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THE CRISIS OF JUNE 2020: THE CASE OF THE RETIRED GENERALS AND ADMIRALS AND THE CLARION CALLS OF THEIR CRITICS IN LEX NON SCRIPTA (HISTORIC) PERSPECTIVE

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Joshua Kastenberg*

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* Joshua E. Kastenberg is a professor at the University of New Mexico, School of Law. He thanks Professor Frederick Schneid at Highpoint University, Professor Mike Neiberg at the United States Army War College, and Professor Rachel Vandaligham at Southwestern Law School for their ideas and help. This Article was authored before the assault on the Capitol on January 6, 2021, and in no way does this article or its author condone the insurrectionary rhetoric by retired flag officers such as Michael Flynn and Thomas McInerney. The author believes that a recall to duty for the purpose of a court-martial for such conduct is fully justified in this instance.

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I. INTRODUCTION

In the first week of June 2020, former Secretary of Defense James Mattis, a retired United States Marine Corps general with substantial wartime experience, along with other retired senior military officers took the unusual step of condemning President Donald Trump for his response to nation-wide demonstrations demanding equal justice and an end to the existence of systemic and institutional racism.¹ Shortly afterward, former Chairman of the Joint Chiefs of Staff, Colin Powell (who had also served as the Sixty-Fifth Secretary of State), likewise argued that President Trump “drifted away” from the Constitution and undermined democracy.² Joining Powell and Mattis were, as a sampling, retired Admiral Michael Mullen, and retired generals John Allen, Martin Dempsey, Michael Hayden, and Tony Thomas.³ This led to more than one pundit questioning whether the senior officers who opposed President Trump were unwise, if not constitutionally ignorant, in their actions.⁴ For instance, Victor Davis Hansen, an emeritus professor, alleged that several of the retired generals and admirals op-

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1. See Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, ATLANTIC (June 3, 2020), <https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640> [https://perma.unl.edu/J57N-HPMT]; David E. Sanger & Helene Cooper, *Military Vets Break Silence on President*, N.Y. TIMES, June 5, 2020, at A1.
 2. Michelle Hackman, *Colin Powell Says Trump Has ‘Drifted Away’ from U.S. Constitution*, WALL STREET J., June 7, 2020.
 3. Fred Kaplan, *The Officers’ Revolt*, SLATE (June 3, 2020, 1:13 PM), <https://slate.com/news-and-politics/2020/06/trump-commanders-esper-mullen-miller.html> [https://perma.unl.edu/E2A7-RXYT]; Paul LeBlanc, *Retired Marine Gen. John Allen: Trump’s Threats of Military Force May Be ‘The Beginning of the End of the American Experiment’*, CNN (June 4, 2020, 2:14 PM), <https://www.cnn.com/2020/06/04/politics/john-allen-trump-protests-george-floyd/index.html> [https://perma.unl.edu/54AM-5YQE]; Mike Mullen, *I Cannot Remain Silent*, ATLANTIC (June 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/american-cities-are-not-battlespaces/612553> [https://perma.unl.edu/7EMM-BHG6].
 4. See, e.g., Hugh Hewitt, *No, Colin Powell. Trump Isn’t the One Who’s ‘Drifted’ from the Constitution*, WASH. POST (June 9, 2020, 2:09 PM), <https://www.washin.com/opinions/2020/06/09/how-colin-powell-got-away-with-an-unjustified-trump-about-constitution/> [https://perma.unl.edu/XU72-R9PE]; Michael J. Stricof, *Should Military Officers Like Jim Mattis Enter the Political Arena?*, WASH. POST, June 4, 2020.

posing the administration's actions used "contemptuous words" against President Trump and then suggested that a court-martial might be a reasonable response.⁵ Others, such as Peter Feaver and James Golby, argued that the military's high approval rating and unrivaled public trust is placed in jeopardy by such conduct of retired generals and admirals.⁶

Yet, those pundits who were critical of the retired generals and admirals overlooked two basic features of the Constitution's demand for the military's subordination to the civil government. First, the Constitution was designed with the fear of standing armies in mind.⁷ To that end, the Constitution's framers intended for weakened presidential ability to order the military to perform domestic police-type duties.⁸ As articulated by Thomas Jefferson in the Declaration of Independence, one of the foremost grievances of the men who led the Revolution against the Crown in 1776 was King George III's use of military forces to police the colonies.⁹

It is critical to place into context the events which led to the actions of Powell and the other retired senior officers (hereafter Powell et al.). Hundreds of thousands of United States citizens and residents exercised their constitutional rights to freedom of speech and to peaceably assemble in protests after the police killing of George Floyd, an unarmed, Black United States citizen in Minneapolis.¹⁰ President Trump threatened, if not attempted, to order the active duty military

5. See Victor Davis Hanson, *Not-So-Retiring Retired Military Leaders*, NAT'L REV. (June 7, 2020, 8:58 PM), <https://www.nationalreview.com/2020/06/not-so-retiring-retired-military-leaders/amp/> [<https://perma.unl.edu/2JYY-BAC7>].

6. See, e.g., Thomas Burke & Eric Reid, *Retired Military Endorsements Erode Public Trust in the Military*, BROOKINGS: ORDER FROM CHAOS (June 30, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/30/retired-military-endorsements-erode-public-trust-in-the-military> [<https://perma.unl.edu/2RCZ-DHSD>].

7. See e.g., *Perpich v. Dep't of Def.*, 496 U.S. 334, 340 (1990); *Reid v. Covert*, 354 U.S. 1, 65–67 (1957) (Harlan, J., concurring).

8. Perhaps, because the framers cited as grievance George III's mandatory stationing of forces in the private houses of his colonial subjects, the fear of a standing army was further amplified in the Constitution's framers. See, e.g., David E. Engdahl, *Soldiers Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 18–31 (1971); Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 6–7 (2002).

9. THE DECLARATION OF INDEPENDENCE para. 14–16 (U.S. 1776). Jefferson wrote of George III, "He has affected to render the Military independent of and superior to the Civil power." *Id.* at para. 13.

10. See, e.g., *Fiery Clashes Erupt Between Police and Protesters over George Floyd Death*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/minneapolis-floyd-protests.html> [<https://perma.unl.edu/RVY2-SKBW>]. The First Amendment to the Constitution of the United States reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. On the right to assemble to seek redress, see

to police cities experiencing spikes in unrest.¹¹ There is both a constitutional and statutory infirmity to President Trump's actions. The Insurrection Act of 1807 and the Posse Comitatus Act of 1878 limit the ability of a president to use the military for domestic law enforcement reasons.¹² In spite of these limitations, President Trump, with the apparent support of Attorney General William Barr and the acquiescence of both Secretary of Defense Mark Esper and a combat-fatigue, uniformed Chairman of the Joint Chiefs of Staff General Mark Milley, emerged from a security bunker to tour the St. John's Episcopal Church while unidentifiable law enforcement, including the possible use of the active duty military and National Guard, used or displayed less-than-lethal weaponry against citizen-demonstrators.¹³

Nationwide violence did, in fact, occur, even though the majority of the demonstrators had peaceful intentions and the sources of violence have been muddied throughout social media. It is possible that an unaligned confluence of independent persons subscribing to right-wing ideologies and persons with anarchic or far-left goals aided the

NAACP v. Button, 371 U.S. 415 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960).

11. See Peter Bergen, *Why Mattis' Verdict on Trump Is Devastating*, CNN (June 4, 2020, 7:43 AM), <https://www.cnn.com/2020/06/03/opinions/mattis-thinks-trump-risks-america-bergen/index.html> [<https://perma.unl.edu/63UQ-RZG5>]; David Ignatius, *Why Mattis and Mullen Toppled Their Bridge of Silence*, WASH. POST (June 4, 2020, 5:21 PM), https://www.washingtonpost.com/opinions/why-mattis-and-mullen-toppled-their-bridge-of-silence/2020/06/04/c71b8f58-a698-11ea-bb20-ebf0921f3bbd_story.html [<https://perma.unl.edu/3GTW-TFED>].
12. The Insurrection Act of 1807 is codified at, ch. 39, 2 Stat. 443 (codified as amended at 10 U.S.C. §§ 331–335 (2006)). The 1878 Posse Comitatus Act is codified at ch. 263, § 15, 20 Stat. 152 (codified as amended at 18 U.S.C. § 1385 (2000)). The Posse Comitatus Act reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

 18 U.S.C. § 1385 (2000). While it is true that The Posse Comitatus Act applies only to the Army, and by implication, the Air Force, the Department of Defense Instructions extend the Act to the Navy and Marine Corps. See, e.g., U.S. DEP'T OF DEF., INSTRUCTION No. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES 24 (2013). On the exemption of the Department of the Navy from the Act, see *United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986). But see *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974).
13. See, e.g., Courtney Kube, Carol E. Lee & Rich Schapiro, *Esper Revises Account of What He Knew About Trump's Photo Op*, NBC NEWS (June 2, 2020, 2:55 PM), <https://www.nbcnews.com/politics/white-house/trump-s-church-photo-op-took-defense-secretary-esper-gen-n1222391> [<https://perma.unl.edu/T9PJ-HSWS>]; Doyle McManus, *Trump Finds Unexpected Center of Resistance: The Pentagon*, L.A. TIMES (June 7, 2020, 4:00 AM), <https://www.latimes.com/politics/story/2020-06-07/column-trump-finds-an-unexpected-center-of-resistance-the-pentagon>.

violence through electronic messaging and physical participation.¹⁴ Instances of violence included fatal attacks on police officers trying to maintain peace, as well looting and arson on private properties and government buildings.¹⁵ Mass upheavals have occurred before in American history, but the degree to which retired senior military officers with substantial command and combat experience characterized a sitting president as a threat to the Constitution, and therefore unfit to hold the position of Commander in Chief, is remarkable.¹⁶ But as remarkable as the actions of the former officers are, their actions were not unforeseeable.

One example, but by no means the only, of the foreseeability of the public criticisms of President Trump from Powell et al. occurred less than one year before the demonstrations. On October 18, 2019, retired Admiral William H. McRaven, the former commanding officer of the United States Navy Seals, penned an op-ed in the *New York Times* excoriating President Trump for abandoning the United States' allies, as well as leaving myriad of oppressed ethnic minorities across the globe to try to survive under dictatorial regimes. Titled *Our Republic Is under Attack from the President*, McRaven's article was not a call to overthrow President Trump, but rather, for the nation's voters to find a new national leader through the electoral process.¹⁷ McRaven also publicly condemned President Trump's pardons of service members convicted or accused of war-crime type offenses.¹⁸ McRaven couched his criticisms as permissible within the "military ethos," yet some

14. See, e.g., Alexander Mallin, *Evidence That Antifa, 'Foreign Actors' Involved in Sowing Unrest and Violence: AG Barr*, ABC NEWS (June 4, 2020, 1:55 PM), <https://abcnews.go.com/Politics/ag-barr-evidence-antifa-foreign-actors-involved-sowing/story?id=71066996> [https://perma.unl.edu/62DK-7YK9]; Clarence Page, *While Trump Blames Antifa, a Menacing Far-Right 'Boogaloo' Movement Rises*, CHI. TRIB. (June 5, 2020), <https://www.chicagotribune.com/columns/clarence-page/ct-column-trump-antifa-fbi-page-20200605-fdviqcg44rdb7pin2moh3nnl2u-story.html>; Craig Timber, Elizabeth Dwoskin & Souad Mekhennet, *Men Wearing Hawaiian Shirts and Carrying Guns Add a Volatile New Element to Protests*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/technology/2020/06/03/white-men-wearings-hawaiian-shirts-carrying-guns-add-volatile-new-element-floyd-protests/> [https://perma.unl.edu/G8XM-X8J4].

15. Mallin, *supra* note 14.

16. The Dorr Rebellion is an example of a mass upheaval in which federal forces were not used against demonstrations. See WILLIAM C. BANKS & STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY* 58–59 (2016); MARVIN E. GETTLEMAN, *THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM 1833–1849*, 116–27 (1973).

17. William H. McRaven, *Our Republic Is Under Attack from the President*, N.Y. TIMES, Oct. 18, 2019, at A27.

18. David Choi, *Retired Navy SEAL Who Oversaw the 2011 Osama bin Laden Raid Says Trump 'Needs to Be Very Careful' About Pardoning Service Members Accused of War Crimes*, BUS. INSIDER (May 21, 2019, 7:59 PM), <https://www.businessinsider.com/navy-seal-mcraven-trump-pardoning-war-crimes-2019-5> [https://perma.unl.edu/6XWS-GBSE].

scholars and pundits criticized him as undermining the traditional civil-military relations construct.¹⁹

If it were possible to view McRaven's conduct without assessing whether the viewpoints he champions are "good for democracy" or "bad for democracy," a historical analysis will evidence that the current environment of retired generals and admirals taking political positions is hardly a danger to the Republic. This history includes retired generals who have vied for the presidency in wartime, as well as those who publicly tried to delegitimize a presidential administration. Indeed, United States history is replete with retired generals who publicly espoused disruption to the government, often for right-wing causes. And, while there is a broad consensus that the military must remain apolitical, elected officials, their staffs, and their supporters, rather than retired senior officers alone, make the goal of an apolitical military more difficult.²⁰ Although debates on whether the political speech and criticisms against presidential administrations by retired senior officers undermines the professional officer ethos are certainly worthwhile, it is, in light of the nation's military and political history, a gross distortion to claim that the conduct of Powell et al. undermines either the Constitution or imperils the goal of an apolitical military.

This Article is divided into five parts. Part II begins with a brief study of the framers' standing army fears. Within this study is a recognition that while the Insurrection Act of 1807 and the Posse Comitatus Act of 1878 set limits on the use of the military in the United States, the two acts have historically been non-justiciable in the courts. The Part next presents a case study of General George Van Horn Moseley, who retired from the Army as the deputy chief of staff—the second general in command—in 1938. It is the premise of this study that because Moseley actively campaigned to undermine President Franklin Delano Roosevelt, and align the United States to Nazi ideology, he was, notionally, the most dangerous of retirees. Yet, the

19. Edward Chang, *Why Retired Military Officers Need To Shut Up About Politics*, FEDERALIST (Oct. 23, 2019), <https://thefederalist.com/2019/10/23/why-retired-military-officers-need-to-shut-up-about-politics/> [https://perma.unl.edu/Z677-NQ97]; Charles Dunlap, *Why an Apolitical Military Is So Important in an Era of an "All-Volunteer" Force*, DUKE: LAWFIRE (Sept. 21, 2019), <https://sites.duke.edu/lawfire/2019/09/21/why-an-apolitical-military-is-so-important-in-an-era-of-an-all-voluntary-force/> [https://perma.unl.edu/D925-ZTBK]; Michael Junge, *The Retired Admiral, the President, and the Military Profession*, DEF. ONE (Aug. 20, 2018), <https://www.defenseone.com/ideas/2018/08/retired-admiral-president-and-military-profession/150673/> [https://perma.unl.edu/WZG4-5U5Q].

20. On Haig, see YANEK MIECZKOWSKI, *THE ROUTLEDGE HISTORICAL ATLAS OF PRESIDENTIAL ELECTIONS* 137 (2001). On Clark, see Steven J. Farnsworth & S. Robert Lichter, *How Television Covers the Presidential Nomination Process*, in *THE MAKING OF THE PRESIDENTIAL CANDIDATES 2008*, at 75, 89 (William G. Mayer ed., 2008).

United States' institutions of government remained strong because of the elected government's overall respect for them. The Part concludes with an analysis of the Department of Defense's ability to recall retired senior officers to duty for the purpose of court-martial or lesser modes of administrative discipline. That is, the Uniform Code of Military Justice (UCMJ) has a specific provision on military jurisdiction over retired service members. The UCMJ also codifies as military crimes officers using "contemptuous" words against a president, vice president, and other senior civilian officials; solicitation to commit mutiny; and, conduct unbecoming an officer and gentleman. Thus, if the administration truly believed that Powell et al. engaged in conduct designed to delegitimize the presidency, they could certainly recall the allegedly offending retired general to duty for a court-martial or administrative proceeding.

Part III analyzes the political conduct of presidential aspirants who had been professional military officers as well as the conduct of their supporters. Between 1836 and 1952, six retired generals sought the presidency to the point that they became a formal candidate of a major party. Two of the aspirants, Zachary Taylor and Winfield Scott, were Whig Party nominees. A third, George Brinton McClellan, embraced what he considered to be "Whig Principles," though he ran as a Democrat because the Whig Party had collapsed prior to the 1856 election and was no longer in existence.²¹ In 1868, Ulysses Grant ran for the presidency as a Republican as did Dwight David Eisenhower in 1952. And, in 1880, Winfield Scott Hancock, a career general, ran for the presidency as the Democratic Party candidate. Although not examined in detail, there were four other career generals who sought the presidency, but who did not ascend to become a candidate through the nomination process. Leonard Wood in 1920, and Douglas MacArthur in 1952, undertook efforts to become a nominee but fell short in doing so at their respective party conventions.²² In 1988, Alexander Haig campaigned in the initial Republican primaries; additionally, Wesley Clark did so in 2004, in the early Democrat primaries.²³

21. See, e.g., STEPHEN W. SEARS, *GEORGE B. MCCLELLAN: THE YOUNG NAPOLEON* 35 (1999).

22. On Leonard Wood's efforts, see JACK C. LANE, *ARMED PROGRESSIVE: GENERAL LEONARD WOOD* 244–45 (2009). Wood initially led in the 1920 Republican Convention voting but could not surpass the required number of votes. *Id.* Warren G. Harding became the Republican nominee on the tenth round of balloting. *Id.* Douglas MacArthur received ten votes in the second and final round of the 1952 Republican Convention. See H.W. BRANDS, *THE GENERAL VS. THE PRESIDENT: MACARTHUR AND TRUMAN AT THE BRINK OF WAR* NUCLEAR WAR 388–90 (2017).

23. On Alexander Haig's attempted candidacy, see Kenneth E. John, *The Polls—A Report: 1980-1988 New Hampshire Presedential Primary Polls*, 53 *PUB. OPINION Q.* 590, 600 (1989). On Clark's efforts, see Jodi Wilgoren, *Dean Woos Fans of Clark, Who Is Said to Support Kerry*, *N.Y. TIMES*, Feb. 13, 2004, at A21.

Part IV presents case studies of retired generals who sought to make an impact on major political, social, and legal issues confronting the nation. The case studies include, retired Army generals Edwin Walker and John Singlaub, and retired United States Marine Corps general David Shoup. Walker—though not technically retired as a result of resigning his commission—and Singlaub were staunch anti-communists who accused presidential administrations of being “soft” on communism. This Article posits that while neither approached the level of Moseley, there is a linear relationship from Moseley to Walker, and then to Singlaub. The case study on Shoup includes mention of retired Marine Corps general Smedley Butler, and Army generals Matthew Ridgway and James Gavin, who, like Shoup, openly opposed the United States involvement in the Vietnam Conflict. Each of the case studies, and for that matter the analysis of Moseley in Part II, contains news coverage of events in footnotes. The purpose of news reporting as a source is not merely to verify that an event occurred but rather to highlight that there was a widespread awareness of the conduct of the retired generals. Finally, within each of the case studies is an additional important facet. All of the retired generals had elected legislators backing their actions.

The conclusion, in Part V, places into context the public statements of Powell et al. in light of the presidential conduct. This conduct includes President Trump’s threats to use military force to augment or replace policing in Washington D.C. and other cities, as well as the character of his journey to the St. John’s Episcopal Church. Additional aspects to contextualize the statements of Powell et al. include President Trump’s favorable treatment, including pardons, of former service members convicted of offenses which could be defined as “war-crimes,” the negative treatment of an active duty officer who fulfilled his constitutional duty to testify to Congress; and the appointment of a retired general to a key policy position in the military establishment who had articulated racist comments and invective toward the prior administration. The conclusory thesis of this Article is that, in light of unique presidential powers over the military, when presidents who respect basic governmental institutions are challenged by the criticism of generals and admirals, neither the country nor the military itself should fear an erosion in civil-military relations. But, because President Trump has displayed little respect for the apolitical role of the military, the statements of Powell et al. are not simply defensible, they are critical to reinforcing the military’s subordination to the civil government.

