

Article

GENERAL LUDENDORFF’S GHOST: INSURRECTION, ACCOUNTABILITY AND THE RETIRED GENERALS IN MILITARY LAW, A NATIONAL SECURITY IMPERATIVE IN THE AFTERMATH OF DONALD TRUMP AND JANUARY 6, 2021

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INTRODUCTION.....	138
I. Erich Ludendorff: Lessons from a Republic Destroyed	146
II. The Dangers of Michael Flynn and the Enabling Sources	154
A. The Conduct of Retired General Michael Flynn	157
B. General Thomas McInerney	161
C. Brigadier General Anthony Tata	163
D. The Military Establishment, Congress, and the Civil-Military Relations Field	165
III. Military Law and the Retiree.....	169
A. The Law and the History of Retiree Recall to Duty	171
B. Sedition in Military Law	174
C. Conduct Unbecoming an Officer and Gentleman.....	176
D. The Framers’ Intent: Restrictive Application of Military Law Favors Recall to Duty.....	178
CONCLUSION.....	181

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INTRODUCTION

In the midst of a seemingly unrelenting election challenge in which the incumbent president, Donald Trump, refused to concede until after January 6, 2021, one of his key allies, retired General Michael Flynn, championed the cause of a far-right white supremacist group, self-titled as the “Proud Boys.” Flynn also encouraged an amalgam of peoples, including other veterans and currently serving military personnel, to delegitimize the administration of incoming president, Joseph Biden.¹ Although Flynn did not take a direct role in the physical attempt to seize the Capitol building and disrupt the constitutional certification process, he goaded the demonstrators to act prior to the insurrection who took part in it.² And he did so after Trump’s reelection efforts failed in both state appellate courts as well as Article III courts, including the United States Supreme Court.³

The term “insurrection” denotes that no less than the Chairman of the Joint Chiefs of Staff, General Mark Miley, and the other chiefs of staff labeled the event an insurrection and used the term “seditious” to describe the January 6 assault.⁴ The Proud Boys and other white nationalist organizations sought the continuation of Trump’s presidency at the cost of suspending the constitutional rights of the nation’s populace, by harming the legislative branch, and in Flynn’s own words, forcing a declaration of martial law and the administration of ballot counting by the United States military.⁵ Flynn,

¹ See, e.g., Ashraf Khalil, *Four People Stabbed and at Least 23 Arrested at Pro-Trump Rally in DC*, TIME MAGAZINE, Dec. 13, 2020; see also Ashraf Khalil, *Multiple People Stabbed after Thousands Gather for Pro-Trump Demonstrations in Washington*, ASSOCIATED PRESS (Dec. 13, 2020), <https://why.org/articles/multiple-people-stabbed-after-pro-trump-demonstrations-in-d-c/>; see also Jonathan Landay, *Pro-Trump protests decry president’s election loss, opposing groups clash in Washington*, REUTERS (Dec. 12, 2020), <https://www.reuters.com/article/us-usa-election-protests/pro-trump-protests-decry-presidents-election-loss-opposing-groups-clash-in-washington-idUSKBN28M0E5>; see also Hailey Fuchs, *As Bids to Overturn Vote Fail, Trump Supporters at Protests Stick With Him*, N.Y. TIMES (Dec. 12, 2020), <https://news.abc-cbn.com/overseas/12/13/20/as-bids-to-overturn-vote-fail-trump-supporters-at-protests-stick-with-him>.

² See, e.g., *Our President Wants Us Here: The Mob that Stormed the Capitol*, N.Y. TIMES (Jan. 2, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html>; see also Will Seakin, *Longtime Trump Advisors Connected to Groups behind Rally that Led to Capitol Attack*, ABC NEWS (Jan. 15, 2021), <https://abcnews.go.com/US/longtime-trump-advisers-connected-groups-rally-led-capitol/story?id=75261028>.

³ See, e.g., *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020); see also *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 U.S. Dist. LEXIS 231093 (D. Ariz. Dec. 9, 2020); see also *Trump v. Biden*, 951 N.W.2d 568 (Wis. Sup. Ct. Dec. 14, 2020); see also *Trump v. Wis. Elections Comm’n*, 983 F.3d 919 (7th Cir. 2020); see also *Donald J. Trump For President, Inc. v. Sec’y Pennsylvania*, 830 Fed. Appx. 377 (3d Cir. 2020); see also *Donald J. Trump For President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

⁴ See JCS, Message to the Joint Force, January 12, 2021. The functions and authorities of the Chairman of the Joint Chiefs of Staff include a role as the principle military advisor to the president and advising Congress. See 10 U.S.C. § 151 et seq.

⁵ See, e.g., Michael Wines, *Here are the Threats Terrorizing Election Workers*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/12/03/us/election-officials-threats-trump.html>. On February 3, 2020, the Canadian Government designated the “Proud Boys” as a terrorist organization under Canadian law. See, e.g., Ian Austen, *Canada Formally Declares Proud Boys to be a Terrorist Group*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/world/canada/canada-proud-boys-terror-group.html>.

moreover, is also aligned with QAnon, a conspiracy driven network which is designed to undermine the government.⁶ An analogous act has occurred once before. In a two-year period beginning in 1921, retired General Erich Ludendorff, an influential veteran of the former Imperial German Army, participated in two militaristic right-wing revolts against the nascent Weimar Republic in Germany—the successor to the Imperial German Government after World War I—and he was an important contributor to Adolf Hitler's early rise to power.⁷

There are similarities between Flynn, and a number of his retired flag officer peers, including Generals Thomas McInerney and Anthony Tata in our times, and Ludendorf (the term “flag officer” denotes generals and admirals). For instance, McInerney, a former United States Air Force vice chief of staff and FOX news contributor, recently claimed that the Central Intelligence Agency operated a network in Germany to assure Joseph Biden's presidency; that United States military personnel were killed trying to seize voting machines on foreign soil; and, that the election results were fraudulent.⁸ He once accused President Barack Obama of treason, and insisted that Senator John McCain aided his North Vietnamese captors.⁹ Like Flynn, McInerney has argued the necessity of martial law.¹⁰ Tata, a Trump appointee to a senior position in the Department of Defense and who never obtained Senate confirmation, has articulated multiple conspiracy theories about Obama's administration as well as espoused anti-Islamic rhetoric. Ludendorff, as examined below, was conspiratorially anti-Semitic and attacked the efficacy of Germany's republican government.¹¹

United States Supreme Court Justice Neil Gorsuch presciently observed in his recent, *A Republic If You Can Keep It*, “our founders knew that the surest protections of human freedom and the rule of law come not from

⁶ Adrienne LaFrance, *The Prophecies of Q American Conspiracy Theories are Entering a Dangerous New Phase*, ATLANTIC (May 15, 2020), <https://www.theatlantic.com/magazine/archive/2020/06/qanon-nothing-can-stop-what-is-coming/610567/>; Fruzina Eordogh, *With Pizzagate, Is Cybersteria The New Normal?*, FORBES (Dec. 7, 2016), <https://www.forbes.com/sites/fruzinaeordogh/2016/12/07/with-pizzagate-is-cybersteria-the-new-normal/?sh=26dd3d602b68>; Matthew Choi, *Twitter disables Michael Flynn, Sidney Powell accounts for spreading QAnon Content*, POLITICO (Jan. 9, 2021), <https://www.politico.com/news/2021/01/08/twitter-michael-flynn-sidney-powell-456660>.

⁷ On Ludendorff's early estrangement from the post-World War I German Government and his role in the rise of Nazism, see Wilhelm Deist, *The Military Collapse of the German Empire: The Reality Behind the Stab-in-the-Back Myth*, 3 WAR IN HIST. 186, 205–07 (1996).

⁸ On McInerney, see Howard Altman, *This Retired three-star falsely claims U.S. Soldiers Died attacking a CIA Facility in Germany Tied to Election Fraud*, MIL. TIMES (Dec. 1, 2020), <https://www.militarytimes.com/news/your-army/2020/12/01/this-retired-three-star-falsely-claims-us-soldiers-died-attacking-a-cia-facility-in-germany-tied-to-election-fraud/>. On Tata, see Em Steck, *Top Pentagon Policy Nominee Has a History of Islamophobic and Offensive Comments*, CNN (June 12, 2020), <https://www.cnn.com/2020/06/12/politics/pentagon-nominee-tata-trump-kfile/index.html>.

⁹ Camille Caldera, *Fact Check: No Soldiers Died in Nonexistent Raid to Seize Election Servers in Germany*, USA TODAY, Dec. 5, 2020.

¹⁰ *Id.*

¹¹ IAN KERSHAW, HITLER 1889–1936: HUBRIS 262 (1999). Professor Kershaw notes that Ludendorff became virulently anti-Catholic as well. *Id.*

written assurances of liberty, but from sound structures.”¹² One “sound structure,” as the Court earlier articulated in *Greer v. Spock*, is that an apolitical military under civilian control is a constitutional tradition.¹³ The ability of the Department of Defense to exert the jurisdiction of the Uniform Code of Military Justice (UCMJ) over Flynn and other retired flag officers is another such a “sound structure” and must be utilized to maintain the national security. And, it is up to the command authorities to make this recall and investigation for trial by court-martial possible, as long as the court-martial meets due process standards.¹⁴ Moreover, a court-martial which sentences officers to a dismissal, the equivalent of a dishonorable discharge, essentially results in the forfeiture of all retirement benefits whereas a federal conviction may not do so.¹⁵ Thus, a court-martial is the only lawful means to divest retired flag officers who undermine the government through severe criminal actions, of their military status.

People might dismiss Flynn, McNerney, Tata, and others as “crackpots” without a sizeable audience other than the president, his administration, and core-followers on the eve of the administration’s dissolution, but, as retired military officers, they can influence the rank and file of the military well into the Biden administration, and beyond. The law authorizing a recall of retirees in receipt of retirement pay to active duty exists in case of a national emergency overcoming the nation’s ability to confront an enemy or law enforcement incapable of terminating an insurrection.¹⁶ Since 2015, the military appellate courts have upheld retiree jurisdiction in four instances.¹⁷ As examined below, these decisions are consistent with a century of prior federal and military appellate court precedent. Although in *Larrabee v. Braithwaite*,

¹² NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 8–9 (2019).

¹³ *Greer v. Spock*, 424 U.S. 828, 839 (1976).

¹⁴ The military justice system is based on military commanders deciding to proceed to a court-martial with the advice of lawyers. See, e.g., Rachel Vanlandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards Symposium: Sexual Assault: Military Justice, Culture, and Expectations*, 11 OHIO ST. J. CRIM. L. 389 (2015); see also Rachel Vanlandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society Symposium Issue: Discipline, Justice, and Command, in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*, 50 NEW ENGLAND L. REV. 21, 23–24 (2015).

¹⁵ 10 U.S.C. § 12740; see also *In re Haynes*, 679 F.2d 718, 719 (7th Cir. 1982).

¹⁶ See, e.g., U.S. Dep’t of Defense, Dir. 1352.1, Management and Mobilization of Regular and Reserve Retired Military Members (Mar. 2, 1990) (citing 10 U.S.C. §§ 672, 688). On the ability of the Secretary of Defense to recall retirees to service, see 10 U.S.C. § 688 et seq. While there is a question as to whether retiree jurisdiction should exist at all, this Article does not delve into this question. See, e.g., Rachel E. VanLandingham, *When Military Justice is Injustice*, HILL (Dec. 20, 2018), <https://thehill.com/blogs/congress-blog/judicial/422318-when-military-justice-is-injustice>; see also Rachel E. VanLandingham, *The First Amendment in Camouflage: Rethinking Why We Criminalize Military Speech*, 80 OHIO ST. L. J. 73, 124 n. 299 (2019) (arguing that certain military speech crimes such as Article 88, while constitutional if prosecuted against active-duty members, are unconstitutional with respect to military retirees).

¹⁷ See, e.g., *United States v. Hennis*, 75 M.J. 796 (A. Ct. Crim. App. 2016), *aff’d*, 79 M.J. 370 (C.A.A.F. 2020); *United States v. Begani*, 79 M.J. 767 (N–M Crim. App. 2020); *United States v. Ballard*, 79 M.J. 675 (A.F. Crim. App. 2019). On past decisions upholding jurisdiction over military retirees, see *Hooper v. United States*, 326 F.2d 982, 987–88 (Ct. Cl. 1964), cert. denied, 377 U.S. 977 (1964). See also *United States v. Tyler*, 105 U.S. 244, 245 (1881).

a recent United States District Court order, a federal judge determined to the contrary as to a specific appellant, the court's order was suggestive that in instances where a military nexus existed, jurisdiction over retirees would be permissible.¹⁸ A reasonable question, then, is not merely whether Flynn and the others are worthy of being recalled to assume a position of military responsibility should an emergency arise, but rather, whether they should be recalled to duty for the purpose of military discipline as lawfully permissible. Because their offenses were of a military nature, the answer is that the military law—that is the court-martial process—must be the primary means of holding the three actors criminally liable.

This article is divided into three sections with several subparts to it each. Section I provides an analysis on the impact of Erich Ludendorff, an influential if not “heroic” retired general of the Imperial German Army who contributed to the rise of Nazism (although the early party was initially referred to as the Nationalsozialistische Deutsche Arbeiterpartei, or NSDAP, this article uses the term Nazi). This section also briefly touches on France's response to an attempted coup in 1962, which included the use of military trials. Section II presents Flynn's conduct, as well as that of McInerney and Tata. This section also includes an analysis of the conduct of certain members of Congress as well as the disconcerting quiet of leading civil-military relations experts and prominent pundits on that subject, and how both may have enabled Flynn and others. Section III provides the legal framework for recalling retired officers to duty for the purpose of a court-martial. It also suggests that sedition and conduct unbecoming an officer are appropriate charges to consider. Although there may be evidence of other crimes that the three retired flag officers have committed, this article concentrates on the military definition of sedition as well as conduct unbecoming an officer and gentleman (hereafter conduct unbecoming), because of the specific military nature of both crimes.¹⁹

There are five additional points of importance before turning to the example of Weimar Germany and Ludendorff. First, nothing in this article should be interpreted as presuming the guilt, beyond a reasonable doubt, of Flynn, McInerney, or Tata, or a demand for a specific sentence.²⁰ Moreover, at present, there is a significant constitutional challenge to the continuation

¹⁸ *Larrabee v. Braithwaite*, No. 19-654, 2020 WL 6822706 (D.D.C. 2020). Since this time, however, *Larrabee* has resulted in a published order. *See Larrabee v. Braithwaite*, 502 F. Supp.3d 322 (D.D.C. 2020).

¹⁹ For the federal offense of seditious conspiracy, see 18 U.S.C. § 2384. The elements of this offense are (1) a conspiracy, (2) to either (a) oppose by force the authority of the United States government or (b) prevent, hinder, or delay the execution of any law of the United States. *Id.* This charge has been held constitutional. *See, e.g., United States v. Rodriguez*, 803 F.2d 318 (7th Cir.1986).

²⁰ *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002). A court-martial must be free from unlawful command influence as it negates the prosecution's burden of proof beyond a reasonable doubt. *See United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). It should also be noted that service-members facing a court-martial have broader discovery rights than in federal trials. *See, e.g., United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986).

of military jurisdiction over retired officers and enlisted service-members.²¹ As an important caveat to this article, I believe that the Constitution's Framers' would have doubted the efficacy of the present legal scheme enabling retirement jurisdiction, but this article is premised on the courts maintaining such jurisdiction. That said, even without exploring German military history, all three of the retired flag officers who are the subject of this article have been placed on notice as to the potential unlawfulness of their conduct.

On September 11, 1986, Secretary of Defense Caspar Weinberger reported to the public that the Department of Defense had banned "active participation" in hate groups.²² During the previous year, the military had been confronted with the fact that some of its members had taken an active role in the Ku Klux Klan and other right-wing white supremacist organizations.²³ In *Middendorf v. Henry*, Justice Lewis Powell, a World War II veteran, drafted a concurrence in which he recognized that persons subject to the UCMJ do not surrender their constitutional rights, but these rights are conditioned in light of the "unique military exigencies" that necessarily govern many aspects of military service.²⁴

Military trials of service-members begin with an investigation, followed by a referral of charges by an officer who has made some examination of the accused service-member's misconduct, and believes there is evidence that an offense exists.²⁵ A fuller investigation differing substantially, but akin to a grand jury, will examine the charges including the military's jurisdiction and whatever defenses may exist.²⁶ The officer accused of crimes under the UCMJ is afforded the opportunity to contest evidence and present legal arguments at this pretrial hearing.²⁷ The pretrial hearing authority advises a high-ranking commanding officer on all legal and evidentiary matters related to the charges, and the accused officer is entitled to rebut this advice to the commanding officer.²⁸ Under the UCMJ, the commanding officer also is

²¹ See *Larrabee v. Braithwaite*, No. 19-654, 2020 WL 6822706 (D.D.C. 2020), *appeal docketed sub nom.* *Larrabee v. Harker*, No. 21-5012 (D.C. Cir. 2021).

²² See *Military Forbids Active Role of Soldiers in Hate Groups*, N.Y. TIMES, Sept. 12, 1986, at A25.

²³ See, e.g., *Military Personnel in Racist Rallies*, PITTSBURGH COURIER, May 3, 1986; *ACLU Criticizes Pentagon "Hate Group" Policy*, N.Y. TIMES, Oct. 30, 1986, at A23.

²⁴ *Middendorf v. Henry*, 425 U.S. 25, 49 (1976) (Powell J., Concurring). On Powell's military service, see JOHN CALVIN JEFFRIES, JUSTICE LEWIS POWELL, JR. 29-45 (2002).

²⁵ See Manual for Courts-Martial Rules for Courts-Martial (RCM) 307, II-28 (2016). In instances where an officer or other convening authority prefers charges against an accused service-member under coercion or a lack of belief in the truth of charges, the court-martial is deprived of jurisdiction. See, e.g., *Frage v. Moriarty*, 27 M.J. 341 (C.M.A. 1988); *United States v. Goodman*, 31 C.M.R. 397 (N.B.R. 1961); see also *United States v. Bolton*, 3 C.M.R. 374 (A.B.R. 1951), *pet. denied*, 3 C.M.R. 150 (C.M.A. 1952). A defective referral is not waived if it is discovered after trial. See *United States v. Miller*, 31 M.J. 798, 801 (A.F.C.M.R. 1990).

