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## ANOTHER "SOLEMN PUBLIC LIE"\*

*Frederick Bernays Wiener\*\**

When Roger Williams, the founder of Rhode Island, and the founder of religious toleration in what was to become the United States of America, examined the charter that King James I had given the Governor and Company of the Massachusetts Bay in New England, he found in that document two significant misstatements. Williams first pointed out the falsity of the recital wherein the King "blessed God that he was the first Christian Prince that had discovered this land."<sup>1</sup> He then denounced the royal land grant to the Massachusetts Bay Company, because that land belonged, not to the King, but to the Native Americans who lived in that area. Accordingly, Roger Williams asserted that the monarch had told "a solemn public lie."<sup>2</sup>

More than three and a half centuries later, on June 10, 1982, the United States Postal Service issued a twenty cent postage stamp — then the rate for a first class letter — picturing a woman wearing a medal with the label "Dr. Mary Walker / Army Surgeon / Medal of Honor."<sup>3</sup>

In reality, however, Dr. Walker was never during her lifetime commissioned an Army surgeon. All of her services during the Civil War had been performed as a contract surgeon, a civilian employee. President Andrew Johnson, unable to recognize Dr. Walker's wartime service in any other way, ordered in 1866 that she be given a Medal of Honor. That award was taken from her in 1917 after a high-ranking Army board, reviewing the Medal of Honor roll pursuant to congressional mandate for compliance with

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\* Editor's note: This article addresses three subjects which, superficially, bear little relationship to each other: Congressional Medal of Honor law, abuse of discretion by executive branch officials and the process for ratifying constitutional amendments. The author, however, weaves whole cloth from these three strands.

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1. JAMES E. ERNST, ROGER WILLIAMS: NEW ENGLAND FIREBRAND 102 (1932).

2. *Id.*

3. THE POSTAL SERVICE GUIDE TO U.S. STAMPS, No. 2013, 218-19 (17th ed. 1991).

the statutory standards for that decoration, found she was not entitled to it.<sup>4</sup>

Sixty years later, and fifty-eight years after Dr. Walker's death, the Secretary of the Army in 1977 "corrected" her record to show that she was indeed commissioned an Army surgeon, and reinstated her Medal of Honor.<sup>5</sup> Five years later, the United States Postal Service issued the stamp in question.

The present inquiry examines the question whether the characterization that Roger Williams applied to King James I's Massachusetts Bay Company charter would also be an appropriate label for the Dr. Walker postage stamp. Who was Dr. Mary Edwards Walker, and what facts underlay her claim to distinction?

It appears that she became a doctor in 1855 over much opposition, after being the second woman ever to graduate from Syracuse Medical School. She never developed much of a practice because the public then had little faith in women doctors. She habitually wore trousers (actually long bloomers), according to contemporary photographs. As indicated, she served as a contract surgeon during the Civil War. The account of her life in the *Dictionary of American Biography*<sup>6</sup> does not indicate what some other sources assert, that she was captured by the Confederates at Chattanooga and imprisoned for a time in Richmond.<sup>7</sup>

It must be remembered that, until World War II, there was no statutory authority to commission women in the armed forces. Consequently, the only capacity in which Dr. Walker could serve was that of contract surgeon. Being a contract surgeon placed Dr. Walker in the same situation as male doctors who had passed the required examination for the Army's Medical Corps, but for whom no vacancy was then available. For example, Major General Leonard Wood, who ultimately became Chief of Staff of the Army from 1910 to 1914, was employed as a contract surgeon until the necessary vacancy appeared, after which he was commissioned an Assistant Surgeon.<sup>8</sup> This is perfectly clear from that Domesday Book of United States Army officers up to 1903, Heitman's *Histor-*

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4. See *infra* notes 49-52 and accompanying text.

5. See *infra* notes 84-86 and accompanying text.

6. 19 *DICTIONARY OF AMERICAN BIOGRAPHY* 352 (1936).

7. JOHN J. PULLEN, *A SHOWER OF STARS* 107, 246 (1966) (citing SYLVIA G. DANNETT & KATHERINE M. JONES, *OUR WOMEN OF THE SIXTIES* 15-16 (1963); BENJAMIN P. POORE, *PERLEY'S REMINISCENCES OF SIXTY YEARS IN THE NATIONAL METROPOLIS* 457 (Philadelphia 1886)).