There are five additional matters important to assessing the statements and actions of Powell et al. First, although retired senior officers have engaged in political activities, particularly regarding their opposition to military cuts and the need for military readiness, this

Article addresses only broader challenges to presidential policies outside of a strictly defense policy. Thus, while the “Revolt of the Admirals” in 1948–1949 can contribute to a discourse on the expected role of retired generals and admirals, the so-called revolt was a challenge to President Harry S. Truman’s administration favoring resource allocation for the newly-formed Air Force over the Navy.²⁴ None of Truman’s opponents from the retired ranks accused him of sabotaging the national defense by an unconstitutional action, or for the benefit of an opposing nation.²⁵ Second, because most of the contemporary writing on the alleged threats to civil-military relations do not delve into the U.S. military’s legal history, the arguments tend toward a polemical, rather than scholarly, approach. Of course, a law review article has length limits, but in analyzing the present actions of Powell et al. against important constitutional norms such as the fear of standing armies and prior case studies, it becomes clear that there is no direct threat to the Constitution or the Republic by their actions. Third, this Article is partly premised on the concept of *lex non scripta*. Defined as an unwritten law found in custom, *lex non scripta* remains a source of military law.²⁶ So too, within this Article, does *lex non scripta* serve as a barometer for assessing norms of civil-military relations. To this end, this Article is based on archival research and does not merely rely on secondary sources, including, as a sampling, research from the Library of Congress, National Archives and Records Administration, and the special collections libraries of Mississippi State University, Arizona State University, and Gettysburg College.

Fourth, for the purpose of this Article, the term “professional officer” only includes those senior officers who were in uniform for a full career rather than those brought into the military and commissioned at high rank, such as had commonly occurred in the War of 1812 and the Civil War. Historically, during expansions of the Army, private citizens have been commissioned at high rank and are not included in this category. Although this definition may appear arbitrary, it would exclude, for example, Andrew Jackson, even though he served in the

24. On the Revolt of the Admirals, see JEFFREY G. BARLOW, REVOLT OF THE ADMIRALS: THE FIGHT FOR NAVAL AVIATION, 1945–1950, at 1–3 (1994). Professor Barlow notes that Secretary of Defense James Forrestal was concerned about the role of retired generals and admirals making public statements on “issues effecting the National Military Establishment.” *Id.* at 199.

25. PAOLO E. COLETTA, THE UNITED STATES NAVY AND DEFENSE UNIFICATION 1947–1953, at 169–80 (1981).

26. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 42 (Boston, Little, Brown, and Co. 1896). As defined by Winthrop, the military’s *lex non scripta* consists of the “customs of the service” and “[t]he unwritten laws and customs of war.” *Id.*; see also *United States v. Pitasi*, 20 C.M.A. 601 (1971) (quoting Winthrop for the meaning of *lex non scripta*). Winthrop maintained the importance of military law throughout the Articles of War and courts-martial procedures. See, e.g., JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW 237–38 (2009).

Revolutionary War against Britain and obtained the rank of major general during the War of 1812.²⁷ In between these two wars, Jackson was a lawyer, a United States senator, a Tennessee Supreme Court justice, and a wealthy plantation owner.²⁸ After leading militia and regular forces to a victory over the British at New Orleans, Jackson remained in the Army and commanded forces in Florida during the Seminole War.²⁹ He resigned from the Army in 1821 and unsuccessfully ran for the presidency in 1824, before being elected president in 1828 and reelected four years later.³⁰ Jackson was a military hero but also politically controversial prior to his presidency.³¹ Indeed, shortly after the victory over the British in New Orleans, Jackson had a federal judge arrested who had ordered him to release civilians held for court-martial.³² The definition would also exclude William Henry Harrison, who was feted by the Whig Party as a military hero in the elections of 1836 and 1840 but had never qualified for either the limited Revolutionary War or War of 1812 pensions.³³

Finally, although this Article is premised on the conduct of retirees, it is helpful to review their conduct through a civil-military relations lens as first advanced by Samuel Huntington. Huntington was a political science professor and national security advisor to President James Earl Carter.³⁴ In 1957, Huntington published the *Soldier and the State: The Theory and Politics of Civil-Military Relations*, a work that several other scholars have labeled the classic theory of civil-military relations in the United States.³⁵ He insisted that one of the fundamental keys to maintaining military professionalism was for the

27. See LYNN H. PARSONS, *THE BIRTH OF MODERN POLITICS: ANDREW JACKSON, JOHN QUINCY ADAMS, AND THE ELECTION OF 1828*, at 5–19 (2011); SEAN WILENTZ, *ANDREW JACKSON 14–18* (Arthur M. Schlesinger, Jr. ed., 2005).

28. 1 ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767–1821* (1977).

29. SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 243–45* (2005).

30. HARVEY L. SCHANTZ, *Sectionalism in Presidential Elections*, in *AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY, AND POLITICAL CHANGE 101–02* (Harvey L. Schantz ed., 1996).

31. ROBERT V. REMINI, *HENRY CLAY: STATESMAN FOR THE UNION 161–68* (1991).

32. See 1 JONATHAN LURIE, *ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775–1950*, at 11–16 (1992).

33. RICHARD J. ELLIS, *OLD TIP VS. THE SLY FOX: THE 1840 ELECTION AND THE MAKING OF A PARTISAN NATION 188* (2020).

34. ERWIN C. HARGROVE, *JIMMY CARTER AS PRESIDENT: LEADERSHIP AND THE POLITICS OF THE PUBLIC GOOD 120–49* (1999).

35. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* (1957). On Huntington's influence and reputation, see Edward M. Coffman, *The Long Shadow of The Soldier and the State*, 55 J. MIL. HIST. 69, 69 (1991); Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 805–06 (2012).

military to remain outside of the nation's politics.³⁶ The objective control by civilians over the military, to Huntington, enabled military professionalism to accrue to the benefit of the United States without politicizing the military.³⁷ Huntington had other observations on civil-military relations which are important to analyzing the case studies listed below as well as assessing President Trump's conduct and the responses from the retired generals and admirals. Huntington posited that since the end of World War II Congress took an increased interest in military affairs, which led to an increased politicization of the military, particularly in regard to Senator Joseph McCarthy's investigations and the military's responses.³⁸

In each of the case studies presented in this Article, members of Congress advocated for the political positions espoused by the retired general and highlighted the general's words for the purpose of attacking a presidency. In subsequent editions of his book, Huntington did not address the individuals in this Article. Indeed, Huntington wrote very little on the duties of retired officers, though he noted that because the military lacked a formal retirement system prior to the Civil War, generals and admirals often remained in their positions until they "died in their boots."³⁹ To be sure, there were various pension acts passed by Congress for veterans of the War for Independence as well as the 1812 War with Britain, but these applied to only a limited number of veterans and did not accrue until the veteran reached an advanced age.⁴⁰ As a result, some of the examples analyzed in this Article occurred at a time when retired generals remained on active duty simply because there was no legal category for "retired status."

II. FEARS OF A STANDING ARMY, GEORGE VAN HORN MOSELEY, AND RETIREE JURISDICTION

In 1784, the Congress of the Confederation (the name for Congress under the Articles of Confederation) passed legislation which practi-

36. Pearlstein, *supra* note 35, at 807–09.

37. HUNTINGTON, *supra* note 35, at 85. Huntington penned:

The one prime essential for any system of civilian control is the minimizing of military power. Objective civilian control achieves this reduction by professionalizing the military, by rendering them politically sterile and neutral. This produces the lowest possible level of military political power with respect to all civilian groups. At the same time it preserves that essential element of power which is necessary for the existence of a military profession.

Id.

38. *Id.* at 460.

39. *Id.* at 207.

40. See, e.g., ROBERT L. CLARK, LEE A. CRAIG & JACK W. WILSON, A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES 125–27 (2003); WILLIAM HENRY GLASSON, HISTORY OF MILITARY PENSION LEGISLATION IN THE UNITED STATES 25–31 (1900).

cally abolished a federal army and began with the words “[a]nd whereas, standing armies in time of peace are inconsistent with the principles of republican governments, dangerous to the liberties of a free people, and generally converted into destructive engines for establishing despotism”⁴¹ In spite of the Constitution’s framers’ fears of a standing army, the framers created the possibility of a small, yet permanent, military caste by not mandating the termination of military jurisdiction when an officer retires. And in more than one instance, retired generals have sought to change national politics. George Van Horn Moseley presents an example of a retired general who not only entered into the political arena but who sought to delegitimize the Roosevelt and Truman administrations both in the United States and abroad. And, while there had been a mechanism for a president to recall the retired general for the purpose of a court-martial, Roosevelt did not do so, thereby adding to the *lex non scripta* of civil-military relations.

A. Standing Army Fears

There is a broad consensus that the Constitution’s framers believed that a standing army was a danger to the liberties of citizens.⁴² Secondarily, the framers also tended to have a philosophical view that a standing army was incompatible with civil virtue.⁴³ Part of the framers’ philosophical views against standing armies had to do with the construct of both the small British Army as well as the larger continental European armies, which were often soldiered by what was considered the “dregs of society,” including criminals and “men without morals.”⁴⁴ Professor John Childs, a leading scholar of British military history, characterized the British Army of William III (1689–1702) as resembling “a giant sponge which had soaked up much

41. WILLIAM ADDLEMAN GANOE, *THE HISTORY OF THE UNITED STATES ARMY* 90 (1924); Lawrence Delbert Cress, *Republican Liberty and National Security: American Military Policy as an Ideological Problem, 1783 to 1789*, 38 WM. & MARY Q. 73 (Jan. 1981).

42. Their fear emanated from the English Whig concerns regarding standing armies. See THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 350 (Boston, Little Brown, & Co. 1871); Earl F. Martin, *America’s Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 145–47 (2006).

43. Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 996 (2020) (citing CHARLES ROYSTER, *A REVOLUTIONARY PEOPLE AT WAR* 354–56 (1979)).

44. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 53 (1998); DAVID PARROTT, *THE BUSINESS OF WAR: MILITARY ENTERPRISE AND MILITARY REVOLUTION IN EARLY MODERN EUROPE* 157–61 (2012); PETER H. WILSON, *THE THIRTY YEARS WAR: EUROPE’S TRAGEDY* 212 (2009).

of the dross and dirt of English society.”⁴⁵ However vulgar the idea of a standing army was to civic virtue, the standing army fears were rooted in a belief that a military commander or a president could use an army under his command to topple the Constitution.⁴⁶

According to Professor Richard Kohn, one of the leading scholars of civil-military relations, “[n]o principle of government was more widely understood or more completely accepted . . . than the danger of a standing army in peacetime.”⁴⁷ The Supreme Court has also observed that the founders adopted the English Whig’s fears of standing armies and that this became an influence in shaping the Constitution.⁴⁸ A small degree of elaboration highlights the coupling of the fear of a standing army with an executive who commands over it in ignorance of laws governing the military. In 1642, John March articulated Parliament’s claim that the Crown could not be considered a supreme commander over the militia because Parliament itself established the military law.⁴⁹ In 1689, with the passage of the Mutiny Act, William and Mary were precluded from determining the extent of military jurisdiction in Britain, and the maintenance of the standing army was subject to annual renewal by Parliament.⁵⁰ In passing the Mutiny Act, Parliament declared a general military law principle that “noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law or in any other manner then by the Judgement of his Peeres and according to the knowne and Established Laws

45. JOHN CHILDS, *THE BRITISH ARMY OF WILLIAM III, 1689-1702*, at 112–15 (1987).

46. See Russell F. Weigley, *The American Civil-Military Cultural Gap: A Historical Perspective*, *Colonial Times to the Present*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 215, 219 (Peter D. Feaver & Richard H. Kohn eds., 2001); Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 924 (1988).

47. RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 2 (1975).

48. *Loving v. United States*, 517 U.S. 748 (1996). In *Loving*, the Court, in an opinion authored by Justice Kennedy, noted:

Mindful of the historical dangers of autocratic military justice and of the limits Parliament set on the peacetime jurisdiction of courts-martial over capital crimes in the first Mutiny Act, 1 Wm. & Mary, ch. 5 (1689), and having experienced the military excesses of the Crown in colonial America, the Framers harbored a deep distrust of executive military power and military tribunals.

Id. at 760.

49. See, e.g., J. MARCH, *AN ARGUMENT OR, DEBATE IN LAW: OF THE GREAT QUESTION CONCERNING THE MILITIA; AS IT IS NOW SETTLED BY ORDINANCE OF BOTH THE HOUSES OF PARLIAMENT* (London, Pain & Simmons 1642); see also JANELLE GREENBERG, *THE RADICAL FACE OF THE ANCIENT CONSTITUTION: ST. EDWARD’S “LAWS” IN EARLY MODERN POLITICAL THOUGHT 200–03* (2001) (describing the debate over who controlled the militia in 1640’s England).

50. 1 Will. & Mary, sess.2, c.2 (1689); see F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED* 328 (2001).

of this Realme.”⁵¹ In 1698, John Trenchard—a well-known political writer, or “pamphleteer” of the late seventeenth century—warned that where there is a standing army, “the King is perpetual General, may model the Army as he pleases, and will be called High-Treason to oppose him.”⁵² Trenchard also argued that a sovereign’s use of standing armies could lead to the destruction of a constitution.⁵³

In the rebelling colonies that became the United States, George III’s use of a standing army (with the addition of Hessian mercenaries) was bitterly resented and is listed in the Declaration of Independence’s grievances.⁵⁴ Shortly after arriving as ambassador to France, Thomas Jefferson made his belief known that standing armies were antithetical to the new republic.⁵⁵ Likewise, Delegate Edmund Randolph noted at the Virginia ratifying convention that “there was not a member in the federal Convention, who did not feel indignation” at the idea of a standing army.⁵⁶ And, James Madison argued in the *Federalist Papers*:

The liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution.⁵⁷

It is true that, over time, the standing army fears have dissipated. In 1951, political scientist Clinton Rossiter posited that had the framers foreseen the need of an enlarged army during the twentieth century and the largely responsible conduct of its commanders, they

51. Mutiny Act 1689, 1 Will. & Mary, ch. 5. The act, however, decreed swift and capital punishment for mutinies and desertions. *Id.*

52. JOHN TRENCHARD, AN ARGUMENT SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT, AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY 14 (London 1698). The radical Whigs, among them John Trenchard, are remembered today as rigid defenders of personal liberties in the face of Britain’s increasingly powerful fiscal-military state. See Adam Lebovitz, *An Economy of Violence, Financial Crisis and Whig Constitutional Thought, 1720-1721*, 29 YALE J.L. & HUMAN. 165, 168–69 (2017).

53. TRENCHARD, *supra* note 52, at 11.

54. See, e.g., David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 447, 517 (2008).

55. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in THOMAS JEFFERSON: WRITINGS 914 (Merrill D. Peterson ed., 1984); see also Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 6 (1958) (discussing Jefferson’s desire to have a bill of rights as a mode of defense from the dangers of a standing army).

56. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 401 (2d ed. 1901).

57. THE FEDERALIST NO. 41, at 262 (James Madison) (Clinton Rossiter ed., 1961).

would have determined that their fears were groundless.⁵⁸ This is not to state that Rossiter lightly dismissed the possibility that the United States could devolve into a dictatorship; in fact, in 1948, he warned that this could become a possibility.⁵⁹

Although the Court has recognized the importance of the framers' standing army fears, the federal judiciary historically absented itself from applying common rights to appeals against military acts. For instance, in *Orloff v. Willoughby*, the Court, in an opinion authored by Justice Robert Jackson, concluded that "judges are not given the task of running the Army."⁶⁰ *Orloff* arose from a medical doctor's challenge to being drafted into the army as an enlisted soldier after the Air Force initially determined him to be unfit for a commission because of his alleged ties to communism.⁶¹ A further oddity to *Orloff* was that the Senate, in its hearings on a peacetime draft, assured the American Medical Association that doctors would only be drafted to serve as doctors, who by their status, had to be commissioned officers.⁶² In 1958, the Court in *Harmon v. Brucker*, a short *per curiam* decision, held that the military, like the federal government, had an obligation to follow its own regulations.⁶³ Harmon and another service member were discharged with less than honorable discharges solely on the basis that they had attended meetings of leftist organizations on the Attorney General's Subversive Organizations List prior to their service.⁶⁴ *Harmon* only modified *Orloff* in that the Court did not find the regulation offensive to due process, but rather, in a de facto manner, adopted *Service v. Dulles*, a decision which required the State Department to comply with its own regulations regarding security clearances and the removal of employees.

Thus, even with the existence of *Harmon*, *Orloff* has remained influential in military law. In the 1981 case *Rostker v. Goldberg*, in regard to the training and control of military forces, the Court observed, "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence."⁶⁵ The Court earlier applied this same abstention jurisprudence to the performance of the Ohio Na-

58. CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 102 (1951).

59. CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 288–314 (1948).

60. *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

61. *See, e.g.*, JOSHUA E. KASTENBERG & ERIC MERRIAM, *IN A TIME OF TOTAL WAR: THE FEDERAL JUDICIARY AND THE NATIONAL DEFENSE* 201–06 (2016).

62. *See Orloff*, 345 U.S. at 84.

63. *See Harmon v. Brucker*, 355 U.S. 579 (1958).

64. JOSHUA E. KASTENBERG, *SHAPING U.S. MILITARY LAW: GOVERNING A CONSTITUTIONAL MILITARY* 13–15 (2014).

65. *Rostker v. Goldberg*, 453 U.S. 57, 65–66 (1981) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

tional Guard following the Kent State shootings fifty years ago.⁶⁶ Finally, federal courts have also determined that neither the Insurrection Act of 1807 nor the Posse Comitatus Act of 1878 provide judicial avenues for recourse against the executive branch.⁶⁷ Thus, when President Trump acted with the threat to use the military in response to the nation-wide demonstrations for racial justice, however in contravention his conduct was to the framers' standing army fears, federal court intervention was unlikely.

B. George Van Horn Moseley: A Forgotten Extreme in Civil-Military Relations

Perhaps the most disturbing example of a retired general who tried to upend the Republic is that of Major General George Van Horn Moseley, a one-time Deputy Chief of Staff of the Army (the second ranking general at the time). On February 22, 1942, George E. Deatherage, the former "commander" of the Knights of the White Camellia, informed a congressional investigation that his organization sought to create a fascist government in the United States with Moseley as the leader.⁶⁸ A civil-military relations scholar need not guess what Moseley intended because he left his correspondences to the Library of Congress, Manuscripts Division. There are dozens of letters in which he claims that Jews and non-whites posed a threat to civilization.⁶⁹ However, one letter in particular evidences Moseley's knowl-

66. See *Gilligan*, 413 U.S. at 11–12.

67. On the Insurrection Act and the political question doctrine, see *Luther v. Borden*, 48 U.S. 1 (1849). On the non-justiciability of domestic military surveillance, see *Laird v. Tatum*, 408 U.S. 1 (1972). On violations of the Posse Comitatus Act not providing a suppression remedy in criminal trials, see *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985).

68. *Admitted Nazi Contacts*, N.Y. TIMES, Feb. 24, 1942, at 1.