²⁶ See, e.g., 10 U.S.C.S. § 832. During the pretrial investigation, the accused service-member has a right to counsel. See, e.g., *United States v. Wimberley*, 36 C.M.R. 159 (U.S. C.M.A. 1966). Moreover, the pretrial investigation cannot, unlike a grand jury, be sealed from the press or public in most circumstances. *Id.*

²⁷ 10 U.S.C.S. § 832 (d)(4) (2019).

²⁸ *United States v. Youngman*, 48 M.J. 123, 128 (C.A.A.F. 1998).

required to adhere to the advice of her or his own legal counsel, and when the legal counsel—known as a staff judge advocate recommends not proceeding to trial—the commanding officer is bound by that advice.²⁹ The commanding officer then determines whether to refer the charges to a general court-martial where most of the same rights that a citizen possesses apply.³⁰ After a finding of guilt, the convicted officer has several avenues of appeal, including avenues of appeal not granted to civilians.

Secondly, the conditions of Weimar Germany and those of the United States were dissimilar in several aspects. The United States possesses a republican form of government that is well over two-hundred years old.³¹ Thus, even though United States history is replete with legal exclusions from equality such as slavery, Jim Crow laws, the treatment of Native American peoples, and the denial of women the right to vote or enter working professions, the Constitution has served as a safeguard against a mass tyranny, such as fascism.³² Prior to 1918, Germany was an imperial state dominated by the hereditary Hohenzollern Kaiser, Wilhelm II (1859-1941).³³ The Weimar Republic was created in 1919 and effectively ended with Adolf Hitler's ascension to the presidency after a series of crises, the year before the death of its previous president, Paul von Hindenburg, on August 2, 1934.³⁴ In 1934, the United States, which specifically eschewed a heredity, or even life-time ruler, was demographically a more diverse nation than Weimar Germany and continues to be so.³⁵ And the United States Constitution precludes the establishment of a state religion as well as a religious test for entry into the government, while in Weimar Germany, there were effectively two state religions.³⁶ Finally, Article 106 of the Constitution of the Weimar Republic had practically, though not completely, abolished military courts.³⁷ The United States' military has, under the UCMJ, worldwide jurisdiction over its personnel.³⁸ In spite of these, and other differences, Ludendorff remains an important example to assess the conduct of Flynn, McInerney, and Tata.

²⁹ 10 U.S.C. § 834 (2019).

³⁰ *Youngman*, 48 M.J. at 129–30; *Weiss v. United States*, 510 U.S. 163, 167–68 (1994).

³¹ *See, e.g.*, GORSUCH, *supra* note 12, at 8–10. Not only does the United States possess a republican form of government, but each of the states admitted into the United States must also possess a republican form of government. *See* U.S. CONST. art. IV, § 4.

³² *See, e.g.*, SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 21–37 (2006).

³³ JOHN C.G. RÖHL, *THE KAISER AND HIS COURT: WILHELM II AND THE GOVERNMENT OF GERMANY* 11–14 (1987).

³⁴ *See, e.g.*, BENJAMIN CARTER HETT, *THE DEATH OF DEMOCRACY: HITLER'S RISE TO POWER AND THE DOWNFALL OF THE WEIMAR REPUBLIC* 150–52 (1st ed. 2018).

³⁵ THOMAS JANOSKI, *THE IRONIES OF CITIZENSHIP: NATURALIZATION AND INTEGRATION IN INDUSTRIALIZED COUNTRIES* 120 (2010).

³⁶ STEWART A. STEHLIN, *WEIMAR AND THE VATICAN: GERMAN-DIPLOMATIC RELATIONS IN THE INTERWAR YEARS* 52–54 (2014); *Everson v. Board of Ed. of Ewing TP*, 330 U.S. 1, 8 (1947).

³⁷ WEIMAR CONST. art. 106.

³⁸ *See, e.g.*, *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020) (citing *Solorio v. United States*, 483 U.S. 435, 450–51 (1987)).

Third, there has been an infiltration of violent right-wing extremists into the military.³⁹ This is not new, as it may be recalled that Timothy McVeigh, who was central to the Oklahoma City bombing, served in the Army.⁴⁰ As the identities of people involved on the assault of the Capitol have been uncovered, the public has learned that military veterans and reservists took part.⁴¹ Moreover, one active-duty captain led a group of people to the “stop the steal” rally on January 6, and it has been reported that she boasted about doing so on social media.⁴² Related to this issue are the large numbers of flag officer retirees who have endorsed presidential candidates.⁴³ That is, Flynn and McInerney were, by no means, alone in backing Trump’s reelection efforts. Indeed, two-hundred and thirty-five retired generals signed a letter in support of Trump, and their number included retired generals who have violated prohibitions against divulging classified data, as well as, degraded non-European immigrants, Islam, gay and lesbian rights, and various causes associated with the Democratic Party.⁴⁴ Echoing a conservative refrain from the later Weimar Republic, the retired flag officers who backed Trump insisted that the Democratic Party had become pervaded with Marxism and socialism.⁴⁵ An internet biographical search of the letter reveals that all of the signatories that have a pay grade above O-8 are white men. Several of the

³⁹ See, e.g., Jeff McCausland, *Inside the U.S. military’s battle with white supremacy and far-right extremism*, NBC NEWS (May 25, 2019, 7:32 AM), <https://www.nbcnews.com/think/opinion/inside-u-s-military-s-battle-white-supremacy-far-right-ncna1010221>.

⁴⁰ See, e.g., DANIEL LEVITAS, *THE TERRORIST NEXT DOOR: THE MILITIA MOVEMENT AND THE RADICAL RIGHT* 7 (2004).

⁴¹ See, e.g., Ron Farrow, *Air Force Combat Veteran Breached the Senate*, NEW YORKER (Jan. 9, 2021), <https://www.newyorker.com/news/news-desk/an-air-force-combat-veteran-breached-the-senate>.

⁴² *Officer resigns as Army investigates her involvement in Washington rally that led to U.S. Capitol riot*, CBS NEWS (Jan. 11, 2021, 9:02 AM), <https://www.cbsnews.com/news/emily-rainey-fort-bragg-captain-resigns-washington-rally-army-investigating/>.

⁴³ Political endorsements have long been a concern in the field of civil-military relations. See Zachary E. Griffiths, *Are Retired Flag Officers Overparticipating in the Political Process?* 50 *PARAMETERS* 39, 39–49 (2020); see also Hannah Miller, Note, *Generals & General Elections: Legal Responses to Partisan Endorsements by Retired Military Officers*, 73 *VAND. L. REV.* 1209, 1219–20 (2020).

⁴⁴ See John Bowden, *More than 200 retired military leaders endorse Trump as ‘proven leader,’* HILL (Sept. 14, 2020, 5:53 PM), <https://thehill.com/homenews/campaign/516374-over-200-retired-military-leaders-endorse-trump-as-proven-leader>. Some of the signatories also backed Trump in 2016. See, e.g., Dan Lamothe, *Retired generals endorsing Trump include one reprimanded for disclosing classified information*, WASH. POST (Sept. 6, 2016, 12:12 PM), <https://www.washingtonpost.com/news/checkpoint/wp/2016/09/06/retired-generals-endorsing-trump-include-one-reprimanded-for-disclosing-classified-information/>. One of the signatories, retired Major General Brian Hawley, a former Air Force Judge Advocate General, was apparently untroubled by Trump’s pardons of service-members convicted of “war crime” type offenses. This is lamentable because judge advocate generals historically emphasized the necessity of compliance with the law of armed conflict since the Vietnam era. See, e.g., W. Hays Parks, *The United States Military and the Law of War: Inculcating an Ethos*, 69 *SOC. RSCH.* 981, 981–83 (2002); see also Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 *AM. J. INT’L L.* 1, 11–13 (2010).

⁴⁵ See Letter from Senior Military Leaders, https://cdn.donaldjtrump.com/public-files/press_assets/235-military-leaders-endorse-president-trump-final.pdf. The letter states: “It can be argued that this is the most important election since our country was founded. With the Democratic Party welcoming to socialists and Marxists, our historic way of life is at stake.” *Id.*

signatories are noteworthy for other reasons. Retired Admiral John Poindexter who was once convicted of lying to Congress about his role in the Iran-Contra scandal also signed his support for Trump.⁴⁶ And, retired General William Boykin, who had been admonished by the military for disclosing classified information, as well as, proclaimed that the United States was under threat from a stealthy Sharia intrusion into the social fabric of the nation, signed.⁴⁷

Fourth, officers are different than the enlisted military force. There are expectations placed on officers that are embodied in their oath of office and the public trust placed in their commission.⁴⁸ For instance, an officer masquerading as another person on a telephone for the innocuous purpose of terminating an apartment lease may not have violated a state or federal criminal statute. But, under the UCMJ, he or she can still be guilty of conduct unbecoming of an officer.⁴⁹ However, the chargeable conduct against Flynn, McInerney, and Tata is supportable in military law both for the substantive reasons discussed below, and for the fact that they have had ample notice of the prohibition, satisfying any legitimate due process concerns.⁵⁰ One basis for notice is that the military law is partly based on *lex non-scripta*.⁵¹ That is, past historic norms or customs, placed Flynn, McInerney, and Tata, on notice as to the dangerousness of their conduct, and the example of Ludendorff is one part of this *lex non-scripta*. And German military history is a subject of study throughout the military officers' educational process which Flynn, McInerney, and Tata undertook.

⁴⁶ United States v. Poindexter, 951 F.2d 369, 371 (D.C. Cir. 1991). It should be noted that the Court of Appeals for the District of Columbia overturned the defendant's conviction. *Id.*

⁴⁷ Lamothe, *supra* note 44.

⁴⁸ See, e.g., WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 712–13 (Boston, Little, Brown, and Company 2d ed. 1896); see also JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES (2016). All officers take the following oath per 5 U.S.C.A. § 3331:

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C.A. § 3331 (1960).

⁴⁹ See, e.g., United States v. Weldon, 7 M.J. 938, 943 (N.C.M.R. 1979). The (then) Court of Military Appeals determined, in light of a restrictive jurisdiction test, that this offense possessed a military nexus. *Id.* at 944 (citing Relford v. Commandant, 401 U.S. 355 (1971)).

⁵⁰ The Due Process Clause of the Fifth Amendment “requires ‘fair notice’ that an act is forbidden and subject to criminal sanction” before a person can be prosecuted for committing that act. United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing United States v. Bivens, 49 M.J. 328, 330 (C.A.A.F. 1998)). Moreover, “[t]he due process principle of fair notice mandates that an ‘accused has a right to know what offense and under what legal theory’ he will be convicted.” See United States v. Tunstall, 72 M.J. 191, 192 (C.A.A.F. 2013) (quoting United States v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010)).

⁵¹ WINTHROP, *supra* note 48, at 42. As defined by Winthrop, the military's *lex non scripta* consists of “the customs of the service,” and “the unwritten laws and customs of war.” *Id.*; see also United States v. Pitasi, 44 C.M.R. 31, 36 (1971). 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 (Matin Gordon ed., 2009).

Finally, in regard to Flynn's conduct in particular, *lex-non scripta*, takes on a greater importance when comparing the status of the army in German political culture to the status of the military in the United States. The German Army was a part of the German identity.⁵² Gallup polling shows that the United States military is the most trusted institution in the nation.⁵³ Discussed further in this article, the Constitution's framers feared the creation of a standing army, and although an army came into being, it was intended to be an apolitical institution. Or, as Professor Samuel Huntington once argued, the principle of professional norms and ethics instead of partisan connections is important to civilian control of the military by a constitutional means.⁵⁴ To not hold Flynn, McInerney, and Tata accountable by asserting military jurisdiction over them will ultimately weaken governmental and public the trust in the military as well as potentially undermine the national security over the long-term by a failure to create a deterrent.

I. ERICH LUDENDORFF: LESSONS FROM A REPUBLIC DESTROYED

Following his dismissal from the Imperial German Army by Kaiser Wilhelm II in late 1918, a fifty-eight year-old Erich Ludendorff struggled to adjust to his retirement after having served in uniform since the age of twelve when he entered into an officers training academy.⁵⁵ Unlike so many of his contemporaries who rose to the rank of general in the former Imperial German Army, Ludendorff did not have a "von" in his life to signify some connection to high nobility.⁵⁶ This did not seem to matter. Prior to the United States declaration of war on Germany in 1917, the American journalist H.L. Mencken informed his readers that Ludendorff had practically taken over the German war effort and in spite of his lack of nobility had "powerful effect of his personality upon the better-informed and more sophisticated classes of Germans."⁵⁷ Mencken's observation on Ludendorff was accurate. The general had created a military dictatorship over the civil government, only capable of being overridden by his two superiors, the commanding general of the Imperial German Army, Hindenburg, and of course, Kaiser Wilhelm II.⁵⁸

⁵² David Harrisville, *Justifying a War of Extermination: Identity and Image in Hitler's Army*, EUROPE NOW (Dec. 1, 2016), <https://www.europenowjournal.org/2018/11/30/justifying-a-war-of-extinction-identity-and-image-in-hitlers-army/>.

⁵³ See *Confidence in Institutions*, GALLUP NEWS (current through 2021), <https://news.gallup.com/poll/1597/confidence-institutions.aspx>.

⁵⁴ SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 167 (rev. ed. 1981).

⁵⁵ See DAVID KING, *THE TRIAL OF ADOLF HITLER: THE BEER HALL PUTSCH AND THE RISE OF NAZI GERMANY* (2017); see also PETER FRITSCH, *GERMANS INTO NAZIS* 123 (1998).

⁵⁶ DAVID R. STONE, *THE RUSSIAN ARMY AND THE GREAT WAR: THE EASTERN FRONT, 1914–1917*, 68 (2015); WALTER GOERLITZ, *HISTORY OF THE GERMAN GENERAL STAFF, 1657–1945, 180–81* (transl. Brian Battershaw 1954); DAVID F. BURG, *ALMANAC OF WORLD WAR I*, 268 (2010); HOLGER H. HERWIG, *THE FIRST WORLD WAR: GERMANY AND AUSTRIA-HUNGARY, 1914–1918, 83–84* (2014).

⁵⁷ H. L. Mencken, *Ludendorf*, ATLANTIC, June 1917.

⁵⁸ GERALD FELDMAN, *ARMY, INDUSTRY, AND LABOR IN GERMANY, 1914–1918* 432–35 (2014).

How Ludendorff became a virtual military dictator is answerable in the uniqueness of German history between 1871 and 1918. The German unification after Prussia and its German states in alliance were militarily victorious over the "Second French Empire" of Napoleon III in 1871, resulted in the creation of a democratically elected legislature, the Reichstag.⁵⁹ However, partly as result of the Imperial German Army generals' near-universal aversion to being subject to a democratic body, the Hohenzollern ruler, Kaiser Wilhelm I (1797-1888) retained almost full control over the army.⁶⁰ This continued through the end of World War I so that as long as Wilhelm II tolerated the army's position as equal to, or above the elected legislature, he also accepted Ludendorff's prominence in German domestic wartime politics.⁶¹

Ludendorff rose through the officer ranks from his lieutenantcy in 1885 to a position on the general staff, and in the first month of the war, he commanded a force to victory against the Belgian Army at Liege. In late August, 1914, he, along with Hindenburg, led a small German Army to crush an immense Russian military force threatening to invade Germany at the Battle of Tannenberg.⁶² This victory was followed up with two more at the twin battles at the Masurian Lakes which resulted in the seizure of territory in Russia.⁶³ In addition to being feted as the "hero of Tannenberg," Ludendorff was also credited with salvaging Germany's ally, the Austrian Habsburg Empire from destruction before going on to cause Czarist Russia's defeat and then become second in command of the German war effort on the Western Front, with the title of Quartermaster General.⁶⁴ In the last month of the war, owing to dissatisfaction with the war effort, Kaiser Wilhelm II dismissed Ludendorff from command.⁶⁵ But by then, the conflict was almost over and had cost Germany the death of almost two-million soldiers, four million injuries, a malnourished population, and a destroyed economy.⁶⁶ Ludendorff later

⁵⁹ ISABELL V. HULL, *THE ENTOURAGE OF KAISER WILHELM II, 1888–1918* 176–92 (2004). On the German unification after the War of 1870, see ERICH EYCK, *BISMARCK AND THE GERMAN EMPIRE 173–81* (1964); see generally DAVID WETZEL, *A DUEL OF NATIONS: GERMANY, FRANCE, AND THE DIPLOMACY OF THE WAR OF 1870–1871* 145–212 (2012).

⁶⁰ See also Wolfgang J. Mommsen, *Kaiser Wilhelm II and German Politics*, 25 *J. CONTEMP. HIST.* 290, 292–93 (1990).

⁶¹ HULL, *supra* note 59, at 287–88.

⁶² DONALD JAMES GOODSPEED, *LUDENDORFF: GENIUS OF WORLD WAR I* 110–12 (1966); HERWIG, *supra* note 56, at 53; John W. Wheeler-Bennett, *Ludendorff: The Soldier and the Politician*, 14 *VA. Q. REV.*, 187–89 (1938).

⁶³ CORELLI BARNETT, *THE LORDS OF WAR: FROM LINCOLN TO CHURCHILL* 122–25 (2012).

⁶⁴ DAVID F. BURG, *ALMANAC OF WORLD WAR* 268 (2004).

⁶⁵ GORDON CRAIG, *THE POLITICS OF THE PRUSSIAN ARMY* 345 (1964); JOHN G. ROHL, *KAISER WILHELM: A CONCISE LIFE* 173–76 (2014); GERHARD RITTER, *THE SWORD AND THE SCEPTER: THE PROBLEM OF MILITARISM IN GERMANY, VOL. IV* 366 (1969).

