MEDALS "RIDICULOUSLY GIVEN"? THE AUTHORITY TO AWARD, REVOKE, AND REINSTATE MILITARY DECORATIONS IN THREE CASE STUDIES INVOLVING EXECUTIVE CLEMENCY

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I. Introduction

In November 2019, then-president Donald Trump stirred controversy when he issued pardons to Clint Lorance and Mathew Golsteyn and reversed the demotion of Edward Gallagher—all current or former military Service members accused or convicted of serious crimes during active armed conflict. A number of the former president's actions were without precedent: in Golsteyn's case, a Service member accused of law of armed conflict violations had never before received a pardon prior to trial;[1] in Gallagher's case, a President had never before intervened in a law of armed conflict prosecution before conviction,[2] prevented revocation of Special Forces insignia,[3] or punished a prosecution team by revoking their achievement

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[1] *See* Lieutenant Colonel Dan Maurer, *Should There Be a War Crime Pardon Exception?*, LAWFARE (Dec. 3, 2019, 9:31 AM), https://www.lawfareblog.com/should-there-be-war-crime-pardon-exception (documenting that Donald Trump is the first President to pardon Soldiers for offenses that violate the law of armed conflict, either before or after conviction).

[2] Sam LaGrone, *Updated: President Trump Tweets to Stop Gallagher Trident Review Board*, USNI NEWS, https://news.usni.org/2019/11/21/president-trump-tweets-to-stop-gallagher-trident-review-board (Nov. 22, 2019, 6:43 AM).

[3] Meghann Myers & Carl Prine, *Esper Explains Why Navy Secretary Was Fired Over Double-Talk in SEAL Trident Controversy*, MIL. TIMES (Nov. 25, 2019), https://

medals.[4] While the media's coverage of these events was extensive, the focus on the prosecutions largely overshadowed the impact on eligibility for and retention of military decorations.

These distinct case studies provide insight into the potential effects of pardons on retroactive service medal eligibility, the ability to revoke and then restore valor medals, as well as the ability to revoke medals already lawfully awarded and presented. They illustrate that the full scope of authority to deny or revoke achievement or valor medals is unclear in both the governing statute and some regulations and has not been uniformly applied between the services. This ambiguity and inconsistency has resulted in award revocations that could be overturned by administrative boards or in Federal court. To avoid such an outcome, the limits of revocation authority should be further clarified by policy, statute, or both.

II. Military Decorations and Honorable Service

A. First U.S. Military Awards

Military decorations and awards were introduced in the nascent U.S. military during the Revolutionary War, when General George Washington established the Badge of Military Merit on his own authority to "encourage every species of Merit."[5] However, the badge quickly fell into disuse.[6] Military awards proved unpopular in the early Republic, partly due to their association with European aristocracy and the perception that they were undemocratic.[7] It was not until the Civil War that the first lasting military award, the Medal of Honor, was authorized by statute to "furnish a great stimulus to exertion" initially for Service members in the Navy and, later, the Army.[8]

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www.militarytimes.com/news/your-military/2019/11/25/secdef-explains-why-navy-secretary-was-fired-over-double-talk-in-seal-trident-controversy.

[4] Colby Itkowitz, *Trump Orders Lawyers' Achievement Awards Revoked in Navy SEAL Murder Case*, WASH. POST (July 31, 2019), https://www.washingtonpost.com/politics/trump-orders-lawyers-achievement-awards-revoked-in-navy-seal-murder-case/2019/07/31/11a74d2c-b3cf-11e9-951e-de024209545d_story.html.

[5] DWIGHT S. MEARS, THE MEDAL OF HONOR: THE EVOLUTION OF AMERICA'S HIGHEST MILITARY DECORATION 13 (2018).

[6] *Id.*

[7] *Id.* at 10.

[8] *Id.* at 13–14.

The Medal of Honor was intended as a tool to incentivize desired behavior and improve morale. In the award's infancy, it was the only tangible medal available to reward gallantry, achievement, or service in any branch of the military.[9] Its governing statutes, however, listed little in the way of eligibility criteria and delegated authority to the heads of the military services to award as they saw fit.[10] In the case of the Army, no regulations existed for the medal until 1897, some 35 years after its authorization.[11] This policy vacuum later led to the perception that a great many medals were awarded on dubious merits, which vicariously tainted other recipients by lowering the general prestige of the decoration.[12] This finally spurred the Army to develop exacting criteria to elevate the decoration at the turn of the twentieth century.[13] One of these new requirements was honorable service, which was likely intended as a method of sorting through the relative merit of the many hundreds of retroactive claimants who petitioned the Army for the Medal of Honor.[14]

B. Honorable Service Requirement

Military decorations trace the requirement for honorable service to 1903, when the War Department issued a general order stipulating that "[n]either a medal of honor nor a certificate of merit will be awarded in any case when the service of the person recommended, subsequent to the time when he distinguished himself, has not been honorable."[15] The Medal of Honor was still the only tangible decoration in the Army at this time, which firmly tied the requirement for subsequent honorable service to valor decorations.[16] The same regulatory provision was interpreted to include campaign badges[17] in 1905.[18] In 1918, the provision was added to the Army's appropriations bill that authorized new and existing medals during World War I; the bill provided that "no medal, cross, bar, or other device,

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[9] *See id.* at 40, 64–68. The Certificate of Merit was converted to a badge in 1905 and other valor decorations were authorized by executive order and statute in 1918. *Id.*
[10] *Id.* at 13.
[11] *Id.* at 21.
[12] *Id.* at 43.
[13] *Id.* at 27.
[14] *Id.* at 36–37.
[15] U.S. Dep't of War, Gen. Order No. 28, para. 199½ (Mar. 12, 1903).
[16] MEARS, *supra* note 5, at 64–68.
[17] Campaign badges were the precursor to campaign medals, and they were awarded for participation in specified geographical theaters during a discrete time period. *Id.* at 40.
[18] U.S. Dep't of War, Circular 17 (Mar. 31, 1905).

hereinbefore authorized, shall be awarded or presented to any individual whose entire service subsequently to the time he distinguished himself shall not have been honorable."[19] The provision applied only to decorations authorized in that legislation but was subsequently interpreted to apply to all military decorations in the Army.[20] The same provision applied equally to the Air Force, since at the creation of the Air Force as a separate branch, it inherited much of the Army's statutory authority for military awards.[21]

The Navy received the "subsequent honorable service" provision in a 1919 bill that contained military award provisions substantially borrowed from the Army's companion bill enacted the prior year.[22] The Navy's bill specified "[t]hat no medal or cross or no bar or other emblem or insignia shall be awarded or presented to any individual or to the representative of any individual whose entire service subsequent to the time he distinguished himself shall not have been honorable."[23] This provision was more expansive than the Army's, as it already covered all existing and future Navy decorations.

The requirement for honorable service was eventually expanded in regulations for all branches of the military, soon growing well beyond mere "subsequent" service. Today, various regulations add to the statutory authority and effectively require honorable service before, during, and after qualification for all military decorations. Regulations also sanction retroactive revocation of medals already awarded and presented, which also has historically been tethered to honorable service.

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[19] Act of July 9, 1918, Pub. L. No. 65-193, 40 Stat. 845, 872.
[20] *Id.*; U.S. DEP'T OF WAR, ARMY REGULATIONS para. 188 (Nov. 15, 1913) (C80, Sept. 17, 1918) (specifying that "[n]o medal of honor, distinguished-service cross, distinguished-service medal, or bar, or ribbon shall be awarded or presented to any individual whose entire service subsequent to the time he distinguished himself shall not have been honorable").
[21] MEARS, *supra* note 5, at 116; U.S. DEP'T OF ARMY & U.S. DEP'T OF AIR FORCE, REG. 1-11-53, TRANSFER OF FUNCTIONS PERTAINING TO DECORATIONS AND AWARDS para. 2*b* (20 Dec. 1948).
[22] MEARS, *supra* note 5, at 74.
[23] Act of Feb. 4, 1919, Pub. L. No. 65-253, 40 Stat. 1056, 1057.

III. Clint Lorance and Eligibility for a Campaign Medal

A. Background

Clint Lorance, then a U.S. Army first lieutenant and platoon leader deployed to Afghanistan, ordered one of his Soldiers to open fire on several unarmed Afghan motorcyclists in July 2012.[24] He claimed that the rules of engagement had been modified to allow firing on any motorcycle, which he reportedly knew was untrue.[25] Two unarmed Afghans were killed in the resultant shooting, which amounted to gunning down men who posed no apparent threat at the time.[26] Lorance subsequently falsified a report about the incident and claimed that the victims could not be assessed because the bodies had been removed by local villagers.[27] He was turned in by one of his own Soldiers,[28] leading to his conviction by court-martial for murder and other charges and an approved sentence of nineteen years' confinement, dismissal from the service, and forfeiture of all pay and allowances.[29]

Lorance also presumably had his Afghanistan Campaign Medal suspended and administratively revoked[30] as a "collateral consequence"[31] of court-martial. That medal is normally awarded automatically upon tour completion, based solely on having served within the "land area of the country of Afghanistan and all airspaces above the land" for a specified period of time.[32] Then-president Trump later pardoned Lorance under the dubious rationale that the motorcyclists had approached "with unusual speed," and that the lieutenant was merely "prioritizing the lives of

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[24] United States v. Lorance, No. ARMY 20130679, 2017 WL 2819756, at *2 (A. Ct. Crim. App. June 27, 2017).
[25] Dave Philipps, *Cause Célèbre, Scorned by Troops*, N.Y. TIMES (Feb. 24, 2015), https://www.nytimes.com/2015/02/25/us/jailed-ex-army-officer-has-support-but-not-from-his-platoon.html.
[26] *Lorance*, 2017 WL 2819756, at *2.
[27] *Id.* at *3.
[28] *Id.*
[29] *Id.* at *1.
[30] U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS para. 1-30*b* (5 Mar. 2019) [hereinafter AR 600-8-22].
[31] "A collateral consequence is '"[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence."'" United States v. Talkington, 73 M.J. 212, 215 (C.A.A.F. 2014) (alteration in original) (quoting United States v. Miller, 63 M.J. 452, 457 (C.A.A.F. 2006)).
[32] AR 600-8-22, *supra* note 30, para. 2-17*b*–*c*.

American troops" by ordering the engagement.[33] Whether justified or not, Lorance's pardon raises interesting questions about whether clemency erases a Service member's misconduct and makes them eligible for military decorations that are predicated on honorable service. Lorance's case study demonstrates that a pardon does not in fact erase underlying misconduct, and therefore does not alter award eligibility.

B. Army Service Medals and Honorable Service

Campaign medals like the one Lorance earned and ostensibly lost are a type of service medal based on a period of qualifying service rather than an achievement or gallant action, and they are awarded for having served in a specified geographical theater during an authorized time period.[34] As discussed above, the Army's "subsequent honorable service" provision was interpreted to include the precursor to campaign medals in 1905.[35] The Army expanded this requirement in 1922, stipulating that "[s]ervice medals and clasps may be earned by honorable service only," and that "[s]ervice in an enlistment which was terminated otherwise than honorably is not considered honorable service, within the meaning of the term as here used."[36] Thus, regulations required both the qualifying service and the service afterward to be honorable. The Army's current regulation states that "the military service of the Servicemember on which qualification for award of [campaign, expeditionary, and service] medals is based must have been honorable."[37] With the exception of only one service medal,[38] this authority is regulatory. Most service medals do not trace requirements for honorable service during qualifying periods to statutory authority, since the awards are not authorized by statute in the first place. Service following medal qualification, however, is still covered by the statutory provision on subsequent honorable service.[39]

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[33] *Statement from the Press Secretary*, WHITE HOUSE (Nov. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-97.
[34] U.S. Dep't of War, Circular 17 (Mar. 31, 1905).
[35] *Id.*
[36] U.S. DEP'T OF WAR, REG. 600-65, AWARD AND SUPPLY OF SERVICE MEDALS para. 4*a* (Jan. 30, 1922) (C2, Apr. 30, 1925).
[37] AR 600-8-22, *supra* note 30, para. 2-9*d*.
[38] 10 U.S.C. § 1128(f) (listing honorable service as a prerequisite for the prisoner-of-war medal).
[39] *Id.* § 1136.

Honorable service throughout the entire qualifying period is a fundamental prerequisite for service medals; thus, any less-than-honorable service is a basis for award denial. While there is no precise threshold for what constitutes "honorable" service,[40] it often corresponds to conduct that merits retention in the service.[41] According to Army regulations, a determination of honorable service for the purpose of medal qualification "will be based on such honest and faithful service according to the standards of conduct, courage, and duty required by law and customs of the service of a Servicemember of the grade to whom the standard is applied."[42]

The Army's regulatory requirement for honorable service ostensibly prevented Lorance from receiving an Afghanistan Campaign Medal based on the misconduct underlying his court-martial conviction and the administrative determination that his qualifying service in Afghanistan was not honorable.[43] His subsequent pardon, however, could potentially change this outcome depending on its effect on his underlying service. Normally, Lorance would qualify for the medal based solely on time in theater; regulations require thirty consecutive days at a minimum, and he had several months.[44] Participating in an armed engagement is another method to qualify for the decoration without respect to time in theater.[45] Thus, somewhat ironically, the same unauthorized engagement that branded Lorance a murderer could be used to establish his eligibility, but only if his pardon truly has the effect of erasing his misconduct.