8. JACK C. LANE, *ARMED PROGRESSIVE: GENERAL LEONARD WOOD* 1, 3, 16 (1978).

*ical Register and Dictionary of the U.S. Army*, which shows Wood's first commission but makes no mention of his prior non-military service as a contract surgeon.<sup>9</sup> Wood was duly commissioned Assistant Surgeon and ranked as a first lieutenant during his first three years of service. After that he ranked as a captain, but could not attain the rank of major until he was commissioned Surgeon. Medical officers did not obtain actual military rank until 1908.<sup>10</sup>

Army nurses deserve a few words at this point. In 1901, Congress created "the Nurse Corps (female),"<sup>11</sup> which in 1918 was redesignated as the "Army Nurse Corps."<sup>12</sup> After World War I, its members were given relative rank, primarily to grant them disciplinary power over enlisted patients.<sup>13</sup>

In force during all of World War II, the provision granting nurses relative rank raised the question whether, if an Army chief nurse with the relative rank of first lieutenant were to commit a grossly indecorous act, she could be convicted under the 95th Article of War of "conduct unbecoming an officer and a gentleman." The correct answer to this bantering query was invariably negative — not because the lady in question was not and never could be a gentleman, but because under existing law she was not an officer. Congress did not commission Army nurses until 1947,<sup>14</sup> acting grudgingly in the view of the beneficiaries, inasmuch as members of the Women's Army Corps (WACs) had been granted full commissioned status in 1943.<sup>15</sup>

These digressions aside, we turn now to the congressional enactments that authorized Medals of Honor. Prior to the Civil War "military decoration was considered to be a European vanity."<sup>16</sup> But early in that conflict, in December 1861, Congress in an act dealing with the Navy, directed that "'medals of honor' . . . shall be bestowed upon such petty officers, seamen, landsmen, and marines as shall most distinguish themselves by their gallantry in

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9. 1 FRANCIS B. HEITMAN, *HISTORICAL REGISTER AND DICTIONARY OF THE U.S. ARMY* 1055 (1903).

10. Act of Apr. 23, 1908, ch. 150, 35 Stat. 66.

11. Army Reorganization Act of Feb. 2, 1901, ch. 192, 31 Stat. 748, 753.

12. Army Appropriation Act of July 9, 1918, ch. 143, 40 Stat. 879-80.

13. National Defense Act of June 4, 1920, ch. 227, 41 Stat. 759, 767-68.

14. Act of Apr. 16, 1947, ch. 38, 61 Stat. 41.

15. Act of July 1, 1943, ch. 187, 57 Stat. 371.

16. PULLEN, *supra* note 7, at 53.

action and other seamanlike qualities during the present war. . . ."<sup>17</sup>

Soon afterwards, in July 1862, Congress provided for a similar award for the Army, again omitting commissioned officers, and again recognizing conduct involving gallantry in action. It then authorized the award of Medals of Honor "in the name of Congress" — hence the continuing practice of referring to the decoration as the "Congressional Medal of Honor"<sup>18</sup> — "to such non-commissioned officers and privates as shall most distinguish themselves by their gallantry in action, and their soldier-like qualities, during the present insurrection."<sup>19</sup>

Again, no commissioned officers were eligible. The decoration was available only to recognize acts in current hostilities, and "soldier-like qualities" could mean everything — or nothing. Army eligibility for the award was altered in March 1863, by authorizing awards of the Medal of Honor to "such officers, non-commissioned officers and privates as have most distinguished or may hereafter most distinguish themselves in action."<sup>20</sup>

But Congress never repealed the clause authorizing award of the Medal of Honor for "other soldier-like qualities;" it never extended those criteria to enable commissioned members of the Army to receive it for that reason; and it was not until June 1897 that the quoted phrase was, in the Army Regulations then promulgated, stricken from the provisions governing Medals of Honor.<sup>21</sup>

Both of the next congressional acts dealing with the Medal of Honor date from 1916, and both go to the very heart of the present inquiry. On April 27 of that year, Congress established "The Army and Navy Medal of Honor Roll," in order to pay ten dollars a month to every person, regardless of rank, "who has been awarded a medal of honor for having in action involving actual conflict with an enemy distinguished himself conspicuously by gallantry or intrepidity, at the risk of his life, above and beyond the call of duty. . . ."<sup>22</sup>

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17. Act of Dec. 21, 1861, ch. 1, 12 Stat. 329, 330.