⁶⁶ On Germany's losses, see MARTIN GILBERT, *THE FIRST WORLD WAR: A COMPLETE HISTORY* 541 (1994). See also Wilhelm Deist & E.J. Feuchtwanger, *The Military Collapse of the German Empire: The Reality Behind the Stab-in-the-Back Myth*, 3 *WAR IN HISTORY* 186–207 (1996).

infamously claimed that Germany was “stabbed in the back” by Jews, liberals, Bolsheviks, and others, causing the nation’s defeat.⁶⁷

The Weimar Republic was, to be sure, confronted by violent Marxist, or “Spartacist,” uprisings in 1919-20 that threatened its existence.⁶⁸ But it was also challenged by right-wing militias and political movements whose members believed that a liberal democracy would destroy the German identity, elevate the status of disfavored groups, and result in chaos.⁶⁹ They wanted to form a dictatorship, if not the return of a monarchy as the answer to their fears.⁷⁰ One of the central parts of Germany’s identity, the Army, had been reduced in numbers mirroring a large police force, and it was led by generals who had little interest in the Weimar Republic’s success or failure.⁷¹ Indeed, the Reichswehr’s leadership—“Reichswehr” became the name for the post World War I German Army—almost universally sought to maintain its independence from the elected government much as the Imperial German Army had been able to do prior to 1918.⁷² One day before the armistice effectively ending World War I, General Wilhelm Groener, who had succeeded Ludendorff as Quartermaster General and Germany’s first post-war president, Frederick Ebert entered into a pact where the army would return from the battlelines of Eastern France and Russia as long as the new government recognized the authority of the German officer corps.⁷³ This situation of military prominence continued during the Republic. Indeed, in contravention of the Treaty of Versailles, one of the Reichswehr’s leaders, General Hans von Seeckt, planned for a war of revenge against France as early as 1922, while his staff insisted that the removal of Jews from government was a necessary precursor to such a war, and this meant that he had to bypass the civil government to implement his designs for the military.⁷⁴ The elected government did not countenance either goal. Under von Seeckt’s command which lasted from 1919 until 1926, the Reichswehr did not intervene against right-wing uprisings including two significant events during Friedrich Ebert’s presidency which lasted from 1919 to 1925.⁷⁵ In essence, the German Army left the

⁶⁷ ANNA VON DER GOLTZ, HINDENBURG: POWER, MYTH, AND THE RISE OF THE NAZIS 56 (2009); ANDREAS DORPALEN, HINDENBURG AND THE WEIMAR REPUBLIC 51–52 (2008); Klaus Schwabe, *World War I and the Rise of Hitler*, 38 *DIPLOMATIC HISTORY* 864, 868 (2014).

⁶⁸ See, e.g., ERIC WALDMAN, THE SPARTACIST UPRISING OF 1919 AND THE CRISIS OF THE GERMAN SOCIALIST MOVEMENT: A STUDY IN RELATION OF POLITICAL THEORY AND PARTY PRACTICE 1–11 (1958).

⁶⁹ See, e.g., ERIC WEITZ, WEIMAR GERMANY: PROMISE AND TRAGEDY 114–15 (2018).

⁷⁰ Brian Crim, “Our Most Serious Enemy:” *The Specter of Judeo-Bolshevism in the German Military Community, 1914–1923*, 44 *CENTRAL EUROPEAN HISTORY* 620, 624–28 (2011).

⁷¹ KARL JOHN NEWMAN, EUROPEAN DEMOCRACY BETWEEN THE WARS 117 (1970).

⁷² See, e.g., MATTHEW STIBBE, GERMANY: POLITICS, SOCIETY, AND CULTURE 73 (2003); F.L. CARSTEN, THE REICHSWEHR AND POLITICS, 1918–1933, 12 (1966); ROBERT B. KANE, DISOBEDIENCE AND CONSPIRACY IN THE GERMAN ARMY, 1918–1945, 53 (2008).

⁷³ HERWIG, *supra* note 56, at 431.

⁷⁴ CARSTEN, *supra* note 72, at 200.

⁷⁵ Arthur L. Smith, Jr., *General von Seeckt and the Weimar Republic*, 20 *R. OF POLITICS* 340, 347–57 (1958).

government to fend for itself, even when the government called upon it for protection.

The first attempted right-wing coup, named after its leader Wolfgang Kapp, occurred in 1920.⁷⁶ Kapp, along with General Walther von Luttwitz, the Commander in Chief of the Reichswehr Group Command, refused to obey Ebert's orders to disband two Freikorps units near Berlin.⁷⁷ The Freikorps were loose collections of armed militias, but under the Versailles Treaty and Weimar German Law, their legality was in question.⁷⁸ Because the Freikorps were largely composed of war veterans, had been instrumental in the defeat of communist uprisings, and supportive of conservative causes, the Reichswehr's leadership were reticent to take action against them.⁷⁹ According to Professor Walter Goerlitz, an influential German military historian from a prior generation, von Seeckt prevented the army from taking part in Kapp's and Luttwitz's attempted coup, but he also kept the army from protecting Ebert's government against the coup's success to preserve the integrity of the army. It also may have been the case that von Seeckt did not want to confront his former superior, Ludendorff.⁸⁰ Several of the putsch members were later prosecuted and carted off to jail, though the majority were acquitted in both civil trials and courts-martial.⁸¹ It is noteworthy that General Luttwitz was never prosecuted. He used a fake passport to flee to Hungary but was permitted to return to Germany in 1924 as part of an amnesty. He remained active in nationalist politics and was an early supporter of the Nazi Party.⁸²

Ludendorff, who openly supported the "putsch," escaped a trial, in part, because the very government that struggled for survival recognized that jailing one of Germany's most powerful and popular military veterans might further imperil its existence.⁸³ After Kapp's defeat, a communist uprising broke out in the Ruhr, Germany's, industrial center.⁸⁴ Ebert's government had defeated Kapp by evacuating Berlin and successfully convincing the civil government as well as key industries to undergo a general strike.⁸⁵ The

⁷⁶ JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 153–55 (1990).

⁷⁷ *Id.*

⁷⁸ MARK JONES, *FOUNDING WEIMAR: VIOLENCE AND THE GERMAN REVOLUTION OF 1918–1919*, 18–23 (2016); WALTER LACQUER, *GUERRILLA WARFARE: A HISTORICAL AND CRITICAL STUDY* 166–67 (1998).

⁷⁹ EBERHARD KOLB, *THE WEIMAR REPUBLIC* 50 (2005).

⁸⁰ Raffael Scheck, *Politics of Illusion: Tirpitz and Right-Wing Putschism, 1922–1924*, 18 *GER. STUD. REV.* 29, 29–49 (1995).

⁸¹ LACQUER, *supra* note 78, at 166–67. *See also* ANTHONY MCELLIGOT, *WEIMAR GERMANY* 85–95 (2009).

⁸² *Id.*

⁸³ HOWARD M. SACHAR, *THE ASSASSINATION OF EUROPE, 1918–1942*, 29 (2014); Roger Chickering, "Sore Loser: Ludendorff's Total War," in ROGER CHICKERING, *THE SHADOWS OF TOTAL WAR: EUROPE, EAST ASIA, AND THE UNITED STATES, 1919–1939*, 159 (2003).

⁸⁴ FRED TAYLOR, *THE DOWNFALL OF MONEY: GERMANY'S HYPERINFLATION AND THE DESTRUCTION OF THE MIDDLE CLASS* 139–142 (2013).

⁸⁵ FINN, *supra* note 76, at 154.

communists' leaders, fearing a right-wing takeover of Germany, reacted by revolting against the Weimar Republic.⁸⁶ Ebert's government determined that the Freikorps, which had just threatened to topple the Weimar Republic and install a dictatorship or renewed monarchy, and the Reichswehr, which had ostensibly remained neutral in Kapp's putsch, became necessary for the suppression of communism.⁸⁷ This belief was justified in the sense that the communist "Red Army" forces numbered over 50,000 and were clearly a danger to the Weimar Republic. But, Ebert's government was far more tolerant of the army summarily executing captured communist soldiers than it was in holding military officers and retired generals like Ludendorff accountable.⁸⁸

Importantly, it was well known in the United States that Ludendorff had played a role in Kapp's putsch. Newspaper reporting on the Kapp Putsch continues to bear mention because it reminded American readers that a military that failed to remain subordinate to the elected government not only acted unlawfully, it posed a danger to the laws and the people alike. On March 15, 1920, the *Washington Post's* front page informed its readers that Ludendorff had been in communication with Kapp.⁸⁹ On March 24, 1920, the *New York Times* reported that Luttwitz and Admiral Adolph Trotha—another military leader involved in the attempted coup—had been arrested and Kapp and Ludendorff fled from Germany.⁹⁰ One day later, the *Times'* front page noted that Ludendorff was one of the leading plotters behind the effort to topple Ebert.⁹¹ The *Atlanta Constitution*, *Los Angeles Times*, and *Chicago Tribune* carried similar details as to Ludendorff's role.⁹² Indeed, the *Atlanta Constitution* reported the putsch as a military coup.⁹³ And, on March 25, the *Post* noted that Ludendorff was likely to be charged with treason.⁹⁴ However, in early 1922, the *Times* reported that while the Attorney General of Germany conceded Ludendorff might have been morally complicit in supporting the coup, the former general did not take the steps necessary for a charge of treason to be levied against him.⁹⁵

In 1923, Ludendorff recognized in an aspiring but troubled young war veteran, a leader who just might raise Germany to its "former greatness" by

⁸⁶ *Id.*

⁸⁷ JAMES M. DIEHL, *PARAMILITARY POLITICS IN WEIMAR GERMANY*, VOL I 21–24 (1977).

⁸⁸ Werner T. Angress, *Weimar Coalition and Ruhr Insurrection, March–April 1920: A Study of Government Policy*, 29 J. OF MOD. HIST. 1, 7–9 (1957).

⁸⁹ *Ebert Cabinet Quits Dresden for Stuttgart: Strike Spreads First Bloodshed at Frankfurt*, WASH. POST, Mar. 15, 1920.

⁹⁰ *Luttwitz and Trotha are Placed Under Arrest*, N.Y. TIMES, Mar. 23, 1920, at 1.

⁹¹ Edwin L. James, *State of Berlin Serious: Ludendorff as Plotter*, N.Y. TIMES, Mar. 25, 1920, at 1.

⁹² "German Rebel Regime Seems On Last Legs," ATLANTA CONST., Mar. 17, 1920; *Kapp Plot Ends Ludendorff and Hindenburg Era*, CHI. TRIB., Mar. 22, 1920; *South Germany Declares Against Revolution: Teutonic Factions are Vying for Control*, L.A. TIMES, Mar. 15, 1920.

⁹³ *Ebert Regime Forced to Leave Berlin*, ATLANTA CONST., Mar. 14, 1920.

⁹⁴ *Wesel Siege Goes On: Revolt Aims at Army: Ludendorff Accused*, WASH. POST, Mar. 25, 1920.

⁹⁵ *War Trials Report Alarms Germany*, N.Y. TIMES, Jan. 16, 1922, at 7.

giving to its people a unified martial identity.⁹⁶ The young leader, Adolf Hitler would go on to use Ludendorff's stature to do just that.⁹⁷ Both Ludendorff and Hitler insisted that liberals, socialists, communists, Jews and others had "stabbed Germany in the back," leading to their defeat in World War I.⁹⁸ Ludendorff was so important to Hitler in the early 1920s that when, in late 1923, he attempted his own Putsch (the "Beer Hall Putsch"), and was jailed, it was forgivable to the Nazis that Ludendorff once more escaped a conviction and jail as evidenced by the fact that in his 1925 *Mein Kampf*, Hitler lauded the general as the one man who valiantly struggled against the German government's "criminal half-heartedness" in prosecuting the first World War.⁹⁹ (Ludendorff was prosecuted in a juryless trial under Bavarian law, but unlike Hitler, the judges acquitted him).¹⁰⁰ In 1925, Hitler insisted that Ludendorff, already a Nazi Party member in the Reichstag, vie for the presidency under the Nazi banner.¹⁰¹ Ludendorff did so but received less than two percent of the vote and lost to Hindenburg.¹⁰² Perhaps, because of Hindenburg's status as a war hero and also because of his ability to create a sense of stability, the Reichswehr's leaders shifted their support to the government.¹⁰³ Still, Ludendorff remained influential and the Nazi Party venerated him until his death in 1937.¹⁰⁴

Ludendorff influenced the military in indirect ways. In 1930, Reichswehr lieutenants, Hans Ludin, Richard Scheringer, and Hans Wendt were arrested and prosecuted in a German federal trial for trying to recruit soldiers into the Nazi Party in violation of the Minister of Defense General Wilhelm Groener's admonition that Nazism was incompatible with service in the army.¹⁰⁵ In the words of the former vice-chancellor of Oxford University, Alan Bullock, "Groener, the Minister of Defense, a man of integrity and experience, had been uneasily conscious that a good many members of the Officer Corps were becoming sympathetic to the Nazis."¹⁰⁶ The three lieutenants were charged with high treason, and despite Hitler's testimony, were

⁹⁶ JAMES GIBLIN, *THE LIFE AND DEATH OF ADOLF HITLER* 38–40 (2002).

⁹⁷ DIETRICH ORLOW, *THE NAZI PARTY: A COMPLETE HISTORY* 43–45 (2007).

⁹⁸ PETER ROSS-RANGE, *1924: THE YEAR THAT MADE HITLER* 1–7 (2006).

⁹⁹ ADOLF HITLER, *MEIN KAMPF* 275 (Ralph Manheim & Houghton Mifflin trans., 1971).

¹⁰⁰ David Jablonsky, *Rohm and Hitler: The Continuity of Political-Military Discord*, 23 *J. OF CONT. HIST.* 367, 367–71 (1988). For further information on Ludendorff's role in the "Beer Hall Putsch," see ALLAN BULLOCK, *HITLER: A STUDY IN TYRANNY* 107–10 (1962). For further information on the acquittal, see INGO MULLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 15–16 (Deborah Schneider trans., 1991).

¹⁰¹ RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* 201–02 (2003).

¹⁰² *Id.*

¹⁰³ DORPALEN, *supra* note 67, at 123–25.

¹⁰⁴ See, e.g., CHARLES HAMILTON, *LEADERS AND PERSONALITIES OF THE THIRD REICH: THEIR BIOGRAPHIES, PORTRAITS, AND AUTOGRAPHS* 309–10 (1984).

¹⁰⁵ WILLIAM L. SHIRER, *RISE AND FALL OF THE THIRD REICH* 139–40 (2019).

¹⁰⁶ BULLOCK, *supra* note 100, at 179.

found guilty.¹⁰⁷ But according to William Shirer in his classic *The Rise and Fall of the Third Reich*, the three officers were given comparatively light prison sentences.¹⁰⁸ And professor Ian Kershaw, who authored one of the leading biographies of Hitler, noted that Joseph Goebbels believed the trial afforded Hitler a “masterstroke” means to legitimize the Nazi Party because he testified that the party would only attempt to take power through constitutional means.¹⁰⁹

As in the case of the two putsches, the American press widely reported on the trial of the three officers. On September 24, 1930, the *Chicago Tribune* reported that the three junior officers were charged with trying to overthrow the government.¹¹⁰ The *New York Times*, on its front page, reported that one of the officers defended their actions with the statement: “An inner spiritual and moral revival of the Reichswehr is necessary . . . we are convinced that the government never once followed the will of the people from the time of the Treaty of Versailles through the signing of the Young Plan.”¹¹¹ One has to wonder whether a military trial would have permitted Hitler, as a former enlisted soldier, to testify at all because his testimony was not relevant to the actual charge. This point raises a critical concern to the new administration under President Biden.

After Hindenburg’s death in 1934, the Reichswehr became intertwined with the Nazi Party, and ultimately swore its loyalty to Hitler.¹¹² In turn, the Reichswehr enlarged beyond the Versailles Treaty’s limits and became the Wehrmacht.¹¹³ Had Weimar’s judicial authorities truly held Ludendorff to account in their military criminal justice processes, it is speculatively possible that Germany’s resurgence under Nazi rule would not have occurred. The same could be said for Ebert’s government permitting Ludendorff to escape from prosecution altogether after the Kapp Putsch. The operative term “speculatively possible” only denotes that Weimar’s authorities did not do so, and Ludendorff was able, in concert with Hitler, to continue to push antisemitic and anti-liberal conspiracies to the people of Germany. In turn, their tandem efforts cemented the “stab in the back” mantra as an accepted fact to the public that was instrumental in Hitler’s ascension to become Germany’s Führer in 1934. In essence, the retired general helped enable Hitler’s rise to power,

¹⁰⁷ *Id.*; Guido Enderis, *Hitler Would Scrap Versailles Treaty and Use Guillotine*, N.Y. TIMES, Sept. 26, 1930, at 1.

¹⁰⁸ SHIRER, *supra* note 105, at 140; see also Timothy S. Brown, *Richard Scheringer, the KPD and the Politics of Class and Nation in Germany, 1922–1969*, 14 CONT. EUR. HIST. 317, 317 (2005) (noting that Scheringer began his career at a time when the political neutrality of the army was eroding); BULLOCK, *supra* note 100, at 322.

¹⁰⁹ KERSHAW, HITLER 32 (2003).

¹¹⁰ *German Treason Trial in Opened: Hitler Accused*, CHI. TRIB. (Sept. 24, 1930).

¹¹¹ *Indictment of Hitler for Treason Sought as Three Officers Are Tried: Boastfulness of German Army Youths Involves Fascist Chief*, N.Y. TIMES, Sept. 24, 1930, at 1.

¹¹² KERSHAW, *supra* note 109, at 212.

¹¹³ CARSTEN, *supra* note 72, at 309.

and Hitler went so far as to push Ludendorff as the first national Nazi candidate for president.

In contrast to Weimar Germany's treatment of Ludendorff and the three Reichswehr lieutenants prosecuted in civilian court for treason, the French government of the Fifth Republic executed Colonel Jean-Marie Bastien-Thiry for his role in an attempted assassination of President Charles de Gaulle after a military trial found him guilty in 1962.¹¹⁴ Bastien-Thiry's military trial arose as a result of an attempted coup against de Gaulle by several retired senior officers who were angered at de Gaulle's support for Algerian independence.¹¹⁵ Some of the senior generals were prosecuted in a special hybrid tribunal, which incorporated military law, while the majority of military and veteran (military retirees) forces in the Organisation Armée Secrète—the militarist organization formed to maintain France's suzerainty if not ownership over Algeria—were prosecuted in military tribunals.¹¹⁶ While it is true that just as political conditions and demographics in Weimar Germany differ from those in the United States today, and France's political conditions differ from the United States as well, it is important that the French military has remained unquestionably loyal to the Fifth Republic since the military trials of the OAS and Bastien-Thiry's execution.¹¹⁷

The Fifth Republic's determination to hold military trials may have been based on the experiences of the Third Republic which lasted between 1871 and 1940. In the aftermath of France's defeat by Germany in 1871, political movements were formed to return France to a monarchy and also to launch a war of revenge against Germany.¹¹⁸ General Georges Boulanger, who resigned his commission to run for office and in 1889 briefly became a deputy in the French legislature, was an immensely popular leader, but he had engaged in treasonous activity, including creating the conditions for a possible coup.¹¹⁹ Professor Sheri Berman characterized Boulanger as being at the vanguard of a new right-wing movement in France: "nationalist, anti-liberal, and anti-democratic."¹²⁰ In April 1889, the French government issued a warrant

¹¹⁴ Julian Jackson, *General De Gaulle and His Enemies: Anti-Gaullism in France Since 1940*, 9 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 43, 57–65 (1999).