C. Impact of Pardons on Underlying Offenses

Several precedents inform the question of whether pardons erase the underlying offense. In the 1866 case of *Ex parte Garland*, the Supreme Court struck down a law that prevented attorneys from practicing before certain courts unless they could swear they had "never voluntarily borne arms against the United States" or "exercised the functions of any office

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[40] *But see* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 3-7*a* (19 Dec. 2016) (defining "honorable" service at separation).
[41] U.S. DEP'T OF DEF., INSTR. 1348.33, DOD MILITARY DECORATIONS AND AWARDS PROGRAM sec. 8 (Dec. 21, 2016) (C5, Apr. 9, 2021).
[42] AR 600-8-22, *supra* note 30, para. 1-17*a*.
[43] *Id.* paras. 1-17*a*(1), 1-30*b*.
[44] *Id.* para. 2-17*c*; Michelle Tan, *Hero or Murderer? Soldiers Divided in 1LT Lorance Case*, ARMY TIMES (Jan. 12, 2015), https://www.armytimes.com/news/your-army/2015/01/12/hero-or-murderer-soldiers-divided-in-1lt-lorance-case.
[45] AR 600-8-22, *supra* note 30, para. 2-17*c*.

. . . in hostility to the United States."[46] Garland, a former member of the Confederate Congress, had received a full pardon from President Lincoln but was still barred from practicing on account of his inability to take this oath.[47] The Court ruled that the law in question was "in direct opposition to the constitutional effect of the pardon," explaining that perpetual disqualification amounted to Congress "punish[ing] the petitioner for the same offence" by denying him a property right.[48] In dicta, the Court expressed that "when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence."[49] This portion of the opinion was never exercised literally, as both courts and executive officials repeatedly determined that a pardon did not actually expunge the record of an offense.

In 1898, the Attorney General considered how a pardon interacted with a law that required prior honorable service as a prerequisite for reenlistment.[50] Private Daniel T. Thompson had been convicted of desertion from the 7th Infantry and was dishonorably discharged.[51] After he received a full pardon from the President, he applied for reenlistment. The applicable statute stated that "no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful."[52] The Attorney General reasoned that the bar on enlistment was lawful because it did not necessarily flow from a conviction; after all, "[t]here are many acts of a soldier which may be regarded under the strict rules of the requirements of the military service as unfaithful or dishonest, but of which a military court-martial would not take cognizance."[53] Many potential actions that would bar reenlistment were not impacted by pardons since they "do not reach that grade of offense which would authorize the exercise of executive clemency."[54] In the Attorney General's view, "Congress has the right to prescribe qualifications and conditions for

[46] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 376 (1866).
[47] Michele E. Boardman, Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.L.C. 104, 108 (2006).
[48] *Garland*, 71 U.S. at 340, 347.
[49] *Id.* at 380.
[50] Army—Enlistment—Pardon, 22 Op. Att'y Gen. 36 (1898).
[51] *Id.* at 37.
[52] Act to Regulate Enlistments in the Army of the United States, 28 Stat. 215, 216 (1894).
[53] *Army—Enlistment—Pardon*, 22 Op. Att'y Gen. at 39.
[54] *Id.*

enlisted men."[55] He ruled that a pardon merely "relieves [a criminal] of the disabilities legally attaching to his conviction," but "does not destroy an existing fact, viz, that his service was not honest and faithful."[56]

Subsequent Supreme Court decisions affirmed that a pardon does not in fact "blot out" guilt entirely. In *Carlesi v. New York*, the Court expressed that the judiciary could use prior pardoned offenses as circumstances of aggravation for another crime.[57] The Court reasoned that the practice was not *ex post facto*, as it merely punished "future crimes" and thus was not "in any degree a punishment for [a] prior crime."[58] In *Burdick v. United States*, the Court held that a pardon could be refused due to the "guilt implied in the acceptance"[59] and that acceptance of a pardon stands as "a confession of guilt."[60] Of course, both of these cases are clearly incompatible with the notion that a pardon entirely erases the record of an offense.

In 1918, the Attorney General opined on the ability of a pardoned former Navy officer to reenter the active Navy or the Fleet Naval Reserve in spite of his dismissal by court-martial.[61] Per statute, honorable discharge was a requirement for both appointments.[62] According to the Attorney General, the key question was whether the statutory restriction was "punishment for an offense" or "a qualification for appointees to office in the Navy."[63] He ultimately determined that the statute did not "impose a penalty as such on individual offenders," and that its "incidental disabilities . . . are not removed by a pardon."[64] The Attorney General explained that a pardon "abates whatever punishment flows from the commission of the pardoned offense," but could not "eradicate the *factum* which is made a criterion of fitness."[65] However, the outcome changed in the case of a different statute that perpetually stripped military deserters of the ability to hold office, as well as citizenship rights, even after issuance of a pardon. Here, in the Attorney General's view, the statute imposed disabilities "not

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[55] *Id.*
[56] *Id.*
[57] Carlesi v. New York, 233 U.S. 51, 59 (1914).
[58] *Id.* at 57, 58.
[59] Burdick v. United States, 236 U.S. 79, 91 (1915).
[60] *Id*. at 94.
[61] Naval Service—Desertion—Pardon, 31 Op. Att'y Gen. 225 (1918).
[62] *Id.* at 226.
[63] *Id.*
[64] *Id.* at 230.
[65] *Id.* at 227.

merely incidental to rules prescribing the qualifications for service in the Navy," but rather as "penalties for the punishment of offenses."[66] Therefore, the distinction between the two laws was that one was a legitimate congressional regulation of military fitness criteria, while the other was a clear punishment that imposed impermissible restrictions on civil rights after a pardon.

In 1927, The Judge Advocate General of the Army ruled that a pardoned Soldier remained ineligible for a campaign medal under a regulation implementing the "subsequent honorable service" provision.[67] Though the Soldier in question had served honorably during service in the Philippines, he was convicted of desertion during a subsequent enlistment and dishonorably discharged.[68] After receiving a full and unconditional pardon from the President, the Soldier applied for a Philippine Campaign Medal under the theory that his service during that enlistment was qualifying because the pardon removed the subsequent misconduct.[69] Regulations allowed the medal's retroactive approval so long as the Soldier had "subsequently to the last nonhonorable service been in an honorable status in the Army."[70] Since the Soldier had not served honorably after the less-than-honorable service resulting in conviction, The Judge Advocate General ruled that the pardon did not relieve him of the taint of misconduct.[71] This demonstrates that the Army understood a pardon's function as removing punishment, not erasing prior misconduct as if it had never occurred. In context, the withholding of a medal was not a penalty for a crime. Rather, it was mere regulation of eligibility criteria ostensibly intended to protect the inherent value of the decoration to other past and future recipients.

The Judge Advocate General of the Army established another precedent in 1947 by ruling that an Army Air Force colonel's Legion of Merit could be disapproved for less than a court-martial conviction.[72] Specifically, the colonel was disciplined after his period of qualifying service for

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[66] *Id.* at 232.
[67] U.S. DEP'T OF WAR, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY: 1912–1930 sec. 389 (1932).
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] U.S. DEP'T OF ARMY, BULLETIN OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, JANUARY–FEBRUARY 1947, at 46 (1947).

"'reprehensible . . . gross misconduct' of such a nature as to make him an object of contempt and a discredit to the service."[73] The Judge Advocate General opined that this characterization precluded a determination that the colonel's entire period of service was honorable under the governing regulation, which required that "no decoration shall be awarded or presented to any individual whose entire service subsequent to the time he distinguished himself shall not have been honorable."[74] Thus, actions not reaching a criminal threshold could nevertheless be determined as a departure from the honorable service required by the statute. This demonstrates that the effect of the "subsequent honorable service" provision was not interpreted as a penalty for a crime, but as a screening mechanism for underlying conduct that was disreputable to the individual and their branch of military service.

D. Impact of Pardons on Expungement

Federal appellate cases have also ruled that pardons do not result in automatic expungement of records, though the issue has not yet reached the Supreme Court. In the Third Circuit case of *United States v. Noonan*, a draft evader was convicted of violating the Military Selective Service Act and subsequently pardoned.[75] The pardonee petitioned to have his conviction expunged due its impact on his employment prospects, claiming that the pardon should automatically result in both the erasure of his indictment "as if it had never occurred" and the impoundment of all records pertaining to his arrest and conviction.[76] On appeal, the Third Circuit reasoned that the President's authority to expunge criminal records "must stem either from an act of Congress or from the Constitution itself" and that no such authority existed.[77] The court deemed the pardon power as "an executive prerogative of mercy, not of judicial record-keeping."[78] In reversing the expungement request, the court reflected that "to tamper with judicial records" would "[fly] in the face of the separation of powers doctrine."[79] Similar rulings on

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[73] *Id.*
[74] *Id.* (quoting U.S. DEP'T OF WAR, REG. 600-45, DECORATIONS para. 19 (22 Sept. 1943)).
[75] United States v. Noonan, 906 F.2d 952, 953–54 (3d Cir. 1990).
[76] *Id.* at 954.
[77] *Id.* at 955 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952)).
[78] *Id.*
[79] *Id.* at 956.

expungement were subsequently issued by the D.C.,[80] Seventh,[81] and Ninth Circuits.[82]

The Department of Justice's Office of Legal Counsel adopted the *Noonan* holding in a 2006 opinion on the impact of a presidential pardon authored for the United States Pardon Attorney.[83] The Office of Legal Counsel concluded that a pardon "does not operate to erase automatically the records relating to the pardoned offense," and that "[t]he relevant judicial and executive records preserve an important set of historical facts concerning the individual's criminal history."[84] However, the Office of Legal Counsel also opined that a President might order the expungement of records separate from a pardon, which might be successful unless prevented by "any statutory constraints on executive record-keeping."[85] The Department of Justice's position on the effects of pardons has not changed in this respect. Its website on pardon information states that, "[w]hile a presidential pardon will restore various rights lost as a result of the pardoned offense and should lessen to some extent the stigma arising from a conviction, it will not erase or expunge the record of [one's] conviction."[86] Further, the website warns pardon applicants that a "[p]ardon of a military offense will not change the character of a military discharge."[87]

E. Impact of Pardon on Lorance

Applied to Lorance's case, the denial of a campaign medal due to less-than-honorable service is squarely in accord with law, policy, and precedent. The mere issuance of a pardon does not erase the fact of his less-than-honorable service, and therefore the misconduct underlying a conviction may be used to deny military awards due to the failure to satisfy the honorable service requirement. Interpreted most favorably to Lorance, the denial of an award could subjectively be seen as a penalty or punishment, considering that it was a collateral consequence of his court-martial. On

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[80] *In re* North, 62 F.3d 1434, 1437 (D.C. Cir. 1994).
[81] Hirschberg v. Commodity Futures Trading Comm'n, 414 F.3d 679 (7th Cir. 2005).
[82] United States v. Bays, 589 F.3d 1035 (9th Cir. 2009).
[83] Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.L.C. 104 (2006).
[84] *Id.* at 110.
[85] *Id.*
[86] *Pardon Information and Instructions*, U.S. DEP'T OF JUST., https://www.justice.gov/pardon/pardon-information-and-instructions (Nov. 23, 2018).
[87] *Id.*

the other hand, as with the case of Private Daniel T. Thompson, the bar of less-than-honorable service was not exclusively applicable to misconduct leading to court-martial convictions. Honorable service prerequisites have been interpreted to preclude awards for a broad spectrum of misconduct that may not result in trial by court-martial, including any service that is not "honest and faithful."[88] Further, military regulations do not refer to the effects of the "honorable service" provision as a penalty or punishment, and there is no evidence that the provision was crafted for this purpose. Indeed, when the first "honorable service" provision for the Medal of Honor appeared in Army regulations, it contained no clear explanation of underlying intent.[89] In context, during this period the Army received petitions from many separated Soldiers who sought retroactive awards.[90] Thus, the most likely explanation is that the Army sought to restrict medal eligibility based on the category of service, both as a matter of efficiency and to elevate the prestige of the decoration. This would make the provision incidental to regulation of the award itself and not a penalty for court-martial conviction.

Finally, Lorance's case is similar to the 1927 ruling of The Judge Advocate General of the Army, in which a Soldier had been convicted of an offense by court-martial and received an unconditional pardon. That Soldier was barred from receipt of a campaign medal based on the fact of his misconduct after his qualifying service—the act of desertion, which ran afoul of the requirement for subsequent honorable service. Similarly, Lorance's pardon does not erase his conviction or the fact that his underlying service—which included murder—was less-than-honorable. The primary difference is that Lorance's misconduct occurred during his qualifying period of service, and the deserter's followed. However, they were both instances where less-than-honorable service correctly precluded the award of a campaign medal, even after issuance of an unconditional pardon.