69. See, e.g., Letter from Gen. George Van Horn Moseley, U.S. Army, to Edward Harding (Mar. 3, 1945) (on file with the Library of Congress); Letter from Gen. George Van Horn Moseley, U.S. Army, to Tiffany Blake, Editorial Writer, Chi. Tribune (Mar. 30, 1939) (on file with the Library of Congress). Moseley penned to Blake, the Tribune's chief editor, "[i]nvestigations that I have made in New York and in many other cities, proved to me very conclusively that the Jew is pressing Communism." *Id.* In the same letter, Moseley disclaimed that he was a fascist. *Id.* Moseley wrote the letter in response to Blake's challenge that "I know of no importations from the old country which are more inconsistent with fundamental American principles, and few more hurtful to American welfare, than anti-semitism." Letter from Tiffany Blake, Editorial Writer, Chi. Tribune, to Gen. George Van Horn Moseley, U.S. Army (Mar. 28, 1939) (on file with the Library of Congress); see also Letter from James S. Kemper, President, Chamber of Commerce of the United States, to Gen. George Van Horn Moseley, U.S. Army (May 10, 1940) (on file with the Library of Congress) (responding to Moseley's concerns); Letter from Gen. George Van Horn Moseley, U.S. Army, to Joseph V. Connolly, Int'l News Serv. (June 13, 1939) (on file with the Library of Congress) (expressing Moseley's view that communism was under "Jewish control" and explaining how he believed Jewish people to be linked to communism).

edge of the continuation of military jurisdiction over him with the concluding statement: "The only good I can do now is in keeping up quite a large correspondence with men who are in a position to influence public affairs. The enemy has completely silenced me, and I am handicapped, as I am still a Government official, in fact."⁷⁰ Despite his understanding of the Army's continuous jurisdiction, he also believed he could publicly campaign against President Roosevelt, the New Deal, Jews, and civil rights.

In 1939, Moseley tried to have General Walter Delamater, the commander of the New York National Guard, expel Jewish officers from the Guard.⁷¹ That same year, a small fascist organization, the American Christian Front Conference, sought Moseley to become a "fuhrer for the United States" just as Adolph Hitler had garnered the title in Germany.⁷² In April, 1940, the United States Attorney for the Southern District of New York prosecuted a captain named John T. Prout for sedition against the United States Government.⁷³ Prout, like Moseley, was connected with the American Christian Front, and there was evidence that Moseley at least knew of Prout's involvement.⁷⁴ Likewise, in 1944, the movement's leader, William Pelley, was prosecuted for sedition against the government at the behest of Nazi Germany.⁷⁵ When the Federal Bureau of Investigations searched Pelley's property, they found correspondence between Pelley and Moseley to "change the course of American history."⁷⁶

On June 4, 1939, the *New York Times*, along with other major newspapers, reported that the Judge Advocate General of the Army was in the process of investigating the recently retired Moseley for the purpose of advising Secretary of War Harry Woodring whether to conduct a court-martial.⁷⁷ The Articles of War—the predecessor to the modern Uniform Code of Military Justice—criminalized "all disorders and neglects to the prejudice of good order and military discipline, [and] all conduct of a nature to bring discredit upon the military ser-

70. Letter from Gen. George Van Horn Moseley, U.S. Army, to James Scott Kemper, President, Chamber of Commerce of the United States (Dec. 28, 1940) (on file with the Library of Congress).

71. See Letter from Gen. George Van Horn Moseley, U.S. Army, to Gen. Walter A. Delamater, N.Y. Nat'l Guard (Apr. 21, 1939) (on file with the Library of Congress).

72. GLEN JEANSONNE, *WOMEN OF THE FAR RIGHT: THE MOTHERS' MOVEMENT AND WORLD WAR II* 40 (1996).

73. *Bishop Is Called 'Paid Alien Agent'*, N.Y. TIMES, Apr. 17, 1940, at 10.

74. *Pelley Is Pictured in Plot for Revolt*, N.Y. TIMES, July 28, 1944, at 6.

75. *Charge Pelley Planned a Coup to Seize Power*, CHI. TRIB., July 28, 1944.

76. *Id.*

77. See, e.g., *Moseley Inquiry Started by Army; Judge Advocate General Will Decide if There Are Grounds for Court Martial*, N.Y. TIMES, June 4, 1939, at 39; *Moseley Court-martial Asked of War Office*, L.A. TIMES, June 4, 1939, at 5.

vice,” and this prohibition applied to retired soldiers.⁷⁸ Less than a year earlier, Woodring accused Moseley of disloyalty to the United States after Moseley warned, in a public speech, that the federal government’s expansion of authority under President Franklin Roosevelt would lead to a dictatorship.⁷⁹ The *Washington Post*, *New York Times*, *Chicago Tribune*, and other major newspapers reported on Moseley’s conduct.⁸⁰ And, it appeared that prominent generals remaining in the Army supported Moseley against Woodring.⁸¹

Moseley was not merely an outspoken critic of the New Deal, he was a virulent anti-Semite and had openly accused Roosevelt of being a communist.⁸² The threat of an investigation did not, apparently, deter him, as evidenced by his public excoriation of Roosevelt nominating Felix Frankfurter to the Supreme Court. “Nothing could so encourage the enemies within our gates as this proposed appointment,” the *Atlanta Constitution* quoted him. “Nothing could demonstrate more clearly the President’s opinion of the work of the Dies committee [the predecessor of the House Un-American Activities Committee] as the appointment of a man whom our subversive elements look up to as their protector.”⁸³ Moseley was not alone in the military hierarchy in his assessment of Frankfurter. In 1954, Douglas MacArthur, in his retirement, claimed to the Federal Bureau of Investiga-

78. Act of June 4, 1920, ch. 227, 41 Stat. 759, 806–07 (repealed 1948); see also Frederick Bernays Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A. J. 357, 357–58 (1968) (discussing the legislative history of the Uniform Code of Military Justice). The Articles of War, at that time, only applied to the Army and the National Guard when called into active service. Leider, *supra* note 43, at 1040–41. The Naval Articles applied to the Navy and Marine Corps. See, e.g., A.A. HARWOOD, *THE LAW AND PRACTICE OF NAVAL COURT-MARTIAL* 7–10 (New York, D. Van Nostrand 1867); WINTHROP, *supra* note 26, at 31–37.

79. *Woodring Hit Moseley Political Talk as Disloyal: General, 64, Retires, Fears Dictatorship, Sees ‘Sinister Motive,’ Army Regrets Words*, WASH. POST, Oct. 1, 1938.

80. See, e.g., *D.C. Army Men Feel Moseley Made Mistake: Criticized New Deal, Rebuked by Woodring, Other Cases Recalled*, WASH. POST, Oct. 2, 1938; *Excited Moseley Tells of Fears: Talks of ‘Warnings’ from Friends; Statement Is Stricken from Record*, ATLANTA CONST., June 2, 1939, at 1; *Gen. Moseley Warns of Dictator Peril: Draws Rebuke from Sec’y Woodring*, CHI. TRIB., Oct. 1, 1938; *Moseley Attacks Rearming, Urges Political Coalition*, WASH. POST, Nov. 12, 1938, at X3; *War Department Scanning Activities of Gen. Moseley: But Army Denies It Has Launched and Independent Inquiry*, WASH. POST, May 27, 1939, at 7.

81. See, e.g., JOSEPH W. BENDERSKY, *THE JEWISH THREAT: ANTI-SEMITIC POLITICS OF THE U.S. ARMY* 252–54 (2000).

82. See, e.g., 2 *Antisemitism: A Historical Encyclopedia of Prejudice and Persecution* 471–72 (Richard S. Levy ed., 2005).

83. *General Moseley Bitterly Assails ‘Menace’ of Frankfurter Influence: Says Germany No Problem ‘Compared to Dangerous Trend’ Portended by Appointment to Supreme Court of Harvard Law Dean*, ATLANTA CONST., Jan. 7, 1939, at 2.

tions Director, J. Edgar Hoover, that Justice Frankfurter was a leading subversive.⁸⁴

The activity that led to the Army's investigation of Moseley began with his open advocacy, at a Deutsch-American Bund rally, that an international Jewish conspiracy was attempting a communist takeover of the United States.⁸⁵ The Bund was the leading pro-Nazi organization in the United States, and Moseley insisted that Jews sought the ruin of democracy.⁸⁶ By calling Moseley to testify and assuring him he was not under investigation, Congress delayed, if not preempted, a court-martial in a manner such as that which benefitted retired Lieutenant Colonel Oliver North a half century later.⁸⁷ During his testimony, Moseley was accompanied by Congressman Jacob Thorkelson (R-MT), a one term congressman remembered for his opposition to the New Deal and his anti-Semitic defense of Nazi Germany.⁸⁸ Moseley claimed to the House that the Roosevelt Administration intentionally ignored the dangers of communism, and he called the Deutsch-American Bund "impressively patriotic," while insisting that the Army should be used to fight communist groups inside of the United States rather than posture for a war against Germany or Japan.⁸⁹ After Moseley testified, Congressman Joseph Starnes (D-AL) penned his thanks to Moseley, adding "when you attempt to expose un-American and Subversive activities you incur bitter and unscrupulous enemies. Enemies of the Government are also

84. ALEXANDER CHARNS, *CLOAK AND GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT* 5 (1992).

85. *Turn Army on Communists, Moseley Says, Defending Bund: Calls N.Y. Rally 'Impressive,' Laments Roosevelt Attitude*, WASH. POST, June 1, 1939, at 1.

86. SANDER A. DIAMOND, *THE NAZI MOVEMENT IN THE UNITED STATES, 1924-1941*, at 223-51 (1974).

87. *Moseley Proposes Use of the Army to Drive Out Reds: Tells Dies Committee Menace Could Be Handled in Five Minutes from White House*, N.Y. TIMES, June 1, 1939, at 1. On North, see *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990). North was convicted in the United States District Court after testifying before Congress under a grant of congressional immunity, but, because the prosecutor could not, or did not, prove that the prosecution's witnesses were untainted by the congressional testimony, the Court of Appeals remanded the case to the district court to exclude witnesses who had testified before Congress. *United States v. North*, 910 F.2d 843, 872 (D.C. Cir. 1990); see also R.S. Ghio, Note, *The Iran-Contra Prosecutions and the Failure of Use Immunity*, 45 STAN. L. REV. 229, 247-50 (1992) (discussing the use of immunity during the Iran-Contra investigations in the late 1980s).

88. On Thorkelson, see MARC C. JOHNSON, *POLITICAL HELL-RAISER: THE LIFE AND TIMES OF SENATOR BURTON K. WHEELER OF MONTANA* 228 (2019). See also *Moseley Depicts a 'World Jewry'*, N.Y. TIMES, June 2, 1939, at 8 (describing Moseley's testimony in front of the Dies Committee).

89. *Moseley Lauds Bund and Charges Red Plot to Overthrow United States*, L.A. TIMES, June 1, 1939, at 1.

enemies of those who defend it.”⁹⁰ Although Moseley had congressional allies, when the committee investigated his claims it determined his warnings were not only far-fetched, but deplorable and expunged some of his comments from the record.⁹¹

Moseley’s first correspondence to a president over a political matter occurred in 1931 when he was still on active duty. He promised his support to former President Calvin Coolidge for the enactment of a constitutional amendment which would prohibit the government from going into debt.⁹² Moseley, like Coolidge, opposed the fulfillment of the post-World War I bonus promise, both in an accelerated payment to alleviate misery caused by the Great Depression’s high unemployment and on its scheduled release.⁹³ To this end, he became associated with the National Economy League.⁹⁴ The Economy League was, in the words of one scholar, “an organization of prominent financiers and business leaders who denounced the Bonus and called for dramatic reductions in veteran benefits.”⁹⁵

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90. Letter from Congressman Joseph Starnes, House of Representatives, to Gen. George Van Horn Moseley, U.S. Army (Feb. 13, 1940) (on file with the Library of Congress). Like Thorkelson, Starnes supported segregation and argued that civil rights and communism were linked. *See, e.g.*, MICHAEL NEWTON, *WHITE ROBES AND BURNING CROSSES: A HISTORY OF KU KLUX KLAN FROM 1866*, at 87 (2014); GEORGE SIRGIOVANNI, *AN UNDERCURRENT OF SUSPICION: ANTI-COMMUNISM IN AMERICA DURING WORLD WAR II* 47 (1990).
 91. *Dies Inquiry Strikes Out Moseley Text: General Is Permitted to Read Statement Then It’s Dropped*, WASH. POST, June 2, 1939, at 1; *see also* JEANSONNE, *supra* note 72, at 40 (describing the racism of Moseley’s testimony and how it was scrubbed from the Congressional record).
 92. Letter from Gen. George Van Horn Moseley, U.S. Army, to Calvin Coolidge, former President, U.S. (Mar. 14, 1931) (on file with the Library of Congress). Moseley professed his admiration for “the stand you take on public questions, national and international.” *Id.* In 1932, Moseley joined the National Economy League in an effort to have the Constitution be amended with a prohibition against spending monies on non-defense matters unless the available tax dollars were immediately available. *See* Letter from Grenville Clark to Gen. George Van Horn Moseley, U.S. Army (July 14, 1932) (on file with the Library of Congress) (letter was sent by Mr. Clark’s secretary; enclosed with the letter was a copy of the “Declarations of Purposes and Plan of Organization” for the National Economy League); Letter from Grenville Clark to Gen. John J. Pershing, U.S. Army (July 13, 1932) (on file with the Library of Congress).
 93. *See* LUCY G. BARBER, *MARCHING ON WASHINGTON: THE FORGING OF AN AMERICAN POLITICAL TRADITION* 74–79 (2002). For a history of Moseley’s role in the Army being used to police and then attack the Bonus March, *see* James F. Vivian & Jean H. Vivian, *The Bonus March of 1932: The Role of General George Van Horn Moseley*, 51 WIS. MAG. HIST., AUTUMN 1967, at 26–36.
 94. *See* Letter from Grenville Clark to Gen. George Van Horn Moseley, U.S. Army (July 14, 1932) (on file with the Library of Congress).
 95. STEPHEN R. ORTIZ, *BEYOND THE BONUS MARCH AND GI BILL: HOW VETERAN POLITICS SHAPED THE NEW DEAL ERA* 57–58 (2010). For news reporting on the National Economy League, *see* *Plans National Fight on Veterans’ ‘Racket,’* N.Y. TIMES, May 23, 1932, at 2.

Moseley also had a personal relationship with former President Herbert Hoover, and he shared an editorial he had written against Woodring with Hoover, disclaiming any anger that he had been passed over by General Malin Craig for the Army's top position.⁹⁶ On October 1, 1938, Hoover lauded Moseley for being "among those trying to save the Republic."⁹⁷ One year after the United States' declaration of war on Japan and Germany, Moseley wrote a lengthy diatribe to Hoover, accusing Jews and Bolsheviks of starting the world conflagration and disclaiming that Japan was an enemy of the United States.⁹⁸ Moseley also evidenced what can be aptly termed as a "white supremacist" view of the United States' survival, writing: "As far as the white man is concerned, the index of our ability to even approach a lasting peace, is in the question of race, and in the progress we are making in breeding the white race up and eliminating the undesirable elements."⁹⁹

After World War II ended, the aged Moseley continued to try to dehumanize minorities into non-citizens. In 1946, he wrote to Senator Tom Connally (D-TX), an anti-civil rights legislator, that "[i]f we in America now lack the character to face and solve the problem of the communist and the Jew, then we deserve to go down to defeat, disgrace and slavery."¹⁰⁰ That same year he celebrated the election of Eugene Talmadge, a staunch segregationist, as Georgia's governor by penning an editorial that Georgia was a state where "white Christian Americans still rule."¹⁰¹ In April 1952, Moseley championed the idea that a hidden enemy was attempting to take over the nation's steel

96. Memorandum from Gen. George Van Horn Moseley, undated (1938) (on file with the Library of Congress).

97. Letter from Herbert Hoover, former President, U.S., to Gen. George Van Horn Moseley, U.S. Army (Oct. 1, 1938) (on file with the Library of Congress).

98. Letter from Gen. George Van Horn Moseley, U.S. Army, to Herbert Hoover, former President, U.S. (Dec. 18, 1942) (on file with the Library of Congress). Moseley wrote:

And then, there is the problem of the Jew. No lasting peace can even be approached until we have the character to stand up to the councils of the world and solve the recurring problem of the Jew – the Jew who has been run out of every country in which he has been domiciled. . . . Mr. Hitler's drastic policy of getting rid of the Jews has many more friends than we are sometimes led to believe.

Id.

99. *Id.*

100. Letter from Gen. George Van Horn Moseley, U.S. Army, to Senator Tom Connally, U.S. Senate (Mar. 12, 1946) (on file with the Library of Congress). On Connally's anti-civil rights efforts, see, e.g., ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 156 (1990); PAUL MATZKO, THE RADIO RIGHT: HOW A BAND OF BROADCASTERS TOOK ON THE FEDERAL GOVERNMENT AND BUILT THE MODERN CONSERVATIVE MOVEMENT 56 (2020).

101. Letter from Gen. George Van Horn Moseley, U.S. Army, to Time Magazine Editorial Board (July 27, 1946) (on file with the Library of Congress).

corporations.¹⁰² This was a direct accusation that President Truman's efforts to end a labor strike (through an action that the Supreme Court, in *Youngstown Sheet and Tube v. Sawyer*, later declared unconstitutional) was, in reality, a Jewish conspiracy.¹⁰³ In 1956, Moseley championed the Nuremberg convicted Karl Doenitz to lead the Federal Republic of Germany.¹⁰⁴ Doenitz had commanded the Nazi German submarine fleet at the start of the war before rising to become Commander in Chief of the German Navy and served as Fuhrer in the last week of the Nazi Government's existence.¹⁰⁵ At no time during the Roosevelt, Truman, and Eisenhower administrations was Moseley brought back onto active duty for the purpose of a court-martial, even though he actively worked to undermine all three administrations and basic tenets of the Constitution. Yet he did not only insult presidents, he advocated causes, including the creation of a fascist government, which were antithetical to the Constitution.

C. UCMJ Jurisdiction over Retirees and Presidential Authority to Command Respect

Military jurisdiction over retirees is codified at 10 U.S.C. § 802(a)(4)–(6). Unlike a traditional federal pension arising from a civil service career, military retirement pay is premised on the retiree being subject to recall to duty in case of a national emergency.¹⁰⁶ Section 4 enables the Department of Defense to recall retirees from active duty who are in receipt of pay for the purpose of court-martial or other military discipline.¹⁰⁷ Section 5 enables the extension of military jurisdiction to retired reservists who are hospitalized under the medical care of the armed forces.¹⁰⁸ Section 6, which is unique to the Depart-

102. Letter from Gen. George Van Horn Moseley, U.S. Army, to Harold Keith Thompson, Jr. (Apr. 21, 1952) (on file with the Library of Congress).

103. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). On the steel strike and accusations of Truman becoming a dictator, see MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 83–117 (1994).

104. Letter from Gen. George Van Horn Moseley, U.S. Army, to Karl Doenitz, Grand Admiral, Ger. Navy (Nov. 19, 1956) (on file with the Library of Congress).

105. EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG* 392 (1966).

106. See, e.g., *In re Haynes*, 679 F.2d 718, 719 (7th Cir. 1982); Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 356–57 (1964).

107. 10 U.S.C. § 802(a)(4) (2009) reads: “Persons subject to this chapter (a) The following persons are subject to this chapter: . . . (4) Retired members of a regular component of the armed forces who are entitled to pay.”