¹¹⁵ Michael C. Desch, *Threat Environments and Military Missions*, in Larry Diamond, CIVIL-MILITARY RELATIONS AND DEMOCRACY 12, 19–23 (1996); JULIAN JACKSON, DE GAULLE 554–56 (2018).

¹¹⁶ JACKSON, *supra* note 115, at 557.

¹¹⁷ Desch, *supra* note 115, at 23. See also Pascal Vennesson, *Civil-Military Relations in France: Is There a Gap?* 26 J. OF STRATEGIC STUDIES, 29–42 (2010); Marc C. DeVore, *Strategic Satisficing: Civil-Military Relations and French Intervention in Africa*, 4 EUR. J. OF INT'L SEC., 163–89 (2019); Krishnadev Calamur, *Why France's Top General Quit*, ATLANTIC (July 19, 2017), <https://www.theatlantic.com/news/archive/2017/07/france-general-resigns/534132/>.

¹¹⁸ See, e.g., CHARLES HAUSS, POLITICS IN FRANCE 37–39 (2000).

¹¹⁹ SHERI BERMAN, DEMOCRACY AND DICTATORSHIP IN EUROPE: FROM THE ANCIEN REGIME TO THE PRESENT DAY 112–15 (2019) (hereinafter DEMOCRACY AND DICTATORSHIP) (Boulanger "thrived on and encouraged the general discontent" against the government); HAUSS, *supra* note 118, at 37–39. Flynn has acted in a similar manner.

¹²⁰ BERMAN, *supra* note 119, at 113.

for Boulanger's arrest and trial, but he fled to Belgium and committed suicide.¹²¹

In 1934, right-wing riots broke out across Paris, and several retired flag officers involved in the riots imperiled the government of Édouard Daladier.¹²² Retired French Admiral Antoine Schwerer headed the far-right Action Française, which took part in the riots, and although he died prior to France's defeat in 1940, his organization supported Marshal Henri Pétain's collaborationist Vichy regime.¹²³ One of the groups, titled as the Croix-de-Feu and led by a retired Colonel François La Roque, grew to over 700,000 members.¹²⁴ One historian has concluded that La Roque "got far closer, in every sense of the word, to the seat of power than Mussolini's Black Shirts ever did."¹²⁵ None of the retired military officers involved in the riots were prosecuted in military trials, though some of the more prominent retired officers later bolstered the Vichy regime after the French defeat in 1940.¹²⁶ For instance, La Roque expressed a duty to support Marshal Petain rather than join with the Free French in 1941.¹²⁷ It is not an unreasonable observation then that in enabling military trials of former officers, de Gaulle at least made it less palatable for a would-be Boulanger, La Roque, or Schwerer, to try to upend the government.

II. THE DANGERS OF MICHAEL FLYNN AND THE ENABLING SOURCES

Flynn is not the first general officer to appeal to racism during a presidential election. In 1880, Major General Winfield Scott Hancock, a Civil War hero, ran for the presidency while still on active duty. Indeed, he was the commanding general of the Atlantic Division in New York and subject to the

¹²¹ *Id.* On the Boulanger Affair, see also WILLIAM D. IRVINE, *THE BOULANGER AFFAIR RECONSIDERED: ROYALISM, BOULANGISM, AND THE ORIGINS OF THE RADICAL RIGHT IN FRANCE* 3–5 (1989).

¹²² BRIAN JENKINS AND CHRIS MILLINGTON, *FRANCE AND FASCISM: FEBRUARY 1934 AND THE DYNAMICS OF POLITICAL CRISIS* 101–26 (2015). On the militant nature of the French right-wing, and in particular the actions of a retired French colonel, see Andreas Wirsching, *Political Violence in France and Italy After 1918*, 1 *J. OF MOD. EURO. HIST.* 60, 75–76 (2003).

¹²³ On Schwerer, see Jean-Noël Grandhomme, *From Royal to French action: Admiral Antoine Schwerer (1862–1936), a Full Commitment* 265 and *GUERRES MONDIALES ET CONFLITS CONTEMPORAINS* 47–59 (2017). On his successor's alliance with Petain, see FRANCESCO GIUBILEI, *THE HIST. OF EUR. CONSERVATIVE THOUGHT* 192–93 (2019).

¹²⁴ William D. Irvine, *Fascism in France: The Strange Case of the Croix de Feu*, 63 *THE J. OF MOD. HIST.* 271, 275 (1991).

¹²⁵ *Id.*

¹²⁶ See, e.g., SEAN KENNEDY, *RECONCILING FRANCE AGAINST DEMOCRACY: THE CROIX DE FEU AND THE PARTI SOCIAL FRANÇAIS, 1927–1945*, 226–28 (2007). The political and economic situation in France in 1934 bore some similarity to that in Germany a decade earlier. See Susan Bindoff Butterworth, *Daladier and the Munich Crisis: A Reappraisal*, 9 *J. OF CONT. HIST.* 191, 196–97 (1974) (noting that with the beginning of the 1930s and the onset of the real economic and social problems of the depression, the tendency to shift between a left-wing and a right-wing formula had become dangerously and dishearteningly regular).

¹²⁷ Robert J. Soucy, *French Fascism and the Croix de Feu: A Dissenting Interpretation*, 26 *J. OF CONT. HIST.* 159, 173 (1991).

Articles of War—the predecessor military law to the UCMJ—when he sought the presidency.¹²⁸ In an effort to wrest California's voters away from Republican James Garfield, Hancock's campaign claimed that Garfield would welcome “hordes of Chinese migrants” into the state.¹²⁹ Exacerbating the antagonism that California's white population had toward the Chinese, Hancock's smear against Garfield was effective enough to have the state vote for the Democratic Party candidate for the only time in the nineteenth century.¹³⁰

Nor is Flynn, McInerney, or Tata the first retired flag officer to espouse that a presidency is illegitimate. In the late 1930s, retired Major General George Van Horn Moseley publicly spoke against President Franklin Roosevelt's administration and claimed that Jews in the United States sought a communist takeover.¹³¹ In 1939, Moseley, who had retired months earlier, tried to have General Walter Delamater, the commander of the New York National Guard expel Jewish officers from the Guard.¹³² That same year, a small fascist organization, the American Christian Front Conference, sought Moseley to become a “Führer” for the United States” just as Adolph Hitler had garnered the title in Germany.¹³³ On February 22, 1942, George E. Deatherage, the former “commander” of the Knights of the White Camellia—a pro-Nazi organization—informed a congressional investigation that his organization sought to create a fascist government in the United States with Moseley as the leader.¹³⁴

Moseley, much like Flynn, McInerney, and Tata, did not resign his commission and safely collected his retirement, even though he understood there was a possibility he could be recalled and court-martialed. In the Library of Congress which houses Moseley's personal correspondence, one letter written in 1940, in particular evidences his knowledge of the continuation of military jurisdiction over him with the concluding statement: “the only good I can do now is in keeping a large correspondence with men who are in a position to influence public affairs. The enemy has silenced me, and I am handicapped, as I am still a government official, in fact.”¹³⁵

¹²⁸ See, e.g., DAVID M. JORDAN, WINFIELD SCOTT HANCOCK: A SOLDIER'S LIFE 283–84 (1988).

¹²⁹ BENJAMIN ARRINGTON, THE LAST LINCOLN REPUBLICAN: THE PRESIDENTIAL ELECTION OF 1880, 157–58 (2020); ALAN PESKIN, GARFIELD 506 (1978). See also *Democratic Last Resorts*, N.Y. TIMES, Oct. 23, 1880, at 10.

¹³⁰ YANEK MIECZKOWSKI, THE ROUTLEDGE HISTORICAL ATLAS OF PRESIDENTIAL ELECTIONS 67 (2013); PESKIN, *supra* note 129, at 511.

¹³¹ See, e.g., JOSEPH BENDERSKY, THE JEWISH THREAT: ANTI-SEMITIC POLITICS OF THE UNITED STATES ARMY 252–54 (2000); see also Toni L. Kamins, *Jews Seek War, Finance Communism, Gen. Moseley Tells Philadelphia Rally*, JEWISH TELEGRAPHIC AGENCY (1939), <https://www.jta.org/1939/03/30/archive/jews-see-war-finance-communism-gen-moseley-tells-philadelphia-rally> (last visited Mar 22, 2021).

¹³² Moseley to General Delamater, Apr. 21, 1939 (Papers in the Library of Congress).

¹³³ GLEN JEANSONNE, WOMEN OF THE FAR RIGHT: THE MOTHERS MOVEMENT AND WORLD WAR II 40 (1997).

¹³⁴ *Deatherage Loses Job on Knox's Order*, N.Y. TIMES (Feb. 24, 1942), <https://www.nytimes.com/1942/02/24/archives/deatherage-loses-job-at-navy-base-by-order-of-knox-exhead-of.html>.

¹³⁵ Moseley to James Scott Kemper, Dec. 22, 1940 [GVM/4].

There is another flag officer that Flynn in particular, but to a lesser degree McNerney and Tata have emulated, albeit with one significant difference. In 1962 General Edwin Walker resigned his commission rather than retire, specifically so that he could engage in activities such as standing with Governor Ross Barnett of Mississippi and exhort white citizens to violently prevent the integration of that state's flagship university, as well as openly accuse General Maxwell Taylor of being a communist.¹³⁶ Walker understood that he could be recalled to duty and court-martialed if he continued to collect his retirement, so he resigned his commission before his Mississippi episode.¹³⁷ Prior to his resignation, Walker's conduct concerned both the Eisenhower and Kennedy administrations. Eisenhower had placed Walker in command of forces responsible for enforcing constitutional integration of schools in Little Rock, Arkansas after the state governor commanded the state national guard to prevent the enforcement of *Brown v. Board of Education*.¹³⁸ But in Walker's next assignment, he appeared to criticize Eisenhower and claimed that communists had infiltrated the government.¹³⁹ In the first year of Kennedy's presidency Walker was removed from a divisional command in Europe after he tried to indoctrinate soldiers with conservative political tracts.¹⁴⁰

Because Flynn, along with McNerney and Tata, have not thought it prudent to resign, they still collect their retirement. Unlike Walker, they have evidenced a willingness to remain subject to the UCMJ and flout the law at the same time. There is another important point to Walker that bears on Flynn's conduct in particular. Walker, like Ludendorff, influenced at least one junior officer into following his example. 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.¹⁴¹ The attack on Williams was essentially a claim that President Kennedy's foreign policy with the emerging post-colonial African governments was supportive of communism.¹⁴² It is noteworthy that approximately one in five people

¹³⁶ Joshua E. Kastenberg, *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*, 99 NEB. L. REV. 594, 633–39 (2021).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Army is Ordered to Reinstate Major Allied with General Walker; Court Invalidates Dismissal of Walker for Forbidden Speech to D.A.R. in 1962*, N.Y. TIMES (June 19, 1964), <https://www.nytimes.com/1964/06/19/archives/army-is-ordered-to-reinstate-major-allied-with-gen-walker-court.html>.

¹⁴² See Thomas J. Noer, SOAPY: A BIOGRAPHY OF G. MENNEN WILLIAMS 159–64 (2006); See, e.g., *President Backs Williams On Africa for Africans*, N.Y. TIMES (Mar. 2, 1961), <https://www.nytimes.com/1961/03/02/archives/president-backs-williams-on-africa-for-africans-president-backs.html>; see also PETER SCHWAB, *DESIGNING WEST AFRICA: PRELUDE TO THE 21ST CENTURY CALAMITY* 1–3 (2004).

arrested in the January 6 attack on the Capitol were military veterans or reservists.¹⁴³

A. The Conduct of Retired General Michael Flynn

This article centers on Flynn's association with the Proud Boys and the "Stop the Steal" organization, rather than his conduct during the "Mueller Investigation" into the 2016 election. However, it is important to gain a fuller understanding of his association with QAnon and the white nationalist groups since Trump issued him a pardon. On April 30, 2014, Flynn announced his retirement from the Army after an over thirty-year service.¹⁴⁴ Shortly after his retirement, he founded the Flynn Intel Group, a Delaware chartered corporation designed to provide "lobbying services" to foreign corporations and entities.¹⁴⁵ Flynn failed to register as a foreign agent after accepting over \$500,000 to investigate Fethullah Gülen at the behest of a business partner of Turkey's president, Recep Tayyip Erdoğan.¹⁴⁶ The Obama administration's opposition to Gülen's extradition contributed to a rift in United States-Turkish relations as Gülen is a cleric that Erdoğan insists is a danger to Turkey's security.¹⁴⁷ Flynn's failure to register under the law was, in fact, a violation of the Foreign Agents Registration Act.¹⁴⁸

It should be troubling that Flynn, a one-time director of the Defense Intelligence Agency engaged in lobbying on behalf of a foreign government, even though Turkey is a member of the North Atlantic Treaty Organization, and then failed to register in compliance with the law. The Defense Intelligence Agency is responsible for, among other missions, collecting intelligence on the military capabilities of foreign nations and non-governmental actors.¹⁴⁹ It is also noteworthy that Flynn was not held in high esteem at the end of his active duty military career.¹⁵⁰ His coworkers were concerned that

¹⁴³ Tom Dreisbach & Meg Anderson, *Nearly 1 In 5 Defendants In Capitol Riot Cases Served In The Military*, NAT'L PUB. RADIO (Jan. 2021), <https://www.npr.org/2021/01/21/958915267/nearly-one-in-five-defendants-in-capitol-riot-cases-served-in-the-military.html>.

¹⁴⁴ Nicholas Confessore, *How Michael Flynn's Disdain for Limits Led to a Legal Quagmire*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/18/us/politics/michael-flynn-intel-group-trump.html>.

¹⁴⁵ Matea Gold, *The Mystery Behind a Flynn Associate's Quiet Work For the Trump Campaign*, WASH. POST (May 4, 2017), https://www.washingtonpost.com/politics/the-mystery-behind-a-flynn-associates-quiet-work-for-the-trump-campaign/2017/05/04/fc86980e-3044-11e7-9534-00e4656c22aa_story.html.

¹⁴⁶ *Id.*

¹⁴⁷ Ceylan Yeginsu, *Turkey Issues a Warrant for Fethullah Gulen, Cleric Accused in Coup*, N.Y. TIMES (Aug. 4, 2016), <https://www.nytimes.com/2016/08/05/world/europe/turkey-erdogan-fethullah-gulen.html>.

¹⁴⁸ 22 U.S.C. § 612 (2007); see Adam Goldman, *Associate of Former Security Adviser Found Guilty of Secretly Lobbying for Turkey*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/23/us/politics/bijan-kian-guilty-flynn.html>.

¹⁴⁹ 50 U.S.C. § 3003 (2020) (lists the Defense Intelligence Agency as a part of the United States Government's intelligence community); see, e.g., *Khatchadourian v. Def. Intelligence Agency*, 453 F. Supp. 3d 54 (D.D.C. 2020).

¹⁵⁰ Michael D. Shear, *Obama Warned Trump About Hiring Flynn, Officials Say*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/08/us/politics/obama-flynn-trump.html>.

he had become too close with his Russian intelligence counterparts.¹⁵¹ Moreover, Acting Attorney General Sally Yates testified to the Senate in 2017 that she warned the Trump administration about Flynn's unreliability.¹⁵² During the investigation into Russian election interference, led by Robert Mueller, Flynn issued false statements under oath.¹⁵³ After being charged with the offense of lying to the Federal Bureau of Investigation, he pled guilty in federal court.¹⁵⁴ Ironically, during the 2016 presidential campaign he encouraged crowd supporting Trump to shout "lock her up" in regard to Trump's opponent, Hillary Clinton.¹⁵⁵

In July of this past year, Flynn appeared to swear allegiance to QAnon, a conspiracy-driven network which is designed to sow doubt in governmental institutions as well as to support Trump.¹⁵⁶ On October 2, 2020, the House of Representatives passed a bipartisan resolution condemning QAnon for its blatant anti-Semitism as well as its encouragement to engage in criminal or violent activity.¹⁵⁷ In the prior four years, Flynn has been involved in unusual political activity and as noted above, pled guilty to a federal charge of lying under oath.¹⁵⁸ The lie was accepted by a United States District Court judge to be "material," to the crime of obstruction of justice even though Attorney General William Barr, over the objections of the Department of Justice's prosecutors and many noted constitutional and criminal law scholars argued in opposite.¹⁵⁹

On November 25, 2020, Trump issued a very broad pardon to Flynn.¹⁶⁰ And on December 18, 2020 two weeks after the Electoral College confirmed that Joseph Biden and Kamala Harris were elected president and vice president, Flynn proclaimed that Trump should declare martial law and have the

¹⁵¹ Adam Goldman, *F.B.I. Used Informant to Investigate Russia Ties to Campaign, Not to Spy, as Trump Claims*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/us/politics/trump-fbi-informant-russia-investigation.html>.

¹⁵² Matthew Rosenberg, *Talk of Flynn, Leaks, and Secrets*, N.Y. TIMES, May 9, 2017.

¹⁵³ *United States v. Flynn*, 411 F. Supp. 3d 15 (D.D.C. 2019).

¹⁵⁴ *Id.*; see also *In re Flynn*, 973 F.3d 74, 76 (D.C. Cir. 2020).

¹⁵⁵ Ryan Beckwith, *Michael Flynn Led a 'Lock Her Up' Chant at the Republican Convention. Now He's Charged With Lying to the FBI*, TIME (Dec. 1, 2017), <https://time.com/5044847/michael-flynn-hillary-clinton-republican-convention-lock-her-up/>.

¹⁵⁶ Marshall Cohen, *Michael Flynn Posts Video Featuring QAnon Slogans*, CNN (June 7, 2020), <https://www.cnn.com/2020/07/07/politics/michael-flynn-qanon-video/index.html>.

¹⁵⁷ H.R. Res. 1154, 116th Cong. (2020).

¹⁵⁸ See, e.g., Spencer Hsu, *Michael Flynn Judge Says Pardon Doesn't Mean Ex-National Security Advisor is Innocent*, WASH. POST, Dec. 8, 2020.

¹⁵⁹ See, e.g., Charlie Savage, *Never Seen Anything Like This: Experts Question Dropping of Flynn Prosecution*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/us/politics/michael-flynn-case.html>.