IV. Mathew Golsteyn and Revocation of a Valor Award

A. Background

In February 2010, Mathew Golsteyn, then a captain in the U.S. Army, allegedly detained a bomb-maker suspected of attacking U.S. forces in his

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[88] AR 600-8-22, *supra* note 30, para. 1-17*a*.
[89] U.S. Dep't of War, Gen. Order No. 28, para. 199½ (Mar. 12, 1903).
[90] MEARS, *supra* note 5, at 40–41.

area of operations, Forward Operating Base McQueary, Afghanistan. According to a U.S. Army Criminal Investigation Command report, Golsteyn conspired with other members of his Special Forces team to surreptitiously detain and murder the bomb-maker, then "buried him in a shallow grave, and later returned to burn the remains."[91] The Army's criminal investigators were unaware of the incident until Golsteyn sat for a polygraph test in September 2011 while interviewing for a position at the Central Intelligence Agency. Golsteyn allegedly admitted to the polygraph examiner that he had detained, killed, and buried the unarmed bomb-maker.[92] This led to a criminal investigation, but the Army initially declined to charge Golsteyn for lack of corroborating evidence.[93]

Instead of immediately facing charges under the Uniform Code of Military Justice, Golsteyn was administratively reprimanded by a general officer, who cited "a serious departure from the high standards of integrity and professionalism expected of a Commissioned officer of th[at] command," specifically Golsteyn's admission to a "Law of Armed Conflict violation."[94] In addition, Golsteyn's valor decoration—a Silver Star earned for gallantry in action during the same tour—was administratively revoked after presentation on the basis of service that was "less than honorable."[95] The Silver Star had been recommended after a firefight with enemy snipers on 20 February 2010, when Golsteyn "repeatedly exposed himself to direct and accurate enemy fire during a four-hour engagement."[96] Golsteyn was praised for his "calm demeanor, decisive actions and fearlessness in the face of the enemy," specifically for running "approximately 150 meters under

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[91] CRIM. INVESTIGATION COMMAND, U.S. DEP'T OF ARMY, 0906-2011-CID023-43647-5H1A, CID REPORT OF INVESTIGATION - FINAL/SSI - 0906-2011-CID023-43647-5H1A/5X5/5X4/5X1/5Y2B0/9J, at 26 (2013) [hereinafter GOLSTEYN REPORT OF INVESTIGATION].

[92] *Decorated US Soldier 'Admitted Murder in CIA Job Interview,'* BBC NEWS (Dec. 14, 2018), https://www.bbc.com/news/world-us-canada-46573452; Mathew Golsteyn, No. AR20200000309, Army Bd. for Corr. of Mil. Records 4 (June 26, 2020).

[93] Ryan Devereaux & Jeremy Scahill, *Documents: Green Beret Who Sought Job at CIA Confessed to Murder*, INTERCEPT (May 6, 2015, 7:26 PM), https://theintercept.com/2015/05/06/golsteyn.

[94] *U.S. Army Documents on Major Mathew Golsteyn*, INTERCEPT (May 6, 2015, 7:25 PM), https://theintercept.com/document/2015/05/06/u-s-army-documents-major-mathew-golsteyn.

[95] *Id.*

[96] *Matthew* [sic] *L. Golsteyn*, HALL OF VALOR PROJECT, https://valor.militarytimes.com/hero/52976 (last visited Aug. 27, 2021).

heavy machine gun and sniper fire" to retrieve a Carl Gustaf recoilless rifle and then using the weapon to decisive effect.[97]

Golsteyn's Silver Star was revoked on the basis of misconduct that the Army believed "occurred prior to" and was "distinctly separate" from his heroic actions,[98] but the exact timing of the alleged murder remains obscure due to a lack of witness testimony.[99] Thus, it is unclear whether the misconduct fell within the textual parameters of the "subsequent honorable service" provision, as it apparently occurred days before his service qualifying him for the Silver Star.[100] However, as discussed below, the "honorable service" provision is not the only authority to revoke military decorations. Golsteyn's Silver Star had previously been approved for upgrade to a higher medal, the Distinguished Service Cross, as part of a review meant to remedy a lack of valor decorations.[101] The upgraded award was also suspended and revoked prior to presentation.[102] Golsteyn's Special Forces tab was similarly revoked by administrative action.[103]

In 2015, an administrative board of inquiry determined that the Army had not proven by a preponderance of the evidence that Golsteyn had committed a law of armed conflict violation, but that sufficient proof existed of conduct unbecoming an officer.[104] The board substantiated an allegation of Golsteyn's "misconduct, moral, or professional dereliction," not only because of the murder, but also because he "took steps to cover it up" and "failed to report all the facts officially and for the record over an extended period of time."[105] Based on this finding, the board recommended that

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[97] *Id.*
[98] *U.S. Army Documents on Major Mathew Golsteyn*, *supra* note 94; GOLSTEYN REPORT OF INVESTIGATION, *supra* note 91, at 110.
[99] GOLSTEYN REPORT OF INVESTIGATION, *supra* note 91.
[100] *Cf. id.* at 60, 106 (discussing approximate periods of investigation).
[101] *U.S. Army Documents on Major Mathew Golsteyn*, *supra* note 94; MEARS, *supra* note 5, at 132.
[102] *U.S. Army Documents on Major Mathew Golsteyn*, *supra* note 94.
[103] Dave Philipps, *Pardoned Soldier Is Denied Bid to Rejoin Green Berets*, N.Y. TIMES, Jan. 10, 2020, at A21.
[104] Dan Lamothe, *Matt Golsteyn Planned to Join the CIA and Go to Iraq. Now He Faces a Murder Charge.*, WASH. POST (Feb. 9, 2019), https://www.washingtonpost.com/world/national-security/they-do-not-obey-their-own-rules-soldier-facing-murder-case-says-he-must-defend-himself-against-the-army/2019/02/09/a4cdb5b2-2baf-11e9-97b3-ae59fbae7960_story.html.
[105] Mathew Golsteyn, No. AR20200000309, Army Bd. for Corr. of Mil. Records 8 (June 26, 2020).

Golsteyn be separated from the Army with a characterization of service as general (under honorable conditions).[106]

Golsteyn subsequently made an admission to killing the bomb-maker during an interview on Fox News, spurring the Army to reopen its investigation and formally charge him with murder in 2018.[107] In an ironic twist, this interview occurred around the same time the Army's lead criminal investigator in Golsteyn's case was accused of stolen valor relating to his own military decorations—specifically wearing badges and a Purple Heart that he did not earn.[108] In 2019, former president Trump made the unprecedented decision to pardon Golsteyn prior to his trial, explaining that the Soldier's victim had "continue[d] to threaten American troops and their Afghan partners," and that a pardon was "in the interests of justice" due to the protracted nature of the prosecution.[109]

Following his pardon, Golsteyn's attorney announced that he was requesting "reinstatement of everything that was taken from him," including his valor decoration and Special Forces tab.[110] The attorney claimed that the effect of the pardon was to "put [Golsteyn] back in the position he was prior to the allegations,"[111] so that he was "allowed everything, just as if this never happened."[112] According to the attorney, former president Trump had directed that Golsteyn's record be "expunged,"[113] and that the Army's failure to complete this action was a "complete contravention" of

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[106] Kyle Jahner, *Board: Ex-Green Beret Mathew Golsteyn Should Receive General Discharge*, ARMY TIMES (June 29, 2015), https://www.armytimes.com/news/your-army/2015/06/29/board-ex-green-beret-mathew-golsteyn-should-receive-general-discharge.
[107] Philipps, *supra* note 103.
[108] *See* Todd South, *Lead Investigator in Green Beret Murder Case Pleads Guilty to Stolen Valor Charges*, ARMY TIMES (May 7, 2019), https://www.armytimes.com/news/your-army/2019/05/07/lead-investigator-in-green-beret-murder-case-pleads-guilty-to-stolen-valor-charges (documenting that the investigator pleaded guilty to three specifications of Article 134, UCMJ, and was sentenced to a three-grade reduction).
[109] *Statement from the Press Secretary*, *supra* note 33.
[110] Louis Casiano, *Pardoned Green Beret Matt Golsteyn Seeks Military Awards, Decorations*, FOX NEWS (Nov. 19, 2019), https://www.foxnews.com/us/pardoned-green-beret-matt-golsteyn-seeks-military-awards-decorations.
[111] *Id.*
[112] Philipps, *supra* note 103.
[113] *Id.*

the President's wishes.[114] Nevertheless, the Army refused to reauthorize Golsteyn's Special Forces tab, and his request to reinstate his valor decoration was routed to an administrative board known as the Army Board for Correction of Military Records (ABCMR).[115] While the ABCMR denied all of Golsteyn's requests,[116] the case still raises questions about the ability of a military service or a President to revoke or reinstate a different type of military award than discussed in the Lorance case study—a valor decoration—as well as the impact of an unconditional pardon on the same decoration. Golsteyn's case demonstrates that revocation, while often not linked to statutory authority, is presumptively lawful and is not directly affected by a pardon. On the other hand, the authority for revocation is an obscure patchwork of both statute and regulation that would greatly benefit from clarification.

As in Lorance's case, Golsteyn's eligibility for a military decoration was predicated on the same military regulations and statute requiring honorable service.[117] However, the two cases are different in several respects. Golsteyn claimed the pardon should expunge all records relating to his misconduct, which is a step further than merely arguing that a pardon blots out guilt in the eyes of the law. Golsteyn and Lorance also were facing revocation of different types of medals: Golsteyn's was a valor decoration based on a discrete qualifying action occurring on a single day, while Lorance's was a campaign medal that was predicated on honorable service throughout a qualifying period of time and location. Another difference was the fact that Golsteyn's misconduct apparently preceded his qualifying action, although the precise date of the alleged murder remains elusive. Also unlike Lorance, Golsteyn never was convicted at court-martial, although both medals were apparently revoked by administrative action on the basis of underlying misconduct. Further, at the point of revocation, Golsteyn's

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[114] Vincent Barone, *Army Denies Special Forces Titles to Soldier Pardoned by Trump*, N.Y. POST (Jan. 9, 2020, 10:20 PM), https://nypost.com/2020/01/09/army-denies-special-forces-title-to-soldier-pardoned-by-trump.

[115] Bryan Bender, *General Denies Request for Pardoned Special Forces Soldier to Regain Elite Patch*, POLITICO (Jan. 9, 2020, 8:37 PM), https://www.politico.com/news/2020/01/09/golsteyn-trump-pardon-special-forces-097053.

[116] Mathew Golsteyn, No. AR20200000309, Army Bd. for Corr. of Mil. Records 11–14 (June 26, 2020).

[117] *See* discussion *supra* Section III.B.

Silver Star had already been awarded and presented, which arguably changes the legal implications because of the vesting of property interests.

B. Army Medal Revocation in the Early Twentieth Century

The intent behind requirements for honorable service[118] is somewhat murkier when used to justify revocation of a medal for valor after it was awarded and presented. At the inception of the "honorable service" provision, in the early twentieth century, medals were seen as property with mostly intrinsic value. Thus, in 1904, the Judge Advocate General of the Army[119] ruled that

> [w]hen a medal is conferred there is included in the grant a conveyance of ownership of the medal, regarded as a chattel, which becomes the property of the grantee, and is subject to such disposition as he may see fit to make it as a part of his personal estate.[120]

Also in 1904, the Judge Advocate General of the Army ruled on a proposal by President Theodore Roosevelt to revoke hundreds of Civil War era Medals of Honor previously awarded under dubious circumstances. The Judge Advocate General opined that revocation would be unlawful due to an administrative *res judicata* doctrine under which "an act or decision of the President cannot be reviewed or reversed by a successor" except under specific exceptions, such as "fraud, mistake in matters of fact arising from errors in calculation, or newly discovered material evidence."[121]

Failure to revoke the contested medals in 1904 eventually led to legislation enacted in 1916 which authorized a one-time review and revocation of Army Medals of Honor if certain *ex post facto* criteria were satisfied.[122] The resulting review revoked 911 awards under this

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[118] *Id.*

[119] While the senior uniformed attorney in the U.S. Army is currently referred to as "The Judge Advocate General," that position was "the Judge Advocate General" prior to 31 January 1924. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 139 (1975).

[120] OFF. OF THE JUDGE ADVOC. GEN., U.S. DEP'T OF WAR, DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY: 1912, at 665 (1912).

[121] Memorandum from the Judge Advoc. Gen. of the Army to Sec'y of War (Sept. 20, 1904).