108. Section 5 reads, “Retired members of a reserve component who are receiving hospitalization from an armed force.” *Id.* § 802(a)(5).

ment of the Navy, authorizes jurisdiction over members of the Fleet Reserve and the Fleet Marine Reserve.¹⁰⁹

The Court, as well as federal and military appellate courts, have upheld military jurisdiction over retirees who collect retirement pay.¹¹⁰ In 1963, the United States District Court for the District of Columbia, in *Taussig v. McNamara*, determined that the military can place service-related limits on the commercial activities of retirees.¹¹¹ Taussig, a retired Navy captain, challenged a law which precluded him from selling services to the Navy because the law—which was reasonable in relation to active-duty service members—equated retirees to active duty personnel.¹¹² A violation of these limits can, in theory, result in a recall to active duty. However, the limits placed on retirees may not be arbitrary or capricious. For instance, a retired service member who decides to settle in a foreign country but maintains United States citizenship and does not join a foreign military cannot be stripped of pay.¹¹³

In 1896, the Court of Appeals for the District of Columbia, in *Closson v. United States ex rel Armes*, determined that the Army retained court-martial jurisdiction over an officer who retired in 1883.¹¹⁴ The retired officer, Captain George A. Armes, a decorated Civil War veteran, had sent an insulting letter to General John M. Schofield shortly before Schofield's retirement as Commanding General of the Army.¹¹⁵ This was not the first occasion Armes faced a court-martial and he had been characterized as “[a]n easily offended and trouble-prone man . . . the object of numerous courts-martial.”¹¹⁶ In 1889, the *New York*

109. Section 6 reads, “Members of the Fleet Reserve and the Fleet Marine Corps Reserve.” *Id.* § 802(a)(6).

110. *United States v. Tyler*, 105 U.S. 244, 246 (1881); *Costello v. United States*, 587 F.2d 424 (9th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); *Abbott v. United States*, 200 Ct. Cl. 384 (Ct. Cl. 1973), *cert. denied*, 414 U.S. 1024 (1973); *Ward v. Charles*, 585 F. Supp. 574 (N.D. Tex. 1984); *Watson v. Watson*, 424 F. Supp. 866 (E.D.N.C. 1976); *Chambers v. Russell*, 192 F. Supp. 425 (N.D. Cal. 1961); *United States v. Begani*, 79 M.J. 767 (N-M Ct. Crim. App. 2020); *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989).

111. *Taussig v. McNamara*, 219 F. Supp. 757 (D.C. Cir. 1963). Taussig, a retired naval officer, sought an injunction against the Secretary of Defense and the United States Attorney General from enforcing a prohibition against him working as an agent in certain defense contracts. *Id.* at 758. The district court, in a three-judge panel, ruled against Taussig. *Id.* at 762.

112. *Id.* at 758–59.

113. *See, e.g.*, *United States v. Gay*, 264 U.S. 353 (1924).

114. *Closson v. United States ex rel. Armes*, 7 App. D.C. 460, 470–71 (D.C. Cir. 1896).

115. *Id.*

116. LOUISE K. BARNETT, UNGENTLEMANLY ACTS: THE ARMY'S NOTORIOUS INCEST TRIAL 70 (2000). Armes was, even in his own estimation, a colorful officer. *See, e.g.*, GEORGE A. ARMES, UPS AND DOWNS OF AN ARMY OFFICER 588–604 (1900); WAYNE R. KIME, COLONEL RICHARD IRVING DODGE: THE LIFE AND TIMES OF A CAREER ARMY OFFICER 493–94 (2006).

Times reported that Armes was court-martialed for “conduct unbecoming an officer and a gentleman” after he assaulted the governor of Pennsylvania during President Benjamin Harrison’s inauguration.¹¹⁷ Under the headline “A Lucky Officer,” the *Times* reported that Armes had been court-martialed in 1868, 1870, and 1879, but Presidents Ulysses Grant, Rutherford Hayes, and James Garfield restored him to duty each time.¹¹⁸ In 1896, the *New York Times* and other newspapers produced several news articles on Armes’s conduct along with Schofield’s order to have him arrested with the intention of conducting a court-martial.¹¹⁹ In regard to the War Department’s recall of Armes, the appellate court characterized the arrest and recall as “not that of a civilian ruthlessly imprisoned by arbitrary military authority.”¹²⁰

Only once has the military court-martialed a retired senior officer for conduct believed to have violated the Articles of War, where the conduct alleged also occurred after retirement.¹²¹ In 1948, the Secretary of the Navy recalled retired Admiral Selden Hooper, a decorated World War II veteran, to duty based on allegations of conduct unbecoming an officer and gentleman, conduct of a nature to bring discredit on the armed forces, and sodomy.¹²² Hooper, who served in the Navy from 1921 until 1948, was caught in a law enforcement sting operation targeted against gay men.¹²³ After being found guilty and sentenced to a dismissal—the officer equivalent of a dishonorable dis-

117. *A Lucky Army Officer: The Many Courts-Martial of Capt. George A. Armes*, N.Y. TIMES, June 9, 1889, at 5.

118. *Id.*

119. *Major Armes to Be Re Arrested: The District Court of Appeals Decides that Gen. Schofield’s Order of Arrest Justified*, N.Y. TIMES, Jan. 7, 1896, at 6; *Armes’s Case an Issue: Discipline of the Army Is Involved in This Affair*, N.Y. TIMES, Dec. 14, 1895, at 3; *Captain Armes Arrested*, S.F. CALL, Sept. 28, 1895, at 1; *The Arrest of Captain Armes, It May Cause Trouble for Gen. Schofield if the Civil Courts Refuse to Recognize It as Legal*, N.Y. TIMES, Oct. 1, 1895, at 9.

120. *Closson*, 7 App. D.C. at 470–71. Armes was never court-martialed by the Army. See, e.g., *The Armes Case*, SALT LAKE CITY TRIB., Jan. 30, 1896, at 3.

121. See JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 72–74 (1974).

122. *Hooper v. Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958); LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE 27–33 (2015).

123. FADERMAN, *supra* note 122, at 27–33; see also J. Mackey Ives & Michael Davidson, *Court-Martial Jurisdiction over Retirees under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 MIL. L. REV. 1, 22 (2003) (describing the court-martial in *Hooper*). Professor Faderman uncovered that the commanding officer of the district overseeing Hooper’s court-martial had once before recalled a reserve officer to active duty for the purpose of administratively discharging the retired officer with a less than honorable discharge, though in that instance, it was for suspected membership in a subversive organization. FADERMAN, *supra* note 122, at 33; see also, *Bland v. Connally*, 293 F.2d 852 (D.C. Cir. 1961) (holding that the Secretary of the Navy does not have the implied authority to discharge a retired officer for subversive activities); *Bland v. Hartman*, 245 F.2d 311 (D.C.

charge—Hooper spent two decades unsuccessfully trying to argue to the federal courts that the military did not have jurisdiction over him because he was retired.¹²⁴ The nation's major newspapers covered Hooper's court-martial and his appeal efforts.¹²⁵

10 U.S.C. § 802(4)–(6), along with *Closson* and *Hooper*, enables the military to recall to duty a retired senior officer who publicly delegitimizes a presidency for the purpose of court-martialing the officer or issuing an adverse administrative decision regarding the officer's status. If, in fact, a president, secretary of defense, service secretary, or other general serving in a convening authority capacity believed that a retired officer undermined presidential authority over the military, the accused officer could be brought back onto active duty and disciplined either through the court-martial or administrative process.¹²⁶ Whether by a court-martial or through an adverse administrative decision, an officer faces loss of income, a fine, or loss of retirement and benefits.¹²⁷ In either a court-martial or an administrative process, the UCMJ provides the Commander in Chief with three statutes, in particular, in which to adjudge the conduct of retired officers accused of undermining a presidency.

Article 88 of the UCMJ prohibits officers from using contemptuous language against a president as well as other specified cabinet and sub-cabinet officials.¹²⁸ Article 88 carries a maximum sentence of one year in confinement and a dismissal.¹²⁹ In 1945, the United States Court of Appeals for the Fifth Circuit determined that an enlisted ser-

Cir. 1957) (holding that the Navy could discharge a retired officer for subversive activity).

124. *See, e.g.*, *Hooper v. Hartman*, 274 F.2d 429 (9th Cir. 1959); *Hooper v. United States*, 164 Ct. Cl. 151 (Ct. Cl. 1964); *Hooper v. Laird*, 41 C.M.R. 329 (C.M.A. 1970).

125. *See, e.g.*, *Morals Conviction of Admiral Upheld*, WASH. POST, Jan. 16, 1960, at A9; *Navy Trial Upheld for Retired Officer*, N.Y. TIMES, Sept. 27, 1958, at 8.

126. On the incorporation of UCMJ articles to administratively separate or discipline service members, see *N.G. v. United States*, 94 Fed. Cl. 375 (Cl. Ct. 2010).

127. *See, e.g.*, 10 USC § 815 (2006); *Piersall v. Winter*, 435 F.3d 319 (D.C. Cir. 2006); *Fuller v. United States*, 127 Fed. Cl. 640 (Cl. Ct. 2016).

128. 10 U.S.C. § 888 (2006). The statute provides that:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

Id. On the use of Article 88 to administratively terminate an officer's commission, see *Sharpe v. United States*, 134 Fed. Cl. 805 (Cl. Ct. 2017), *aff'd*, *Sharpe v. United States*, 935 F.3d 1352 (Fed. Cir. 2019). Although the issue in *Sharpe* had to do with backpay and reinstatement, the claims court and the court on subsequent appeal did not challenge the validity of removing an officer from the service who violated Article 88. *Id.*

129. 10 U.S.C. § 888.

vice member's court-martial conviction under the Sixty-Second Article of War and its commensurate sentence were constitutional.¹³⁰ Private Hugh Callan had openly advocated, much in the same manner as had the retired Moseley, that President Roosevelt was "a dirty politician" whose war aims were relegated to "safeguarding the wealth of Jews."¹³¹ While Callan was an enlisted service member and charged under a different statute than the predecessor to Article 88, the Fifth Circuit's decision later became important to upholding the constitutionality of Article 88 against an officer in *United States v. Howe*.¹³² In 1967, Lieutenant Henry H. Howe prominently stood outside of the Fort Bliss Army Base in El Paso, Texas while displaying a sign to the public which stated "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FASCISTS IN 1968," on one side, and "END JOHNSON'S FASCIST AGGRESSION IN VIETNAM," on the other.¹³³ In *Parker v. Levy*, the Court, while citing to *Howe*, upheld criminalizing officer speech that degraded military readiness and discipline.¹³⁴ In addition to Article 88, an officer may be prosecuted for violating the UCMJ's prohibition against soliciting mutiny as well as conduct unbecoming an officer and gentleman.¹³⁵

130. *Sanford v. Callan*, 148 F.2d 376 (5th Cir. 1945). Callan, unlike Moseley, was enlisted and not subject to the predecessor of UCMJ Article 88. *Id.*

131. *Id.* at 376–77. Callan also publicly claimed that Nazi Germany's and Imperial Japan's reasons for waging war against the United States were justified. *Id.*

132. *United States v. Howe*, 37 C.M.R. 429 (C.M.A. 1967). The Court of Military Appeals noted that a version of Article 88 existed in the British Army at the time of the Revolution and remained a part of the military law of the United States. *Id.* at 437. The court further noted:

The evil which Article 88 of the Uniform Code, *supra*, seeks to avoid is the impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State and the Commander-in-Chief of the Land and Naval Forces of the United States.

Id. at 437.

133. *Id.* at 432. For coverage of Lieutenant Howe's conduct, see *ACLU Will Aid Army War Critic*, N.Y. TIMES, Jan. 17, 1966, at 5; *Anti-Vietnam Army Officer Loses Appeal: Case Raises Point of Off-Duty Actions by Military Personnel*, WASH. POST, Aug. 5, 1967, at A1; *Army Lieutenant Examined: Carries Poster in Viet Rally*, EL PASO HERALD-POST, Nov. 8, 1965, at 23.

134. *Parker v. Levy*, 417 U.S. 733, 754 (1974). It should be noted, however, that Captain Howard Levy was not charged with violating Article 88. *See id.* at 737–38. Rather, Levy was convicted, in part, *inter alia*, for violating Article 133, Conduct Unbecoming an Officer and Gentleman. *Id.* at 738.

135. 10 U.S.C. § 882, titled "Solicitation," incorporates the solicitation of others to engage in mutiny. 10 U.S.C. § 882 (2006); *see, e.g.*, *United States v. Morris*, 21 C.M.R. 535 (N.B.R. 1956). 10 U.S.C. § 933 states: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." 10 U.S.C. § 933 (2006).

III. GENERALS AND THE QUEST FOR THE PRESIDENCY

Identifying the original purpose of the Whig Party contextualizes the actions of current retired generals and admirals, as well as any supposed impact on civil-military relations. According to Professor Michael F. Holt, in his comprehensive history of the Whig Party, “[t]he original objective of the Whig Party . . . was to save public liberty . . . by keeping [President Andrew] Jackson’s hand-picked successor out of the White House.”¹³⁶ This also meant removing the political ideology Jackson brought into government. Jackson’s detractors claimed, among other criticisms, that he routinely disregarded the law and posed a threat to the Republic.¹³⁷ The Whigs failed to accomplish their goal in 1836 with the election of Jackson’s vice president, Martin Van Buren, to the presidency, but their loss to Van Buren led to a continuation of vocal anti-Jacksonian policies.¹³⁸ In 1840, when military hero and Whig candidate William Henry Harrison campaigned for the presidency, he declared that the government was “in the hands of a monarchy,” and under Jackson and Van Buren, the United States had become “a monarchy in spirit if not in name.”¹³⁹ That three Whig presidential candidates had extensive military experience and two—Zachary Taylor and Winfield Scott—were professional soldiers evidences that, even in the pre-Civil War Republic, certain generals were not universally believed to be threats to liberty, but rather, there was a belief that the generals were able to govern for the preservation of the Constitution.

A. The Successful Run: Taylor, Grant, and Eisenhower

Prior to 1952, generals who served as “career” or “professional” military officers had thrice become president in United States history. Additionally, three prominent career officers aspired to be president but lost in the general elections. Each of the six: Zachary Taylor, Winfield Scott, George McClellan, Ulysses Grant, Winfield Scott Hancock, and Dwight Eisenhower, spent considerable parts of their pre-political

136. MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 49 (1999).

137. MARK R. CHEATHAM, *ANDREW JACKSON AND THE RISE OF THE DEMOCRATS* 245 (2015); EDWARD PESSEN, *JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS* 184–87 (1985); MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES, AND PARTISANSHIP* 237–40 (2006).

138. WILENTZ, *supra* note 27, at 449–54.

139. ELLIS, *supra* note 33, at 188; *see also* Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 *HARV. J.L. & PUB. POL’Y* 667, 677–78 (2003) (quoting William Henry Harrison for the proposition that “the Government is now a practical monarchy”). Professors Calabresi and Yoo point out that Presidents Harrison, John Tyler, Zachary Taylor, and Millard Fillmore often exercised unitary executive power despite the Whig position to the contrary. *Id.* at 697–704.

lives in the Army and had achieved national acclaim as professional military officers. All six of the presidential aspirants were the product of a party process which strove to nominate a candidate who promised stability or a return to a prior status quo rather than revolutionary change. Each presents a case-study worthy of a full length book, but are noted here for the purpose of arguing that if a general (or admiral) who formally enters into the political arena by running for the nation's highest office does not present a threat to civil-military relations, then remarks of retired senior officers lacking their prior command authority can hardly be said to constitute a threat to the United States or the place of the military within it.

Zachary Taylor was commissioned a lieutenant (ensign) in the Army on May 3, 1808.¹⁴⁰ He served in the War of 1812, the Black Hawk War of 1832, the Seminole War (1835–1842), and commanded a significant military force in Texas during the Mexican-American War (1846–1848) before becoming the Whig presidential candidate in 1848.¹⁴¹ Since the United States Military Academy was established as a small institution in 1802, in Taylor's time most of the Army's officers received their commissions through the militia system or by direct appointment.¹⁴² Thus, the fact that Taylor received his commission without attending the Academy was not unusual.¹⁴³ During his military career, Taylor had not overtly espoused Whig Party positions, but several of that party's elites believed his military credentials were necessary for obtaining the presidency, particularly because of the factionalism enveloping the country over slavery.¹⁴⁴

In selecting Taylor, Whig leaders followed their first successful quest for the presidency when they nominated William Henry Harrison in 1840. Harrison, who served as president between March 4 and April 4, 1841, was a prominent military figure from the War of 1812,

140. K. JACK BAUER, *ZACHARY TAYLOR: SOLIDER, PLANTER, STATESMAN OF THE OLD SOUTHWEST* 5 (1985). Taylor's commission was a part of the enlargement of the Army in response to the Chesapeake Affair the prior year. *Id.* In 1807, the crew of the H.M.S. Leopard, a British Royal naval ship, attacked and boarded the U.S. frigate Chesapeake, and, following the American commander's surrender, British naval officers removed four sailors from the Chesapeake that they determined had deserted from the Royal Navy. One of the removed sailors was convicted and executed. This incident led to the increase in the size of the military and was one of several underlying causes of the War of 1812 with Britain. See DONALD R. HICKEY, *THE WAR OF 1812*, at 16–17 (1989).

141. HOLT, *supra* note 136, at 269–71; DAVID M. POTTER, *THE IMPENDING CRISIS, 1848–1861*, at 79–81 (Don E. Fehrenbacher ed., 1976).

142. See, e.g., STEPHEN E. AMBROSE, *DUTY, HONOR, COUNTRY: A HISTORY OF WEST POINT* 24–38 (1966); WILLIAM H. RIKER, *THE DEVELOPMENT OF AMERICAN FEDERALISM* 158–61 (1987).

143. BAUER, *supra* note 140, at 5–6.

144. 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854*, at 477–92 (1990); HOLT, *supra* note 136, at 269–70; JOSEPH G. RAYBACK, *FREE SOIL: THE ELECTION OF 1848*, at 35–45 (1970).

but he had long been out of the military, having served as minister to Gran Columbia, in both houses of Congress, and as the territorial governor of Indiana.¹⁴⁵ Neither Taylor nor Harrison were roundly viewed as a danger of usurping democracy.¹⁴⁶ Indeed, Whig leaders hoped Taylor could bring an end to sectionalist fights over slavery without resorting to what they perceived as Jackson's disregard for the law and convention.¹⁴⁷ As a sign of his commitment to respect constitutional institutions, Taylor promised to sign the Wilmot Proviso if Congress voted for it.¹⁴⁸ Named for its originator, Congressman David Wilmot (D-PA), the Proviso was a proposed law to prevent the extension of slavery into any lands conquered from Mexico.¹⁴⁹

In 1868, after the Republican Party nominated Ulysses Grant, Taylor defeated Democrat Party candidate Horatio Seymour by 356,592 votes (or by a margin of 52.7% to 47.3%).¹⁵⁰ Four years later, Grant bested Horace Greeley to earn another term of office.¹⁵¹ Greeley ran on a liberal Republican platform that sought reconciliation with the South but also reform in the Republican Party against the spoils system.¹⁵² Grant beat Greeley by a margin of 55.6% to 43.8% of the popular vote, and Grant notably obtained the support of several former Confederate officers, including John Singleton Mosby who only eight years earlier had been considered a war criminal.¹⁵³ Because Grant's elections were the first two after the Civil War and the Union Army policed the former Confederate states as part of Reconstruction, the nature of the military's subordination to the civil government became central to the question of whether Grant would respect the Constitutional subordination of the military to the civil government.¹⁵⁴ In

145. On Harrison, see HENDRIK BOORAEM, *A CHILD OF THE REVOLUTION: WILLIAM HENRY HARRISON AND HIS WORLD, 1773–1798*, at 1–7 (2012).

146. See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 195 (2009); WILENTZ, *supra* note 29, at 449.

147. WILENTZ, *supra* note 29, at 616–17.

148. HOLT, *supra* note 136, at 345.

149. ROGER L. RANSOM, *CONFLICT AND COMPROMISE: THE POLITICAL ECONOMY OF SLAVERY, EMANCIPATION, AND THE AMERICAN CIVIL WAR* 97–99 (1990). The Proviso did not become law because pro-slavery Whig and pro-slavery Democrats in the Senate voted for its removal from a House bill. *Id.*

150. DEBORAH KALB, *GUIDE TO U.S. ELECTIONS* 310 (2015).

151. ANDREW L. SLAP, *THE DOOM OF RECONSTRUCTION: THE LIBERAL REPUBLICANS IN THE CIVIL WAR ERA* 164–65 (2006).

152. MITCHELL SNAY, *HORACE GREELEY AND THE POLITICS OF REFORM IN NINETEENTH-CENTURY AMERICA* 176–80 (2011); ADAM MAX TUCHINSKY, *HOARCE GREELEY'S NEW-YORK TRIBUNE: CIVIL WAR-ERA SOCIALISM AND THE CRISIS OF FREE LABOR* 228–34 (2009).