18. PULLEN, *supra* note 7, at 182-83, 194.

19. Joint Resolution of July 12, 1862, 12 Stat. 623-24.

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

21. PULLEN, *supra* note 7, at 139.

22. Act of Apr. 27, 1916, ch. 88, 39 Stat. 53.

Also in 1916, the National Defense Act directed the Secretary of War to convene a board of five retired general officers to investigate and report

upon past awards or issues of the so-called congressional medals of honor by or through the War Department; this with a view to ascertaining what medals of honor, if any, have been awarded or issued for any cause other than distinguished conduct by an officer or enlisted man in action involving actual conflict with an enemy by such officer or enlisted man or by troops with which he was serving at the time of such action.<sup>23</sup>

Appointed to constitute the Medal of Honor Board were the following: Lieutenant General Nelson A. Miles, last Commanding General of the Army, and himself a Medal of Honor recipient; Lieutenant General Samuel B.M. Young, first Chief of Staff of the Army and recipient of three brevets for gallantry during the Civil War; Major General Joseph P. Sanger, recipient of two Civil War brevets for gallantry; Major General Oswald H. Ernst; and Brigadier General Butler D. Price.<sup>24</sup> After the Board concluded its labors, it issued its report on January 17, 1917.<sup>25</sup>

In order to preclude even the slightest possibility of personal bias, every one of the several thousand cases considered by the Miles Board was simply numbered, with the names of the medal holders eliminated from the several files. Briefs of all the cases considered can be found at pages 289-478 of the cited Senate Document. But as those briefs are not listed in numerical order, anyone looking for a particular award must examine some 190 pages of small type before finding it.

The Miles Board disqualified 911 individuals to whom Medals of Honor had been awarded.<sup>26</sup> The Awards to the four officers and twenty-five first sergeants who had served as President Lincoln's funeral guard "on its long and circuitous journey from Washington

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23. National Defense Act of June 3, 1916, ch. 134, § 122, 39 Stat. 166, 214.

24. S. Doc. No. 58, 66th Cong., 1st Sess. 108 (1917).

25. *Id.* (at page 115 there is noted the promotion of Brigadier General Price to Major General).

26. PULLEN, *supra* note 7, at 171. This number is made up as follows: President Lincoln's funeral escort, 29; other recipients never "in action," 6; civilian scouts, 5; 27th Maine, 864; other recipients under General Orders 195, 6; and Dr. Mary Walker, 1. Each of these seven items is discussed *seriatim* in the text immediately following.

to Illinois”<sup>27</sup> were too impetuously conferred, as they had not been earned “in action.”<sup>28</sup> The names of six other recipients were also stricken for the same reason.<sup>29</sup>

Five civilian scouts, including William F. (“Buffalo Bill”) Cody, were stripped of their Medals of Honor — but with deep regret, as two of those awards had initially been recommended by that doughty Indian-fighter, Lieutenant General Miles, President of the Board.<sup>30</sup> In the case of those five, although their Medals of Honor had been earned in action, they were not awarded according to law because civilian scouts were neither officers nor enlisted men.<sup>31</sup> It was otherwise for regularly enlisted Indian Scouts, who had been part of the Army since 1866, when they became entitled to “receive the pay and allowances of cavalry soldiers.”<sup>32</sup> Thus individuals known only as “Jim” and “Rowdy” remained on the Medal of Honor Roll.<sup>33</sup>

Although when first authorized, the Indian Scouts were to “be discharged whenever the necessity for their further employment is abated,” the last of them remained on active duty long after there was any further need for their employment “in the Territories and Indian country.”<sup>34</sup> The last instances of the use of the Army’s Indian Scouts in troubles involving other Indians came in Arizona Territory in May 1896. The last employment of any military force because of Indian activity occurred at Leech Lake, Minnesota, in October 1898.<sup>35</sup> Yet Indian Scouts remained on the rolls, with seventy-five authorized in the post-Spanish War Army Reorganization Act of 1901.<sup>36</sup>

Despite an increase of fifteen enlistments in 1916-17 for potential service with the Punitive Expedition into Mexico, the number of Indian Scouts on active duty after World War I was insufficient to warrant their being grouped into units; the twenty-three then

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27. PULLEN, *supra* note 7, at 106-07.

28. S. Doc. No. 58, at 114, 133.

29. *Id.* at 114.

30. PULLEN, *supra* note 7, at 158-64.

31. *Id.* at 109; S. Doc. No. 58, at 114.

32. Act of July 28, 1866, ch. 299, 14 Stat. 332, 336.

33. PULLEN, *supra* note 7, at 109.

34. Act of July 28, 1866, *supra* note 32.

35. 2 FRANCIS B. HEITMAN, HISTORICAL REGISTER AND DICTIONARY OF THE U.S. ARMY, *supra* note 9, at 304.