[122] MEARS, *supra* note 5, at 52.

authorization—all without so much as a hearing afforded to the impacted recipients.[123] One of the affected recipients, Lieutenant Colonel (Retired) Asa Gardiner, a former judge advocate and professor of law at the U.S. Military Academy at West Point, complained that "the possession of a medal is a property right and cannot be lawfully taken away . . . without a judicial hearing and an opportunity to be heard in [my] own behalf."[124] As Gardiner correctly noted, revocation should have raised due process concerns due to the substantial property interest enjoyed by medal recipients, but resolving this issue fell to later generations.[125] The mass revocation also set at least an informal precedent that Medals of Honor could only be revoked with congressional authorization, though this was never articulated in policy. To date, no further legislation to expressly revoke personal military decorations has been enacted and no other Medals of Honor have been revoked.

Early Army regulations never expressly referenced the ability to revoke a decoration and, instead, appeared to contemplate only the denial of a medal prospectively—that is, prior to its award and presentation. Thus, when the Army's 1905 circular expanded the "honorable service" provision to campaign badges, the Secretary of War directed that "the badge may be withheld" rather than revoked.[126] Similarly, The Judge Advocate General of the Army's early precedents did not reference revocation, but merely the denial of awards not yet presented. One prominent example occurred in 1924, when The Judge Advocate General ruled that a valor decoration could not be retroactively awarded to First Lieutenant Arthur Cody, an officer who had been convicted at court-martial for drunkenness on duty.[127] Cody had been commended for gallantry in action in the Philippines in 1913, and became retroactively eligible for the Distinguished Service Cross after the award was authorized in 1918.[128] No such precedents were published

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[123] *Id.* at 55–61.
[124] *Id.* at 60.
[125] *Id.* at 51–52 (explaining that the same session of Congress also authorized a pension for Medal of Honor recipients).
[126] U.S. Dep't of War, Circular 17 (Mar. 31, 1905).
[127] U.S. DEP'T OF WAR, *supra* note 67, sec. 377; Headquarters, U.S. Dep't of War, Gen. Order No. 116 (Aug. 29, 1917).
[128] *Hero of Many Battles Dies at Post After Remarkable Career*, WKLY. J.-MINER, June 7, 1922, at 1.

for revocation of awards that had already been awarded and presented to recipients, suggesting that the Army was not revoking medals at this time.

C. Evolution of Army Regulations Governing Revocation

Army regulation authorized revocation for a limited purpose unrelated to misconduct starting in 1956: to rescind an "interim award" made "by appropriate authority *pending* final action on a recommendation for a higher award."[129] If the higher award was ultimately disapproved, then the interim award became permanent. However, if the higher award was approved, the lower award had to be "revoked simultaneously" to avoid awarding two military decorations for the same act.[130] In this case, revocation was authorized purely to avoid running afoul of the 1926 executive order by President Coolidge, which stipulated that "[n]ot more than one of the several decorations authorized by Federal law will be awarded for the same act of heroism or extraordinary achievement."[131]

Revocation of previously presented decorations due to misconduct was first authorized in Army regulation in 1961, some fifty-eight years after the appearance of the "subsequent honorable service" provision in policy. The regulation specified that "[a]ny award for meritorious service may be revoked if facts subsequently determined would have prevented original approval of the award."[132] This was the first express authority for revocation of this type among any of the services in regulations issued after World War I. Curiously, the language went well beyond subsequent misconduct, as "facts subsequently determined" appears to reference misconduct either prior to or during a qualifying period of service. After all, subsequent misconduct would not "have prevented original approval," since this would require approving officials to have knowledge of the future. Notably, the scope of this provision was restricted to service medals, which was likely due to the inherent characteristics of this type of decoration; service medals are distinguishable from valor or achievement medals because they are often based on a protracted period of service rather than a discrete event.[133] Thus,

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[129] U.S. DEP'T OF ARMY, REG. 672-5-1, DECORATIONS AND AWARDS 9 (20 July 1956).
[130] *Id.*
[131] Exec. Order No. 4601 (Mar. 1, 1927), *reprinted in* STAFF OF H. COMM. ON HOMELAND SEC., 111TH CONG., COMPILATION OF HOMELAND SECURITY RELATED EXECUTIVE ORDERS (E.O. 4601 THROUGH E.O. 13528) (1927–2009) 9 (Comm. Print 2010).
[132] U.S. DEP'T OF ARMY, REG. 672-5-1, AWARDS para. 17 (3 May 1961).
[133] *Compare id.*, *with* AR 600-8-22, *supra* note 30, para. 1-18*a*.

less-than-honorable actions during the qualifying period of service materially undermine a key qualification for the award in a way that they might not for a valor or achievement medal.

The Army subsequently revoked several decorations in high-profile cases during the 1960s, but they tended to be either awards for meritorious service or awards that were clearly fraudulent. One high-profile case was the first Sergeant Major of the Army, William O. Wooldridge, who was stripped of his Distinguished Service Medal in 1969 after he was implicated in a bribery scheme related to the operation of Service member clubs in Vietnam.[134] The Army released a statement that claimed that "information became available which established that he did not merit the award" without further elaboration.[135] Later, Wooldridge pleaded guilty to bribery, was ordered to sign over most of his assets to the Government, and was sentenced to five years of probation.[136] Also implicated in the same scandal was Major General Carl C. Turner, the former Provost Marshal General of the Army, who also saw his Distinguished Service Medal revoked.[137] In that case, the Army explained that "[Turner's] service for the period did not merit the award," clearly implying that misconduct had materially tarnished the period of qualifying service.[138]

A rare case of revocation of valor and achievement awards occurred in 1970, when it was discovered that fraud had tainted several medals awarded to Brigadier General Eugene P. Forrester, the assistant division commander of the First Cavalry Division. Specifically, at the end of Forrester's tour in Vietnam, the division's chief of staff, Colonel George Newman, discovered that Forrester had not been recommended for any awards. Newman directed his staff to draft award recommendations overnight, which led to narratives that were entirely falsified.[139] After an investigation, Forrester was ultimately stripped of both the Silver Star and the Distinguished Flying

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[134] *Pentagon Revokes Service Decoration of Former Top G.I.*, N.Y. TIMES, Sept. 6, 1969, at 17.
[135] *Id.*
[136] *Ex-Top G.I. Gets Probation in Bribery*, N.Y. TIMES, May 30, 1973, at 36.
[137] *Turner Service Medal Revoked by the Army*, N.Y. TIMES, Oct. 9, 1969, at 53; *see Retired Army Gen. Carl C. Turner, 83, Dies*, N.Y. TIMES, Jan. 1, 1997 at B6 (documenting that Turner was later incarcerated in 1971 for tax evasion and stealing firearms).
[138] *Turner Service Medal Revoked by the Army*, *supra* note 137.
[139] *Army Begins Moving to Rescind General's Controversial Medal*, N.Y. TIMES, Oct. 27, 1970, at 12.

Cross.[140] What is noteworthy is that the medals were not revoked because of less-than-honorable conduct by the recipient, but rather because the actions actually cited for the awards were complete fabrications.

In 1974, Army regulation expanded misconduct-related revocation to include any personal decoration already presented, which included valor awards. The new regulation specified that "[o]nce an award has been presented, it may be revoked if facts subsequently determined would have prevented original approval of the award, had they been known at the time of award."[141] The addition of the language about facts preventing approval "had they been known at the time of the award" further clarified that the language was referencing the time before or during the qualifying period of service, not later service as with the "subsequent honorable service" provision. By 1980, the same regulation required a "statement of concurrence/nonconcurrence" from "the individual concerned."[142] In 1982, the regulation contained a provision about appellate options, explaining that "the affected individual will be informed that he/she may appeal the revocation action through command channels to [Headquarters, Department of the Army]."[143] These were clear attempts to ensure revocation was accompanied by notice and due process, in order to prevent successful legal challenges.

Due process related to medal revocation has perhaps become even more important in recent decades, as both Federal and State laws conferred substantial collateral property interests on recipients of military medals, particularly combat-related decorations. Medal of Honor recipients receive benefits the Army refers to as "entitlements," such as a special pension, air transportation, commissary and exchange privileges, and burial honors.[144] Enlisted recipients of Service Crosses or the Medal of Honor receive a ten percent increase in retired military pay.[145] The Federal Government offers enhanced veterans' preference in hiring to Purple Heart and campaign medal

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[140] *U.S. Orders Medals Taken from General*, CHI. TRIB., Oct. 23, 1970, at 9.
[141] U.S. DEP'T OF ARMY, REG. 672-5-1, MILITARY AWARDS para. 1-28*a* (3 June 1974) (C4, 1 Aug. 1974).
[142] U.S. DEP'T OF ARMY, REG. 672-5-1, MILITARY AWARDS para. 1-28*a* (15 Dec. 1980) (C6, 15 Jan. 1981).
[143] U.S. DEP'T OF ARMY, REG. 672-5-1, MILITARY AWARDS para. 1-28*a* (1 Sept. 1982) (C7, 1 Oct. 1982).
[144] AR 600-8-22, *supra* note 30, para. 1-39.
[145] 10 U.S.C. § 3991(a)(2).

recipients.[146] Arlington National Cemetery allows interment of Medal of Honor, Service Cross, Distinguished Service Medal, Silver Star, and Purple Heart recipients who do not otherwise qualify for burial.[147] The military uses the Purple Heart as one basis for eligibility to combat-related special compensation, an entitlement that increases combat-related disability.[148]

In Alabama, public colleges may waive all undergraduate tuition and fees for Purple Heart recipients.[149] In Massachusetts, recipients of the Medal of Honor or a Service Cross are entitled to tax exemptions[150] and free vehicle license plates.[151] In New Hampshire, certain valor medals, campaign medals, and combat-related badges qualify recipients for a tax credit.[152] In Missouri, most valor medal recipients may park their vehicles for free at any public college or university in the state.[153] In Texas, recipients of valor medals and some service medals merit free license plates,[154] waiver of toll fees,[155] and waiver of most governmental parking fees.[156] In Golsteyn's residence of Virginia,[157] recipients of the Medal of Honor[158] or Purple Heart[159] receive free license plates and vehicle registration exemptions, and Medal of Honor recipients are not taxed on military retirement income.[160] These are just a few of the property interests that are indirectly conferred through these decorations.

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[146] *Policy, Data, Oversight: Veterans Services*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide-for-hr-professionals (last visited Sept. 10, 2021).
[147] *Establishing Eligibility*, ARLINGTON NAT'L CEMETERY, www.arlingtoncemetery.mil/funerals/scheduling-a-funeral/establishing-eligibility (last visited Sept. 10, 2021).
[148] U.S. DEP'T OF DEF., COMBAT-RELATED SPECIAL COMPENSATION 5 (2004).
[149] ALA. CODE § 16-1-43 (2016).
[150] MASS GEN. LAWS ch. 90, § 2 (2021).
[151] *Id.* ch. 59, § 5.
[152] N.H. REV. STAT. ANN. § 72:28 (2018).
[153] MO. REV. STAT. § 304.725(1) (2017).
[154] TEX. TRANSP. CODE ANN. § 504.315 (2021).
[155] *Id.* § 372.053.
[156] *Id.* § 681.008.
[157] Lamothe, *supra* note 104.
[158] VA. CODE ANN. § 46.2-745 (2004).
[159] *Id.* § 46.2-742.
[160] *Id.* § 58.1-322.02(18).

D. Army Regulations Applied to Golsteyn and Subsequent Controversy

By the time Golsteyn's Silver Star was revoked in 2014, both the Army's regulation concerning revocation of decorations and its practice thereof had evolved considerably, even if the statutory authority had not. Army regulation authorized revocation after presentation "if facts subsequently determined would have prevented original approval of the award had they been known at the time,"[161] which clearly applied to Golsteyn's circumstances. The regulation further specified that presentation was "the physical act of pinning or clipping the medal on a Soldier's chest or handing the Soldier the medal, certificate or orders,"[162] which notably precluded Golsteyn from claiming that his Distinguished Service Cross was already presented. Further, the regulation gave express due process protections by requiring "a statement of concurrence or non-concurrence (with comments) from the individual concerned," as well as appeal options.[163]

It is perhaps unsurprising that when Golsteyn's medal was revoked, it sparked an outcry from some members of Congress who saw the move as outside of the military's authority. Representative Duncan Hunter, a member of the House Armed Services Committee, claimed that "once you allow for political appointees to take away something of which they know nothing whatsoever, you're politicizing the awards process."[164] In Hunter's view, "[t]here are probably people in jail now that are most proud of the one thing they did in their life. And it might have been on the battlefield . . . you can't take that away from them, no matter what they might have done afterwards."[165]

Former Secretary of the Army John McHugh justified the revocation to Hunter by citing that "facts subsequently determined" would have prevented the original approval.[166] In his view, if the U.S. Forces-Afghanistan

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[161] U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS para. 1-30*a* (11 Dec. 2006).
[162] *Id.*
[163] *Id.*
[164] Kyle Jahner, *Lawmakers Agree to Limit Power to Revoke Valor Awards*, ARMY TIMES (May 4, 2015), https://www.armytimes.com/news/your-army/2015/05/04/lawmakers-agree-to-limit-power-to-revoke-valor-awards.
[165] *Id.*
[166] Kyle Jahner, *Congressman Pushes Army on Why It Revoked Green Beret's Silver Star*, ARMY TIMES (Feb. 5, 2015), https://www.armytimes.com/news/your-army/2015/02/05/congressman-pushes-army-on-why-it-revoked-green-beret-s-silver-star.

commander—who had been delegated approval authority—had previously known about "the derogatory information" in Golsteyn's case, "he would not have awarded [him] the Silver Star."[167] McHugh also referenced the "subsequent honorable service" statutory provision, as well as the Department of Defense's *Manual of Military Decorations and Awards*, in stating that there would be no award of a medal to a Service member "whose entire service during or after the time of the distinguished act, achievement, or meritorious service has not been honorable."[168] Notably, the "subsequent honorable service" provision and the cited manual provision did not necessarily cover Golsteyn's case, since the Army tentatively concluded that his misconduct occurred before his qualifying service.[169] However, the Army's regulation certainly was applicable, as it clearly authorized revocation due to misconduct prior to medal qualification. It is also possible that McHugh referenced the requirement for honorable service before, during, and after qualification because of the uncertainty surrounding when Golsteyn's misconduct actually occurred.