¹⁶⁰ Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html>.

military administer a revote.¹⁶¹ Indeed, Axios has reported that Flynn and other conspiracy leaders met with Trump and accused the Justice Department under Attorney General Barr of being untrustworthy and in league with the conspiracy to deny Trump reelection.¹⁶² Multiple media sources reported on Flynn exhorting the Proud Boys and other white supremacist organizations between December 11, and immediately prior to the January 6 assault on Congress.¹⁶³

Understanding the Department of Justice's charge against Flynn, as well as the efforts of the Russian government in the 2016 election are important in placing Flynn's later conduct into another context. The Soviet Union had attempted to influence one presidential election. In 1968, the Committee for State Security (KGB) favored Hubert Humphrey over Richard Nixon, but Humphrey rejected an offer for assistance.¹⁶⁴ Nixon, it is now known, sought to undermine Lyndon Johnson's peace efforts by lobbying the South Vietnamese government to continue the war.¹⁶⁵ There is a broad consensus that the Russian government attempted to tilt the 2016 election to Trump. Flynn's deceit to the Federal Bureau of Investigation on his contacts with Ambassador Sergey Kislyak is well documented within the "Mueller Report."¹⁶⁶ Indeed, the report concluded "Flynn's false statements and omissions impeded and otherwise had a material impact on that ongoing investigation."¹⁶⁷ Whether Flynn attempted to aid Russia is not pertinent to the charges suggested below, but his conduct during the investigation into election interference evidences his state of mind to later disrupt the constitutional processes of government.¹⁶⁸

Like Ludendorff, Flynn is an accomplished author in the field of military affairs. In 2016 he authored *The Field of Fight: How We Can Win the Global*

¹⁶¹ See, e.g., Jordan Williams, *Michael Flynn: Trump Could Deploy Military to rerun the Election*, HILL (Dec. 18, 2020), <https://thehill.com/homenews/news/530795-michael-flynn-trump-should-deploy-military-to-rerun-election>.

¹⁶² Jonathan Swann, *Bonus episode: Inside the craziest meeting of the Trump presidency*, AXIOS (Feb. 2, 2021), <https://www.axios.com/trump-oval-office-meeting-sidney-powell-a8e1e466-2e42-42d0-9cf1-26eb267f8723.html>.

¹⁶³ See Matthew Rosenberg, *Flynn Is Back, Selling Anger and T-Shirts*, N.Y. TIMES (Feb. 7, 2021); N'dea Yancey-Bragg & Joshua Bote, *At least 23 arrested as crowds turn unruly after pro-Trump rally in Washington, DC*, USA TODAY (Dec. 12, 2020), <https://www.usatoday.com/story/news/nation/2020/12/12/trump-march-brings-thousands-dc-ahead-electoral-college-vote/3882935001/>; *Arrests as Trump backers protest in D.C. ahead of major rally*, CBS NEWS (Jan. 6, 2021), <https://www.cbsnews.com/news/dc-rally-arrests-trump-backers-protest/>.

¹⁶⁴ ANATOLY DOBRYNIN, IN CONFIDENCE: MOSCOW'S AMBASSADOR TO SIX COLD WAR PRESIDENTS 174 (2016).

¹⁶⁵ CARL SOLBERG, HUBERT HUMPHREY: A BIOGRAPHY 392–94 (2003).

¹⁶⁶ U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 ELECTION, VOL I 194–95 (2019), <https://ia803007.us.archive.org/11/items/MuellerReportVolume1Searchable/Mueller%20Report%20Volume%201.pdf>.

¹⁶⁷ *Id.*

¹⁶⁸ State of mind evidence has long been admissible to prove intent as well as the commission of a crime. See, e.g., *United States v. Brown*, 490 F. 2d 758, 764 (D.C. Cir. 1973); *People v. Carines*, 597 N.W.2d 130, 135 (Mich. Sup. Ct. 1999).

War Against Radical Islam and its Allies with the St. Martin's Press.¹⁶⁹ Flynn as also been cited in several studies on terrorism, the role of intelligence in American military operations against Islamic-terror networks, and the importance of cultural knowledge.¹⁷⁰ He began his career in the military after graduating from the University of Rhode Island in 1981 on an Army Reserve Officers Training Corps scholarship and entered into the military intelligence field. Flynn took part in Operation Urgent Fury, the invasion of Grenada, and has served in senior military positions during the Global War on Terror. While his impressive military record may serve as mitigation, it also highlights the fact that he was able to comprehend the gravity and dangers of his criminal conduct. And, as previously noted, Flynn was exposed to German military history throughout his attendance in the armed forces military educational process.

One troubling feature, among the many, to emerge after the January 6 attack on the capitol is that Flynn's brother, Lieutenant General Charles Flynn was involved in the military's response to the insurrection.¹⁷¹ It has been reported that when, on January 6, Capitol Police Chief Steven Sund implored the Army to immediately activate the D.C. National Guard, Lieutenant General Walter Piatt, while in the vicinity of Charles Flynn, responded that he would not support approving this request.¹⁷² Piatt has since denied making that statement.¹⁷³ Unlike the state National Guard, the Washington D.C. National Guard has the president as its commander in chief at all times, but the Secretary of the Army may order the guard's deployment.¹⁷⁴ Initially, senior military spokespersons denied that Lieutenant General Charles Flynn took part in the slow mobilization of the National Guard, but this proved to be

¹⁶⁹ THE FIELD OF FIGHT: HOW WE CAN WIN THE GLOBAL WAR AGAINST RADICAL ISLAM AND ITS ALLIES (2016).

¹⁷⁰ See, e.g., Lawrence F. Cline, *Culture for the Masses: Supporting Small Units with Cultural Intelligence*, 31 AM. INTELLIGENCE J. 39, 39–41 (2013); Mike Flynn, *An Interview with Lieutenant General Mike Flynn*, 4 PRISM 180, 181–89 (2014); WELTON CHANG, *FIXING INTELLIGENCE: REFORMING THE DEFENSE INTELLIGENCE ENTERPRISE FOR BETTER ANALYSIS* 85–90 (2013).

¹⁷¹ Dan Lamothe, *Lt. Gen. Charles Flynn Denies Relationship with Brother Was a Factor in Military's Response*, WASH. POST, Jan. 21, 2021; Mark Mazzetti et al., *Inside a Deadly Siege: How a String of Failures Led Mob to a Dark Day at the Capitol*, N.Y. TIMES (Jan. 10, 2021), <https://www.nytimes.com/2021/01/10/us/politics/capitol-siege-security.html>.

¹⁷² Carol D. Leonnig, *House, Senate Security Officials Hamstrung Efforts to Call in National Guard*, WASH. POST, Jan. 11, 2021.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., 10 U.S.C. § 12406 (2019). This statute states:

Whenever: (1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation; (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or (3) the President is unable with the regular forces to execute the laws of the United States; the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

Id.

false.¹⁷⁵ Moreover, Maryland Governor Larry Hogan's request to deploy the Maryland National Guard into the Capitol was initially rebuffed, by the Secretary of Army's office, in spite of the fact that members of Congress frantically sought his assistance.¹⁷⁶ As in the case of the D.C. Guard's activation, the Trump administration could have approved Governor Hogan's offer.¹⁷⁷ This seeming inaction of the Trump administration's response in activating the D.C. Guard raises the appearance of a possibility similarity between the Reichswehr's absence from involvement in the Kapp Putsch, since the people involved in the "stop the steal" movement to destroy the constitutional process of Electoral College certification were largely aligned with right-wing ideologies. Even if retired General Flynn had no influence in the slowness in the administration's slowness to protect Congress, his exhortations to overturn the election and implement martial law would, as advocated here, be punishable under the UCMJ. Flynn's conduct coupled with the Trump administration's slowness to respond, however, certainly places Flynn further into the Ludendorff model.

B. General Thomas McInerney

General Thomas McInerney began his Air Force career in 1959 after graduating from the United States Military Academy.¹⁷⁸ He took part in the 1962 Berlin Crisis, served as a forward air controller, and flew combat missions during the Vietnam Conflict.¹⁷⁹ There should be little doubt that he served the United States in hazardous missions with valor and served with distinction in peacetime, being promoted to the second ranking position in the Air Force, vice chief of staff.¹⁸⁰ McInerney retired from active duty in 1994 and became a consultant and editorialist for FOX.¹⁸¹ But, as in the case of Flynn, it is troubling that after rising to a position analogous to that of retired General George Van Horn Moseley, his conduct has sufficiently emulated both Moseley's and Ludendorff's.

In 2016 McInerney endorsed Trump's candidacy, and while there is nothing unlawful about doing so, it is notable that he had previously joined with

¹⁷⁵ Oren Lieberman & Barbara Starr, *Army Now Acknowledges the Brother of Michael Flynn was a Part of the Army Response to Capitol Riot*, CNN (Jan. 21, 2021), <https://www.cnn.com/2021/01/21/politics/michael-flynn-brother-capitol-hill-riot/index.html>.

¹⁷⁶ Shaila Dewan et al., *Police Failures Spur Resignations and Complaints of Double Standard*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/Capitol-cops-police.html>.

¹⁷⁷ *Id.*

¹⁷⁸ *Lieutenant General Thomas G. McInerney*, U.S. AIR FORCE, <https://www.af.mil/About-Us/Biographies/Display/Article/106262/lieutenant-general-thomas-g-mcinerney/> (last visited Jan. 2, 2022).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; See also Yvonne Sanchez, *Fox News Cuts Ties With Retired General Who Called POW John McCain, "Songbird John,"* AZ CENT. (May 11, 2018), <https://www.azcentral.com/story/news/politics/arizona/2018/05/11/fox-news-retired-general-tom-mcinerney-calls-john-mccain-songbird-charles-payne/602455002/>.

Trump in challenging Obama's legitimacy.¹⁸² Known as the "birther conspiracy," McInerney insisted that Obama was born outside of the United States and therefore could not be a legitimate president.¹⁸³ In 2010 he openly backed Lieutenant Colonel Terry Lakin, who refused to deploy to Afghanistan based on his belief that Obama was not eligible to be president.¹⁸⁴ Lakin, however, did not quietly lodge his objections to Obama but rather publicly insisted that Obama was an illegitimate commander-in-chief and did so through a conservative organization overseen by a former United States Senator.¹⁸⁵ It is true that McInerney is not the first former general to champion a service-member challenging an administration. When in 1969 a sailor named Oscar Priest published a newsletter critical of the Vietnam Conflict, disparaging both Federal Bureau of Investigation Director J. Edgar Hoover and Secretary of Defense Melvin Laird, an expert military witness testified that Priest's newsletter was unlikely to undermine military discipline.¹⁸⁶ However, the expert did not challenge Nixon's legitimacy as commander-in-chief; rather, he testified that Priest was not a danger to military discipline, and therefore the analogy is somewhat tenuous and not entirely helpful to McInerney.¹⁸⁷

McInerney's public assertions of Obama's illegitimacy could have been charged under Article 133 as well as under other articles such as solicitation to commit mutiny or contempt for the President.¹⁸⁸ However, the focus of

¹⁸² Maggie Habberman, *Donald Trump is Endorsed By Nearly 90 Military Figures*, N.Y. TIMES (Sept. 7, 2016), <https://www.nytimes.com/2016/09/07/us/politics/donald-trump-earns-backing-of-nearly-90-military-figures.html>. McInerney was not a scholar in the sense that Flynn has been. However, he has been quoted in military journals. *See, e.g.*, Dick Anderegg, *The Jet Age: Korea, Vietnam, and the Cold War*, 54 AIR POWER HISTORY 20, 22–35 (1994); Thomas McInerney, *UPDATING THE NATO FORCES FOR THE 21ST CENTURY, THE FUTURE OF AMERICAN MILITARY PRESENCE IN EUROPE* 95–99 (2002).

¹⁸³ *Id.*

¹⁸⁴ Jason Linkins, *Fox News Military Analyst Comes Out As Birther*, HUFFINGTON POST (Sept. 1, 2010, 4:30 PM), https://www.huffpost.com/entry/fox-news-military-analyst_n_702516.

¹⁸⁵ Alex Koppelman, *New Soldier Joins Birthers' Anti-Obama Crusade*, SALON (Apr. 5, 2010), https://www.salon.com/2010/04/05/birther_soldier_terrence_lakin/.

¹⁸⁶ JOSHUA E. KASTENBERG, *SHAPING U.S. MILITARY LAW: GOVERNING A CONSTITUTIONAL MILITARY* 95–96 (2014). *See* Sanford Ungar, *Gen. Shoup Will Testify for Priest*, WASH. POST, Apr. 20, 1970; *see also* Sanford Ungar, *Gen. Shoup's Testimony Cut Short*, WASH. POST, Apr. 21, 1970.

¹⁸⁷ *Id.*

¹⁸⁸ Article 82(b) of the UCMJ "Soliciting commission of offenses" reads:

Any person subject to this chapter who solicits or advises another to violate section 885 of this title (article 85), section 894 of this title (article 94), or section 899 of this title (article 99)—

(1) if the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and

(2) if the offense solicited or advised is not attempted or committed, shall be punished as a court-martial may direct.

10 U.S.C. § 882 (2019); Article 88 "Contempt toward officials" reads:

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.

10 U.S.C. § 888 (2019).

this article is on his current conduct, including falsely claiming that Speaker of the House Nancy Pelosi's laptop was taken during the assault on the Capitol and that the election was fraudulent.¹⁸⁹ This was yet another effort by McNerney to delegitimize the elected government. As noted above, McNerney claimed the special forces had attacked a Central Intelligence Agency facility in Germany to stop that agency from ensuring Biden's election.¹⁹⁰ He further insisted, without supporting facts, that Trump had defeated Biden in a "landslide" and that the Democratic Party had become treasonous.¹⁹¹ Given that his comments were published in the *Military Times*, it should be assumed that the military's rank and file were aware of his beliefs. This gives rise to the possibility that one or more members of the military, if not the general public, acted in accordance.

C. Brigadier General Anthony Tata

Like McNerney, retired Brigadier General Anthony Tata earlier claimed that Obama was an illegitimate president. Tata was commissioned in 1981 after graduating from the United States Military Academy. He retired in 2009. However, prior to his retirement, the Army Inspector General's office investigated him for adultery, and either he or his lawyer submitted a doctored court document.¹⁹² After retiring he was hired as the chief operating officer for the District of Columbia Public Schools and then Wake County, North Carolina Public School System in a similar capacity.¹⁹³ In 2013, North Carolina's governor appointed him as Secretary of the Department of Transportation. However he resigned from the position after two years.¹⁹⁴ After leaving public office, and during Trump's presidency, Tata alleged that Obama was a terrorist leader who sought Israel's destruction.¹⁹⁵ Between 2017 and 2020, Tata also made statements against Speaker Pelosi and other

¹⁸⁹ Camille Caldera, *Fact Check: Pelosi's Conference Room Laptop Was Not Taken by Special Forces During Capitol Riot*, USA TODAY (Jan. 14, 2021), <https://www.usatoday.com/story/news/factcheck/2021/01/13/fact-check-pelosis-conference-room-laptop-taken-capitol-riot/6654323002/>.

¹⁹⁰ Howard Altman, *This Retired Three-star Falsely Claims US Soldiers Died Attacking a CIA Facility in Germany Tied to Election Fraud*, MIL. TIMES (Dec. 1, 2020), <https://www.militarytimes.com/news/your-army/2020/12/01/this-retired-three-star-falsely-claims-us-soldiers-died-attacking-a-cia-facility-in-germany-tied-to-election-fraud/>.

¹⁹¹ *Id.*

¹⁹² *Army Inspectors: Tata Had Adulterous Affairs During Service*, CHI. TRIB. (Sept. 21, 2015), <https://www.chicagotribune.com/news/sns-bc-nc—tata-military-record-20150920-story.html>.

¹⁹³ Richard Stradling, *White House Taps Former Wake Schools and NCDOT Leader Tony Tata for Pentagon Position*, RALEIGH NEWS & OBSERVER (Apr. 23, 2020), <https://www.newsobserver.com/article242226456.html>.

¹⁹⁴ Bruce Sicheloff, *Tony Tata's Army Career Included Phony Court Order, at Least 2 Affairs*, RALEIGH NEWS & OBSERVER (Sept. 19, 2015), <https://www.newsobserver.com/news/politics-government/article35852217.html>.

¹⁹⁵ Gordon Lubold, *Generals Pull Support for Pentagon Nominee Tata over Offensive Tweets*, WALL ST. J. (June 18, 2020), <https://www.wsj.com/articles/generals-pull-support-for-pentagon-nominee-tata-over-offensive-tweets-11592496512>.

government officials.¹⁹⁶ In June 2020, Trump nominated Tata to the position of undersecretary of defense for policy.¹⁹⁷ This critical position is responsible for, among other duties “the integration of the activities of the Department into the National Security Strategy of the United States.”¹⁹⁸ Because of Senate objections, Tata withdrew his name from consideration prior to a confirmation vote.¹⁹⁹ Still, Trump placed Tata in the Pentagon by making him a senior advisor to Secretary of Defense Mark Esper.²⁰⁰

On November 10, 2020, after the election, Trump obtained Esper’s resignation.²⁰¹ Esper had previously objected to the use of the military to curb demonstrations demanding an end to police brutality and systemic racism in June 2020 which had, in some instances, turned violent.²⁰² One day later, Trump removed Joseph Kernan, the undersecretary of defense for intelligence, and James Anderson, the acting undersecretary of defense for policy, and appointed Christopher Miller as acting secretary of defense to replace Esper.²⁰³ Trump’s actions resulted in all ten living former defense secretaries, including former Vice President Richard Cheney and former Secretary of Defense James Mattis warning Miller that involving the military in the resolution of election disputes would undermine the Constitution.²⁰⁴ With Anderson’s resignation, Trump placed Tata into the position that the Senate originally considered him for.²⁰⁵ While Tata has apologized for his past commentary, and his more recent statements have been subdued, he was likely in a position to publicly speak against the January 6, 2021 insurrection at the

¹⁹⁶ *Id.*

¹⁹⁷ Em Steck, *White House Tells Senate Armed Services They Plan to Withdraw Controversial Pentagon Nominee, Source Says*, CNN (July 30, 2020), <https://www.cnn.com/2020/07/30/politics/anthony-tata-nomination-hearing/index.html>.

¹⁹⁸ 10 U.S.C. § 134(b) (2019).

¹⁹⁹ *See, e.g.*, 166 Cong. Rec. S2948 (daily ed. Jan. 11, 2020) (nomination of Anthony J. Tata); Steck, *supra* note 197.