36. Army Reorganization Act of Feb. 2, 1901, ch. 192, § 1, *supra* note 11; 2 HEITMAN, *supra* note 9, at 623.

remaining were, on June 30, 1921, placed on the Detached Enlisted Men's List.<sup>37</sup> Thereafter, their numbers gradually decreased, and as late as January 15, 1941, only eight were left.<sup>38</sup> Finally, after World War II, the last four Indian Scouts were retired on September 30, 1947. All four were Apaches, and all had the rank of sergeant.<sup>39</sup> Therefore, we have the paradox that of the Indian Scouts' eighty-one years on active duty with the Army, nearly two-thirds of that period involved only garrison duty. The Indian Scouts' branch insignia, crossed arrows, was, in mid-1942, conferred on the newly organized First Special Service Force,<sup>40</sup> and today it identifies all members of the U.S. Army's Special Operations Command.<sup>41</sup>

A large group considered by the Miles Board were those who qualified under Secretary of War Edwin M. Stanton's General Orders No. 195, issued on June 29, 1863, just as the Union and Confederate armies were marching to their confrontation at Gettysburg. That document offered "an appropriate Medal of Honor for the troops who, after the expiration of their term, have offered their services to the Government in the present emergency."<sup>42</sup>

One of the units affected by that precipitous tender was the 27th Maine, a nine-months regiment then numbering 864 officers and men.<sup>43</sup> Of those, only 309 extended their service by four days. The other 555 members of the 27th Maine simply went home when their terms of enlistment ended.<sup>44</sup> They had signed up for nine months and that period had expired; the coming battle did not and could not affect their obligation — and the haying season in Maine was rapidly approaching.<sup>45</sup> Yet, when the regiment's muster roll reached the War Department, it was directed that Medals of Honor be prepared for all its 864 members, those who had soldiered on as well as those who headed home.<sup>46</sup>

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37. Mem. from Sec. Hist. Sec., Army War College, to Pub. Rel. Br., Office Dep. C/S, War Dep't (Jan. 15, 1941) (copy on file with author of this article).

38. *Id.*; accord, Rep. Sec. War, at 40 (1940).

39. Letter to author from David A. Huet, Post Museum, Fort Huachuca, Az. (Nov. 7, 1991).

40. R. D. BURHANS, *THE FIRST SPECIAL SERVICE FORCE* 16 (1947).

41. ARMY REGULATION 670-1, § 28-10(29) & Figure 27-103, "Uniforms and Insignia" (Update Issue, Sept. 1, 1992).

42. S. Doc. No. 58, 66th Cong., 1st Sess. 113 (1917); PULLEN, *supra* note 7, at 93.

43. S. Doc. No. 58, at 113, 289; PULLEN, *supra* note 7, at 67-81.

44. S. Doc. No. 58, at 113-14.

45. PULLEN, *supra* note 7, at 70-71.

46. PULLEN, *supra* note 7, *passim*.

When the Miles Board examined the situation of the 27th Maine, then, and even now, the most decorated regiment in all of American military history, they struck off the names of the 555 who went home: "Made in error. Not justified." As to the 309 members who stayed on, plus six other Medal of Honor recipients under General Orders No. 195,<sup>47</sup> the Board determined that their awards were legally made even though they had not been earned in action — and the Board recommended that rescission be deferred pending possible reconsideration by Congress of its 1916 Acts. The Board also recommended restoration of the civilian scouts whose names were stricken. Congress never did relax its 1916 standards, with the result that, as in the case of the civilian scouts, even the worthy beneficiaries of the ill-fated General Orders No. 195 were not spared revocation of their awards.<sup>48</sup>

The final person deprived of the Medal of Honor was Dr. Mary Walker, case number 966. Her file says nothing about her confinement as a prisoner of war. But it clearly shows that, when a Dr. Phelps, professor of medicine at Dartmouth College, sent a letter about Dr. Walker's services, Surgeon General Joseph K. Barnes appended an adverse indorsement. Her file further shows that, when Dr. Walker applied for a commission as Assistant Surgeon, her application was denied. President Andrew Johnson, who wished to give her "recognition of the Government,"<sup>49</sup> was advised that such an application was not authorized. He then inquired whether there was any law under which an honorary or complimentary brevet commission might be conferred. There being none, he later as Commander in Chief simply ordered that she be given a Medal of Honor, and that decoration was in fact issued to her on January 24, 1866, for "services rendered during the war" over the years 1861-65.<sup>50</sup>

Following the war, Dr. Walker made the most of this distinction, wearing it whenever possible, including President Chester A. Arthur's first New Year's Day reception.<sup>51</sup> But after the Miles Board had reviewed the evidence in her case, it struck Dr. Walker's name with the comment, "This was a contract surgeon whose service

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47. S. Doc. No. 58, at 113, 115, 184, 290-92.