Hunter was clearly unsatisfied with McHugh's explanation. In 2015, he sponsored legislation that sought to remove the military's authority to unilaterally "revoke any combat valor award."[170] The provision was incorporated into a version of the National Defense Authorization Act for Fiscal Year 2016, but was removed in conference.[171] Reportedly, there was ambivalence about the provision because it would have prevented military secretaries from making needed corrections, even in cases of fraud or mistake, as in the case of Brigadier General Forrester.

According to Representative Adam Smith, the provision would have impacted more than "just [Golsteyn's] individual case"; the provision "says under no circumstances once a service award is given can it be taken away."[172] Representative Joe Heck agreed, claiming that the provision sought to change "how awards are revoked not just in this case, but across

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[167] *Id.*
[168] Larry Kummer, *How Does the Army Reward Heroism? Not Well, as This Story Shows*, FABIUS MAXIMUS (Feb. 7, 2015), https://fabiusmaximus.com/2015/02/07/us-army-matthew-golsteyn-hero-punished-dod-78310.
[169] *U.S. Army Documents on Major Mathew Golsteyn*, *supra* note 94.
[170] H.R. 2011, 114th Cong. (2015).
[171] H.R. REP. NO. 114-102 (2015).
[172] Jahner, *supra* note 164.

the board."[173] Hunter sponsored similar provisions that were incorporated into versions of the National Defense Authorization Acts for Fiscal Years 2018 and 2019, but they were also removed in conference.[174]

In 2019, the Office of the Secretary of Defense released new guidance on revocation limits, probably in reaction to Hunter's repeated attempts to curtail this authority. The guidance stated that

> [t]he revocation of [personal military decorations] under the "honorable" service requirement should be used sparingly and should be limited to those cases where the Service member's actions are not compatible with continued military service, result in criminal convictions, result in determinations that the Service member did not serve satisfactorily in a specific grade or position, or result in a discharge from military service that is characterized as "Other Than Honorable," "Bad Conduct," or "Dishonorable."[175]

This rationale apparently was based on the premise that separation should be the threshold for less-than-honorable service, since failure to separate implicitly labels the actions in question as honorable—or at least honorable enough to merit retention. It appears that the Office of the Secretary of Defense only intends for the provision to apply retroactively to members who are still under military jurisdiction or who committed offenses under military jurisdiction serious enough to recall them for courts-martial. However, this is merely a framework and is not necessarily present in service-level regulations.[176] Notably, this guidance would still sanction the revocation of Golsteyn's medal, since his actions resulted in a determination that he "did not serve satisfactorily in a specific grade or position."[177] The Office of the Secretary of Defense likely influenced subsequent legislation, enacted in December 2019, which expanded the "subsequent honorable

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[173] *Id.*
[174] H.R. REP. NO. 114-404 (2017); H.R. REP. NO. 115-874 (2018).
[175] U.S. DEP'T OF DEF., INSTR. 1348.33, DOD MILITARY DECORATIONS AND AWARDS PROGRAM sec. 8 (Dec. 21, 2016) (C3, June 20, 2019) [hereinafter DODI 1348.33].
[176] *See* U.S. DEP'T OF DEF., INSTR. 5025.01, DOD ISSUANCES PROGRAM 17 (Aug. 1, 2016) (C3, May 22, 2019) (listing that Department of Defense instructions "[m]ay provide general procedures for implementing policy").
[177] DODI 1348.33, *supra* note 175.

service" provision to encompass all decorations issued in any military service.[178] This effectively gave stronger backing for revocation of many Army and Air Force medals, since the previous statutes requiring subsequent honorable service did not cover all military awards.[179]

E. Analysis of Authority Behind Regulations Applied to Golsteyn

There is certainly an argument that the authority to revoke Golsteyn's Silver Star was poorly linked to statutory authority, given the fact that the regulations implementing the "subsequent honorable service" provision have evolved considerably over the last century. There is also little doubt that the Army never intended to revoke awards in this manner when the authorizing statute was first enacted, evidenced by the facts that this express authority was completely absent in the regulations and that it was not exercised retroactively for many decades. Rather, until the 1960s, the Army likely intended known misconduct to prevent an award from being either approved or presented in the future—in the same manner as applied to Golsteyn when the Army revoked his medal's upgrade to the Distinguished Service Cross prior to presentation.

While the full scope of the Army's regulation on medal revocation may not be clearly traceable to a statute, this fact does not make it invalid. After all, the "subsequent honorable service" statute was itself a regulation for some fifteen years prior to codification, suggesting that the military has the independent authority to set the parameters of revocation in the absence of statutory restrictions to the contrary. This is also consistent with judicial interpretation of executive and congressional authority to regulate the military under the Constitution—the so-called military deference doctrine.[180] Under the modern version of this doctrine articulated in the 1970s, the Supreme Court recognized that the military is "a specialized society separate from civilian society" with its own "laws and traditions," including a greater ability to regulate conduct in view of this "different

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[178] 10 U.S.C. § 1136.

[179] *See* Act of July 9, 1918, Pub. L. No. 65-193, 40 Stat. 845, 872; Act of July 2, 1926, Pub. L. No. 69-446, 41 Stat. 780, 789 (stipulating that these statutes requiring subsequent honorable service only covered the Medal of Honor, Distinguished Service Cross, Distinguished Service Medal, Soldier's Medal, and Distinguished Flying Cross).

[180] John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 694 (2007).

relationship of the Government to members of the military."[181] In applying the doctrine, the Court has expressly endorsed "a healthy deference to legislative and executive judgments in the area of military affairs,"[182] and "great deference even when the President acts alone in [the areas of foreign and military affairs]."[183] Military awards and decorations are certainly a longstanding aspect of military culture, and they represent an import tool for incentivizing behavior and "improving morale" both on and off the battlefield.[184] Thus, the ability to award and revoke medals arguably falls squarely within this special relationship.

It is also notable that existing statutory authority to regulate honorable service does not specify that subsequent less-than-honorable service is the exclusive route to medal disqualification.[185] Revocation is also a possible interpretation of the requirement for honorable service—at least for subsequent misconduct, particularly since the provision does not clearly address whether a medal will simply be withheld or also revoked. The practice of medal revocation is also consistent with other consequences of misconduct, such as retroactive reduction of retirement rank to "the highest permanent grade in which [an officer] served on active duty satisfactorily."[186] As with medal revocation, reducing an officer to the last grade in which they served satisfactorily suggests that less-than-honorable service taints more than merely the period after misconduct. Also, as with medal revocation after presentation, reducing a retirement grade can be performed retroactively in cases where misconduct is discovered after officers already retired[187]—Army regulations allow reopening of retirement grades when a "separation and/or accompanying grade determination was procured by fraud,"[188] and also in cases when "[s]ubstantial new evidence [is] discovered after, contemporaneously with, or within a short time before separation [which] could result in a lower grade determination . . . ."[189] This standard is very much comparable to revocation of personal military

[181] Parker v. Levy, 417 U.S. 733, 743, 751 (1974).
[182] Rostker v. Goldberg, 453 U.S. 57, 66 (1981).
[183] Boumediene v. Bush, 553 U.S. 723, 832 (2008).
[184] U.S. DEP'T OF ARMY, THE MEDAL OF HONOR OF THE UNITED STATES ARMY 25 (1948).
[185] 10 U.S.C. § 1136.
[186] *Id.* § 1370(a)(1).
[187] *Id.*
[188] U.S. DEP'T OF ARMY, REG. 15-80, ARMY GRADE DETERMINATION REVIEW BOARD AND GRADE DETERMINATIONS para. 4-1*c*(1) (12 Feb. 2020).
[189] *Id.* para. 4-1*c*(2).

decorations based on "facts subsequently determined [which] would have prevented original approval of [an] award."[190] It is notable, however, that unlike many cases of medal revocation, retirement grade reduction is based in statute, not regulation.

F. Analysis of Golsteyn's ABCMR Application

In 2019, Golsteyn appealed to the ABCMR to reinstate his Distinguished Service Cross on the grounds that its revocation was an "unjust action" that contravened the Senior Army Decorations Board, as well as former president Trump's alleged promise that "everything would be expunged."[191] According to Golsteyn's counsel, "this is an easy fix that can be completed with a phone call and a signature for a deserving warrior."[192] The ABCMR disagreed, opining that Golsteyn "failed to demonstrate by a preponderance of evidence that an error or injustice occurred such that the applicant should be awarded either the DSC or the [Silver Star]."[193] Specifically, the ABCMR noted that Golsteyn's "overall behavior . . . did not indicate innocence," and that his "actions were not compatible with continued military service."[194] Further, though Golsteyn requested removal of the general officer memorandum of reprimand from his personnel file, the ABMCR declined, noting that the Department of Justice's acting pardon attorney had informed him that his pardon did "not erase or expunge the record of offense charges and does not indicate innocence,"[195] and that "it was not necessary, or even desirable, to expunge all records describing or condemning [his] now-pardoned conduct."[196]

Golsteyn's ABCMR case was unlikely to result in the reinstatement of his Distinguished Service Cross for the simple reason that such a correction is outside of the board's statutory authority. The decoration has a clear statute of limitations that requires awarding "within five years after the date of the act justifying the award,"[197] which had already expired in Golsteyn's case. Congress extended the statute of limitations for the review that

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[190] AR 600-8-22, *supra* note 30, para. 1-30*a*.
[191] Mathew Golsteyn, No. AR20200000309, Army Bd. for Corr. of Mil. Records 1 (June 26, 2020).
[192] *Id.* at 2.
[193] *Id.* at 11.
[194] *Id.*
[195] *Id.* at 9.
[196] *Id.* at 13.
[197] 10 U.S.C. § 7274(b)(1).

recommended upgrading Golsteyn's medal, but this extension also expired in December 2019.[198] Thus, Golsteyn's request clearly fell under regulations as a case where the ABCMR "is not authorized to act for the Secretary of the Army," since neither the Secretary of the Army nor the President can award the medal on their own in violation of an act of Congress.[199] Such a request could have been recommended by the ABCMR, but implementation would have required both presidential approval and congressional waiver.[200]

It is notable that the ABCMR arguably possessed the authority to reinstate Golsteyn's interim Silver Star through its record correction power, as this medal is not constrained by a statute of limitations.[201] However, depending on when Golsteyn's misconduct occurred, restoring this medal might violate the statutory requirement for his subsequent service to be honorable—a status that remains unchanged by the pardon[202] or the regulatory authority to revoke a medal "if facts subsequently determined would have prevented original approval of the award had they been known at the time of approval."[203] Restoration of revoked awards is not unprecedented. The ABCMR has restored at least six revoked Medals of Honor in prior cases; however, the board acted without congressional waivers and in violation of other statutory requirements, making these restorations unlawful.[204] It is also possible that other restorations have occurred, but verification is difficult because the service boards for correction of military records (BCMRs) do not presently publish all decisions, as required by Federal law.[205]

Following the ABCMR's ruling, Golsteyn's attorney continued to lobby the President on Twitter to reverse the decision unilaterally, even

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[198] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 582(a), 130 Stat. 2000, 2149 (2016).
[199] U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS para. 2-13*b*(3) (31 Mar. 2006).
[200] MEARS, *supra* note 5, at 192.
[201] 10 U.S.C. § 7276; U.S. DEP'T OF WAR, *supra* note 67, sec. 105.
[202] 10 U.S.C. § 1136.
[203] AR 600-8-22, *supra* note 30, para. 1-30*a*.
[204] *See generally* MEARS, *supra* note 5, at 167–80 (discussing administrative restorations); Dwight S. Mears, *"Neither an Officer nor an Enlisted Man": Contract Surgeons' Eligibility for the Medal of Honor*, 85 J. MIL. HIST. 51, 60 (2021).
[205] 10 U.S.C. § 1552(a)(5); *NVLSP Appeals Dismissal of Its Lawsuit to Compel Pentagon to Post All DRB & BCMR Decisions*, NAT'L VETERANS LEGAL SERVS. PROGRAM (Apr. 14, 2020), https://www.nvlsp.org/news-and-events/press-releases/nvlsp-appeals-dismissal-of-its-lawsuit-to-compel-pentagon-to-post-all-drb-b.

though such an action likely would have been unlawful due to the statute of limitations governing the award.[206] The attorney claimed that allowing the revocation to stand amounted to "kowtow[ing]" to the officials who revoked Golsteyn's medal, allegedly as a political move.[207] He also urged the President to "[t]ake charge of the Army" by overruling the Secretary of the Army,[208] who he claimed "stole" Golsteyn's decoration.[209] This stance suggested the Army's personnel actions in Golsteyn's case were tainted by political motives, beyond its authority, or otherwise inconsistent with the President's pardon determination. However, the ABCMR record suggests that little or no evidence was offered to support these assertions.[210]

G. Analysis of Potential Administrative Procedure Act Claim in the Golsteyn Case

Since Golsteyn failed to have his medal reinstated by the ABCMR, he can file a lawsuit in Federal court seeking relief under the Administrative Procedure Act.[211] This merely requires a "final agency action" as a prerequisite, which could be either an ABCMR denial or a service-level denial that results in legal consequences.[212] The likelihood of success in court is slim because the burden of proof is extraordinarily high.