153. See KALB, *supra* note 150, at 312; JAMES A. RAMAGE, *GRAY GHOST: THE LIFE OF COL. JOHN SINGLETON MOSBY* 333 (1999).

154. See, e.g., GREGORY P. DOWNS, *DECLARATIONS OF DEPENDENCE: THE LONG RECONSTRUCTION OF POPULAR POLITICS IN THE SOUTH, 1861–1908*, at 113 (2011).

spite of his position as the Commanding General of the Army, in 1868 much of the country appeared to accept that Grant did not seek dictatorial rule and would respect constitutional norms.¹⁵⁵ Given the nature of Grant's support in 1872, the same conclusion can reasonably be made.

Grant had been commissioned in 1843, following his graduation from the United States Military Academy, and had fought in the Mexican-American War. As a result of indebtedness, alcoholism, and personal misfortune, he left the Army in 1854.¹⁵⁶ When the Civil War began, he obtained a colonelcy and, through a series of successful commands in increasingly bloody battles, was promoted to major general.¹⁵⁷ After commanding an army at the Battle of Vicksburg and in Tennessee, President Lincoln promoted Grant to lieutenant general—a rank not held since George Washington resigned his commission—as well as to command over all the Union's armies.¹⁵⁸ By war's end, Grant was a military hero, at least in the North, and remained apart from the internecine fights in Congress and the Executive Branch, which led to the impeachment and Senate trial of President Andrew Johnson.¹⁵⁹

Although as president Grant would exercise extraordinary powers to defeat the Ku Klux Klan and maintain Reconstruction, he had no designs to erode the military's subordination to the civil government.¹⁶⁰ Indeed, he was reactive rather than proactive to events in the southern states and sought Congress's approval to use the Army to restore order and preserve the newly achieved rights of former slaves.¹⁶¹ Grant's "let us have peace" platform was designed to reduce the possibility of a renewed war, and to that end, he tried to avoid taking actions that would lead to him being accused of becoming a despot.¹⁶²

In 1952, Dwight David Eisenhower achieved the Republican nomination for the presidency and then won a sweeping victory against his

155. *See, e.g.*, WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION, 1869–1879*, at 22 (1979).

156. WILLIAM S. MCFEEELY, *GRANT: A BIOGRAPHY* 28–57 (1981).

157. BROOKS D. SIMPSON, *ULYSSES S. GRANT: TRIUMPH OVER ADVERSITY, 1822–1865*, at 78–83 (2000).

158. JOAN WAUGH, *U.S. GRANT: AMERICAN HERO, AMERICAN MYTH* 1–3 (2009).

159. *See id.*; MCFEEELY, *supra* note 156, at 274–75; BROOKS D. SIMPSON, *LET US HAVE PEACE: ULYSSES S. GRANT AND THE POLITICS OF WAR AND RECONSTRUCTION* 203–08 (1991).

160. *See* PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 34–35 (2011); JOSIAH BUNTING III, *ULYSSES S. GRANT* 111–15 (2004).

161. BUNTING III, *supra* note 160, at 111–15.

162. *See, e.g.*, RON CHERNOW, *GRANT* 700–07 (2018). Chernow points out that in spite of Grant's reticence to use the Army to police the South, in response to doing so, leading Democrats accused him of despotism. *Id.*

Democratic opponent, Governor Adlai Stevenson.¹⁶³ Eisenhower had served in the Army from 1915 through his last position as commanding general of North Atlantic Treaty Organization (NATO) military forces, which ended on May 30, 1952.¹⁶⁴ Eisenhower also served as Columbia University's president before becoming the commander of NATO forces, but he retained his military status while at Columbia. Unlike McClellan, Eisenhower retired from the military before running for the presidency.¹⁶⁵ Moreover, even though Eisenhower had been assigned as MacArthur's subordinate earlier in his military career, he did not side with MacArthur after Truman removed him from command.¹⁶⁶ As president, Eisenhower's relationship with the Army's senior leadership was strained as he sought to reduce the size of the nation's conventional forces (particularly the Army) and have the threat of "massive retaliation"—an enlarged nuclear arsenal—serve as a national safeguard against Soviet aggression.¹⁶⁷

While Eisenhower's nomination came on the second ballot of the Republican Convention in Chicago, it is noteworthy that the recently retired MacArthur aligned with Senator Robert Taft in an effort to defeat him.¹⁶⁸ MacArthur delivered the convention's keynote speech, and while still subject to the UCMJ, excoriated President Harry Truman.¹⁶⁹ In ignorance of the notion of an apolitical military, MacArthur insisted that he was "a lifelong Republican."¹⁷⁰ He then accused the administration of having been "guileless" in negotiations with the Soviet Union at Yalta, Potsdam, and in other locations; of accumulating power to the point of a "totalitarian trend"; and permitting mass corruption.¹⁷¹ While MacArthur's attacks on Truman could be partly

163. See, e.g., WILLIAM I. HITCHCOCK, *THE AGE OF EISENHOWER: AMERICA AND THE WORLD IN THE 1950s*, at 69–83 (2018).

164. SAKI DOCKRILL, *EISENHOWER'S NEW-LOOK NATIONAL SECURITY POLICY, 1953–1961*, at 17–18 (1996); WILLIAM MCCLENAHAN, JR. & WILLIAM H. BECKER, *EISENHOWER AND THE COLD WAR ECONOMY* 1–12 (2011).

165. JOHN ROBERT GREENE, *I LIKE IKE: THE PRESIDENTIAL ELECTION OF 1952*, at 49–51 (2017).

166. SAMUEL WALKER, *PRESIDENTS AND CIVIL LIBERTIES FROM WILSON TO OBAMA: A STORY OF POOR CUSTODIANS* 170 (2012).

167. ANDREW J. BACEVICH, *THE LONG WAR: A NEW HISTORY OF U.S. NATIONAL SECURITY POLICY SINCE WORLD WAR II* 225–26 (2007).

168. See, e.g., MICHAEL D. PEARLMAN, *TRUMAN AND MACARTHUR: POLICY, POLITICS, AND THE HUNGER FOR HONOR AND RENOWN* 247–48 (2008); W.H. Lawrence, *Taft Fights to Stop Eisenhower with Coalition in Ballot Today; Platform Wins Without Clash*, N.Y. TIMES, July 11, 1952, at 1; John N. Popham, *MacArthur Backers Intensifying Boom: Declare General's Nomination Would Heal Rifts—Claim Fifth-Ballot Victory*, N.Y. TIMES, July 7, 1952, at 10.

169. Anne O'Hare McCormick, *MacArthur Role Fades: Eisenhower Victory Transforms Drama of Keynote Speech into Lost Cause Plea*, N.Y. TIMES, July 8, 1952, at 20.

170. *Text of MacArthur's Keynote G.O.P. Convention Speech Assailing Administration*, N.Y. TIMES, July 8, 1952, at 18.

171. *Id.*

attributable to the bitterness of being removed from command during the Korean War, Truman remained his Commander-in-Chief at the time the speech was delivered.¹⁷² At no time was MacArthur formally admonished by the military for his open denigration of a sitting president.

As president, Eisenhower reluctantly federalized the Arkansas National Guard and placed it under Army command after Governor Orval Faubus obstructed the rulings of a United States District Court judge to desegregate the state's public schools by first using his National Guard, in its state status, as a means to do so.¹⁷³ Eisenhower's actions were hardly a step toward despotism as Faubus had not only defied a district court but did so by using a state National Guard as the means of defiance.¹⁷⁴ Eisenhower's overall military policy, which included reducing the size of the Army and other conventional forces and instead relying on a massive nuclear deterrent, was titled the "New Look Strategy" and was a step in demilitarizing the country in the sense that fewer citizens were conscripted into the military.¹⁷⁵ The reduction in the size of the Army was not without its critics in the ranks of generals, but it evidenced to the country that Eisenhower viewed his role as a constitutional president with limits on his power to use the military for political ends.¹⁷⁶

B. The Unsuccessful Candidates: Scott, McClellan, and Hancock

Perhaps because the Whigs found success with Harrison and Taylor, in 1852 they turned to Winfield Scott, the Commanding General of the Army and a veteran of both the War of 1812 and the Mexican-American War, to be their presidential candidate.¹⁷⁷ Although the Compromise of 1850 was crafted as an attempt at ideological reconciliation by leading Whigs such as Henry Clay, the question of slavery continuously threatened to undo the Whig Party.¹⁷⁸ Leading Whigs sought to reduce the division between "Cotton Whigs" (northerners who supported slavery as a part of the national economy) and "Con-

172. DAVID McCULLOUGH, *TRUMAN* 1016–17 (1992).

173. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 115–18 (2000).

174. *See, e.g.*, ELIZABETH JACOWAY, *TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOOK THE NATION* 136–38 (2007).

175. *See, e.g.*, PETER ROMAN, *EISENHOWER AND THE MISSILE GAP* 21 (Cornell Univ. Press ed. 2019).

176. *See, e.g.*, Thomas F. Soapes, *A Cold Warrior Seeks Peace: Eisenhower's Strategy for Nuclear Disarmament*, in 4 *DIPLOMATIC HISTORY* 57–71 (1980); Gene M. Lyons, *The New Civil-Military Relations*, 55 *AM. POL. SCI. REV.* 53, 53–63 (1961).

177. WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1865*, at 16–18 (1987).

178. *See* ROBERT V. REMINI, *DANIEL WEBSTER: THE MAN AND HIS TIME* 691–95 (1997).

science Whigs” (abolitionist northerners).¹⁷⁹ To this end, Whig elites, ranging from the abolitionist New York governor William Henry Seward to the serving President Millard Fillmore, supported Scott’s candidacy.¹⁸⁰ Following Scott’s loss to Franklin Pierce—also a Mexican-American War veteran—he returned to command the Army, apparently presenting no threat to the Republic.¹⁸¹ In fact, Scott did not retire from the Army until after the Civil War began in 1861.¹⁸²

Major General George Brinton McClellan, the former commander of the Army of the Potomac, resigned his commission on November 8, 1864.¹⁸³ This was the same day that Abraham Lincoln was reelected president, and McClellan had run as his Democrat opponent.¹⁸⁴ Like Grant, McClellan was a United States Military Academy commissioned officer who served in the Mexican-American War. McClellan subsequently left the Army to become chief engineer and then vice president of a railroad before obtaining a commission with the rank of general when the Civil War began.¹⁸⁵ After successive aggravations with the style and slowness of McClellan, Secretary of War Edwin Stanton, with Lincoln’s consent, removed him from command over the Army of the Potomac, the largest force in the Union.¹⁸⁶ As a worry signal of the general’s relationship to the Army, all of the officers in a Wisconsin regiment tendered their resignations in protest of McClellan’s removal.¹⁸⁷

Book-length scholarly studies have examined the poor relationship between Lincoln and McClellan as well as McClellan’s opposition to the Emancipation Proclamation, including his promise that if he were to become president, he would either rescind or ignore it. McClellan, like many Democrats, believed that Lincoln brought dictatorial designs into the presidency, particularly with the use of the Army to de-

179. See JAMES C. KLOTTER, *HENRY CLAY: THE MAN WHO WOULD BE PRESIDENT* 365–68 (2018).

180. HOLT, *supra* note 136, at 728–33; ALLAN PESKIN, *WINFIELD SCOTT AND THE PROFESSION OF ARMS* 207–09 (2003). It should be noted that Samuel Huntington labeled Scott, along with Douglas MacArthur and George B. McClellan, as “brilliant, imperious, cold dramatic officers deriving their values and behavior from an older, aristocratic heritage and finding it difficult to subordinate themselves to civilian authorities.” HUNTINGTON, *supra* note 35, at 367.

181. See PESKIN, *supra* note 180, at 216–19.

182. See DAVID J. EICHER, *THE LONGEST NIGHT: A MILITARY HISTORY OF THE CIVIL WAR* 130–31 (2001).

183. STEVEN W. SEARS, *GEORGE B. MCCLELLAN: THE YOUNG NAPOLEON* 385 (1988).

184. DORIS KEARNS GOODWIN, *TEAM OF RIVALS* 664 (2005).

185. CHESTER G. HEARN, *LINCOLN AND MCCLELLAN AT WAR* 19–39 (2012).

186. WILLIAM MARVEL, *LINCOLN’S AUTOCRAT: THE LIFE OF EDWIN STANTON* 272–83 (2015).

187. STEVEN J. RAMOLD, *BARING THE IRON HAND: DISCIPLINE IN THE UNION ARMY* 215 (2010).

stroy slavery.¹⁸⁸ Professor Jennifer Weber, in her treatise on the ‘Copperheads,’ noted that Pro-Union Democrats feared that if they openly opposed the Emancipation Proclamation it would cause a mutiny in the Union Army’s officer corps among McClellan loyalists.¹⁸⁹ Although there were fears of a McClellan presidency, it is left to conjecture how McClellan would have impacted civil-military relations as president. That McClellan ran while still in the Army did not defy tradition since Scott and Taylor had already done so. It is difficult to assess the impact his actions caused on civil-military relations since Lincoln prevailed. Moreover, the post-Civil War Army was rapidly reduced in size from almost 500,000 soldiers to 25,000 soldiers by 1872 and was largely removed from the populated centers of the nation.¹⁹⁰

The 1864 election was a referendum not only on Lincoln’s administration but also over how the southern states might be readmitted to the Union and whether slavery was to survive as a legal institution.¹⁹¹ McClellan, ironically, was saddled with a party platform that considered the war a “failure” and expressed a desire for peace with the south on less than victor’s terms.¹⁹² To be sure, the Civil War imperiled the United States, and Lincoln had extended military power over the civilian population in a manner never equaled before or since.¹⁹³ Yet, in retrospect, McClellan’s foray into politics was hardly a threat to the Republic nor did it upend the military’s subservience to the government. Evidencing this point, the senior officers under McClellan’s prior command of the Army of the Potomac, including his

188. See, e.g., BURRUS M. CARNAHAN, *ACT OF JUSTICE: LINCOLN’S EMANCIPATION PROCLAMATION AND THE LAW OF WAR* 126 (2007); JOHN C. WAUGH, *LINCOLN AND MCCLELLAN: THE TROUBLED PARTNERSHIP BETWEEN A PRESIDENT AND HIS GENERAL* 210–11 (2010); FRANK J. WILLIAMS, ‘*Doing Less’ and ‘Doing More’: The President and the Proclamation—Legally, Militarily, and Politically*, in *THE EMANCIPATION PROCLAMATION: THREE VIEWS* 48–87 (2006).

189. JENNIFER L. WEBER, *COPPERHEADS: THE RISE AND FALL OF LINCOLN’S OPPONENTS IN THE NORTH* 65 (2006).

190. On the Army’s distance from the population between 1866 and 1917, see WILLIAM ADDLEMAN GANOE, *THE HISTORY OF THE UNITED STATES ARMY* 298–354 (1924); HUNTINGTON, *supra* note 35, at 222–69; DON RICKEY JR., *FORTY MILES A DAY ON BEANS AND HAY* 3–18 (1963); ROBERT M. UTLEY, *FRONTIER REGULARS: THE UNITED STATES ARMY AND THE INDIAN, 1866–1891*, at 1–11 (1973).

191. See HARRY S. STOUT, *UPON THE ALTAR OF THE NATION: A MORAL HISTORY OF THE CIVIL WAR* 388–90 (2006) (discussing the support Lincoln received in the 1864 election from churches and soldiers); WEBER, *supra* note 189, at 179 (describing McClellan’s letter for the acceptance of the 1864 Democratic nomination and McClellan’s favoring of a “peace by reunion” with the South).

192. WEBER, *supra* note 189, at 176.

193. See, e.g., JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 740–47 (1988).

personal friends, remained loyal to the government, did not overtly campaign for him, and pursued Lincoln's war aims.¹⁹⁴

Given the size of the Union and Confederate armies during the Civil War, and the commissioning of lawyers and politicians as generals, it should be little surprise that Republicans and Democrats would run veteran generals of the war for political office.¹⁹⁵ With the exception of Grant, however, the Republican candidates for the presidency were not professional soldiers. Rutherford Hayes began the war in the Union Army with the rank of major and ended the war as a brevet major general.¹⁹⁶ Prior to the war he was a lawyer, and after the war he served in Congress as well as governor of Ohio.¹⁹⁷ Hayes's elevation to the presidency occurred following an election which resulted without a clear winner and a questionable legislative-judicial commission which bargained his presidency for the end of Reconstruction.¹⁹⁸ Likewise, Republican James Garfield was a lawyer and a member of Congress before his brief presidency.¹⁹⁹ As with Hayes, Garfield had no prior military experience, but, as a result of his leadership, he was elevated to the rank of general before the war ended.²⁰⁰ As a Republican Congressman, Garfield opposed the radicals in his party and represented Lambdin Milligan before the Supreme Court.²⁰¹ Garfield's role in *Ex Parte Milligan* displayed his political ideology of limiting the military authority of a president over the general population.²⁰² Finally, Benjamin Harrison ended the Civil War as a brevet brigadier general after serving under General William Tecumseh Sherman.²⁰³ Before the war he was a lawyer, and after the war ended, he entered state politics and was appointed as one of Indiana's senators.²⁰⁴

194. See, e.g., ZACHARY A. FRY, *A REPUBLIC IN THE RANKS: LOYALTY AND DISSENT IN THE ARMY OF THE POTOMAC* 162 (2020); STEPHEN R. TAAFFE, *COMMANDING THE ARMY OF THE POTOMAC* 215–18 (2006).

195. On the Civil War armies having large numbers of lawyers move from their profession into uniform, see, e.g., PETER CHARLES HOFFER, *UNCIVIL LAWYERS: THE LAWYERS' CIVIL WAR* 1–3 (2018).

196. HANS L. TREFOUSSE, *RUTHERFORD B. HAYES* 30–34 (Arthur M. Schlesinger Jr. ed., 2002).

197. See, e.g., ROY MORRIS, *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876*, at 8–10 (2003); TREFOUSSE, *supra* note 196, at 2–11; C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 22–26 (1966).

198. See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 579–81 (2002).

199. ALLAN PESKIN, *GARFIELD* 247, 543 (1978).

200. *Id.* at 128.

201. JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 309–13 (2012).

202. See, e.g., BROOK THOMAS, *CIVIC MYTHS: A LAW-AND-LITERATURE APPROACH TO CITIZENSHIP* 113–14 (2007).

203. See CHARLES W. CALHOUN, *BENJAMIN HARRISON, 1889–1893*, at 26–28 (2005).

204. *Id.* at 3.

Ironically, when the Democrats selected General Winfield Scott Hancock as their presidential candidate in 1880, they ran a career soldier who had taken part in the extension of executive branch power to the degree that in 1865 he refused to comply with a federal judge's habeas order to produce Mary Surratt.²⁰⁵ As early as 1864, Hancock had made it known, while on active duty, that he desired to seek the presidency, and he was a viable candidate at the 1876 Democrat Convention.²⁰⁶ Hancock was never widely perceived as an antagonist to a president in the manner that McClellan was, and he was hardly accused of being a threat to the Union.²⁰⁷ Indeed, the Democrat Party's nominating convention in 1880 appears to have selected Hancock for a reason similar to Taylor's and Winfield Scott's selections; namely, that he could help the party overcome its internal dissensions, much of which predated the Civil War.²⁰⁸ Having obtained the nomination, Hancock lost to Garfield in a close election in the popular vote, though the vote was not close in the Electoral College.²⁰⁹ After his loss, Hancock returned to his military command and served out the duration of his career until he died.²¹⁰ Based on Hancock's resumption of command, it can be surmised that neither Garfield nor President Chester Arthur considered Hancock a threat to the Republic.

