associated with Wounded Knee in the first place.

If the President revokes valor awards unilaterally without a statutory mandate or careful review, then future executives may be encouraged to direct similar revocations or even reverse prior revocations. Unilateral revocation outside of existing policy guidelines would both politicize the action and leave it open to future challenges. In contrast, the review framework proposed here—a congressional mandate, involvement by qualified historians or other subject matter specialists, and participation by DoD—should provide legitimacy for Wounded Knee award revocations, ensure they are relatively permanent, and also establish a lasting precedent for future reviews. Such a framework would be a real service to the military, by both removing the stain of any tainted Wounded Knee medals, and also providing a principled pathway for revocation of other past or future medals tainted by misconduct.

Such a proposal still requires various stakeholders to agree to such a framework. While the recent efforts to revoke Wounded Knee medals have predominately come from lawmakers in the Democratic Party, the core issue is one that should attract bipartisan support. Most Americans likely

agree that unnecessarily killing noncombatants is reprehensible, but such a belief is not only a modern judgment. The Army also forbade that same misconduct in the late nineteenth century, which could be the basis for an agreement to finally remove the stain of the Wounded Knee Massacre from past military decorations.