In 1983, the Supreme Court affirmed the standard of review for BCMR decisions in *Chappell v. Wallace*, holding that BCMR decisions "can be set aside if they are arbitrary, capricious or not based on substantial evidence."[213] In evaluating these factors, a court must consider whether agency decisions were made "on a consideration of the relevant factors and whether there has been a clear error of judgment."[214] Also, the reviewing

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[206] 10 U.S.C. §7274(b)(1).
[207] @MilitaryDefendr, TWITTER (Dec. 23, 2020, 11:33 P.M.), https://twitter.com/MilitaryDefendr/status/1341965096948404225.
[208] @MilitaryDefendr, TWITTER (Dec. 18, 2020, 6:51 P.M.), https://twitter.com/MilitaryDefendr/status/1340082287023517696.
[209] @MilitaryDefendr, TWITTER (Dec. 17, 2020, 9:55 P.M.), https://twitter.com/MilitaryDefendr/status/1339766094437834753.
[210] *See generally* Mathew Golsteyn, No. AR20200000309, Army Bd. for Corr. of Mil. Records (June 26, 2020).
[211] 5 U.S.C. §§ 701–706.
[212] Bennett v. Spear, 520 U.S. 154, 178 (1997).
[213] Chappell v. Wallace, 462 U.S. 296, 303 (1983).
[214] Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (citing LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 182 (1965)).

court is deferential to the agency, and thus "is not empowered to substitute its judgment for that of the agency."[215]

Few plaintiffs have contested BCMR decisions affirming medal revocations—and almost none successfully, likely because of the high burden of proof involved under the Administrative Procedure Act and because revocation due to clear misconduct (or as a collateral consequence of conviction) leaves little to contest. Thus, most cases resulting in litigation are instances of retroactive revocation of service medals due to administrative punishment.[216] One such recent case, *Hoffler v. Hagel*, saw Lieutenant Colonel (Retired) Joseph Hoffler contest an Air Force BCMR (AFBCMR) refusal to reverse a letter of reprimand, lack of promotion, and retroactive revocation of a Meritorious Service Medal.[217] Hoffler claimed that the medal revocation was "a reprisal for his writing to his Senator," but the AFBCMR found that there was no "substantive evidence" to prove that the action "was an abuse of discretion, improper, or based on erroneous information."[218] The district court dismissed the complaint on summary judgment, holding that there was no evidence that the AFBCMR acted "arbitrarily or capriciously when it denied Hoffler's request for relief."[219] The denial was appealed to the United States Court of Appeals for the Fourth Circuit, where the court affirmed dismissal on the grounds that the appellant's arguments "as to why the revocation of his medal was improper . . . constitute no more than unsubstantiated speculation."[220] In sum, both courts correctly refused to substitute their judgment for that of the AFBCMR in the absence of proof of decision-making that was "arbitrary, capricious or not based on substantial evidence."[221]

Only once in history has a Federal judge returned a revoked valor decoration to a plaintiff in a lawsuit contesting a BCMR determination. In 1992, a district court directed the Secretary of the Navy (SECNAV) to return a Navy Cross to Alonzo Swann.[222] Swann, a steward's mate first

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[215] *Id.*
[216] *See, e.g.*, Koster v. United States, 685 F.2d 407 (Ct. Cl. 1982); Hoffler v. Hagel, 122 F. Supp. 3d 438, 441 (E.D.N.C. 2015), *aff'd in part, dismissed in part sub nom.* Hoffler v. Mattis, 677 F. App'x 119 (4th Cir. 2017).
[217] *Hagel*, 122 F. Supp. at 441.
[218] *Id.*
[219] *Id.* at 447.
[220] *Mattis*, 677 F. App'x at 120.
[221] Chappell v. Wallace, 462 U.S. 296, 303 (1983).
[222] Swann v. Garrett, 811 F. Supp. 1336 (N.D. Ind. 1992).

class stationed in "Gun Tub #10" on the aircraft carrier *USS Intrepid* during World War II, had been presented the medal only to have it revoked and downgraded with no explanation.[223] When the carrier was attacked by a Japanese kamikaze aircraft, Swann remained at his post even after "it became apparent that the enemy plane was headed directly for his gun tub."[224] While several other gun crews on the carrier abandoned their positions to save themselves,[225] Swann "steadfastly continued to deliver effective gun fire upon the enemy until the Japanese plane crashed into the tub and exploded," injuring him and killing nine others.[226] Swann alleged that he was subsequently awarded and presented the Navy Cross, but that the medals given to him and other members of his gun tub were then "taken away and substituted with Bronze Stars because of their race."[227]

Swann made an application to the Navy's Board for Correction of Naval Records (BCNR) to request that the Navy Cross be reinstated, but the Navy replied that "[o]fficial Navy records do not show any evidence of the Navy Cross being awarded to [him]" and denied his request for relief on several occasions.[228] Strangely, the BCNR acknowledged that Swann was "issued a temporary citation for the Navy Cross," but claimed there was no clear evidence that race had influenced a downgrade of the award.[229] While it does not appear that the court fully understood the implications of revoking a valor award that was already presented, the fact of the prior presentation was included in the court's justification for reversing the decision.[230] The court ruled that the BCNR's decision was "not supported by substantial evidence in the record" due to numerous records, contemporaneous media reports demonstrating that the medals had in fact been awarded, and even a photograph of one of the gun tub crewmen receiving the Navy Cross.[231] In the court's opinion, failure to "correct blatant injustice in the record" meant that the BCNR acted in violation of its own mandate, and "thus arbitrarily or capriciously."[232] The court reasoned that "when an agency does not

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[223] *Id.* at 1337.
[224] *Id.* at 1340.
[225] *Id.* at 1337.
[226] *Alonzo A. Swann*, HALL OF VALOR PROJECT, https://valor.militarytimes.com/hero/20995 (last visited Oct. 3, 2021).
[227] *Swann*, 811 F. Supp. at 1337.
[228] *Id.*
[229] *Id.* at 1338.
[230] *Id.* at 1343.
[231] *Id.* at 1340–42.
[232] *Id.* at 1340.

specify the factual or legal grounds for its decision, a court cannot give as much deference to the Board's determination."[233] Thus, the decision was reversed and remanded "with instructions to award Swann a Navy Cross."[234] Swann's case demonstrates why it is so rare for Federal courts to reverse determinations on military awards; the Government must utterly fail to justify its decision-making in order to make it arbitrary or capricious enough to overrule.

In light of these precedents, it is extremely unlikely that Golsteyn would prevail in Federal court. Army regulation expressly sanctions the post-presentation revocation of medals for misconduct, and the governing statute facially permits this action. Unlike in *Swann*, there is at least a rational basis for the Army's regulations and its adjudication in Golsteyn's case, meaning that they should survive minimum scrutiny and would not be deemed "arbitrary, capricious or not based on substantial evidence."[235]

Golsteyn's attorney has argued that the pardon has the effect of erasing misconduct as if it never occurred, but this claim is refuted by longstanding case law. As already discussed in the Lorance case study and Golsteyn's ABCMR case, the Justice Department's own position is that a pardon neither restores an individual's entitlements as if the offense had never occurred nor automatically results in expungement of records. Denial or revocation of medals due to misconduct is a matter internal to regulation of the military and does not constitute judicial punishment, so it is not impacted by a pardon. It is unclear if former president Trump actually ordered that Golsteyn's records be expunged separately from the pardon. If this happened and was actually enforced, it would potentially violate Federal record retention statutes that either require preservation or prohibit unsanctioned removal or destruction of records.[236]

Golsteyn may also argue that the Secretary of the Army improperly revoked his medal on the basis of the reprimand alleging a law of armed conflict violation, as the board of inquiry found that this allegation was unsubstantiated.[237] While these adjudications are inconsistent at some level,

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[233] *Id.* at 1342 (citing Werner v. United States, 642 F.2d 404 (Ct. Cl. 1981)).
[234] *Id.* at 1343.
[235] Chappell v. Wallace, 462 U.S. 296, 303 (1983).
[236] 44 U.S.C. § 3106; 18 U.S.C. § 2071; 28 U.S.C. § 534(a)(1).
[237] Mathew Golsteyn, No. AR20200000309, Army Bd. for Corr. of Mil. Records 7 (June 26, 2020).

the board of inquiry still found that Golsteyn's actions met the threshold of conduct unbecoming an officer,[238] which the *Manual for Courts Martial* explains is

> action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer.[239]

The board determined that Golsteyn committed "misconduct, moral, or professional dereliction," evidenced by its finding that he engaged in conduct unbecoming an officer, and recommended a characterization of service less than honorable.[240] It could certainly be argued that conduct unbecoming is less dishonorable than murder, but it is no less prejudicial when it comes to an already settled basis for medal revocation that warrants separation. Further, Golsteyn's televised admission to killing the suspect and acceptance of an unconditional pardon were both forms of admission that further support the board's determination that Golsteyn's service was less than honorable.

H. Overall Impact of Golsteyn Pardon and Recommendations

Overall, Golsteyn's case study illustrates that existing Army regulations and Federal statutes convey adequate authority to revoke medals in cases of subsequently determined misconduct. However, it also conveys that previous Army regulations on medal revocation have reversed themselves and The Judge Advocate General's precedent over the last century with no public explanation, and that modern regulations still lack clarity on the source of their authority. Given this history, it would be prudent to broaden the statutory language to include current regulations on revocation, if only to make this authority more clear. For example, Congress could amend the statute to clarify that revocation is also permissible when misconduct taints the qualifying period of service. The Air Force began to adopt this approach

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[238] UCMJ art. 133 (1950).
[239] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 90c(2) (2019).
[240] Mathew Golsteyn, No. AR20200000309, Army Bd. for Corr. of Mil. Records 7 (June 26, 2020).

in the 1960s, when its awards manual prohibited decorations when an Airman's "entire service during or subsequent to the time of the distinguished act, achievement, or service will not have been honorable."[241] Notably, that provision was, and is, purely regulatory, since the Air Force draws on the same statutory authority as the Army for the purposes of many of its military decorations, including the "subsequent honorable service" provision. One drawback of this proposal is that it may not cover circumstances like Golsteyn's, depending on whether his misconduct truly predated his qualifying period of service. However, it is arguable that Golsteyn's apparent actions should presumptively fall within the scope of this proposal, given that he admitted to misconduct, and thus should not benefit from the Government's inability to fix a precise date. Further, the conspiracy to burn the evidence and obstruct the investigation clearly postdated the killing, which certainly tainted the general time period of his gallant conduct if not the qualifying action itself.