IV. CASE STUDIES: THE *LEX NON SCRIPTA* OF CONDUCT

In 1956, a States' Rights conference was held in Memphis at which Chief Justice Earl Warren was proclaimed an enemy of the United States.²¹¹ Speakers at the conference insisted that the United States was in the midst of a "Marxist-Zionist" takeover and that civil rights equated to communism.²¹² Among the delegates to the conference were retired generals Edward M. Almond and Albert C. Wedemeyer.²¹³ Like George Van Horn Moseley, Wedemeyer was anti-Semitic, and no less than J. Edgar Hoover suspected him of pro-Nazi

205. DAVID M. JORDAN, *WINFIELD SCOTT HANCOCK: A SOLDIER'S LIFE* 176–81 (1996).

206. *See id.* at 213–18.

207. *See, e.g.*, BENJAMIN T. ARRINGTON, *THE LAST LINCOLN REPUBLICAN: THE PRESIDENTIAL ELECTION OF 1880*, at 110–11 (2020); Allan Peskin, *The Election of 1880*, 4 *WILSON Q.* 172, 172–81 (1980); John M. Taylor, *General Hancock: Soldier of the Gilded Age*, 32 *PA. HIST.: J. MID-ATLANTIC STUD.* 187, 187–96 (1965).

208. *See Peskin, supra* note 207, at 178.

209. *Id.* at 181; *see also* HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY 117–19* (2014) (describing the presidential election of 1880 and the lead-up to it).

210. JORDAN, *supra* note 205, at 312–15.

211. CLIVE WEBB, *RABBLE ROUSERS: THE AMERICAN FAR RIGHT IN THE CIVIL RIGHTS ERA* 136–38 (2010).

212. *Id.*

213. *Id.*

leanings prior to the United States entry into World War II.²¹⁴ Wedemeyer retired in 1951, and shortly after, he claimed that China was “lost” to the communist-led forces of Mao Zedong because of communist sympathies within the Truman administration.²¹⁵ In 1957, Wedemeyer publicly demanded that President Eisenhower withdraw recognition of the Soviet Union.²¹⁶ There is also a connection between Wedemeyer and Moseley. In 1958, the aged Moseley wrote to Wedemeyer complaining that President Eisenhower had refused to link the nation’s Jewish population with the threat of world communist domination.²¹⁷ Wedemeyer responded with his agreement that the United States would likely “be destroyed from within.”²¹⁸

Like Wedemeyer, Almond was a segregationist who openly opposed civil rights by linking racial equality advocacy with communism.²¹⁹ One of the groups present, the National Economic Council—another far-right organization opposed to civil rights—listed retired general Charles A. Willoughby and Vice Admiral C.A. Freeman on their board of directors. Like the others, they linked the idea of racial equality to communism.²²⁰ Willoughby, while still on active duty, went so far as to undermine the Truman administration by assisting Senator Joe McCarthy, providing the senator commentary on the state of military affairs to undermine Secretary of the Army Kenneth Royall.²²¹

214. See ROBERT A. ROSENBAUM, *WAKING TO DANGER: AMERICANS AND NAZI GERMANY, 1933–1941*, at 179 (2010); JONATHAN SCHOENWALD, *A TIME FOR CHOOSING: THE RISE OF MODERN AMERICAN CONSERVATISM* 27–29 (2001).

215. *Wedemeyer Seen Reversing Views*, N.Y. TIMES, Oct. 5, 1951, at 7. In 1947, Secretary of State George C. Marshall sent Wedemeyer to China to advise Chiang Kai-shek to undertake significant political and military reforms. See WILSON D. MISCAMBLE, *GEORGE F. KENNAN AND THE MAKING OF FOREIGN POLICY, 1947–1950*, at 219–22 (1992); ARNOLD A. OFFNER, *ANOTHER SUCH VICTORY: PRESIDENT TRUMAN AND THE COLD WAR, 1945–1953*, at 316–18 (2002). Wedemeyer also campaigned for university systems to terminate the employment of professors who refused to swear oaths of loyalty or submit to investigations centered on communism on campuses. See, e.g., *Faculty Oustings Urged*, N.Y. TIMES, May 15, 1953, at 25.

216. *Sever Diplomatic Ties with Reds—Wedemeyer*, ORLANDO SENTINEL, May 27, 1957, at 20.

217. Letter from Gen. George Van Horn Moseley, U.S. Army, to Gen. Albert C. Wedemeyer, U.S. Army (Nov. 26, 1958) (on file with the Albert Wedemeyer Collection at the Hoover Institution Archives).

218. Letter from Gen. Albert C. Wedemeyer, U.S. Army, to Gen. George Van Horn Moseley, U.S. Army (Dec. 6, 1958) (on file with the Albert Wedemeyer Collection at the Hoover Institution Archives).

219. MICHAEL E. LYNCH, *EDWARD ALMOND AND THE U.S. ARMY: FROM THE 92ND INFANTRY TO THE X CORPS* 293–303 (2019).

220. See SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES* 87 (1995).

221. See Letter from Gen. Charles Willoughby, U.S. Army, to Senator Joe McCarthy, U.S. Senate (May 25, 1950) (on file in Charles Willoughby Papers at the Gettysburg College Special Collections). In this letter, Willoughby alleges that the “Roosevelt-Truman Machine” was part of a conspiracy that allowed China to fall

One could add to this list retired General Bonner Fellers, who headed the Citizens Aid Committee, which, in 1955, declared that any form of foreign aid was unconstitutional; that the collective defense requirements of NATO were unfairly greater on the United States; and that even the British government could not be fully trusted.²²² Prior to World War II, Fellers had connections with America First, a largely anti-Semitic organization devoted to keeping the United States neutral with the accompanying rhetoric that Jews would benefit from the United States going to war.²²³ Certainly his attack on NATO was, either by design or effect, an undermining of Eisenhower's presidency. Fellers, like Moseley, Almond, Wedemeyer, and Willoughby, also publicly attacked civil rights.²²⁴ There is an irony to Fellers's criticism of the weakness of NATO because prior to the U.S. entry into World War II, Fellers was assigned to Egypt as an observer of the British Army.²²⁵ During his tenure, the United States' diplomatic code was stolen, and Nazi and Italian intelligence operations obtained and decoded his messages on British troop locations and offensive plans.²²⁶ The Nazi command in the Mediterranean dubbed these messages "little Fellers," and, for two years, the German Afrika Korps, under General Erwin Rommel's command, was able to successfully conduct operations against the British, in part, because of Fellers's carelessness.²²⁷

That a small number of prominent retired, or even active duty, generals and admirals openly provided opinions on political matters may have been partly caused by the invitation of elected officials, as well as political alignments between officers and politicians.²²⁸ As an

to Mao Zedong's Communist Party to seize control by defeating Chiang Kai-shek's Nationalist forces. *Id.*

222. See Letter from Bonner Fellers, Nat'l Dir., For America, to Gen. Curtis LeMay, Vice Chief of Staff, U.S. Air Force (Nov. 25, 1957) (on file with the Library of Congress); Bonner Fellers, For America: A Committee for Political Action, Collective Defense: Strength or Peril? (Nov. 22, 1957) (unpublished manuscript) (on file with the Library of Congress); *Brigadier General Bonner Fellers: Foreign Aid Wastes Money Needed for National Defense*, MANION FORUM (The Manion Forum Radio Show Wkly., Broadcast No. 360, South Bend, Ind., Aug. 20, 1961) (on file with the John D. Trevor Papers at the University of Michigan).
223. See BENDERSKY, *supra* note 81, at 302–04.
224. See, e.g., Willbur H. Baldinger, *Ex-Brass and Braid Attack from Right: A Lot of Brasswork in Rightist Outfits*, WASH. POST, Oct. 14, 1956, at E1; Peter Braestrup, *Now Birch Society Polarizes the Right*, N.Y. TIMES, Apr. 9, 1961, at E10.
225. JOHN W. GORDON, *THE OTHER DESERT WAR: BRITISH SPECIAL FORCES IN NORTH AFRICA, 1940–1943*, at 100 (1987).
226. *Id.*
227. IAN BECKETT, *ROMMEL: A REAPPRAISAL* 27 (2013); GLYN HARPER, *THE BATTLE FOR NORTH AFRICA: EL ALAMEIN AND THE TURNING POINT FOR WORLD WAR II* 24–25 (2017).
228. See, e.g., Isiah Wilson III et al., *Kids These Days: Growing Military Professionalism Across Generations*, in *CIVIL-MILITARY RELATIONS IN PERSPECTIVE: STRATEGY*,

example, in early 1993, Air Force General Harold Campbell referred to President William Jefferson Clinton as a “‘pot-smoking,’ ‘womanizing,’ and ‘draft dodging’ commander-in-chief.”²²⁹ There is a reasonable question as to whether this would have occurred if not for President George H.W. Bush’s criticisms of Clinton during the 1992 presidential contest.²³⁰ In seeking reelection, Bush went so far as to call Clinton a “draft dodger.”²³¹ Prominent Republicans also criticized Clinton as a “draft dodger” for his ability to forego military service in Vietnam through a graduate school exemption, including a Rhodes scholarship to Oxford University.²³² Joining them, the recently retired General Norman Schwarzkopf criticized Clinton’s draft avoidance.²³³ Not all retirees backed Bush on this point. In contrast to Schwarzkopf and Campbell, retired Admiral William J. Crowe, a former Chairman of the Joint Chiefs of Staff, endorsed Clinton over Bush.²³⁴ After Clinton was elected to the presidency, conservative members of Congress, such as Senator Jesse Helms (R-NC), gleefully warned in public forums that soldiers stationed in North Carolina would not welcome the president because of the absence of his military record.²³⁵

There is a precedential danger in attacking the military record, or lack of a military record, of political candidates, as doing so tends to diminish the importance of an apolitical military to the general electorate. However, Bush did not begin the battle over a candidate’s prior military service during the Vietnam Conflict. In 1988, Democrats pointed out that vice presidential candidate, and eventual winner,

STRUCTURE AND POLICY 24–25 (Stephen J. Cimbala ed., 2012); PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 182–83 (2003).

229. *General Who Ripped Clinton Agrees to Pay Fine, Quit Air Force*, CHI. TRIB., June 19, 1993, at L3. Air Force Chief of Staff General Merrill McPeak reprimanded and fined Campbell through an administrative process. *See also* KURT CAMPBELL & MICHAEL E. O’HANLON, *HARD POWER: THE NEW POLITICS OF NATIONAL SECURITY* 23–25 (2006) (describing the lack of support for Clinton from members of the military).
230. *See* ARNOLD R. ISAACS, *VIETNAM SHADOWS: THE WAR, ITS GHOSTS, AND ITS LEGACY* 43–45 (1997).
231. *Bush Steps Up Attack on Clinton’s ‘Pattern of Deception,’ Draft Record*, L.A. TIMES, Oct. 17, 1992, at OCA24.
232. ISAACS, *supra* note 230, at 44.
233. *Schwarzkopf Criticizes Clinton on Draft*, N.Y. TIMES, Sept. 20, 1992, at 24.
234. SAM E. SARKESIAN & ROBERT E. CONNOR, *THE U.S. MILITARY PROFESSION INTO THE TWENTY-FIRST CENTURY: WAR, PEACE AND POLITICS* 66 (2d ed. 2006).
235. Perhaps ironically, Helms invited the newly elected Speaker of the House of Representatives, Newt Gingrich, to North Carolina where he assured Gingrich of his state’s welcome. Gingrich had used the same graduate school vehicle to avoid military service. *See, e.g.*, Howard Kleinberg, *Casting Stones About Vietnam*, BALT. SUN (Dec. 2, 1994), <https://www.baltimoresun.com/news/bs-xpm-1994-12-02-1994336184-story.html> [<https://perma.unl.edu/C2KS-M8NL>].

Daniel Quayle had avoided service in the Vietnam Conflict by using family connections to join a National Guard unit.²³⁶ Although Senator Robert Dole, the 1996 Republican challenger to Clinton, had served in World War II and, in fact, was injured in the liberation of France from Nazi occupation, his running mate Jack Kemp was exempted from active duty military service, avoiding being sent to Germany during the 1961 Berlin Crisis because of an injury sustained while playing professional football.²³⁷ Yet, Democrats pointed out that the year after his exemption he led the San Diego Chargers to a division title as the quarterback.²³⁸ In regards to the 2000 presidential campaign, Vice President Albert Gore Jr. served in the Vietnam Conflict as a military journalist while his opponent, George W. Bush, avoided service much in the same way as Quayle.²³⁹ Four years later, Senator John Kerry (D-MA), who served in combat in Vietnam, lost to Bush and fell victim to odd attacks over the nature of his Vietnam service.²⁴⁰

The case studies listed below and the conduct of the retired generals and admirals listed at the beginning of this Part are a small sampling of extremes which contributed to the politicization of the military through the conduct of the officers and politicians. However, since the United States retains an elected government and other critical institutions, such as an independent judiciary which issues decisions contrary to presidential actions, it can be deduced that politically outspoken retired generals have had little effect on permanently damaging the institutions of constitutional government. This is not to preclude the possibility that each of the individuals caused a degree of harm to other military norms or that they encouraged subordinate officers to engage in discreditable or criminal conduct.

A. The Case of General Edwin Anderson Walker

On July 20, 1983, Assistant Secretary of the Army, Harry N. Walters, restored a pension to former general, Edwin Walker.²⁴¹ The Army Board for Correction of Military Records, an administrative agency within the Department of the Army, recommended that Walker, a decorated World War II and Korean War veteran, be re-

236. Guy Gugliotta, *Was Vietnam a Bad Career Move?*, WASH. POST, Jan. 24, 1993, at C5.

237. Douglas Frantz, *Army Allowed Jack Kemp to Skip Army Call-Up for an Injury*, N.Y. TIMES, Aug. 8, 1996, at 27.

238. *Id.* On Kemp's football career, see GERHARD FALK, FOOTBALL AND THE AMERICAN IDENTITY 9 (2005).

239. See TAI SUNG AN, AMERICA AFTER VIETNAM: FROM ANGUISH TO HEALING 35 (1997); George Lardner Jr. & Lois Romano, *At Height of Vietnam, Graduate Picks Guard*, WASH. POST, July 28, 1999, at A1.

240. See BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING 346 (2006).

241. See generally SCHOENWALD, *supra* note 214, at 100–01.

stored to his rank and retired.²⁴² Unlike Moseley, Walker was not technically a retiree, since he had resigned his commission. Because Walker forfeited his military retirement pay, the military did not possess jurisdiction over him until Walters acted to restore him. A fervent anti-communist, Walker tried to submit his resignation from the Army in 1959, writing “[t]he 5th column conspiracy and influence in the U.S. minimize or nullify the effectiveness of my ideas and principles, military mission and objectives, and the necessary American public spirit to support sons and soldiers.”²⁴³ Walker ultimately resigned his commission in 1962 after being admonished for attempting to indoctrinate soldiers with John Birch materials in Germany and being transferred to a position in the United States.²⁴⁴ His resignation was partly based on his plans to openly accuse the Kennedy administration of fostering communism.²⁴⁵

Walker’s actions, both before and after his resignation, were covered in the major newspapers, including an accusation that President Eisenhower had not been strong enough to stop the “dire peril” of communism.²⁴⁶ On July 21, 1962, Walker issued a press release in which he accused the recently appointed Chairman of the Joint Chiefs of Staff Maxwell Taylor, a decorated World War II veteran, of intentionally trying to “disarm” the United States’ military forces and place them under United Nations command.²⁴⁷ Three days later, Walker, in another press release, once more accused Taylor, but this time in concert with Vice President Lyndon Johnson, of pursuing the loss of Vietnam and selling out the military’s junior officers and enlisted personnel.²⁴⁸ Two months earlier, in a pamphlet, Walker alleged that

242. Codified at 10 U.S.C. § 1552, the Army Board for the Correction of Military Records, then, as now, recommends to the Secretary of the Army the propriety of restoring discharged service members to active duty and upgrading less-than-honorable discharges to honorable, as well as other matters. *See, e.g.*, *Dickson v. Sec’y of Def.*, 68 F.3d 1396 (D.C. Cir. 1995).

243. *Ex Gen Walker Deeply Disturbed by Trends*, L.A. TIMES, Feb. 6, 1962, at 12.

244. JOSEPH CRESPIANO, *IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION* 57–58 (2007); SCHOENWALD, *supra* note 214, at 100–01.

245. *See, e.g.*, Letter from Gen. Edwin A. Walker, U.S. Army, to Senator John Stennis, U.S. Senate (Dec. 11, 1961) (on file with the Stennis Papers at Mississippi State University). Walker implored Stennis not to call him “general” and wrote:

I made the decision to give up this title and all the benefits it represents. Since I did this in order to better serve my country, I believe that it is most important that your committee and the Congress associate me fully with the pride I take in being Mr., an American citizen with full rights of citizenship.

Id.

246. *Walker Carries His Crusade to Southland*, L.A. TIMES, Jan. 11, 1962, at B1.

247. Press Release, Gen. Edwin A. Walker, U.S. Army (July 21, 1962) (on file with the Stennis Papers at Mississippi State University).

248. Press Release, Gen. Edwin A. Walker, U.S. Army (July 24, 1962) (on file with the Stennis Papers at Mississippi State University).

the Kennedy Administration's focus on special forces and counter-insurgency training was, in fact, not designed to defeat communism in far-away lands, but rather, for a more sinister preparation: to destroy anti-communist movements in the United States.²⁴⁹

Prior to his controversial activity in Germany, in 1957, Walker took command of Arkansas National Guard Forces and, in following the orders of Eisenhower and Attorney General Herbert Brownell, oversaw the integration of Little Rock High's public high schools against intense segregationist opposition.²⁵⁰ Later, Walker aligned with pro-segregation movements, believing that the civil rights movement was a communist campaign to undermine the United States.²⁵¹ Indeed, in 1959, while still on active duty, Walker lobbied Arkansas's governor, Orval Faubus, to grant an early release of men convicted of dynamiting school property.²⁵²

On April 16, 1961, *Overseas Weekly*, a privately published magazine distributed to service members stationed in Europe, reported that Walker, as a divisional commander, distributed John Birch Society materials to soldiers under his command.²⁵³ A further investigation uncovered that Walker had accused former President Harry Truman, former Secretary of State Dean Acheson, and former First Lady Eleanor Roosevelt of aiding communism.²⁵⁴ Walker also used his command position to influence soldiers to vote for conservative candidates in the 1960 elections.²⁵⁵ In doing so, he distributed lists of candidates produced by Americans for Constitutional Action, a conservative organization founded by retired Navy Admiral Ben Moreell.²⁵⁶ The *New York Times*, along with other news services, headlined Walker's activi-

249. Edwin A. Walker, *What Is Counter-Insurgency?* (Am. Eagle Pub. Co., 1962) (on file with the Stennis Papers at Mississippi State University).

250. HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 161 (1998); DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* 212–15 (2007).

251. ALAN A. STONE, *LAW, PSYCHIATRY, AND MORALITY: ESSAYS AND ANALYSIS* 25–32 (1984).

252. KAREN ANDERSON, *LITTLE ROCK: RACE AND RESISTANCE AT CENTRAL HIGH SCHOOL* 206 (2010). On the trial of one of the defendants convicted for the bombing, see, Graeme Cope, "*The Master Conspirator*" and *His Henchmen: The KKK and the Labor Day Bombings of 1959*, 76 *ARK. HIST. Q.* 49, 49–67 (2017). See also *Lauderdale v. State*, 343 S.W.2d 422 (Ark. 1961) (describing the bombing and the case of one of the defendants).