²⁰⁰ Helene Cooper, *Trump Puts Pentagon in Political Crossfire with Tata*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/us/politics/tata-pentagon.html>; Dan Lamothe, *Retired General Appointed to Trump Administration in Position that Won’t Require Confirmation*, WASH. POST (Aug. 3, 2020), https://www.washingtonpost.com/national-security/retired-general-appointed-to-trump-administration-in-position-that-wont-require-confirmation/2020/08/02/19b4bfec-d50f-11ea-aff6-220dd3a14741_story.html.

²⁰¹ Tom Bowman, *Trump Terminates Secretary of Defense Mark Esper*, NAT’L PUB. RADIO (Nov. 9, 2020), <https://www.npr.org/2020/11/09/933105262/trump-terminates-secretary-of-defense-mark-esper>.

²⁰² *Id.*; *see also* Gordon Lubold, *Trump Wanted to Fire Esper Over Troops Dispute*, WALL ST. J. (June 9, 2020), <https://www.wsj.com/articles/trump-wanted-to-fire-esper-over-troops-dispute-11591728235>.

²⁰³ Luis Martinez, *Day After Defense Secretary Fired, Top Pentagon Policy Officials Asked to Resign*, ABC NEWS (Nov. 10, 2020), <https://abcnews.go.com/Politics/day-defense-secretary-fired-top-pentagon-policy-official/story?id=74131109>.

²⁰⁴ Ashton Carter et al., *All Ten Living Former Defense Secretaries: Involving the Military in Election Disputes Would Cross into Dangerous Territory*, WASH. POST (Jan. 3, 2021), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html.

²⁰⁵ Press Release, U.S. Department of Defense, DOD Statement on Personnel Changes at the Pentagon (Nov. 10 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2411893/dod-statement-on-personnel-changes-at-the-pentagon/>; Steck, *supra* note 197.

Capitol as it occurred, and certainly after it. In fact, he had a duty to do so under the UCMJ. That is, Article 94 states that a person subject to the code who fails to do his utmost to prevent and suppress a sedition is guilty of violating the article.²⁰⁶ Tata remained publicly silent on January 6 and continues to be.

D. The Military Establishment, Congress, and the Civil-Military Relations Field

It is noteworthy that while the Department of Defense has proved willing to recall retired service members for courts-martial, seldom has it evidenced an inclination to recall retired flag officers, even when there is clear evidence of criminality, such as in the recent so-called “Fat Leonard” scandal which implicated several retired admirals.²⁰⁷ The scandal arose as a result of naval officers, including retired flag officers, and civilian officials in the Department of the Navy receiving kickbacks from an Indonesian contractor. As a result, one admiral was convicted in federal court, another is awaiting trial, and several reprimanded retired flag officers who defrauded the government will still collect millions of taxpayer dollars in retirement benefits and retain their military status.²⁰⁸

General David Petraeus serves as another example of a retired flag officer who committed a UCMJ offense by having an extramarital affair and providing access to classified data to his paramour while he was Commander of U.S. and NATO forces in Afghanistan.²⁰⁹ The offenses came to light after Petraeus left the Army and was serving as CIA Director.²¹⁰ Although perhaps antiquated, the UCMJ criminalizes adultery under Article 134.²¹¹ Petraeus

²⁰⁶ The full language of 10 U.S.C. § 894(a)(3) is:

Any person subject to this chapter, who . . . fails to do his utmost to prevent and suppress a mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior commissioned officer or commanding officer of a mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

Id.

²⁰⁷ See, e.g., Paul R. Ignatius, Opinion, *The Navy Faces Huge Questions: But First It Must Regain Its Balance*, WASH. POST (Apr. 9, 2020), <https://www.washingtonpost.com/opinions/2020/04/09/beyond-navys-scandals-fleets-strength-depends-trust/>.

²⁰⁸ See, e.g., Craig Whitlock & Kevin Uhrmacher, *Prostitutes, Vacations and Cash: The Navy Officials ‘Fat Leonard’ Took Down*, WASH. POST (Sept. 20, 2018), <https://www.washingtonpost.com/graphics/investigations/seducing-the-seventh-fleet/>; see also Carl Prine, *Navy Upbraids Retired Admiral Caught Up in the Fat Leonard Scandal*, SAN DIEGO UNION-TRIB. (Nov. 29, 2017), <https://www.sandiegouniontribune.com/news/watchdog/accountability/sd-me-fat-leonard-censure-20171129-story.html>.

²⁰⁹ Craig Whitlock & Adam Goldman, *Pentagon Won’t Punish David Petraeus any Further in Sex-and-Secrets Scandal*, WASH. POST (Jan. 30, 2016), https://www.washingtonpost.com/world/national-security/pentagon-decides-no-further-punishment-warranted-for-petraeus/2016/01/30/b503348e-c767-11e5-8965-0607e0e265ce_story.html.

²¹⁰ *Id.*

²¹¹ See, e.g., *United States v. Taylor*, 64 M.J. 416 (C.A.A.F. 2007); 10 U.S.C. § 934 Art. 134. General Article.

was a decorated officer who had earned national acclaim, but he was permitted to plead to a federal misdemeanor charge and sentenced to probation.²¹² Like Petraeus, retired General James Cartwright was allowed to plead guilty in federal court to a misdemeanor after it was discovered he lied to Federal Bureau of Investigations agents pursuing national security leaks.²¹³ In *United States v. Gomes*, the Court of Military Appeals accepted this conduct as a chargeable offense for retirees under the UCMJ.²¹⁴ In contrast, several lower-ranking retirees who have been recalled to active duty and court-martialed have been sentenced to dishonorable discharges.²¹⁵ Thus, the failure to hold Flynn and other retired flag officers accountable under military law may inform the military's rank and file that retired flag officers are an unfairly protected class, thereby eroding faith in the fairness of the military justice system.²¹⁶

The first retired flag officer to be court-martialed under the UCMJ was Admiral Selden Hooper in 1957.²¹⁷ A decorated World War II veteran who commanded naval forces against the Japanese, Hooper was caught in a homosexual sting operation, brought back on duty, and court-martialed for conduct unbecoming an officer and gentleman.²¹⁸ He spent the rest of his life unsuccessfully trying to convince the military and federal courts that as a retiree, his conduct had no bearing on the military.²¹⁹ In 2017, the Army recalled an elderly retired general, James Grazioplene, to duty after determining there was probable cause to conclude that he committed rape of a child over two decades earlier.²²⁰ The statute of limitations prohibited the Army from pursuing a court-martial, but Grazioplene later pled guilty in a Virginia

²¹² Mark Hosenball & Will Dunham, *Ex-CIA Chief Petraeus to Plead Guilty, Admits Giving Mistress Secrets*, REUTERS (Mar. 3, 2015), <https://www.reuters.com/article/us-usa-petraeus-plea/ex-cia-chief-petraeus-to-plead-guilty-admits-giving-mistress-secrets-idUKKBN0LZ1XS20150303>.

²¹³ Charlie Savage, *Obama Pardons James Cartwright, General Who Lied to the FBI*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/obama-pardons-james-cartwright-general-who-lied-to-fbi-in-leak-case.html>.

²¹⁴ 11 CMR 232 (CMA 1953); see also *infra* notes 299–300 and accompanying text.

²¹⁵ See, e.g., *United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018); *United States v. Ballard*, 79 M.J. (A.F. Crim. App. 2019); and *Pearson v. Bloss*, 28 M.J. 764 (A.F. Crim. App. 1989).

²¹⁶ Often derisively labelled “different spansks for different ranks,” there has long been a belief that senior officers escape the penalties levied on junior officers and enlisted personnel. See, e.g., Stephen Losey, *Different Spansks for Different Ranks*, AIR FORCE TIMES (Feb. 21, 2018), <https://www.airforcetimes.com/news/your-air-force/2018/02/21/different-spansks-for-different-ranks-lawmaker-questions-lack-of-courts-martial-for-air-force-generals/>.

²¹⁷ See, e.g., *Hooper v. Hartman*, 274 F. 2d 429 (9th Cir. 1958); ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* 114 (2005); Jamie McIntyre, *Retired Generals to Plead Guilty on some Charges*, CNN, Mar. 16, 1999.

²¹⁸ *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958). On Hooper's career, see HILLMAN, *supra* note 217, at 115, 220.

²¹⁹ See, e.g., *United States*, 326 F.2d 982 (Ct. Cl. 1964), and *Hooper v. Laird*, 41 C.M.R. 329 (C.M.A. 1970).

²²⁰ Catherine Valentine, *Retired Two-Star Army General Pleads Guilty to Sexually Abusing his Daughter*, CNN (July 9, 2020), <https://www.cnn.com/2020/07/08/politics/retired-two-star-army-general-pleads-guilty/index.html>.

state court.²²¹ Historically, there is a pattern in which retired flag officers are exempted from court-martial unless their conduct results in a singular victim, such as in Grazioplene's case, or when a disfavored minority violates a military code of conduct, such as in Hooper's case. Clearly, Hooper was not a national security threat, and while Grazioplene's crime was of a horrible nature, he too was not the threat to the nation's security that Flynn and the others are.

The military establishment's reticence to apply the UCMJ to retired flag officers may be partly reflected, if not enabled, by the quietude of practitioners in the field of civil-military relations. Most recently, one of the leading civil-military relations scholars, Professor Peter Feaver, had little to write on Flynn in terms of the military holding him accountable, but at least he mentioned Flynn in regard to the events of January 6.²²² (In 2015 Feaver cautioned that Flynn, having retired from the military and immediately criticized the Obama administration, had made himself vulnerable to a charge of behaving inappropriately.²²³) Andrew Bacevich, another prominent military affairs scholar, observed that Trump had lost respect within the military's flag officer ranks, but he has not mentioned Flynn's conduct prior to the election.²²⁴ Professor Bacevich did, however, criticize the retired flag officers who endorsed Trump's reelection efforts.²²⁵

Beyond Feaver's and Bacevich's scholarship, the punditry on the subject of recalling retirees is laced with an imbalance which exempts Flynn, McInerney, and others who have backed causes associated with January 6. In June, 2020, Victor David Hanson authored a critique of retired generals in the *National Review* but omitted Flynn, McInerney, and Tata.²²⁶ Hansen recently cautioned that retirees remain subject to the UCMJ and could be prosecuted for contempt toward the president, but he was referring to retired flag officers who opposed Trump's response to demonstrations for social justice over the summer.²²⁷ Hanson has, however, been supportive of Trump's policies, if not the president's character.²²⁸ Edward Chang, an author for the *Federalist*, excoriated retired Admiral William McRaven for criticizing Trump, warning

²²¹ *Id.*

²²² Peter Feaver, *The Military Stayed Out of the Insurrection but It Isn't Over Yet*, FOREIGN POL'Y (Jan. 7, 2021), <https://foreignpolicy.com/2021/01/07/pro-trump-insurrection-republican-party-military-capitol/>.

²²³ Sean D. Naylor, *Out of Uniform and Into the Political Fray*, FOREIGN POL'Y (June 19, 2015), <https://foreignpolicy.com/2015/06/19/out-of-uniform-and-into-the-political-fray/>.

²²⁴ Andrew Bacevich, Opinion, *Did You Notice? Trump Just Tried to Turn the U.S. Armed Forces into His Personal Domestic Police Force*, L.A. TIMES (June 4, 2020), <https://www.latimes.com/opinion/story/2020-06-04/james-mattis-donald-trump-tom-cotton-insurrection-act>.

²²⁵ See Kelley Vlahos, *Why Trump's Top Military Brass Endorsement May Alienate the Rank and File*, RESPONSIBLE STATECRAFT (Sept. 15, 2020), <https://responsiblestatecraft.org/2020/09/15/why-trumps-top-retired-military-brass-endorsement-may-alienate-the-rank-and-file/>.

²²⁶ Victor Davis Hanson, *The-Not-So Retiring Retired Military Leaders*, NATIONAL REV. (June 7, 2020), <https://www.nationalreview.com/2020/06/not-so-retiring-retired-military-leaders/>.

²²⁷ *Id.*

²²⁸ E.g., VICTOR DAVIS HANSON, THE CASE FOR TRUMP (2019).

he encouraged insubordination in the ranks.²²⁹ However, an internet search yields an absence of criticism on Flynn and the others from Chang.

Retired Major General Charles Dunlap, a Duke University professor of legal practice and former deputy judge advocate general, warned in 1994 that there was a decline in civilian control of the military and that if “conventional political methodologies” failed, the military itself could be placed in a position of taking over the functions of government.²³⁰ Eight years later he authored a fictionalized account of a military junta in *Parameters*, the Army War College journal.²³¹ The cause of the junta was partly attributable to a loss of faith in democracy and the inability of the government to constitutionally govern.²³² Dunlap has championed the authority to recall retirees and has opposed the conduct of retired flag officers who criticized Trump.²³³ However, since the 2020 summer demonstrations against police brutality, if not since the beginning of the Trump administration, he has supported Trump’s military policies including the pardoning of former service members convicted of “war crime” offenses.²³⁴ He warned attorneys who might advise service members on the legality of presidential orders that they may be committing an offense by doing so.²³⁵ However, in none of his posts, through mid-February 2021, did he appear to articulate concern about Flynn, McInerney, or the dangers of right-wing supremacist groups undermining the military, though he cautioned that efforts to curb extremism in the military might trammel the rights of service members.²³⁶ Disconcertingly, Dunlap’s blog

²²⁹ Edward Chang, *Why Retired Military Officers Need to Shup Up About Politics*, FEDERALIST (Oct. 23, 2019), <https://thefederalist.com/2019/10/23/why-retired-military-officers-need-to-shut-up-about-politics/>.

²³⁰ Charles Dunlap, *Welcome to the Junta: The Erosion of Civilian Control of the United States Military*, 29 WAKE FOREST L. REV. 341, 342, 391 (1994). In his article, Professor Dunlap, a retired deputy judge advocate general of the United States Air Force Judge Advocate General’s Corps wrote:

. . . [T]he military is itself a meritocracy, but a very different one from that which produces the Meritocratic Class now assuming power. In the armed forces, advancement is based largely on the demonstrated ability to succeed in often difficult environments through the orchestration of a complex amalgam of people and machines.

Id. at 366. However, he omitted mention of racial and gender bias in the military, recruitment, retention, and promotion processes, which undermines the meritocratic model. See Witt v. U.S. Dep’t of the Air Force, 444 F. Supp. 2d 1138 (W.D. Wash. 2006) (detailing sexual orientation discrimination in the military).

²³¹ Charles J. Dunlap, Jr, *The Origins of the Military Coup of 2012*, 40 PARAMETERS 107 (2012).

²³² *Id.* at 109.

²³³ See Charles Dunlap, *Should Retired Servicemembers Be Subject to Military Jurisdiction? A Retiree’s Perspective*, LAWFIRE BLOG (Feb. 16, 2019), <https://sites.duke.edu/lawfire/2019/02/16/should-retired-servicemembers-be-subject-to-military-jurisdiction-a-retirees-perspective/>.

²³⁴ See, e.g., Anna Grobe, *Does Trump’s Seal Pardon Undermine Military Justice*, CHRISTIAN SCI. MONITOR (Nov. 27, 2019), <https://www.csmonitor.com/USA/Politics/2019/1127/Does-Trump-s-Navy-SEAL-pardon-undermine-military-justice>.

²³⁵ Charles Dunlap, *Why the Orders Project Is So Troubling*, LAWFIRE BLOG (Oct. 26, 2020), <https://sites.duke.edu/lawfire/2020/10/26/why-the-orders-project-is-troubling/>. Contrary to Dunlap’s claims, the actions of the lawyers in this project appear to be similar to the attorney volunteers who lawfully counseled males subject to the draft during the Vietnam Conflict.

²³⁶ See Charles Dunlap, *Is the Pentagon Prepared for Its “Extremism” Stand-down? Six Ideas that Might Help*, LAWFIRE BLOG (Feb. 7, 2021), <https://sites.duke.edu/lawfire/2021/02/07/is-pentagon-prepared-for>

includes a guest post that could be interpreted as defending the right of active duty officers to engage in conduct that has the potential to undermine an incoming commander-in-chief.²³⁷

Another example of the imbalance in approaching military justice is evident in Congress. For instance, Senator Marco Rubio demanded that the Army discipline Lieutenant Spenser Rapone after discovering that Rapone lauded the long-deceased communist fighter Che Guevara.²³⁸ While it is true that Guevara murdered innocent people, Rapone, who was administratively discharged by the Army, hardly constitutes the threat to the national security on the level of Flynn. Indeed, Rubio has been silent as to generals that backed Trump, including Flynn. Rubio is not alone in the Senate. Lindsay Graham, a retired reserve colonel and judge advocate, lauded Flynn as well.²³⁹ Although Graham spoke complementarily about Flynn prior to January 6, he has remained silent on the matter in the weeks after the event. He has instead oddly cast some of the blame for the gravity of the attack on Speaker Pelosi. Graham is a retired reserve colonel in the Air Force Judge Advocate General's Corps and presumably has enough familiarity with military law and history to understand the dangers of Flynn's conduct.²⁴⁰ Yet, he chose to ally with Flynn.

III. MILITARY LAW AND THE RETIREEE

While the authority to recall retirees has long existed in United States law, it is important to note that this authority withstood constitutional challenge after the Court determined in 1955 in *United States ex rel Toth v. Quarles* that service members who were discharged after serving in the military for a period of time, but short of retirement, were beyond the reach of

its-extremism-stand-down-six-ideas-that-might-help/. Dunlap, in this post, oddly appears to assume that Secretary of Defense Lloyd Austin as well as his office did not consider the legal ramifications of their efforts to curb racism from the military, even though there exists a Department of Defense General Counsel.

²³⁷ Charles Dunlap, *Guest Post: Brian Lee Cox says 'Active-duty Troops Did Not Violate the UCMJ or DoD Policy Merely by Attending the 'Save America Rally,'* LAWFIRE BLOG (Feb. 5, 2021), <https://sites.duke.edu/lawfire/2021/02/05/guest-post-brian-lee-cox-on-active-duty-troops-did-not-violate-the-ucmj-or-dod-policy-merely-by-attending-the-save-america-rally/>.

²³⁸ Alex Horton, *A West Point Grad Wrote 'Communism Will Win' in his cap. The Army Kicked Him Out.*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/checkpoint/wp/2018/06/19/a-west-point-grad-wrote-communism-will-win-in-his-cap-the-army-kicked-him-out/>; Rebecca Kheel, *Rubio Asks Army to Kick Out West Point Grad with Pro-Communist Posts*, HILL (Oct. 4, 2017), <https://thehill.com/policy/defense/353901-rubio-army-should-revoke-commission-of-west-point-grad-with-pro-communist>.