Another issue highlighted by the Golsteyn case is the lack of time constraints on revocation, either in terms of time elapsed since the commission of misconduct or the temporal proximity of award qualification to a given period of misconduct. While Golsteyn's misconduct was first investigated less than two years after the incident,[242] it is clear that his own admission to the Central Intelligence Agency is the only reason that the Army discovered and investigated the alleged crimes. Thus, it is not unreasonable to speculate that absent this admission, the misconduct might otherwise have gone undiscovered for quite some time, if at all. Along these lines, if Golsteyn's misconduct were alternatively discovered after he had retired from a decades-long career, prosecution could theoretically result in revocation of all subsequent awards and decorations, possibly even other valor awards, including those earned decades after his misconduct. While present regulations would technically permit this outcome, such a broad application does not appear to have ever occurred. This scenario, however implausible, highlights that the ability to revoke awards for less-than-honorable service presently has no temporal limitation or requirement to be linked to the misconduct itself. While it may be impractical to tie the military's hands by enacting a statutory time limitation, it would be proactive for the Department of Defense to further refine its revocation

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[241] 32 C.F.R. § 882.4 (Oct. 6, 1964); *accord* U.S. DEP'T OF AIR FORCE, REG. 900-10C, SERVICE AWARDS para. 4(b) (20 July 1961) (C, 14 Oct. 1964).
[242] *U.S. Army Documents on Major Mathew Golsteyn*, *supra* note 94.

guideline to ensure that the practice is both equitable and standardized among the military services. Such a guideline might sanction revocation of medals only if earned during the same grade, position, assignment, or tour tainted by misconduct. This would draw a clear distinction between medals tainted by temporal proximity to misconduct—as in Golsteyn's case—and those that might be separated by years of otherwise honorable service and have no identifiable nexus to misconduct.

V. Edward Gallagher and Revocation of Achievement Medals

A. Background

Edward Gallagher, a now-retired chief petty officer in the Navy's Sea, Air, and Land (SEAL) teams, was charged in September 2018 with the premeditated murder of an Islamic State captive, attempted murder of unarmed civilians, posing with the corpse of a deceased combatant, and other criminal offenses.[243] He was acquitted of murder and attempted murder, likely the result of a key witness contradicting his own prior statements and claiming responsibility for the killing after receiving immunity.[244] Gallagher was ultimately convicted of wrongfully posing for an unofficial picture with a human casualty, for which he was sentenced to four months' confinement (which he served in pretrial confinement) and a demotion of one grade.[245] Following this conviction, former president Trump ordered the demotion reversed.[246] When Gallagher made contemptuous remarks about senior Navy officials, the service ordered a review board to consider revoking his SEAL trident insignia.[247] Then-

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[243] *Issuing Several Pardons, President Trump Intervenes in Proceedings of U.S. Troops Charged or Convicted of Acts Amounting to War Crimes*, 114 AM. J. INT'L L. 307, 309 (2020).

[244] Dave Philipps, *Navy SEAL Whose Testimony Roiled War-Crimes Trial May Face Perjury Charge*, N.Y. TIMES (June 26, 2019), https://www.nytimes.com/2019/06/26/us/corey-scott-edward-gallagher-navy-seal.html.

[245] Dave Philipps, *Navy SEAL Chief Accused of War Crimes is Found Not Guilty of Murder*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/navy-seal-trial-verdict.html.

[246] *Statement from the Press Secretary*, *supra* note 33.

[247] Dave Philipps et al., *Trump's Intervention in SEALs Case Tests Pentagon's Intolerance*, N.Y. TIMES (Nov. 30, 2019), https://www.nytimes.com/2019/11/30/us/politics/trump-seals-eddie-gallagher.html.

President Trump intervened again by ordering that the pin not be revoked, sparking a dispute that led to the firing of SECNAV.[248]

The President clearly opposed the post-trial award of Navy Achievement Medals (also known as Navy and Marine Corps Achievement Medals) to several members of the team that prosecuted Gallagher.[249] While the attorneys in question had not been punished for any misconduct, the lead prosecutor was previously removed from the case for emailing an unauthorized tracking program to Gallagher's defense attorneys, allegedly in an attempt to combat leaks to the media.[250] Upon discovery of the decorations in July 2019, then-President Trump tweeted that the medals were "ridiculously given" to the prosecutors, claiming that "[n]ot only did they 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."[251]

For this reason, former president Trump announced that he had "directed the Secretary of the Navy Richard Spencer & Chief of Naval Operations John Richardson to immediately withdraw and rescind the awards."[252] A Navy spokesman then made the claim that this action was within the secretary's authority and confirmed that the awards were immediately rescinded.[253] This unprecedented presidential intervention in a military justice case raises questions about whether revocation of military awards is lawful after awarding and presentation, particularly where the basis for revocation is a disagreement about the original award decision and the impacted Service members apparently received no notice or due process prior to revocation. Since the Navy's regulations lack any measurable

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[248] Myers & Prine, *supra* note 3.

[249] Hope Hodge Seck, *Trump Orders Navy to Rescind Medals Given to SEAL Eddie Gallagher's Prosecutors*, MILITARY.COM (July 31, 2019), https://www.military.com/daily-news/2019/07/31/trump-orders-navy-rescind-medals-given-seal-eddie-gallaghers-prosecutors.html.

[250] Howard Altman, *Lead Navy Prosecutor in SEAL War Crime Case out over Email Spying*, NAVY TIMES (June 3, 2019), https://www.navytimes.com/news/2019/06/04/lead-navy-prosecutor-in-seal-war-crime-case-out-over-email-spying.

[251] Carl Prine, *Trump Nixes NAMs for 4 Prosecutors Tied to SEAL Case*, NAVY TIMES (July 31, 2019), https://www.navytimes.com/news/your-navy/2019/07/31/trump-nixes-nams-for-4-prosecutors-tied-to-seal-case.

[252] *Id.*

[253] Jeremy Diamond & Barbara Starr, *Trump Moves to Rescind Medals Awarded to Eddie Gallagher Prosecutors*, CNN (July 31, 2019), https://www.cnn.com/2019/07/31/politics/trump-rescinds-navy-prosecutors-medals/index.html.

criteria for revocation, are inconsistent with Department of Defense policy, and have already produced outcomes that are arguably arbitrary or capricious, it is likely that they could be overturned in either administrative or judicial forums.

B. History of Navy's Honorable Service Requirement

For much of the twentieth century, the Navy had a "subsequent honorable service" provision that differed from the Army's, owing to the fact that its statutes authorizing decorations were separate from the Army's. As discussed earlier, its "subsequent honorable service" provision was first passed by Congress in 1919, in a bill that contained military award provisions borrowed from the Army.[254] The primary difference was that the Navy's provision covered all future military decorations and insignia issued for that service, while the Army's covered only the decorations authorized in the bill itself. It is also notable that the Navy previously had a separate and longstanding practice of unilaterally revoking Medals of Honor for severe offenses such as desertion, although this was the product of prior regulations that were clearly superseded by the time of the 1919 legislation's enactment.[255]

In the twentieth century, the Navy did not expressly endorse retroactive revocation of medals as early as the Army. The Navy's first mention of any revocation authority appeared in its 1976 award regulations, which provided that "[a]ny award for a distinguished act, achievement, or service may be revoked before presentation if facts subsequently determined would have prevented original approval of the award."[256] Here, by implication, the Navy saw revocation under this provision as impermissible if it occurred after presentation—a key difference from the Army's regulations of the same period. It is clear that the Navy saw presentation as a key step that would limit the ability to revoke a medal, since presentation is the point where legal rights to the medal vest.

In 1991, the Navy added regulatory language suggesting that revocation after presentation was possible at a higher level. The new regulation instructed that "[i]f the awardee's honorable service is questioned after

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[254] MEARS, *supra* note 5, at 74; Act of Feb. 4, 1919, Pub. L. No. 65-253, 40 Stat. 1056, 1057.
[255] MEARS, *supra* note 5, at 17.
[256] U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1650.1E, NAVY AND MARINE CORPS AWARDS MANUAL sec. 7(b) (17 Nov. 1976) [hereinafter SECNAVINST 1650.1E].

presentation of the award, forward the entire case to the Navy Department Board of Decorations and Medals (NDBDM) . . . for a determination and final disposition."[257] Regulations published in 2002 expressly endorsed post-presentation revocation but reserved the authority for this action to SECNAV:

> Any award for a distinguished act, achievement or service may be revoked before presentation by the approval authority, or after presentation by SECNAV, if facts, subsequently determined, would have prevented the original approval of the award, or if the awardee's service after the distinguishing act, achievement or service has not been honorable.[258]

The wording was revised slightly in 2006 to state that "[i]f subsequently determined facts would have prevented the original approval of the award, or if the awardee's service after the presentation of the award has not been honorable, SECNAV may revoke the award."[259] The language pertaining to "facts, subsequently determined" in these regulations was clearly borrowed from the Army, which had developed revocation policies well before the Navy.

In May 2019, the Navy's regulations were revised again to clarify that "[a]fter any [personal military decoration], [Purple Heart], or unit decoration has been presented, SECNAV is the sole authority for revocation."[260] No criteria were listed to specify what would merit revocation for personal military decorations. Also notable was lack of any due process protections in the Navy's regulations, such as the right to submit a non-concurring statement or an appeal.

Surprisingly, contemporaneous Department of Defense criteria continued to list that Defense and Joint medals awarded at this higher level

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[257] U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1650.1F, NAVY AND MARINE CORPS AWARDS MANUAL sec. 115(3) (8 Aug. 1991) (C1, 25 Feb. 1992).
[258] U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1650.1G, NAVY AND MARINE CORPS AWARDS MANUAL sec. 116(2) (7 Jan. 2002).
[259] U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1650.1H, NAVY AND MARINE CORPS AWARDS MANUAL sec. 211(8)(b) (22 Aug. 2006) [hereinafter SECNAVINST 1650.1H].
[260] U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1650.1J, DEPARTMENT OF THE NAVY MILITARY AWARDS POLICY para. 5(k)(2) (29 May 2019) [hereinafter SECNAVINST 1650.1J].

could only be revoked "if facts, later determined, would have prevented original approval of the decoration."[261] The Department of Defense expanded its guidance on medal revocation in June 2019 to specify that personal military decorations, including those awarded by the Navy, "should be revoked if subsequently determined facts would have prevented the original approval or presentation of the award," and "should be limited to those cases where the Service member's actions are not compatible with continued military service."[262] Therefore, while the Navy's criteria for revocation did not textually contradict the Department of Defense guidance, the Navy's regulation notably failed to articulate a policy that implemented the clear limitations present in this higher policy.

Thus, at the time of the prosecutors' medal revocations in July 2019, the Army and the Navy had similar statutory authority governing honorable service requirements for medals. However, the Navy's regulations diverged from Army and Department of Defense regulations due to their complete absence of circumstances justifying revocation, and the lack of clear due process protections.

C. Analysis of Award Revocations in the Gallagher Case

When former president Trump ordered the revocation of the Navy Achievement Medals for the Gallagher prosecution team in July 2019, the Navy's then-current regulation specified that the medal "may be authorized for meritorious service or achievement in a combat or non-combat situation, based on sustained performance or specific achievement of a superlative nature, and shall be of such merit as to warrant more tangible recognition than is possible by a fitness report or performance evaluation."[263] Thus, the eligibility criteria were open-ended, and the medals could be awarded based primarily on the subjective judgment of the approval authority.

Media reports indicate that one revoked award was justified on the basis of "superior performance" in trial preparation, having "brilliantly cross-examined defense witnesses" and having "expertly delivered the

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[261] U.S. DEP'T OF DEF., INSTR. 1348.33, MANUAL OF MILITARY DECORATIONS AND AWARDS: GENERAL INFORMATION, MEDAL OF HONOR, AND DEFENSE/JOINT DECORATIONS AND AWARDS vol. 1, para. 4(e)(8) (Nov. 23, 2010) (C3, July 10, 2014).
[262] DODI 1348.33, *supra* note 175.
[263] SECNAVINST 1650.1H, *supra* note 259, para. 13(b).

government's case in rebuttal."[264] Another revoked award cited "superior performance," "brilliant legal acumen," and the "unforeseen personnel change" that forced the attorney to become the lead prosecutor.[265] While the citations' authors may have interpreted these actions more favorably than others, it is unlikely that the awards' bases were materially falsified or objectively incorrect. Thus, it was unclear how the revocation decision was justified, since the Navy regulations stated that SECNAV was the "sole authority for revocation."[266]

The most glaring problems with the revoked achievement medals were the justifications invoked by former president Trump. Namely, he cited the prosecution's loss of the case, issues with information obtained during trial, and the botched immunity deal.[267] These claims are troubling not because they were untrue, but because they were known at the time of the awards' approval and presentation, which occurred several weeks earlier.[268] Further, the lead prosecutor had already been removed from the case, so he presumably did not receive an award because of the allegation of misconduct.[269] In other words, justifications seemingly failed to meet the Navy's previous threshold of being "subsequently determined facts [that] would have prevented the original approval of the award," a requirement that was still in force within the Department of Defense.[270] The stated grievances were not "subsequently determined facts" since the approval authorities certainly knew of them prior to their decision. Rather, it appears that the former president merely disagreed with the decision to award the medals, which had no other obvious basis for revocation such as fraud or material error.