253. RANDALL BENNETT WOODS, *FULBRIGHT: A BIOGRAPHY* 287–88 (1995).

254. *Id.* Walker also accused the leading newsmen of the day, including Walter Cronkite, Eric Sevareid, and Edward R. Murrow, of being "fellow travelers." *Id.*

255. *Id.*

256. See KEN I. KERSCH, *CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM* 30–31 (2019). Moreell formed the Americans for Constitutional Action for the purpose of electing more conservatives to Congress. *Fact Sheet: Groups Rate Congress*, 26 *CONG. Q. WKLY. REP.* 915, 916 (1968).

ties.²⁵⁷ Shortly after Walker's activities were uncovered by military investigators, Secretary of Defense Robert McNamara reprimanded and removed him from command.²⁵⁸ Secretary of the Army Cyrus Vance issued a press release informing the public that the Army had administered an official admonishment to Walker for "taking injudicious actions and for making derogatory public statements about prominent Americans while in command of the 24th Infantry Division."²⁵⁹ When Congressman Frank Kowalski (D-CT) called for McNamara to remove Walker from command, conservative organizations accused Kowalski of eroding the Army's ability to resist communism.²⁶⁰

In turn, a special Senate subcommittee confronted McNamara and accused him, as well as President Kennedy, of subverting speech in the military.²⁶¹ Prior to the subcommittee meeting, Walker denounced Kennedy for allegedly hiding critical information from the Senate and because the administration was "soft" on communism.²⁶² Led by conservative, anti-civil rights senators Strom Thurmond (R-SC) and John Stennis (D-MS), the committee was ostensibly designed to determine whether the Department of Defense muzzled anti-communist speech.²⁶³ In late 1961, however, Walker assisted Stennis in shaping how the committee would pursue McNamara and others.²⁶⁴ On April 4, 1962, Walker testified that Secretary of State Dean Rusk

257. Russel Baker, *Walker Is Rebuked for Linking Public Figures to Communism: Truman and Ms. Roosevelt Were Among Targets of General in Germany*, N.Y. TIMES, June 13, 1961, at 1; *Ruckus Settles Down While Army Looks at Charges*, SANTA FE NEW MEXICAN, Apr. 24, 1961.

258. See, e.g., JAMES CLOTFELTER, *THE MILITARY IN AMERICAN POLITICS* 135 (1973).

259. Press Release, Dep't of the Army (June 12, 1961) (on file with the Stennis Papers at Mississippi State University).

260. *As Others See It: Kowalski Replies*, AMARILLO DAILY NEWS, May 19, 1961.

261. *Military Cold War Education and Speech Review Policies: Hearings Before the Special Preparedness Subcomm. of the Comm. on Armed Servs.*, 87th Cong. 1061 (1962). Present during Walker's testimony were, in addition to Stennis, Stuart Symington (D-MO), Henry Jackson (D-WA), Strom Thurmond (R-SC), Robert Bartlett (D-AK), Leverett Saltonstall (R-MA), and Margaret Chase Smith (R-ME). *Id.*

262. Donald Janson, *Walker Accuses Kennedy of 'Gag'*, N.Y. TIMES, Feb. 9, 1962, at 10.

263. JOSEPH A. CALIFANO, JR., *INSIDE A PUBLIC AND PRIVATE LIFE* 95-98 (2005); Joseph Crespino, *Strom Thurmond's Sunbelt: Rethinking Regional Politics and the Rise of the Right*, in *SUNBELT RISING: THE POLITICS OF SPACE, PLACE, AND REGION* 58-81 (Michelle Nickerson & Darren Dochuk eds., 2011).

264. See, e.g., Letter from Gen. Edwin A. Walker, U.S. Army, to Senator John Stennis, U.S. Senate (Nov. 13, 1961) (on file with the Stennis Papers at Mississippi State University); Letter from Gen. Edwin A. Walker, U.S. Army, to Senator John Stennis, U.S. Senate (Apr. 2, 1962) (on file with the Stennis Papers at Mississippi State University); Letter from Gen. Edwin A. Walker, U.S. Army, to Senator John Stennis, U.S. Senate (Oct. 6, 1961) (on file with the Stennis Papers at Mississippi State University). Each of these correspondences indicates that Walker had communicated his answers well in advance of the hearing.

and his assistant, Walt Rostow, had created a foreign policy that permitted communism's global expansion and that there were pro-communist employees in the Department of Defense.²⁶⁵

Shortly after the hearings, Walker returned to Mississippi to help prevent school integration, particularly the enrollment of James Meredith into the University of Mississippi.²⁶⁶ The Justice Department determined that Walker's activities constituted the crimes of inciting insurrection as well as resisting or impeding United States marshals in the performance of their duties.²⁶⁷ Walker encouraged white students to protest against integration as well as to block federal law enforcement from carrying out a judicial order to enable African-American students to attend the state university.²⁶⁸ Walker's involvement startled President Kennedy and his brother, Attorney General Robert Kennedy, to the point that they feared he would try to influence National Guard troops not to follow federal orders to protect the students.²⁶⁹ Attorney General Kennedy, in turn, ordered Walker arrested and held for psychiatric examination.²⁷⁰ However, Walker was deemed sane and never prosecuted.²⁷¹ He did attempt to become Texas's governor but finished last in the 1962 Democratic Party primary.²⁷² Walker later sued the Associated Press, but the Supreme Court overturned a favorable verdict in 1967.²⁷³

Walker, in fact, initiated lawsuits against the media in several state courts, bringing further national attention to his former service and post-military conduct.²⁷⁴ The lawsuits also reminded the public that General Maxwell Taylor condemned Walker and supported Attorney General Kennedy's decision to charge the general with inciting

265. *Walker Rips Rusk's Cold War Policies*, CHI. TRIB., Apr. 6, 1962, at 1.

266. CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* 334 (2009); *Walker Urges Resistance Against U.S.*, L.A. TIMES, Sept. 28, 1962, at 1.

267. *U.S. Transfers Gen. Walker to Prison Hospital*, L.A. TIMES, Oct. 2, 1962, at 1.

268. EAGLES, *supra* note 266, at 334–35.

269. See EVAN THOMAS, *ROBERT KENNEDY* 201–02 (2000).

270. *Federal Intervention in 'Ole Miss' Crisis Takes Shape in Phone Call*, WASH. POST, June 24, 1983, at A12.

271. See SCHOENWALD, *supra* note 214, at 105–06; *Psychiatric Testing Ordered for Walker*, N.Y. TIMES, Oct. 3, 1962, at 1; *Walker Wins Freedom in Ole Miss Riot Case*, L.A. TIMES, Jan. 22, 1963, at 1.

272. *See Ex General Walker Enters Texas Race for Governor*, N.Y. TIMES, Feb. 3, 1962, at 1.

273. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

274. See, e.g., *Walker v. Courier-Journal & Louisville Times Co.*, 368 F.2d 189 (6th Cir. 1966); *Walker v. Kansas City Star Co.*, 406 S.W.2d 44 (Mo. 1966).

insurrection.²⁷⁵ Importantly, Walker also created an environment in which junior officers believed it was permissible to follow suit.²⁷⁶

In 1962, Major Archibald Roberts, a Walker protégé, spoke to the Daughters of the American Revolution and accused Assistant Secretary of State G. Mennen Williams of “leftist leanings” and Los Angeles’ mayor, Sam Yorty, of being a communist.²⁷⁷ As Michigan’s governor in the 1950s, Williams pursued one of the more vigorous pro civil-rights policies in the country and he frequently denounced southern segregationists.²⁷⁸ Prior to Roberts’s speech, Williams proclaimed a new anti-colonial and anti-apartheid Africa policy with the statement, “[W]hat we want for the Africans is what they want for themselves.”²⁷⁹ Anti-civil rights leaders denounced Mennen as a pro-communist and Kennedy as naïve to support independence movements in Sub-Saharan Africa.²⁸⁰ Still, in 1964, the Court of Appeals for the District of Columbia reversed Secretary of the Army Cyrus Vance’s decision to remove Roberts from active duty to the reserves; in following the guidance in *Harmon v. Brucker*, Vance had failed to follow governing Army regulations.²⁸¹ This was therefore a continuation of *Orloff v. Willoughby*’s influence because the appellate court specifically avoided comment on whether the First Amendment’s protections shielded Roberts’s speech from the loss of position or a clearance; the decision in *Roberts* simply focused on whether the military had followed procedure.²⁸²

275. Anthony Lewis, *Mississippi Aides Blamed by U.S. Officials for Riot*, N.Y. TIMES, Oct. 2, 1962, at 1; *Walker Seized at Roadblock*, MIAMI HERALD, Oct. 1, 1962; *Walker to Be Examined at Medical Center*, SAN ANTONIO EXPRESS, Oct. 2, 1962.

276. *See, e.g.*, *Roberts v. Vance*, 343 F.2d 236, 237 (D.C. Cir. 1964). In this instance, Major Roberts had served on Walker’s staff, and, after Walker resigned from the Army, Roberts circulated literature claiming that communists in the Pentagon attempted to libel Walker. The Secretary of the Army, Cyrus Vance, ordered Roberts administratively discharged but failed to follow the Army’s internal regulations in doing so. *Id.* at 239–40.

277. Jack Raymond, *Army Is Ordered to Reinstate Major Allied with Gen. Walker; Court Invalidates Dismissal of Roberts for Forbidden Speech to D.A.R. in 1962*, N.Y. TIMES, June 19, 1964, at 11.

278. THOMAS J. NOER, *SOAPY: A BIOGRAPHY OF G. MENNEN WILLIAMS 159–64* (2006).

279. HELEN W. BERTHELOT, *WIN SOME, LOSE SOME: G. MENNEN WILLIAMS AND THE NEW DEMOCRATS 215* (1995).

280. *See, e.g.*, PETER SCHWAB, *DESIGNING WEST AFRICA: PRELUDE TO 21ST-CENTURY CALAMITY 1–3* (2004); W.H. LAWRENCE, *President Backs Williams on ‘Africa for Africans,’* N.Y. TIMES, Mar. 2, 1961, at 1.

281. *Roberts*, 343 F.2d. at 240.

282. *Id.* The appellate court, in a decision authored by Judge David Bazelon and with future Chief Justice Warren Burger in concurrence, did not specifically cite to *Harmon*. Rather, the court cited to *Vitarelli v. Seaton* and *Service v. Dulles*, which formed the basis for *Harmon*. *Id.*

In the 1970s, Walker was twice arrested and convicted for soliciting male prostitutes.²⁸³ The nation's major news sources reported when the Reagan administration restored Walker to rank and retirement, but missing from their reporting was an analysis on how the restoration might affect civil-military relations.²⁸⁴ Ironically, also missing from the reporting was that Reagan—who had the backing of religious conservatives opposed to homosexuality—restored a general to rank that had been twice convicted for same-sex lewdness, while Selden Hooper, who had not challenged the legitimacy of any president, had died without being accorded a similar dignity.²⁸⁵

B. In the Shadow of Smedley Butler: Generals Shoup, Gavin, and Ridgway

On October 1, 1931, General Smedley D. Butler retired from the United States Marine Corps.²⁸⁶ He was commissioned into the Corps in 1898 and served in the Spanish American War, the Philippine Insurrection, the Boxer Rebellion, in Central America, and in Veracruz.²⁸⁷ In the 1920s, while still on active duty, he was detached to serve as Philadelphia's public safety director and tried to enforce prohibition.²⁸⁸ During Bulter's lengthy military service, he was awarded two Medals of Honor, but President Herbert Hoover threatened him with a court-martial.²⁸⁹ Toward the end of his career, Butler publicly repeated a story that the Italian dictator, Benito Mussolini, had killed a child in an automobile accident.²⁹⁰ Hoover ordered Butler to retract his statement and apologize to Mussolini or face a court-martial.²⁹¹ Butler retracted his statement, and, although much of the public supported him over Hoover, it effectively ended his career.²⁹² After his retirement, Butler unsuccessfully ran for the Senate in Pennsylvania.

283. *Ex-Gen. Walker Arrested Again*, WASH. POST, Mar. 17, 1977, at A7; *General Walker Faces Sex Charge: Right-Wing Figure Accused in Dallas of Lewdness*, N.Y. TIMES, July 9, 1976, at 84.

284. See Warren Weaver Jr., *Pension Restored for Gen. Walker: Army Board Reinstates Rank Two Decades After He Quit in Political Controversy*, N.Y. TIMES, July 24, 1983, at 17; *Army Restores Pension to Controversial General: Walker Had Forfeited Rights by Resigning After Being Admonished in 1961*, L.A. TIMES, July 23, 1983, at A16.

285. On the Reagan Administration and homosexuality, see JEAN HARDISTY: MOBILIZING RESENTMENT: CONSERVATIVE RESURGENCE FROM THE JOHN BIRCH SOCIETY TO THE PROMISE KEEPERS 100 (1999).

286. See generally MARK STRECKER, SMEDLEY D. BUTLER, USMC: A BIOGRAPHY 3–16 (2011).

287. *Id.*

288. M. NELSON MCGEARY, GIFFORD PINCHOT: FORESTER-POLITICIAN 306–07 (1960).

289. See *id.*

290. JOHN PATRICK DIGGINS, MUSSOLINI AND FASCISM: THE VIEW FROM AMERICA 34–35 (1972).

291. *Id.*

292. See STRECKER, *supra* note 286, at 115–19.

He may be best remembered for his claim that a cabal of businessmen had plotted to overthrow President Franklin Roosevelt and his testimony as such to a House investigation.²⁹³ In 1935, he published *War Is a Racket*, a short book damning war profiteering and the greed of industrialists and bankers at the expense of common service men.²⁹⁴ While a lengthy study could be accomplished on Butler alone, it suffices to observe that he attempted to preserve a government rather than delegitimize a president. During the height of the Vietnam War, another retired Marine general followed Butler's example and, along with two decorated retired Army generals, campaigned against the United States involvement in the war, without attempting to cause a presidential change.²⁹⁵

On April 21, 1970, General David Shoup, a retired United States Marine Corps commandant, testified at an enlisted sailor's court-martial.²⁹⁶ In World War II, Shoup earned the Medal of Honor for heroism at the Battle of Tarawa. The Navy charged Roger Priest with inciting desertion, urging insubordination and disloyalty, and a general charge of disorder "to prejudice of good order and discipline in the military." Priest circulated an underground newspaper which encouraged service members to desert to Canada and was highly critical of the government.²⁹⁷ Surprisingly, Priest was assigned to the Pentagon, and he printed articles defaming the White House as well as comic characters reflecting President Richard Nixon, Secretary of Defense Melvin Laird, and Federal Bureau of Investigations Director J. Edgar Hoover as "pigs shitting on the country."²⁹⁸ News agencies across the United States contained stories about Shoup's defense of Priest.²⁹⁹ Shoup's testimony may have been helpful as the court-martial only convicted Priest of the two least egregious charges.³⁰⁰ The court-martial sentenced Priest to no jail time, though the sentence included a bad conduct discharge.³⁰¹ Perhaps, in retrospect, it appears odd that a Medal of Honor recipient, who rose to the highest rank in the Marine Corps,

293. See, e.g., *Gen. Butler Bares 'Fascist Plot' to Seize Government by Force*, N.Y. TIMES, Nov. 21, 1934, at 1; *Plot U.S. Coup: Gen. Butler: Ex-Marine Head 'Reveals' Wild Fascist Plan: 'Ridiculous' Say Men Named*, CHI. DAILY TRIB., Nov. 21, 1934, at 1.

294. SMEDLEY D. BUTLER, *WAR IS A RACKET* (1935).

295. See DAVID MILNE, *AMERICA'S RASPUTIN: WALT ROSTOW AND THE VIETNAM WAR* 210 (2008).

296. *Ex-Marine Chief Appears as Witness for Sailor*, N.Y. TIMES, Apr. 21, 1970, at 17.

297. *Priest v. Sec'y of the Navy*, 570 F.2d 1013 (D.C. Cir. 1977).

298. *Id.* For a more graphic description of Priest's conduct, see JOSHUA E. KASTENBERG, *supra* note 64, at 95-97.

299. See, e.g., *Anti-War Seaman Cleared on Appeal*, WASH. POST, Feb. 12, 1971, at B1; Sanford J. Ungar, *Gen. Shoup Will Testify for Priest*, WASH. POST, Apr. 20, 1970, at C1; *The Strange Case of General Shoup*, ABILENE REP. NEWS, Apr. 30, 1970.

300. *United States v. Priest*, 44 C.M.R. 118 (C.M.A. 1971).

301. *Priest*, 570 F.2d at 1015.

came to the aid of a sailor who denigrated the Commander-in-Chief, but Shoup had already been outspoken against the United States involvement in the Vietnam Conflict.³⁰²

On May 1, 1966, Shoup—two years removed from his date of retirement—spoke to a crowded college-aged audience in Los Angeles and insisted, “I don’t think the whole of Southeast Asia, as related to the present and future safety and freedom of the people of this country, is worth the life or limb of a single American.”³⁰³ Perhaps presaging Powell et al., Shoup also addressed racial inequality lamenting the reality that “‘created equal’ means equal at birth and death” and attacked the prevailing historic narrative with the observation: “You are taught that Columbus was the first to discover America which is as false as my grandmother’s teeth.”³⁰⁴ Shoup’s anti-war activities garnered congressional attention. In 1967, Congressman William Ryan (D-NY) interviewed Shoup on a radio program to have the general’s criticisms of President Johnson’s Vietnam policies aired to constituents.³⁰⁵

Unlike Moseley and Walker, Shoup insisted that the military’s subordination to the civil government was paramount, but he also insisted that negotiating with Ho Chi Minh was the only viable means to secure South Vietnam’s security.³⁰⁶ Shoup also stressed that one of the reasons for domestic social discord was that the youth of the United States had experienced bigotry and been taught a historic narrative based on lies, similar to President Lyndon Johnson’s broken promise of not escalating the war.³⁰⁷ On March 20, 1969, the Senate Foreign Relations Committee called Shoup to testify that, in his opinion, the United States’ security interests were not at stake in South Vietnam.³⁰⁸ Two years after his interview with Ryan, and one year prior to his testimony on behalf of Priest, Senator George McGovern

302. Bob Buzzanco, *The American Military’s Rationale Against the Vietnam War*, 101 POL. SCI. Q. 559, 561 (1986); Howard Jablon, *General David M. Shoup, U.S.M.C.: Warrior and War Protester*, 60 J. MIL. HIST. 513, 531–33 (1996).

303. 113 CONG. REC. 3974 (1967) (statement of Sen. Hartke).

304. *Id.* at 3975

305. Interview Transcript, Congressman William F. Ryan, U.S. House of Representatives, *News from Congressman William F. Ryan: Recorded Interview Between Congressman Ryan and Gen. David Shoup*, (Dec. 19, 1967) (on file with the David Shoup Collection at the Hoover Institution Archives).

306. *Shoup Says U.S. Can’t Win in South Vietnam*, TUCSON DAILY CITIZEN, Mar. 20, 1968; see Interview Transcript, Congressman William F. Ryan, *supra* note 305.

307. Interview Transcript, Congressman William F. Ryan, *supra* note 305.

308. *Present Situation in Vietnam, Hearing Before the Comm. on Foreign Relations*, 90th Cong. 1 (1968); John W. Finneyspecial, 139 in *House Support Drive for a Review of Policy in Vietnam*, N.Y. TIMES, Mar. 19, 1968, at 32. Shoup’s activities were also covered in the Australian press. See, e.g., *The Dove Generals*, SYDNEY MORNING HERALD, Mar. 6, 1968. At the time, Australia was a part of the allied coalition in Vietnam.