48. PULLEN, *supra* note 7, at 161-66.

49. S. Doc. No. 58, at 457.

50. *Id.*

51. PULLEN, *supra* note 7, at 107, (quoting BENJAMIN P. POORE, PERLEY'S REMINISCENCES OF SIXTY YEARS IN THE NATIONAL METROPOLIS at 457 (Philadelphia 1886)).

does not appear to have been distinguished in action or otherwise."<sup>52</sup>

The account of Dr. Walker's life in the *Dictionary of American Biography* is thus incorrect in two respects, first in asserting that after her service as a contract surgeon she was appointed an Assistant Surgeon, and second in stating that the Miles Board's action was taken "because the occasion for [the medal's] giving was not of record in the War Department's archives."<sup>53</sup> Dr. Walker died about two years after the Miles Board acted. It will not occasion surprise that this pioneer feminist never married.<sup>54</sup>

Two generations later, on March 22, 1972, Congress proposed to the States the so-called Equal Rights Amendment, the operative portion of which declared that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."<sup>55</sup> The limitation for ratification of this proposal was set at seven years, but the early urge to ratify slowed as second thoughts surfaced.<sup>56</sup>

Back in 1923, the Supreme Court had declared unconstitutional an Act of Congress which fixed minimum wages for women in industry in the District of Columbia, in part because the then novel Nineteenth Amendment granting women the franchise had rendered invalid any legislation purporting to treat them separately.<sup>57</sup> That approach roused Justice Holmes to dissent: "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."<sup>58</sup>

Similar views appear to have arisen in state legislatures considering the Equal Rights Amendment. Whereas no fewer than twenty-two states had ratified it by December 1, 1972,<sup>59</sup> the pace later slowed perceptibly: six years later, although thirty-five States had ratified, four (five in one view) of those ratifying earlier had

52. S. Doc. No. 58, at 114.

53. 19 *DICTIONARY OF AMERICAN BIOGRAPHY* 352 (1936).

54. *Id.*

55. H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

56. *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION*, S. Doc. No. 92-86, 92d Cong., 2d Sess. 47 (1973).

57. *Adkins v. Children's Hosp.*, 261 U.S. 525, 553 (1923).

58. *Id.* at 569-70 (Holmes J., dissenting).

59. See S. Doc. No. 92-86, *supra* note 56.

withdrawn their ratifications.<sup>60</sup> With the March 22, 1979 deadline rapidly approaching, Congress, on October 20, 1978, adopted a Joint Resolution that extended the time for ratification to June 30, 1983. That enactment bore the signature "Jimmy Carter."<sup>61</sup>

President Carter was not the first president to undertake formal participation in the process of constitutional amendment. More than a century earlier, in the 1860's, two of his predecessors had taken similar action, and, by a strange coincidence of numerical irony, both earlier Presidents had indicated their personal approval of two separate Thirteenth Amendments that had diametrically opposing objectives.

Here it is necessary to supply a bit of background. On the same day that South Carolina adopted its Ordinance of Secession, Senator John J. Crittenden of Kentucky offered a far-reaching if last-ditch compromise to preserve the Union.<sup>62</sup> President Buchanan supported the compromise, but time had expired; other southern states joined South Carolina,<sup>63</sup> and in the end only the sixth of Senator Crittenden's proposals won approval.<sup>64</sup>

On March 2, 1861, two days before President Buchanan's term expired, Congress, by a vote of three-quarters of each house, proposed this "Article XIII" to the States: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."<sup>65</sup> That proposal was ratified by only three states, all acting after Fort Sumter had been fired on and then surrendered.<sup>66</sup> The ultimate Thirteenth Amendment, abolishing slavery in any place subject to the jurisdiction of the United States, was proposed by Congress nearly four years later, on January 31, 1865.<sup>67</sup>

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60. See supplement to S. Doc. No. 92-86, *supra* note 56, *viz.*, S. Doc. No. 96-26, 96th Cong., 1st Sess. S4, S572 (1979).

61. H.R.J. Res. 638, 95th Cong., 2d Sess., 92 Stat. 3799 (1978).

62. For a detailed narrative of the Crittenden compromise, see ROY F. NICHOLS, *THE DISRUPTION OF AMERICAN DEMOCRACY* chs. 21-24 (1948).