²³⁹ *Sen. Graham Praises Pres. Trump for General Michael Flynn Pardon*, ABC NEWS (Nov. 25, 2020), <https://abcnews4.com/news/local/sen-graham-praises-pres-trump-for-general-michael-flynn-pardon>.

²⁴⁰ *See Biography*, U.S. SEN. LINDSEY GRAHAM, <https://www.lgraham.senate.gov/public/index.cfm/biography> (last visited May 2, 2021). Graham served as a military judge on the United States Air Force Court of Criminal Appeals, but he was disqualified from judicial service after a higher appellate court found his senatorial position incompatible with a judicial assignment. *See, e.g., United States v. Lane*, 64 M.J. 1 (C.A.A.F. 2006).

military jurisdiction.²⁴¹ *Toth* concededly arose during a period of conscription and also at a time when the Court significantly reduced the reach of military jurisdiction in a variety of arenas.²⁴² But *Toth* has remained the law of jurisdictional limitation for the United States military. Moreover, it is also significant that in 1958 in *Trop v. Dulles*, the Court precluded the automatic loss of United States citizenship after a court-martial conviction.²⁴³ Thus, while the Court has upheld retaining jurisdiction over retirees, since the end of World War II, it has significantly curbed the reach and effects of military jurisdiction over short-term service members and citizens.

United States laws and military regulations also place occupational and commercial restrictions on retirees. Notably, in 1963, the United States District Court for the District of Columbia, in *Taussig v. McNamara*, upheld a post-employment restriction against lobbying the Department of Defense on behalf of defense corporations.²⁴⁴ *Taussig* did not arise from a court-martial but rather from an instance in which the Department of the Navy halted Joseph Taussig's military retirement income.²⁴⁵ Taussig was a decorated World War II naval veteran.²⁴⁶ After the Navy restored his pension following a ten-week-long inquiry, Taussig sought a declaratory judgment in federal court that the statutory post-retirement prohibition against "influence peddling" was an unconstitutional restraint on him.²⁴⁷ Judge Luther Youngdahl, the author of *Taussig*, determined that commercial prohibitions designed to prevent influence peddling did not amount to "invidious discrimination" but rather

²⁴¹ United States ex rel. *Toth v. Quarles*, 350 U.S. 11 (1955). See also KASTENBERG, *supra* note 186, at 13.

²⁴² See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (determining that the military could not extend jurisdiction over civilians in United States territories if the civil courts were fully functioning); see also *Reid v. Covert*, 354 U.S. 1, 5–6, 40–41 (1956) (determining that United States citizen civilians residing overseas may not be tried by military authorities and have constitutional rights to grand jury indictment and civil trial by jury). On the history of *Duncan*, see JOSHUA E. KASTENBERG AND ERIC MERRIAM, *IN A TIME OF TOTAL WAR: THE FEDERAL JUDICIARY AND THE NATIONAL DEFENSE, 1940–1954*, 96 (2016). On the factual history of *Reid*, see Brittany Warren, *The Case of the Murdering Wives: Reid v. Covert and the Complicated Question of Courts and Courts-Martial*, 212 MIL. L. REV. 133, 142–51 (2012). In *Grissham v. Hagan*, 361 U.S. 278, 280–81 (1960), the Court extended *Reid* to preclude capital murder trials of civilian military employees in military courts, and in *McElroy v. Guagliardo*, 361 U.S. 281, 284 (1960), the Court extended the prohibition to non-capital crimes.

²⁴³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The origins of the law stripping citizenship from persons convicted of desertion date to the Civil War in which the Lincoln Administration believed that desertion was caused by disloyalty. See JOSHUA E. KASTENBERG, *LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861–1865*, 319–20 (2011).

²⁴⁴ *Taussig v. McNamara*, 219 F. Supp. 757, 761–62 (D.D.C. 1963).

²⁴⁵ See *Navy Halts Pension in Test of Directive*, N.Y. TIMES, May 26, 1962, at 8. However, after a ten-week long inquiry, the Navy restored Taussig's pension.

²⁴⁶ Louie Estrada, *Captain Joseph Taussig Dies*, WASH. POST (Dec. 17, 1999), <https://www.washingtonpost.com/archive/local/1999/12/17/capt-joseph-taussig-dies/657a660b-ff69-4e4e-a64d-c08972a395d0/>.

²⁴⁷ See *Conflict Inquiry Restores Pension of Navy Captain*, N.Y. TIMES, June 16, 1962, at 32; and *Taussig*, 219 F. Supp. at 760.

were within the power of Congress to protect the government.²⁴⁸ It is noteworthy that Youngdahl, a World War I veteran, had earlier served as the judge on the trial of Owen Lattimore and cast considerable doubt on the government's national-security-based prosecution in that trial.²⁴⁹

A. The Law and the History of Retiree Recall to Duty

On August 18, 1916, President Woodrow Wilson vetoed a military appropriations bill that, had it become law, would have terminated the Army's ability to recall a retiree to duty for the purpose of a court-martial.²⁵⁰ No sizeable congressional opposition to the recall of retirees was demanding a change in the law. Rather, the impetus for the bill came from one member of the House of Representatives.²⁵¹ Congressman John Hay (D-VA), the chairman of the House Military Affairs Committee, had earlier taken sides in a dispute between General Frederick Ainsworth, the Army's adjutant general, and General Leonard Wood, the chief of staff of the army.²⁵² In the midst of a War Department staff reorganization in 1912, Secretary of War Henry Stimson suspended Ainsworth from his position and initiated court-martial proceedings; Ainsworth asked for permission to retire.²⁵³ Hay, who allied with Ainsworth, was upset that the War Department could recall the now-retired Ainsworth to duty and prosecute him in a court-martial if he continued to bring his dispute with Wood to the public.²⁵⁴

In 1881, the Court, in *United States v. Tyler*, upheld the government's position that military retirement pay is actually "compensation . . . at a reduced rate."²⁵⁵ *Tyler* arose from a retired officer's challenge to the Army's pension scheme, rather than from a court-martial conviction.²⁵⁶ However, the Court held that retirees remain in the service and are therefore subject to the

²⁴⁸ *Taussig*, 291 F. Supp. at 762. *Taussig* also argued that the lack of such prohibitions on retired reserve and National Guard officers was discriminatory, but Judge Luther, in reviewing the legislative history of the prohibition, noted that Congress found that such a prohibition would unfairly interfere with the civilian job opportunities for part-time service-members who had not made a long career in the military. *Id.* at 762.

²⁴⁹ *Judge Luther Youngdahl, Ex-Governor of Minnesota, Dies*, WASH. POST (June 22, 1978), <https://www.washingtonpost.com/archive/local/1978/06/22/judge-luther-youngdahl-ex-governor-of-minnesota-dies/0d2f92b6-9887-4444-bd64-77e326ec51c9/>.

²⁵⁰ 53 CONG. REC. 12,844–45 (1916).

²⁵¹ *Hay Accepts Wilson's Veto: Will Call Up Army Bill with Articles of War Left Out*, N.Y. TIMES, Aug. 22, 1916, at 6.

²⁵² *Army Bill Vetoed; May Cause a Fight*, N.Y. TIMES, Aug. 19, 1916, at 4. See HERBERT ALAN JOHNSON, WINGLESS EAGLE: U.S. ARMY AVIATION THROUGH WORLD WAR I, 74 (2001); see also WILLIAM GARDINER BELL, COMMANDING GENERALS AND CHIEFS OF STAFF, 1775–2013, 33–34.

²⁵³ DAVID WOODWARD, THE AMERICAN ARMY AND THE FIRST WORLD WAR 13 (2014).

²⁵⁴ *Yields on Army Bill: Chairman Hay Will Not Oppose Revision of Articles of War*, WASH. POST, Aug. 20, 1916. Hay's opposition to the ability to recall officers while the government was considering wartime preparations was ill-timed. However, Wilson's veto also reflects that the federal courts had already considered the issue and determined such a recall to be constitutional.

²⁵⁵ *United States v. Tyler*, 105 U.S. 244, 245 (1881).

²⁵⁶ *Id.* at 244.

military's rules and Articles of War.²⁵⁷ At no time prior to Wilson's veto does it appear that the federal judiciary cast doubts on *Tyler*. Indeed, in 1912, the Court favorably referenced *Tyler*.²⁵⁸ Moreover, in 1895, the Court of Claims determined that because there was a statutory prohibition against federal officers representing clients against the United States Government in that court, Colonel William Winthrop, as a retired military officer, was constrained by the same law.²⁵⁹ Ironically, in his *Military Law and Precedents*, Winthrop noted in a footnote: "That retired officers are a part of the army and so triable by court-martial—a fact never indeed admitting of question—is adjudged in *Tyler*."²⁶⁰

In 1895, the Court of Appeals for the District of Columbia refused to intercede in the arrest of a retired officer.²⁶¹ After Captain George A. Armes retired in 1883, one could fairly characterize him as a troubled and troublesome retired officer who attracted attention.²⁶² Prior to his retirement, the Army had thrice court-martialed him for insubordination and assault, including once for punching Pennsylvania's governor.²⁶³ The offense which led to his arrest in 1895 was purely military in nature: he sent an insulting letter to Lieutenant General John McAlister Schofield, the Commanding General of the United States Army.²⁶⁴ Armes was able to obtain a judicial order freeing him from arrest, but the War Department appealed to Justice Ferdinand Morris, who reversed the order.²⁶⁵ To Justice Morris, a Civil War Union Army veteran, it was unquestionably constitutional for a retired officer to remain subject to military law, as evidenced by the beginning of his ruling:

The appellee is an officer of the army of the United States, entitled to wear its uniform and to draw pay as such, and by express provision of the statute law of the United States for the government of the army, made subject to the rules and articles of war, and to trial by court-martial for any infraction of those articles.²⁶⁶

²⁵⁷ *Id.* at 246.

²⁵⁸ *See, e.g.,* *Plummer v. United States*, 224 U.S. 137, 144 (1912).

²⁵⁹ *In re Winthrop*, 31 Ct. Cl. 35, 38–39 (1895). Winthrop unsuccessfully argued that as a retired officer, he was not in a position to connive against or defraud the United States.

²⁶⁰ WINTHROP, *MILITARY LAW AND PRECEDENTS*, *supra* note 48, at 87 n.27. Congress may also exempt retiree pensions from increases including, during times of war. *See* *Murphy v. United States*, 38 Ct. Cl. 511, 525 (1903).

²⁶¹ *Closson v. United States*, 7 App. D.C. 460, 481 (D.C. Cir. 1896).

²⁶² *See id.* at 471. *See also* *Army Officer is Shot by Tenant: Maj. George A. Armes, Retired, Wounded After Ejection Proceedings*, CHI. TRIB., Aug. 22, 1902.

²⁶³ *See, e.g.,* JOSHUA E. KASTENBERG, *TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE, AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I*, 62–65 (2017); *see also* *Major Geo. A. Armes Shot; Retired Army Officer Injured by a Former Tenant—The Major's Exciting Career*, N.Y. TIMES, Aug. 22, 1902, at 1.

²⁶⁴ *Victim of His Spite: Capt. Armes Taken from His Table to an Army Prison*, CHI. TRIB., Sept. 28, 1895.

²⁶⁵ *Closson*, 7 App. D.C. at 461, 481. *See also* *Charges Against Capt Armes*, N.Y. TIMES, Oct. 4, 1895, and *Maj Armes Court-Martial*, WASH. POST, Oct. 5, 1895; *Armes Writ Argued*, WASH. POST, Oct. 6, 1895.

²⁶⁶ *Closson*, 7 App. D.C. at 470.

And, Morris noted that conduct unbecoming an officer and gentleman was one of the laws *Armes*' likely violated.²⁶⁷

In 1961, the United States District Court for the District for Northern California upheld the recall of a retired naval officer for the purpose of a court-martial.²⁶⁸ Similar to the case of retired Admiral Selden Hooper, the Navy charged the retired officer with sodomy and conduct unbecoming an officer.²⁶⁹ In upholding the authority to recall the retired officer, Judge Albert Charles Wollenberg noted "the interest of the Navy in policing its retired members is a legitimate one, since their commissions are not expired, but are merely dormant, pending call."²⁷⁰ Although Wollenberg had never served in the military, he reached a conclusion on retiree jurisdiction similar to Morris and Youngdahl.²⁷¹

Military courts have also consistently upheld the constitutionality of recalling retirees who violate various military law prohibitions. For instance, in 1964, the Court of Military Appeals determined that Congress's extension of jurisdiction to disabled retirees was constitutional and therefore the military could prosecute a retiree for offenses which occurred on an overseas military base.²⁷² In 1987, the Court of Military Appeals upheld the military's assertion of jurisdiction over a retired marine who committed larceny on a military base.²⁷³ In 1989, in *Pearson v. Bloss*, the Air Force Court of Criminal Appeals noted that under regulations prescribed by the Secretary of the Air Force, retired service members could be recalled to active duty if the charges were linked to the military or were adverse to the United States.²⁷⁴

²⁶⁷ *Id.* at 462–63. See also *Armes Case Reversed*, WASH. POST, Jan. 7, 1896.

²⁶⁸ *Chambers v. Russell*, 192 F. Supp. 425, 427–28 (N.D. Cal. 1961).

²⁶⁹ *Id.* at 426.

²⁷⁰ *Id.* at 428. Judge Wollenberg further stated:

It is apparent to this court that an officer of the United States in a retired military status may reasonably be expected to maintain the essential dignity befitting his rank and status, the qualifications and standards of his rank, and hold himself ready and fit for recall to active duty, in so far as he is subject to an involuntary return to service in the event of war or national emergency.

Id.

²⁷¹ *Wollenberg, Albert Charles*, FEDERAL JUDICIAL CTR., <https://www.fjc.gov/node/1390016> (last visited Apr. 25, 2021).

²⁷² *United States v. Bowie*, 34 CMR 411, 412 (CMA 1965). In *Bowie*, the appellant argued that Reid v. Covert precluded his court-martial because as a civilian residing in Canada, he was immune to military jurisdiction. The Court of Military Appeals determined that the continuance of military jurisdiction over retirees included overseas locations. *Id.* at 62. In 1992, in *Sands v. Colby*, 35 M.J. 620, 620–21 (A.C.M.R. 1992), the Army Court of Military Review followed suit and determined the Army possessed jurisdiction over a retiree to prosecute a murder that had occurred in Saudi Arabia.

²⁷³ *United States v. Overton*, 24 M.J. 309, 311–12 (C.M.A. 1987), *cert. denied*, 484 U.S. 976 (1987).

²⁷⁴ *Pearson v. Bloss*, 28 M.J. 764, 766 (A.F.C.M.R. 1989).

B. Sedition in Military Law

Sedition and solicitation of others to commit sedition are rarely prosecuted crimes in the United States military.²⁷⁵ This may be because the overwhelming majority of military personnel take their allegiance to the Constitution as an unbreakable duty. Perhaps, for this reason, in 1983, the Court of Military Appeals, in *United States v Mitchell*, turned to Winthrop's influential *Military Law and Precedents* to provide guidance on the question of intent regarding solicitation.²⁷⁶ Winthrop—who has been called the “Blackstone of Military Law,” by the Supreme Court—continues to be cited for matters on military law.²⁷⁷ Winthrop—a Civil War veteran who rose to become the deputy judge advocate general with the rank of colonel before his retirement in 1895—authored several treatises on military law.²⁷⁸ The federal courts often turned to his scholarship while he was still alive.²⁷⁹ Near the front of his analysis on the nature of military sedition, in *Military Law and Precedents*, he noted that sedition may be defined as “resistance to the *civil power*, demonstrated by riot or aggravated disorder.”²⁸⁰ However, he also noted that at no time prior to the publication of *Military Law and Precedent* had the Army actually court-martialed a soldier for sedition.²⁸¹ Although a service member could be guilty of both mutiny and sedition for actions arising from a singular course of conduct, it is clear that mutiny is the defiance of military orders while sedition is “supposed to apply to acts of a treasonable or riotous nature, directed against the public peace and the civil authority rather than military superiors.”²⁸²

Prosecution of sedition in the military has a long history. In 1649, British military law listed sedition as an offense that was similar in severity to treason.²⁸³ Importantly, under the Council of State, which arose as England's governing body after the execution of Charles I, the law considered sedition to be a verbal action in which the offender made statements to the effect that

²⁷⁵ David G. Baldus, Catharine M. Grosso, George Woodworth, and Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. OF CRIM. L. AND CRIMINOLOGY 1227, 1231 (2012).

²⁷⁶ See, e.g., *United States v. Mitchell*, 15 M.J. 214, 216 (C.M.A. 1983).

²⁷⁷ See, e.g., *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006).

²⁷⁸ See, e.g., WILLIAM WINTHROP, *DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY* (1866); WILLIAM WINTHROP, *AN ABRIDGMENT OF MILITARY LAW* (1893).

²⁷⁹ See, e.g., *In re Grimley*, 137 U.S. 147 (1890); see also *United States v. Landers*, 92 U.S. 77, 80 (1875); see also *Smith v. Whitney*, 116 U.S. 167, 180 (1885); see also *Kurtz v. Moffit*, 115 U.S. 487, 502 (1885); see also *Mechs. and Traders Bank v. Union Bank*, 89 U.S. 276, 302 n. 20 (1874). The Court, in *Mechs. and Traders Bank*, complimented Winthrop's scholarship. *Id.*

²⁸⁰ WINTHROP, *supra* note 48, at 582.

²⁸¹ *Id.*

²⁸² *Id.* at 582–83.

²⁸³ Alexander Tytler, *An Essay on Military Law, and the Practice of Courts Martial*, 96–97, 192 (1802).

the Parliament or Council of State were tyrannical.²⁸⁴ The 1688 Articles of War of James II criminalized sedition as enticing or persuading others to act against the monarch or the government.²⁸⁵ In 1775, the British Articles of War—as adopted by the Continental Army in the War of Independence—criminalized sedition, albeit with no mention of a monarch.²⁸⁶ The 1874 Articles of War for the United States Army prohibited both sedition and the failure to suppress sedition.²⁸⁷

Although there is a dearth of published appellate military law decisions on sedition prior to the UCMJ, court-martial orders from naval and army courts-martial review provide guidance to the historic meaning of sedition in United States courts-martial.²⁸⁸ In 1918, the Navy Judge Advocate General defined military sedition as “conduct tending toward treason but wanting an overt act.”²⁸⁹ In 1942, the Navy Judge Advocate General’s office determined that a service-member who disparaged the United States through unpatriotic language was not guilty of sedition unless the words were uttered with a seditious intent.²⁹⁰ In that particular case, an enlisted Marine was allegedly overheard favoring Italy, a country in which the United States had declared war on, over the United States.²⁹¹

²⁸⁴ *Id.* at 97. The Council of State became the governing body of England after the execution of Charles I on February 14, 1649. J.A. Cannon, *Council of State*, in THE OXFORD COMPANION TO BRIT. HIST., <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/council-state> (last visited May 16, 2021).