(D-SD) asked Shoup to proofread an antiwar speech he intended to give in the Senate.³⁰⁹ In 1972, McGovern was the Democrat candidate for president.³¹⁰

Shoup was by no means the only retired general to criticize the United States' involvement in the war. During the late 1960s, General James Gavin warned that the growing income gulf between wealthy and poor Americans, as well as the seemingly unending Vietnam Conflict, had put the United States in danger.³¹¹ Beginning in 1965, Gavin publicly warned that the escalation of force in Vietnam would cause more harm than good, and the following year, he testified to this opinion before a televised Senate investigation.³¹² Two years later, he announced to the public, in a book titled *Crisis Now*, that the United States aerial bombing campaign was not merely useless to the war effort but was also morally repugnant and a war crime.³¹³ Contemporaneous with Shoup and Gavin, General Mathew Ridgway, a retired and decorated World War II and Korean War veteran, also spoke against the United States using massive bombing to try to subdue communism in Vietnam.³¹⁴

C. The Case of John Singlaub

On May 20, 1977, the *Washington Post*, on its tenth page, described John Singlaub as an active duty general who had run afoul of the Carter administration.³¹⁵ Singlaub had recently criticized President Carter's plan at reducing the United States' military presence in South Korea.³¹⁶ Singlaub was commissioned in the Army at the start of World War II and served in the Office of Strategic Services, a forerunner of the Central Intelligence Agency. He took part in several hazardous missions and then went on to command forces in the Korean War and in Vietnam.³¹⁷ The *Post* conceded that Singlaub was a decorated combat veteran of three wars but also noted that, while sta-

309. Letter from Senator George McGovern, U.S. Senate, to Gen. David Shoup, U.S. Navy (July 2, 1969) (on file with the David Shoup Collection at the Hoover Institution Archives).

310. On McGovern's candidacy, see RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 650-77 (2008).

311. ROBERT BUZZANCO, *MASTERS OF WAR: MILITARY DISSENT & POLITICS IN THE VIETNAM ERA* 342 (1996).

312. JOSEPH A. FRY, *DEBATING VIETNAM: FULBRIGHT, STENNIS, AND THEIR SENATE HEARINGS* 35-39 (2006).

313. DAVID L. ANDERSON, *THE HUMAN TRADITION IN THE VIETNAM ERA* 166 (2000); JAMES GAVIN, *CRISIS NOW* 21 (1968).

314. BUZZANCO, *supra* note 311, at 342.

315. George C. Wilson, 'Tough, Blunt, No-Nonsense Soldier:' *John Kirk Singlaub Fought in 3 Wars, Now Embattled at Home*, WASH. POST, May 20, 1977, at A10.

316. *Id.*

317. KYLE BURKE, *REVOLUTIONARIES FOR THE RIGHT: ANTICOMMUNIST INTERNATIONALISM AND PARAMILITARY WARFARE IN THE COLD WAR* 92-93 (2018).

tioned in Germany in 1961 as a lieutenant colonel, he had become an admirer of Edwin Walker and had personally met with Walker to expand the general's political training program to his own forces.³¹⁸ This established a link from Moseley to Walker to Singlaub.

On April 28, 1979, the *Washington Post*, *New York Times*, and *Los Angeles Times* all informed the nation on Singlaub's retirement.³¹⁹ Republican political leaders condemned Carter over Singlaub's removal from the Korean command. Former California governor and presidential aspirant Ronald Reagan called Carter's actions "disgraceful" and "petulan[t]."³²⁰ On learning of Singlaub's retirement, Senator Barry Goldwater (R-AZ), a 1964 presidential candidate, issued a press release stating: "The wrong man resigned today. . . . President Carter has yet to come up with a military or foreign policy decision that makes sense."³²¹ Senator Robert Dole (R-KS), a former vice presidential candidate who challenged Clinton for the presidency in 1996, called Carter's removal of Singlaub a "'glaring' and 'rather thin-skinned' over-reaction to criticism of his foreign policy."³²²

Because Singlaub himself was politically outspoken while on active duty, and congressional conservatives used his service as a means to attack Carter's foreign policies, it should not have been surprising that he would engage in controversial political conduct throughout his retirement. He joined with Congressman Larry McDonald's (D-GA) Western Goals Foundation, a private anti-communist organization that spied on United States citizens.³²³ Although Singlaub never openly expressed anti-civil rights beliefs, McDonald frequently had done so.³²⁴

318. Wilson, *supra* note 315.

319. George C. Wilson, *Gen. Singlaub Agrees to Retire After 2nd Attack on Carter Policy*, WASH. POST, Apr. 29, 1978, at A1; *General Who Blasted Carter Agrees to Retire: Singlaub Summoned to Pentagon*, L.A. TIMES, Apr. 28, 1978, at A1; *General Who Attacked Carter Agrees to Retire: Singlaub Hit Policies in Korea and on Neutron Bomb*, N.Y. TIMES, June 1, 1978, at 8.

320. Warren Brown, *Reagan: Carter's Handling of General Is 'Disgraceful'*, WASH. POST, May 23, 1977, at A3.

321. Press Release, Senator Barry Goldwater, U.S. Senate (April 28, 1978) (on file with the Barry Goldwater Papers at Arizona State University).

322. Press Release, Senator Robert Dole, U.S. Senate (May 27, 1977) (on file with the Robert Dole Papers at the University of Kansas).

323. See FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 286–87 (1992); TIMOTHY J. MINCHIN & JOHN A. SALMOND, AFTER THE DREAM: BLACK AND WHITE SOUTHERNERS SINCE 1965, at 208 (2011) (describing McDonald's act of introducing an impeachment measure to the House against a federal judge who ordered a school system to be desegregated).

324. See, e.g., Zach Dorfman, *The Congressman Who Created His Own Deep State. Really*, POLITICO (Dec. 2, 2018), <https://www.politico.com/magazine/story/2018/12/02/larry-mcdonald-communists-deep-state-222726> [https://perma.unl.edu/U72J-84EY].

Singlaub also became the head of the World Anti-Communist League and associated with other anti-communist organizations such as the John Birch Society.³²⁵ In doing so, he raised money to support Nicaraguan rebel forces trying to topple the Ortega government, as well as other right-wing, anti-communist movements across the globe.³²⁶ Singlaub's involvement in the Iran-Contra Scandal became well known through a series of investigations and news reporting.³²⁷ Although Singlaub was not alleged to have broken any laws, he associated with a cause in which Reagan Administration officials were indicted and convicted for doing so.³²⁸

V. CONCLUSION: DONALD TRUMP AND THE JUNE CRISIS OF 2020

On June 2, 2020, in the midst of nation-wide demonstrations demanding social justice and with sporadic violence occurring, President Donald Trump threatened to use the active duty military as a police force.³²⁹ One day earlier, federal and city law enforcement, including the National Guard, were ordered to "clear" Lafayette Park in Washington D.C. in order for the President to walk to the church on the other side of the park. At the time, none of the visible protesters were engaged in violent acts, but several of the protesters were still seriously injured by unknown law enforcement or National Guard soldiers. Astoundingly, on July 9, 2020, Secretary of Defense Mark Esper and Chairman of the Joint Chiefs of Staff Mark Milley testified to the House Armed Services Committee that they did not know who issued the order to clear the park of protesters for the president's benefit.³³⁰

In 1967, President Lyndon Johnson authorized the use of federal military forces to curtail rioting in Detroit at the request of Michigan Governor, George Romney.³³¹ In 1992, President George H.W. Bush

325. Doyle McManus, *Rightest Crusade Finds Its Way into Spotlight*, L.A. TIMES, Sept. 16, 1985, at 4.

326. See, e.g., 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTER 1-4, 234 (1993).

327. See, e.g., *Ex-General Tells of Nicaragua Role*, N.Y. TIMES, Aug. 10, 1985, at 3.

328. See, e.g., *United States v. North*, Criminal No. 88-0080-02-GAG, 1989 U.S. Dist. LEXIS 4392, at *1 (D.D.C. Apr. 5, 1989).

329. Kevin Lintak & Sarah Westwood, *Trump Threatens Military Force if Violence in States Isn't Stopped*, CNN (June 2, 2020, 6:10 AM), <https://www.cnn.com/2020/06/01/politics/donald-trump-national-address-race/index.html> [https://perma.unl.edu/9DY8-A4RK].

330. For the actual testimony of Secretary Esper and General Milley, see PBS NewsHour, *WATCH: Pentagon Leaders Testify on Military's Role in Civilian Law Enforcement*, YOUTUBE (July 9, 2020), <https://www.youtube.com/watch?v=14-uzbgwC5w> [https://perma.unl.edu/7Q5E-2TH8].

331. JOSEPH A. CALIFANO, JR., *THE TRIUMPH AND TRAGEDY OF LYNDON JOHNSON: THE WHITE HOUSE YEARS 212-13* (1991). For Johnson's rationale, see Lyndon B. John-

approved the use of the Army and Marine Corps to curtail rioting in Los Angeles.³³² In both instances, state governors sought presidential assistance, but in June of 2020, President Trump threatened to preempt governors and order the active duty military to enforce curfews, conduct arrests, and perhaps fire weapons on citizens.³³³

When, in 2016, Trump campaigned for the presidency, there was a significant question involving his exemption from the Vietnam-era draft.³³⁴ Like President Clinton and President Grover Cleveland,³³⁵ President Trump avoided military service during a time of widespread conscription. As in the case of Cleveland, however, his tenure as Commander-in-Chief has proved controversial—among myriad of reasons—because of his threat to use the military as a domestic police force. Cleveland ordered the Army to safeguard federal interests during the 1894 Pullman Strikes in order to protect federal governmental operations, and the Army was instrumental in suppressing the strike.³³⁶ But, in contrast to Trump, Cleveland served as Commander-in-Chief over a comparatively small army.

Prior to June, 2020, Trump undertook several actions that politicized the military to a degree reminiscent of the type of an armed force Moseley and Walker, if not Wedemeyer, Fellers, and Willoughby, sought. Two events contextualize Trump's actions and the importance of the responses of Powell et al. On April 22, 2020, the Department of Defense noted that retired Brigadier General Anthony Tata would be appointed as Undersecretary of Defense for Policy (USDP).³³⁷ The USDP is the eighth-most senior position in the military establishment and is responsible for duties as assigned by the secretary of defense as

son, *Remarks to the Nation After Authorizing the Use of Federal Troops in Detroit*, AM. PRESIDENCY PROJECT (July 24, 1967) (Gerhard Peters & John T. Woolley eds. 2017), <https://perma.unl.edu/2SEV-2AWS>. See also Sidney Fine, *Rioters and Judges: The Response of the Criminal Justice System to the Detroit Riot of 1967*, 33 WAYNE L. REV. 1723 (1987) (describing the riot and the response).

332. President George H.W. Bush, Address to the Nation on the Civil Disturbances in Los Angeles, California (May 1, 1992), in 1 PUB. PAPERS 685 (1992), <https://www.govinfo.gov/content/pkg/PPP-1992-book1/pdf/PPP-1992-book1-doc-pg685.pdf> [<https://perma.unl.edu/WF8T-XKBX>].

333. *Trump Says He's 'President of Law and Order,' Declares Aggressive Action on Violent Protests*, CBS NEWS (June 2, 2020, 12:15 PM), <https://www.cbsnews.com/news/trump-protest-president-law-and-order/> [<https://perma.unl.edu/4FVK-RVLM>].

334. See, e.g., *Morning Spin: Duckworth Explains 'Cadet Bone Spurs' Nickname for Trump*, CHI. TRIB. (Feb. 15, 2018, 11:10 AM), <https://www.chicagotribune.com/politics/ct-donald-trump-tammy-duckworth-20180215-story.html>.

335. HENRY F. GRAFF, GROVER CLEVELAND 14 (Arthur M. Schlesinger, Jr. ed, 2002).

336. HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR 289–92 (2007).

337. Gordon Lubold, *Generals Pull Support for Pentagon Nominee Tata Over Offensive Tweets*, WALL STREET J., June 18, 2020.

well as the integration of policy across the military.³³⁸ Following his retirement, Tata had been an outspoken critic of President Barack Obama to the point where he challenged the constitutional efficacy of the presidency and conveyed racist statements in electronic messaging and on Fox News in a manner similar to Moseley, Almond, Wedemeyer, Walker, and Willoughby.³³⁹ Yet as of August 1, 2020, the Trump Administration had not rescinded Tata's nomination.³⁴⁰ Indeed, on July 20, 2020, the Trump Administration announced Richard Higgins to serve as Tata's chief of staff should Tata be confirmed by the Senate.³⁴¹ Higgins, like Tata, has issued racially divisive statements, including an accusation that Black Lives Matter is an agent of China.³⁴² Tata's nomination, and the consideration of Higgins, is troubling for another, albeit related, reason. On May 30, 2019, the United States Government Accountability Office determined that minorities in the military were far more likely to be court-martialed for common offenses than white service members.³⁴³ Thus, President Trump nominated a person for a senior level policy position who evidenced a counter-commitment to equality and may have very well contributed to a military climate favoring inequality.

On October 28, 2019, Lieutenant Colonel Alexander Vindman testified to closed sessions of the House Intelligence, Foreign Affairs, and Oversight Committees regarding his knowledge on President Trump's activities in Ukraine.³⁴⁴ The House exercised its subpoena power to compel Vindman's testimony, though if Vindman had sought to testify independent of a subpoena, the Court has recognized that service

338. 10 U.S.C. § 134 (2006).

339. Helene Cooper & Eric Schmitt, *Defense Secretary Faces White House Pressure on Aides and a Military Promotion*, N.Y. TIMES, June 26, 2020, at A20; Em Steck et al., *Top Pentagon Policy Nominee Has a History of Islamophobic and Offensive Comments*, CNN (June 12, 2020, 4:54 PM), <https://www.cnn.com/2020/06/12/politics/pentagon-nominee-tata-trump-kfile/index.html> [https://perma.unl.edu/Y652-RVNP].

340. Cooper & Schmitt, *supra* note 339; Missy Ryan et al., *White House Intensifies Effort to Install Pentagon Personnel Seen as Loyal to Trump*, WASH. POST, June 25, 2020.

341. *See e.g.*, Em Steck et al., *The White House Is Pushing a Conspiracy Theorist Fired from the NSC for a Top Pentagon Position*, CNN (July 20, 2020, 3:15 PM), <https://www.cnn.com/2020/07/20/politics/rich-higgins-conspiracy-theorist-kfile/index.html> [https://perma.unl.edu/KY4C-JJ3G].

342. *Id.*

343. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-344, REPORT TO THE COMMITTEE ON ARMED SERVICES, HOUSE OF REPRESENTATIVES: MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES (2019). The GAO determined that "Black and Hispanic service members were more likely than White service members to be the subjects of recorded investigations in all military services, and were more likely to be tried in general and special court-martial . . ." *Id.* at 13.

344. *See, e.g.*, Micheal D. Shear, *Vindman and Williams: What We Learned from Their Testimony*, N.Y. TIMES, Nov. 20, 2019, at A20.

members do not lose the constitutional right to petition Congress.³⁴⁵ In response, President Trump announced he “fired” Vindman, and it became likely that Vindman’s opportunity for military career advancement—along with that of his brother who is also in the Army—was curtailed because of White House retaliation.³⁴⁶ Moreover, more than one of President Trump’s congressional allies alleged that Vindman was disloyal to the United States because of his foreign birth.³⁴⁷ President Trump likewise alluded that Vindman was disloyal to the United States.³⁴⁸

Added to this list could also be the pardons and commutations of Caucasian service members who had been convicted of “war crime” type offenses.³⁴⁹ At least one prominent military law scholar has warned that the administration’s conduct in politicizing the military and the abandonment of a commitment to hold service members who commit war crimes accountable will prove deleterious to military discipline.³⁵⁰ And, in 2018, when incumbent Congressman Duncan Hunter, Jr. (R-CA) sought reelection and alleged that his Democrat opponent, who happened to be of Palestinian descent but had served in the federal government, was a terrorist, three retired United States Marine Corps generals joined with Hunter.³⁵¹ Yet, the White House did not issue any condemnation of Hunter or the generals, but instead, supported his efforts.³⁵²

345. See, e.g., *Brown v. Glines*, 444 U.S. 348 (1980). In *Brown*, the Court upheld a regulation requiring approval to circulate petitions on base for signatures to send to Congress but reaffirmed that service members, like all citizens, have the right to petition Congress. *Id.* at 350.

346. Eric Schmitt, *Promotion in Jeopardy for Army Officer Who Challenged Trump on Ukraine*, N.Y. TIMES, June 19, 2020, at A15.

347. Noah Weiland, *Impeachment Briefing: How Republicans Are Using Hearings*, N.Y. TIMES, Nov. 22, 2019.

348. Morgan Chalfont, *Trump Says He Wants Officials Who Are ‘Loyal to Our Country’*, HILL (Feb. 25, 2020), <https://thehill.com/homenews/administration/484494-trump-says-he-wants-officials-who-are-loyal-to-our-country> [<https://perma.unl.edu/78TF-8HK3>].

349. See, e.g., Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES, Nov. 16, 2019, at A1.

350. See Dave Phillipps, *Trump’s Pardons for Servicemen Raise Fears That Laws of War Are History*, N.Y. TIMES, Nov. 17, 2019, at A22 (specifically relevant is the statement of Professor Rachel VanLandingham).

351. See, e.g., Charles T. Clark, *Three Retired Generals Join Rep. Hunter’s Attack on Challenger*, SAN DIEGO UNION-TRIB., Oct. 15, 2018. The generals are Terry Paul, Randall West, and T.L. Corwin.

352. See Jake Lahut, *Duncan Hunter, An Early Trump Supporter Who Vaped in a Congressional Hearing, Gets 11 Months in Prison*, BUS. INSIDER (Mar. 17, 2020, 12:53 PM), <https://www.businessinsider.com/duncan-hunter-early-trump-supporter-gets-11-months-in-prison-2020-3> [<https://perma.unl.edu/T7G3-GDMG>]; Katie Rogers & Katie Benner, *Trump Blasts Sessions for Charging G.O.P. Members Before Midterms*, N.Y. TIMES (Sep. 3, 2018), <https://www.nytimes.com/2018/>

Samuel Huntington observed, in citing to long-time journalist Walter Lippman, that “a schism between the generals of the Republican Party and the generals of the Democratic Party would be ‘an almost intolerable thing’ in the Republic.”³⁵³ Huntington also warned that “[a] political officer corps, rent with faction, subordinated to ulterior ends, lacking prestige but sensitive to the appeals of popularity, would endanger the security of the state.”³⁵⁴ From the beginning of his presidency, President Trump has referred to certain of the military’s senior commanders as “my generals.”³⁵⁵ This statement ignored the fact that generals and admirals—as with all officers—swear an oath to the Constitution rather than a president. This is hardly the model of leadership a professional and apolitical military aspires to, if, for no other reason, then it loses the trust of the nation.

Thus, following President Trump’s—along with Attorney General Barr, General Milley, and Secretary of Defense Esper’s—sojourn to the St. John’s Episcopal Church, the Powell et al. responses were articulated in a manner reflective of David Shoup and were within the acceptable *lex non scripta* parameters of civil-military relations of the United States. In other words, the conduct of Powell, McRaven, Mullen, Allen, Dempsey, Hayden, and Mattis was far distant from that of Walker or Moseley. In contrast, President Trump’s apparent vision for, and use of, the military was not only suggestive of a presidentially desired politicized military, but one in which future generals may side with causes such as Moseley and Walker because Trump enabled this to occur. Thus, what Powell et al. accomplished was a powerful reminder to the current military, if not Congress and the citizenry—the military has a constitutional duty to conform within its limited domestic role and thereby exist as a guardian of the nation but not as a means for enabling a president and his advisors to use the military as a step toward tyranny.

09/03/us/politics/trump-sessions-midterms.html?searchResultPosition=1 [https://perma.unl.edu/LU9S-FHWX].

353. HUNTINGTON, *supra* note 35, at 460.

354. *Id.* at 464.

355. Mark Abadi, *Trump Won’t Stop Saying ‘My Generals’ — and the Military Community Isn’t Happy*, BUS. INSIDER (Oct 26, 2017, 12:24 AM), <https://www.businessinsider.in/Trump-wont-stop-saying-my-generals-and-the-military-community-isnt-happy/articleshow/61231471.cms> [https://perma.unl.edu/RWB5-LYS4].