63. For a convenient chronology, see W. ANDREWS, *CONCISE DICTIONARY OF AMERICAN HISTORY* 861-62 (1962).

64. Nichols, *supra* note 62, at 490; 4 ALLAN NEVINS, *THE EMERGENCE OF LINCOLN* 391, 410 (1950).

65. 12 Stat. 251 (1861).

66. S. Doc. No. 49, 87th Cong., 1st Sess. 29, n.7 (1961).

67. 13 Stat. 567 (1865).

Both instances evoked presidential action. The Thirteenth Amendment of 1861 was signed by President Buchanan after it had passed the House on February 28, 1861.<sup>68</sup> The Thirteenth Amendment of 1865, which became part of the Constitution on December 18 of that year,<sup>69</sup> had been proposed in a Joint Resolution that was signed "approved February 1, 1865, Abraham Lincoln."<sup>70</sup>

After March 4, 1861, when President Buchanan's dismal administration finally ended, his signature on the first proposed Thirteenth Amendment apparently evoked no comment.<sup>71</sup> But in February 1865, President Lincoln's did: the Senate by resolution of February 7, 1865, declared that the President's approval "was unnecessary to give effect to the action of Congress, inconsistent with the former practice and should not constitute a precedent for the future."<sup>72</sup>

Without doubt all three Presidents concerned, Buchanan and Lincoln, who affixed their signature to conflicting versions of the Thirteenth Amendment, and Carter, who similarly signed the Joint Resolution extending the time for ratification of the Equal Rights Amendment, did so in order to indicate as publicly as possible their support of the measures in question. But the Senate was correct in February 1865 when it rebuked President Lincoln, because, way back in 1798 it had been judicially determined that a congressional resolution proposing a constitutional amendment is not a legislative act within the meaning of Article I, Section 7, of the Constitution.<sup>73</sup> After all, the Bill of Rights went to the states directly from Congress, and was never submitted to President Washington.

A second instance of numerical irony in the amendment process encompassed the period from 1972 to mid-1992. On March 22,

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68. See NICHOLS, *supra* note 62. The manuscript original (copy obtained from National Archives) shows at the left "Approved March 2;" underneath that, "James Buchanan;" and, on the right, the signature of Wm. Pennington as Speaker of the House of Representatives, and, below that, the signature of John C. Breckinridge as Vice President of the United States and President of the Senate. The manuscript original suggests that Buchanan's signature was not added until after final approval by both houses.

69. S. Doc. No. 49, at 51 n.5.

70. *Id.* at 28-29 n.7.

71. Several biographies of Buchanan fail even to mention the constitutional proposal of 1861. It is, however, briefly noted in 1 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 119-20 (1939).

72. S. Doc. No. 49, at 28-29 n.7.

73. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 380 (1798).

1972, the Equal Rights Amendment was proposed by Congress and submitted to the states.<sup>74</sup> A large and lavishly illustrated volume published in 1974, when prospects for ratification were still rosy, included that provision's text as "Proposed Amendment XXVII."<sup>75</sup> However, just eighteen years later, the actual Amendment XXVII that became a part of the Constitution on May 18, 1992,<sup>76</sup> was hardly the manifestation of late blooming feminist pressure.

Quite to the contrary, it had been the second of the twelve articles drawn by Madison as the Bill of Rights that Congress proposed to the states on September 25, 1789. It provided that "[n]o law, varying the compensation for the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."<sup>77</sup>

Immediately after the Twenty-Seventh Amendment was added to the Constitution, doubts were expressed as to whether an amendment could be ratified by the requisite proportion of States more than two centuries after it had first been proposed. One Supreme Court decision in 1921 had intimated that ratification, to be valid, must follow within a reasonable time.<sup>78</sup> Another decision in 1939 explained that the question of reasonableness was a matter for Congress, and Congress alone, to decide. This second ruling was *Coleman v. Miller*,<sup>79</sup> which elicited four opinions, not one of which was supported by five justices, and where the final result was affirmation by an equally divided Court. Apparently the ninth justice had tired of the disputation and had simply gone home.<sup>80</sup>

Enough was said, however, to declare that timeliness was a political question, one that was left for Congress to determine on its own. Accordingly, two days after the actual Twenty-Seventh

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74. H.R.J. Res. 208, *supra* note 55.