While the Navy's regulations did not define what revocation threshold should be used, they also did not specify that revocation was permissible for any reason and, in this sense, were inconsistent with higher regulations. There is no question that the President or SECNAV could have lawfully

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[264] Carl Prine, *Their Case Collapsed in Court but 4 Navy Prosecutors Still Netted NAMs*, NAVY TIMES (July 30, 2019), https://www.navytimes.com/news/your-navy/2019/07/30/their-case-collapsed-in-court-but-4-navy-prosecutors-still-netted-nams.
[265] *Id.*
[266] SECNAVINST 1650.1J, *supra* note 260.
[267] Seck, *supra* note 249.
[268] Prine, *supra* note 251.
[269] *Id.*
[270] *Compare* SECNAVINST 1650.1H, *supra* note 259, *with* DODI 1348.33, *supra* note 175.

intervened to prevent the awarding of the medals before presentation, but revocation after presentation has long been constrained by both policy and law. The Navy apparently interpreted this provision as granting authority to revoke an award for any reason, in direct contrast to earlier standing policy between 2002 and 2019 and contemporaneous Department of Defense regulations.

Also problematic was the fact that the Navy appeared to comply with the presidential directive almost instantaneously, which means that the impacted prosecutors would have had little to no opportunity to contest the decision.[271] Considering that the rights to these medals vested upon presentation several weeks earlier, this raises questions about due process, such as whether the impacted officers were afforded hearings or the ability to refute allegations prior to an adjudication with legal consequences. While there may have been subsequent administrative remedies, it is unclear if these were offered, and the extraordinary nature of the revocation directive would virtually guarantee that an appeal would be denied. After all, it is evident that Navy officials faced the option of either complying with the President's order or being removed. It is not farfetched to posit that any executive official reviewing the decision on appeal would face a similar conundrum.

Curiously, the Navy dramatically expanded its ability to revoke decorations only two weeks after the presidentially directed revocation of the achievement medals. The new regulation stated that "[i]n all cases, SECNAV retains the authority to revoke or downgrade any award after approval or presentation if, in the judgment of the Secretary, the individual or unit did not merit the award, or if it is otherwise in the best interests of the Navy."[272] It appears that the Navy has claimed authority to revoke awards unilaterally after presentation based solely on the subjective determination that the decision is "in the best interests of the Navy"—a remarkably open-ended clause. This language is far more expansive than any revocation regulation promulgated by any service in the twentieth century, and arguably allows revocation for virtually any reason.

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[271] Prine, *supra* note 251.

[272] U.S. DEP'T OF NAVY, SEC'Y OF NAVY MANUAL M-1650.1, NAVY AND MARINE CORPS AWARDS MANUAL para. 1.2(f)(6) (16 Aug. 2019).

Notably, the Navy's present revocation authority was not in force at the time of former president Trump's directive to revoke the medals, although the expanded authority was likely a reaction to the absence of guidance in this very situation. It is quite possible that the President's intervention caused the service to review its award regulations, resulting in the discovery that they were silent on how a determination to revoke medals would be made. If this was the case, the expanded authority was perhaps an attempt to strengthen the regulation in order to counter administrative or legal challenges. However, since the regulation is inconsistent with equivalent Army[273] and Air Force[274] regulations, as well as higher Department of Defense policy,[275] it is more likely that the policy revision will produce the opposite outcome.

It is most problematic that the Navy's expanded regulations contradict the Office of the Secretary of Defense's June 2019 guidance, which had been issued less than two months earlier.[276] As these instructions were issued under the authority of the Under Secretary of Defense for Personnel and Readiness, the policy proponent had the express authority to "implement policy approved by the Secretary of Defense," including "instructions to the Military Departments."[277] In this case, the instructions specified that revocation of personal military decorations after presentation should only be exercised in

> cases where the Service member's actions are not compatible with continued military service, result in criminal convictions, result in determinations that the Service member did not serve satisfactorily in a specific grade or position, or result in a discharge from military service that is characterized as "Other Than Honorable," "Bad Conduct," or "Dishonorable."[278]

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[273] AR 600-8-22, *supra* note 30.
[274] U.S. DEP'T OF AIR FORCE, MANUAL 36-2806, AWARDS AND MEMORIALIZATION PROGRAM attach. A, para. A4.6 (10 June 2019) [hereinafter AFMAN 36-2806].
[275] DODI 1348.33, *supra* note 175.
[276] *Id.*
[277] U.S. DEP'T OF DEF., DIR. 5124.02, UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS para. 6.4 (June 23, 2008).
[278] DODI 1348.33, *supra* note 175.

It appears that none of these circumstances applied to the prosecutors in question, as there is no evidence that they were accused of or flagged for misconduct.

D. Potential BCNR Remedy for Award Revocations in the Gallagher Case

Due to the conflicting regulations and dubious justification behind the revocation, the impacted Navy prosecutors have an excellent chance of contesting this decision at the BCNR. The decision would fall within the BCNR's purview, as it appears to be an injustice within the BCNR's mandate to "correct an error or remove an injustice."[279] Further, the Navy Achievement Medal is not a statutory medal and is thus not governed by a statute of limitations.[280] This means that it is squarely within SECNAV's authority to award and that, by extension, it is also within the BCNR's authority, as the BCNR exercises SECNAV's authority.[281] In making their case, the applicants could argue that the decision constituted undue command influence where lower regulations did not specify the grounds for revocation and higher regulations were willfully ignored.

E. Potential Administrative Procedure Act Claim for Award Revocations in the Gallagher Case

If the BCNR fails to reverse the decision, Federal court would be another potential avenue for relief. As discussed in the Golsteyn case study,[282] Federal courts can set aside BCMR decision "if they are arbitrary, capricious or not based on substantial evidence."[283] In *Swann v. Garrett*, the plaintiff met this burden by demonstrating that the BCNR had rejected a request for an award's reinstatement despite clear evidence that the medal had been both awarded and presented and later summarily revoked and downgraded with no clear explanation.[284] In the prosecutors' case, the plaintiffs could potentially satisfy this burden of proof by arguing that the President and SECNAV exceeded regulatory authority. Their case would

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[279] 10 U.S.C. § 1552(a)(1).
[280] SECNAVINST 1650.1H, *supra* note 259, sec. 230(13)(b); *see* 10 U.S.C. § 1552(b) (stipulating that boards for correction of military records itself has a three-year statute of limitations from discovery of the error or injustice and that this may be excused "in the interest of justice").
[281] 10 U.S.C. § 1552(a)(1).
[282] *See* discussion *supra* Part IV.
[283] Chappell v. Wallace, 462 U.S. 296, 303 (1983).
[284] Swann v. Garrett, 811 F. Supp. 1336 (N.D. Ind. 1992).

be stronger than Golsteyn's because they could correctly claim that there was no subsequently discovered misconduct on which to base the revocation. In contrast, the Government would have difficulty refuting this argument, as former president Trump prominently documented his reasons for the revocation on Twitter.[285] The President's criticisms failed to satisfy any previous criteria for revocation, and appeared to be no more than disagreement in hindsight. The Navy could claim that the regulation allowed any justification for revocation, including a political motive, but the regulation notably failed to specify any criteria for such a decision. The Navy might also argue that the medal was revoked on grounds separate from the President's order, but this argument would likely be seen as pretextual.

F. Overall Impact of Award Revocations in the Gallagher Case and Recommendations

Overall, the revocations of military awards related to the Gallagher prosecution team illustrate that present regulations governing revocation are inadequate in several respects. First, the Navy's regulations contradict the regulations of the other services[286] and the Office of the Secretary of Defense[287] relating to the authority and criteria to revoke personal military decorations that were previously presented. Indeed, the Navy's most recent regulations on revocation are even incompatible with the overwhelming majority of the service's own prior regulations since revocation was first authorized by implication in 1976.[288] This suggests that there are competing views within the military establishment about the wisdom of unrestrained revocation, perhaps because this makes it more likely that the regulations will be successfully challenged, that Congress will impose its own limitations on revocation, or both.

While the Navy regulation's broad scope and ambiguity do not necessarily make it unlawful, it is insufficiently tied to misconduct—or any measureable standard—to protect Sailors from politically motivated revocation. By failing to articulate any clear standard for revocation, the Navy risks future political intervention as well as damage to the prestige of

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[285] *E.g.*, Peter Baker, *Trump Orders Navy to Strip Medals from Prosecutors in War Crimes Trial* (July 31, 2019), https://www.nytimes.com/2019/07/31/us/politics/trump-navy-seal-war-crimes.html.
[286] AR 600-8-22, *supra* note 30; AFMAN 36-2806, *supra* note 274.
[287] DODI 1348.33, *supra* note 175.
[288] SECNAVINST 1650.1E, *supra* note 256.

the award system itself. After all, if decorations are revoked arbitrarily, capriciously, and without clear explanation, it will undoubtedly reduce their perceived value and any corresponding incentive for Sailors to earn them.

To put regulatory revocation provisions on a firmer legal footing, the Navy should, at a minimum, revert to the policy it utilized between 2006 and 2019, which articulated that revocation is permissible "[i]f subsequently determined facts would have prevented the original approval of the award, or if the awardee's service after the presentation of the award has not been honorable."[289] Further, it should adopt the policy of the Office of the Secretary of Defense and clarify the threshold when revocation is permissible for less-than-honorable service, such as

> cases where the Service member's actions are not compatible with continued military service . . . , result in criminal convictions, result in determinations that the Service member did not serve satisfactorily in a specific grade or position, or result in a discharge from military service that is characterized as "Other Than Honorable," "Bad Conduct," or "Dishonorable."[290]

Finally, the Navy should provide notice of procedures that afford Sailors greater due process in the case of proposed revocation—such as the ability to request a hearing, present counterevidence, and pursue an appeal.

VI. Conclusion

The authority to authorize a military decoration goes hand in hand with the ability to revoke the same, at least absent statutory restrictions. This means that in cases like those of Clint Lorance and Mathew Golsteyn, revocation is presumptively lawful. Lorance's case study is the least controversial, demonstrating that service medals can be forfeited by less-than-honorable conduct during a medal's qualifying period. Given that honorable service is a baseline requirement for a campaign medal, withholding the medal after serious misconduct during the qualifying period is not surprising. When administrative revocation of a medal accompanies a court-martial conviction, this determination is clear-cut. An unconditional pardon does little to change this outcome, as legal challenges, the

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[289] SECNAVINST 1650.1H, *supra* note 259.
[290] DoDI 1348.33, *supra* note 175.

Department of Justice, and administrative precedent demonstrate that clemency restores rights and remits punishment but does not expunge records of misconduct or alter eligibility for military awards.

Golsteyn's case study is more complex due to the type of medal at issue, the uncertain timing of his misconduct, and the complicated history of regulations governing revocation of medals after presentation. Golsteyn qualified for a different type of military decoration than Lorance: a valor award, which is based more on a discrete act of heroism than a protracted period of service. Therefore, it is easier to argue that it remains untainted by misconduct, particularly since Golsteyn may have committed misconduct before, rather than during or after, his qualification. Had this scenario occurred in earlier twentieth century conflicts, it is possible that Golsteyn would have retained his medal irrespective of later investigations or prosecution, since Army regulation did not expressly sanction post-presentation revocation of valor awards due to misconduct until 1974.[291]

The regulatory authority for revocation in cases of pre-qualification misconduct is not based in statute and has evolved considerably since its inception, but has never been successfully challenged. Thus, Golsteyn's request to reinstate his decoration was denied by the ABCMR and would likely suffer similar rejection in Federal court since the Army's regulation covers his situation and is presumptively lawful. Nevertheless, the military would be wise to request that the governing statute be clarified, if only to make this authority less equivocal. Such an amendment might expressly require honorable service both during and after qualifying periods as a prerequisite for any medal. A regulatory guideline to tie medal revocation to the same general time period tainted by less-than-honorable conduct is also advisable to ensure that revocation is adequately linked to less-than-honorable conduct as well as standardized.

The revocation of achievement medals awarded and presented to the Gallagher prosecutors is more questionable than the Lorance and Golsteyn case studies due to the seemingly arbitrary justification, the Navy's inexplicable removal of regulatory standards for revocation in direct contrast with Department of Defense regulations, and the apparent lack of due process accompanying the determination. Regardless of whether the

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[291] U.S. DEP'T OF ARMY, REG. 672-5-1, MILITARY AWARDS para. 1-28*a* (June 3, 1974), (C4, 1 Aug. 1974).

former president's disagreements were subjectively valid, it appears that there was no objective defect in the original award justifications, and he did not intervene until after the medals were presented. This sets a chilling precedent for medal revocation. If allowed to stand, it means that revocation can be accomplished without any rational justification, and would effectively be immune from any challenge due to the lack of measurable criteria.

Medals that were earned under well-defined eligibility criteria deserve equally clear criteria for revocation and the opportunity to contest proposed revocation. Otherwise, other medals associated with property rights may be revoked without notice and in violation of due process requirements. It should be possible to contest these revocations as arbitrary and capricious at the BCNR or Federal court, as the regulation seems to have granted impermissible discretion to SECNAV in apparent contrast to Department of Defense policy. At a minimum, the Navy's revocation provisions should be reverted to the prior version that corresponded with both the Department of Defense and the other military services. This would make revocation permissible only if subsequent facts demonstrate that the medal was not earned and that the misconduct was not compatible with continued military service.