75. B. SCHWARTZ, *THE AMERICAN HERITAGE HISTORY OF THE LAW IN AMERICA* 371 (1974). The manifold shortcomings of this volume are set forth in the present author's review and evaluation, *American Law for the Coffee Table — An Impossible Dream*, 1975 SUP. CT. REV. 423.

76. Certificate of Amendment to the Constitution of the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21,187 (1992), certificate by the Archivist of the United States pursuant to 1 U.S.C. § 106(b), as amended. In 1950, the Administrator of General Services had succeeded to the duty of certification earlier exercised by the Secretary of State, and in 1985 the same obligation was transferred to the official now charged with it.

77. 1 Stat. 97 (1789).

78. See *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

79. 307 U.S. 433 (1939).

80. See Note, *Sawing a Justice in Half*, 48 YALE L.J. 1455 (1939).

Amendment had been certified by the Archivist of the United States to be a part of the Constitution, Congress by a vote of 99 to 0 in the Senate and 414 to 3 in the House, declared in separate concurrent resolutions that Madison's "Article the Second," which Congress had submitted more than 202 years previously, had in its view been validly ratified.<sup>81</sup> As one senator said, "[t]here is a reason that the Senate needs to act by this resolution and that reason is to ward off any legal attacks that might come on the issue of timeliness."<sup>82</sup> Consequently, Congress no longer possesses the power to raise its own compensation at will.

But the issues raised by the failure to ratify the Equal Rights Amendment still leave unsettled two critical legal questions. First, can Congress, after first setting a time limit for ratification when it submits an amendment to the states, later extend that period? Second, can a state that has already ratified a proposed constitutional amendment, validly rescind its own ratification before that proposal has become a part of the Constitution? Both queries still await an authoritative answer because, after the extended 1983 deadline had passed, the Equal Rights Amendment still had not been ratified by three-quarters of the states.<sup>83</sup>

Thus the Constitution of the United States as it stands today still fails to join together what both God and Nature had eons earlier put asunder. But the possibility of that ultimate result did not deter those outside the White House, Congress and the State legislatures. Those who were dedicated to the innermost aspirations of feminists awarded a consolation prize to all who might be grieving over the impending failure of the Equal Rights Amendment.

The Secretary of the Army on June 10, 1977, acting upon the recommendation of the Army Board of Correction of Military Records, signed the order to reinstate Dr. Walker's Medal of Honor and correct the official records. The Board ruled that had it not been for her sex she would have been commissioned in 1861 and concluded that "when consideration is given to her total contribution, her acts of distinguished gallantry, self-sacrifice, patriotism, dedication and unflinching loyalty to her country, despite the apparent discrimina-

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81. S. Con. Res. 120, 102d Cong., 2d Sess. (1992); H.R. Con. Res. 320, 102d Cong., 2d Sess. (1992); 138 CONG. REC. H3380, H3382, H3396 (daily ed. May 19, 1992).

82. 138 CONG. REC. S6948 (daily ed. May 20, 1992).

83. See *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981); *judgment stayed sub nom. National Org. for Women, Inc. v. Idaho*, 455 U.S. 918 (1982); *judgment vacated by* 459 U.S. 809 (1982). See generally, S. Doc. No. 16, 99th Cong., 1st Sess. 902-12 (1987).

tion because of her sex, the award of the Medal of Honor appears to have been appropriate, and that the award was in consonance with the criteria established by the Act of April 27, 1917 [sic], and in keeping with the highest traditions of military service."<sup>84</sup>

Without question, the secretary of a military department is empowered to correct any military record of his department when he "considers it necessary to correct an error or remove an injustice."<sup>85</sup> Here, however, the Secretary of the Army undertook two steps. The first, "despite the apparent discrimination because of her sex," was to commission Dr. Walker as an Assistant Surgeon fifty-eight years after her death when, by standards in force 116 years earlier, she simply was not qualified for military status.

Second, the Secretary of the Army reinstated her Medal of Honor, but without indicating how the Miles Medal of Honor Board had erred sixty years earlier in concluding that Dr. Walker's "service does not appear to have been distinguished in action or otherwise."<sup>86</sup>

No details were offered in 1977; all that was presented to justify restoring Dr. Walker's Medal of Honor was generalized purple prose. The Secretary's action was an indefensible instance of rhetoric masking desire — and that in violation of two basic principles several times decreed by Congress many years earlier.

The first of those basic principles was articulated on three separate occasions, when Congress declared that a Medal of Honor could only be awarded "for having in action involving actual conflict with an enemy distinguished himself conspicuously by gallantry or intrepidity, at the risk of his life, above and beyond the call of duty."<sup>87</sup> The words "himself" and "his" are irrelevant; the laws of the United States have always provided that "[i]n determining the meaning of any Act of Congress, unless the context in-

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84. Letter from M. Bruce Downey, Senior Representative, Government Relations Department, U.S. Postal Service, to Sen. Barry Goldwater of Arizona (Aug. 27, 1982) (copy on file with author of this article).

85. 10 U.S.C. § 1552 (1988).

86. S. Doc. No. 58, 66th Cong., 1st Sess. 114 (1917).

87. This principle was articulated in 1916, 1918 and 1963: Act of Apr. 27, 1916, ch. 88, 39 Stat. 53; Army Appropriation Act of July 9, 1918, ch. 143, 40 Stat. 845, 870; Act of July 25, 1963, Pub. L. No. 88-77, 77 Stat. 93 (codified at 10 U.S.C. § 3741).

dicates otherwise words importing the masculine gender include the feminine as well."<sup>88</sup>

Just what conduct on Dr. Walker's part during her Civil War service could fairly have been comprehended within that thrice repeated statutory language was never explained by the Secretary. And how could that official in 1977 have been unaware of the standards governing awards of the Medal of Honor during the Korean War less than a quarter of a century earlier? In that conflict, which lasted from 1950 to 1953, the standards were such that of 131 Medals of Honor awarded, only thirty-seven went to living men.<sup>89</sup>

A second congressional standard violated in 1977 was the rule against retroactivity, barring the nation's highest decoration for valor long after memories had faded and witnesses had died. Unhappily, that had been the post-Civil War practice, allowing decades to elapse before actually honoring distinguished conduct. A few examples are those of Lieutenant General Nelson A. Miles, twenty-nine years; Lieutenant General Arthur MacArthur (Douglas' father), twenty-six years; and Colonel Horace Porter, aide-de-camp to Generals Grant and Sherman, over thirty-eight years.<sup>90</sup>

In order to curb this practice, Congress in 1918 provided that no Medal of Honor may be granted more than three years after the act of gallantry sought to be rewarded.<sup>91</sup> That imposition of a time limit between the act of bravery and its subsequent recognition was restated in 1960.<sup>92</sup> While it is clear that allowances were made to correct instances of awards lost or not acted on, Congress as late as 1963 indicated its refusal to accord eligibility to conduct taking place many years previously.<sup>93</sup>

Thus, when the Secretary of the Army in 1977 undertook to "correct" what the Miles Board had determined, he rode roughshod over standards that Congress had repeatedly enacted. And he disregarded utterly the quality of valor requisite for receipt of a Medal of Honor. Thus the "correction" of Dr. Walker's record constituted an unforgivable affront to all those, living and dead alike, who had won the Medal of Honor for exceptional, unusual and

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88. 1 U.S.C. § 1 (1988).

89. PULLEN, *supra* note 7, at 191.

90. 1 HEITMAN, *supra* note 9, at 652, 708, 799.

91. Army Appropriations Act of July 9, 1918, *supra* note 87, at 871.

92. Act of July 5, 1960, Pub. L. No. 86-582, § 1(1), 74 Stat. 320 (codified at 10 U.S.C. § 3744(b)); see S. REP. No. 1734, 86th Cong., 2d Sess. 4 (1960).

93. See sources cited *supra* notes 91-92.

outstanding bravery. In short, the Secretary ignored the law requiring "gallantry or intrepidity, at the risk of his life; above and beyond the call of duty."<sup>94</sup>

The conclusion is inescapable that, when the Secretary of the Army acted on Dr. Mary Walker's military record in 1977, he did not correct that record; he falsified it. And when what had begun as intra-departmental paperwork culminated with the issuance of over 100,000,000 copies of the Dr. Mary Walker postage stamp,<sup>95</sup> there was committed in the name of the United States an utterly inexcusable "solemn public lie."

Can anything be done to rectify this outrage? Probably not -- because Congress in the law for the correction of military records also provided that "[e]xcept when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."<sup>96</sup> Even extreme philo-feminism, however much in this instance it denigrates the genuine heroism of thousands of male combatants, does not add up to fraud.

The "solemn public lie" will, it appears, be allowed to stand. Here again, the truthful 1917 finding will never catch up with the falsehoods perpetrated in 1977 and again in 1982.

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94. See sources cited *supra* note 87.

95. THE POSTAL SERVICE GUIDE TO U.S. STAMPS, No. 2013, 218 (17th ed. 1991).

96. 10 U.S.C. § 1552(a) (1988).