²⁸⁵ Article IX reads:

Whoever shall go about to Entice or Persuade either Officer or Soldier to join in or engage in any Traitorous or Rebellious Act either against the Royal Person of the King or Kingly Government shall suffer Death for it; and whoever shall not reveal to his superior Officer such a conspiracy as soon as ever it shall come to his knowledge shall be judged equally guilty with the Contrivers of such a Plot or Conspiracy, and consequently shall suffer same Penalty.

GARNET WOLSELEY, 2 THE LIFE OF JOHN CHURCHILL, DUKE OF MARLBOROUGH, TO THE ACCESSION OF QUEEN ANNE 83–84 (1894).

²⁸⁶ GEORGE BRECKENRIDGE DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 342 (1st ed. 1903).

²⁸⁷ Article 22 reads: “Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment, as a court-martial may direct.” *Id.* at 389. Article 23 reads:

Any officer or soldier who being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same or having knowledge of any intended mutiny or sedition, does not without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.

Id. at 391.

²⁸⁸ For the process of courts-martial review, see Joshua E. Kastenberg, *Fears of Tyranny: The Fine Between Presidential Authority over Military Discipline and Unlawful Command Influence Through the Lens of Military Legal History in the Era of Bergdahl*, 49 HOFSTRA L. REV. 11, 110–12 (2020).

²⁸⁹ C.M.O. 4—1918, in 1 OFFICE OF THE JUDGE ADVOCATE GEN., U.S. NAVY, COMPILATION OF COURT-MARTIAL ORDERS FOR THE YEARS 1916–1937, 147 (1940).

²⁹⁰ OFFICE OF THE JUDGE ADVOCATE GEN., U.S. NAVY, COMPILATION OF COURT-MARTIAL ORDERS 270 (1942).

²⁹¹ *Id.* Apparently, while the enlisted Marine was in a taxicab he stated “I hope Italy comes over and takes the whole damned United States. The damned presidents of the United States are as rotten as the United

Both sedition and mutiny are considered among the most serious crimes and may be punished with a sentence of death.²⁹² The UCMJ lists both mutiny and sedition within Article 94.²⁹³ In current military law, sedition is defined as acting “with intent to cause the overthrow or destruction of lawful civil authority, creat[ing], in concert with any other person, revolt, violence, or other disturbance against that authority.”²⁹⁴ Mutiny is defined as “violence or disturbance” with a corresponding “intent to usurp or override lawful military authority” or a refusal “in concert with any other person, to obey orders or otherwise do his duty.”²⁹⁵ Thus, sedition is a crime against the civil government while mutiny is a crime against the military. UCMJ Article 82 makes it illegal to solicit others to commit sedition or mutiny.²⁹⁶ In 1952, the Army charged over eighty soldiers from the same regiment with sedition after they refused to attack Chinese positions during the Korean War.²⁹⁷ One year later, the Army Board of Military Review—a predecessor to the modern Army Court of Criminal Appeals—determined in *United States v. Turner* that a military prisoner who counsels other prisoners to resist mandatory work may be guilty of the crime of soliciting mutiny.²⁹⁸ In 1956, the Navy Board of Review determined, in *United States v. Morris*, that an enlisted service member who was sentenced to a Navy brig for other crimes was guilty of soliciting others to commit mutiny by refusing, and coercing others to refuse, to march in formation to the mess hall.²⁹⁹ There is widely reported evidence, as noted above, that Flynn solicited others to commit sedition for a cause far more deleterious to the nation than any of these examples.

C. *Conduct Unbecoming an Officer and Gentleman*

The elements for a violation of Article 133, Conduct Unbecoming an Officer, are first that the officer accused committed or omitted to do certain acts and second that under the circumstances, these acts or omissions constituted conduct unbecoming an officer and a gentleman.³⁰⁰ In *United States v. Gomes*, one of the earliest appeals to arise under the UCMJ, the (then) Court of Military Appeals noted that the prohibition includes an officer articulating false statements to Federal Bureau of Investigation agents.³⁰¹ The Court of Military Appeals held that even if the false statement did not arise to meet

States.” *Id.* In response to President Franklin Roosevelt’s request, Congress declared war on Italy on December 11, 1941. Joint Resolution, Pub. L. 77-332, 55 Stat. 797 (1941).

²⁹² 10 U.S.C.S. § 894 (2021).

²⁹³ 10 U.S.C.S. § 894 (2021).

²⁹⁴ 10 U.S.C.S. § 894 (a)(2) (2021).

²⁹⁵ 10 U.S.C.S. § 894 (a)(1) (2021).

²⁹⁶ 10 U.S.C.S. § 882 (2021).

²⁹⁷ *88 Soldiers Convicted in Korea Attack Mutiny*, L.A. TIMES, Jan. 25, 1953.

²⁹⁸ 10 C.M.R. 394, 398 (A.B.R. 1953).

²⁹⁹ 21 C.M.R. 535, 540 (N.B.R. 1956).

³⁰⁰ *E.g.*, *United States v. Conliffe*, 67 M.J. 127, 132 (C.A.A.F. 2009).

³⁰¹ 11 C.M.R. 232 (C.M.A. 1953).

the actual elements of perjury, it still could be held criminal under Article 133 because it evidenced, in part, a “moral unfitness” for an officer.³⁰² Given that Flynn earlier lied to the Federal Bureau of Investigation, and notwithstanding former Attorney General William Barr’s claim that Flynn’s conduct did not constitute a federal crime, it is clear that had Flynn been recalled to duty and court-martialed, his conduct could have reasonably been charged under Article 133. It is less clear that Flynn’s pardon extends to shield him from military crimes because the pardon itself does not specify “military offenses.”³⁰³

Notice, to be sure, is an important due process right, and the Court has addressed notice as it applies to Article 133. In 1974 the Court reaffirmed, in *Parker v. Levy*, that the military constitutes a separate society in which tolerable limits on speech and expression are constitutional.³⁰⁴ *Levy* arose from an army officer serving as a doctor counseling enlisted service-members not to deploy to Vietnam.³⁰⁵ The officer, Captain Howard Levy, also publicly articulated his opposition to the United States’ involvement in the Vietnam Conflict.³⁰⁶ Found guilty of disobeying a lawful order and conduct unbecoming a gentleman, a court-martial sentenced him to three years at hard labor and a dismissal.³⁰⁷ While Levy raised a First Amendment defense on appeal, the Court, in an opinion authored by Justice William Rehnquist, held that the amendment’s protections are not as broad in the military as in civilian life.³⁰⁸

Since 1974, the military courts have continued to uphold Article 133. In *United States v. Voorhees*, the Court of Appeals for the Armed Forces upheld a conviction based on an officer’s sexually-laden comments to enlisted personnel.³⁰⁹ In *United States v. Hartwig*, the Court of Appeals for the Armed

³⁰² *Id.* at 236. In *United States v. Diaz*, No. NMCCA 200700970, 2009 CCA Lexis 79 at *7, *16 (N-M Ct. Crim. App. 2009), the Navy-Marine Court of Criminal Appeals, in an unpublished opinion, held that the release of classified information to an unauthorized person was chargeable under Article 133. The Court of Appeals for the Armed Forces upheld the officer’s conviction and sentence. *United States v. Diaz*, 69 M.J. 127, 137 (C.A.A.F. 2010).

³⁰³ *See, e.g.*, *Lorance v. Commandant*, 435 F. Supp. 3d 1169, 1177–78 (D. Kan. 2020) (holding that a pardon does not shield a convicted service member from the collateral consequences of the pardon).

³⁰⁴ *Parker v. Levy*, 417 U.S. 733, 743 (1974).

³⁰⁵ *Id.* at 736.

³⁰⁶ *Id.* at 737 (“If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.”). Other officers and service-members were prosecuted during the conflict for similar conduct. *See, e.g.*, *United States v. Howe*, 37 C.M.R. 429 (C.M.A. 1967); *Sec’y of the Navy v. Avrech*, 418 U.S. 676 (1974); *Priest v. Sec’y of the Navy*, 570 F. 2d 1013 (D.C. Cir. 1977); and *Culver v. Sec’y of Air Force*, 559 F. 2d 622 (D.C. Cir. 1977).

³⁰⁷ *Parker*, 417 U.S., at 736.

³⁰⁸ *Id.* at 759. The Court noted that in military law, other considerations arise:

The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

Id.

³⁰⁹ *United States v. Voorhees*, 79 M.J. 5, 17 (C.A.A.F. 2019).

Forces determined that an officer's language need not present a clear and present danger to the military to run afoul of Article 133.³¹⁰ Although *Hartwig* arose from an officer's sexually salacious letter to a fourteen-year old, the court, in citing to *Priest v. Secretary of the Navy*, noted that a service-member's language that "undermines the effectiveness of response" by military personnel to command may be constitutionally prohibited.³¹¹ *Priest* is an important decision issued by the Court of Appeals for the District of Columbia because it recognized that an enlisted sailor who published an underground newspaper critical of the Vietnam conflict and calling authority "illegitimate" could undermine military effectiveness.³¹²

D. The Framers' Intent: Restrictive Application of Military Law Favors Recall to Duty

In 1950, with the enactment of the UCMJ, Congress expanded the military's jurisdiction over crimes beyond what it had ever been.³¹³ However, at the height of the Vietnam Conflict, the Court, in *O'Callahan v. Parker*, curtailed the military's jurisdiction to crimes which had a direct military nexus.³¹⁴ Authored by Justice William O. Douglas, *O'Callahan* rested on the premise that because the nation's founders had a fear of standing armies and had limited court-martial jurisdiction to military-specific offenses, the 1950 expansion was unconstitutional.³¹⁵ Less than two years after *O'Callahan*, the Court in *Relford v. Commandant* listed twelve factors to consider in determining whether the military possessed court-martial jurisdiction.³¹⁶ Notable among these factors is the flouting of military authority and a connection between a military duty and the charged crime.³¹⁷ The primary responsibility of all officers is fidelity to the Constitution as embodied in their oath of office. While it is true that the Court overturned *O'Callahan* in *Solorio v. United States* (and by implication negated *Relford*),³¹⁸ when reviewing Flynn's conduct under the service-connection test arising from the two moribund decisions, it is clear that the military would retain jurisdiction. So too would it in regard to *McInerney* and *Tata*.

³¹⁰ *United States v. Hartwig*, 39 M.J. 125, 128 (C.M.A. 1994).

³¹¹ *Id.* citing to 570 F.2d at 1017.

³¹² *Priest*, 570 F.2d. at 1017.

³¹³ See Harvey Allen Sernovita, *The New Boundaries of Military Jurisdiction*, 43 TEMP. L. Q., 166 168–69 (1969–1970).

³¹⁴ *O'Callahan v. Parker*, 395 U.S. 258, 270–71 (1969).

³¹⁵ *Id.* at 268–69. For the history of *O'Callahan*, see Joshua E. Kastenberg, *Cause and Effect: The Origins and Impact of Justice William O. Douglas's Anti-Military Ideology from World War II to O'Callahan v. Parker*, 26 T. COOLEY L. REV. 163 (2009).

³¹⁶ *Relford v. Commandant*, 401 U.S. 355, 365 (1971).

³¹⁷ *Id.*

³¹⁸ *Solorio v. United States*, 483 U.S. 435, 441 (1987).

Two recent Court of Appeals for the Armed Forces decisions highlight how, even under the *Relford* twelve-part test, jurisdiction may still attach to Flynn, McInerney, and Tata. In *United States v. Hennis*, the appellate court determined that the Army was not constitutionally barred from recalling to active duty a retired service member who had committed murder in North Carolina.³¹⁹ The civilian trial resulted in a conviction for the murder of three military dependents in 1986, but the conviction and death penalty were overturned by the North Carolina Supreme Court.³²⁰ In 1989 Hennis was acquitted by a North Carolina jury and permitted to return to active duty until his retirement in 2004.³²¹ The Court of Appeals for the Armed Forces determined that even if the *Relford* test remained in effect, the military would maintain jurisdiction because there was a service nexus between Hennis and the murder victims, who were the children and spouse of an active-duty officer.³²²

There is a final reason why it is important to hold Flynn and the others accountable under military law. At the United States' founding, the Constitution's framers believed that a standing army was a danger to the liberties of citizens.³²³ In the words of Professor Richard Kohn, "No principle of government was more widely understood or more completely accepted . . . than the danger of a standing army in peacetime."³²⁴ The founders adopted the Whigs' fears of standing armies, and this fear influenced the shaping of the Constitution.³²⁵ 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 appears among the grievances listed in the Declaration of Independence.³²⁶ Shortly after arriving as the ambassador to France, Thomas Jefferson made it known to the new nation that standing armies were antithetical to the new republic.³²⁷ Likewise, Delegate Edmund Randolph noted at the Virginia ratifying convention that "there was not a member of the federal

³¹⁹ *United States v. Hennis*, 79 M.J. 370, 380 (C.A.A.F. 2020).

³²⁰ *Id.* at 374.

³²¹ *Id.*

³²² *Id.* at 378–79.

³²³ Their fear emanated from the English Whig concerns regarding standing armies. See Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 *MISS. L. J.* 135, 145–47 (2005), and THOMAS COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* 350 (1868). See also JOHN WHITECLAY CHAMBERS II, *TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA*, 23–25 (1987).

³²⁴ RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802* 2 (1975).

³²⁵ See *id.* at 3–4.

³²⁶ See, e.g., David Luban, *On the Commander in Chief Power*, 81 *S. CAL. L. REV.* 447, 501, 517–18 (2008).

³²⁷ Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in M. PETERSON, *THOMAS JEFFERSON: WRITINGS* 914, 916 (1984). See also Frederick Bernays Weiner, *Courts-Martial and the Bill of Rights: The Original Practice* 1, 72 *HARV. L. REV.* 1, 6 (1958).

convention who did not feel indignation” at the idea of a standing army.³²⁸ One only need recall that James Madison, in the Federalist Papers argued:

. . . [T]he 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.³²⁹

As late as 1829, no less a military icon than former general President Andrew Jackson, in his first inaugural address, stressed standing armies were “dangerous to free government in time of peace.”³³⁰ And even at the beginning of twentieth century, the standing army fears remained a part of the political-legal landscape.³³¹ For instance, in 1908, while addressing the Ohio Board of Trade on the need for a permanent army, future president William Howard Taft conceded “there is an indefinite, elusive, but influential impression in the minds of many that there is something inconsistent with the purpose of a republic.”³³² As Taft had previously been Secretary of War and served as governor general in the Philippines,³³³ he wanted to justify his position, while campaigning, that a standing army was critical to the protection of the United States from both external enemies and the possibility of a mass insurrection against the government.³³⁴ In 1914, President Wilson, who would veto the effort to end the military’s jurisdiction over retirees, was emphatically opposed to a large standing army. “From the first we have had a clear and settled policy with regard” he challenged advocates of increasing the military’s size before concluding that to depart from the nation’s founders meant “that we had lost our self-possession.”³³⁵

³²⁸ JONATHAN ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (1901).

³²⁹ THE FEDERALIST NO. 41., at 257 (JAMES MADISON) (Clinton Rossiter ed., 1961).

³³⁰ Andrew Jackson, First Inaugural Address (Mar. 4, 1829) in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 437–38 (James D. Richardson ed., 1902).

³³¹ See, e.g., Senator John Sharp Williams to President Wilson, October 26, 1915, quoted in KASTENBERG, *supra* note 263, at 26. Williams, a confidant of Wilson, argued against expanding the army: “Let the modern critics laugh at it as much as they please, a large standing army is always a menace to free institutions.” *Id.*

³³² WILLIAM HOWARD TAFT, *The Army of the United States: Address Before the Ohio Board of Trade of Columbus Ohio, April 2, 1908*, in PRESENT DAY PROBLEMS: A COLLECTION OF ADDRESSES DELIVERED ON VARIOUS OCCASIONS 79–80 (1967 ed.).

³³³ Joshua E. Kastenberg, *Chief Justice Taft’s Conception of Judicial Integrity: The Legal History of Tummy v. Ohio*, 65 CLEVELAND ST. L. REV. 317, 329 (2017).

³³⁴ WILLIAM HOWARD TAFT, *The Army of the United States: Address Before the Ohio Board of Trade of Columbus Ohio, April 2, 1908*, in PRESENT DAY PROBLEMS: A COLLECTION OF ADDRESSES DELIVERED ON VARIOUS OCCASIONS 79–80 (1967 ed.).

³³⁵ THOMAS J. KNOCK, TO END ALL WARS: WOODROW WILSON AND QUEST FOR A NEW WORLD ORDER 59 (1992).

While conceding that sedition is both a military and a civilian crime, albeit with differing elements, it remains important that the military exercise jurisdiction over Flynn, McNerney and Tata to maintain the military's subordination to the civilian government and the Constitution. That is, a military which effectively investigates and prosecutes Flynn, McNerney, and Tata in a fair trial—the court-martial—is reminding the nation that the military is not above the law and will not shun its fullest application against offending retired flag officers. And, if confronted with a dangerous insurrection, the military units assigned by the government to protect the republic's existence will be reliably compliant with the Constitution, rather than with a retired flag officer's or errant representative's self-serving interpretation of the document.

CONCLUSION

In 1916, the Judge Advocate General of the Army, General Enoch Crowder, testified on the need to maintain retiree jurisdiction as “necessary, in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and impair that control over those forces which the Constitution vests in the President.”³³⁶ In analyzing Crowder's observations, Professor Joseph W. Bishop, in 1964, observed that Crowder's reference to “tendencies” may have been a suggestion that the retired list could “become a source of plots and conspiracies against the Government.”³³⁷ Bishop went on to note that “such fears are not, of course pure fantasy” and pointed to the history of the Weimar Republic as well as the French Third, Fourth, and Fifth Republics before commenting on the possibility of such an event occurring in the United States.³³⁸ Bishop lived through the machinations of Erich Ludendorff, as well as that of Edwin Walker and George Van Horn Moseley, but it is Flynn, McNerney, and Tata who give credence to his fears, not only for their actions, but also because of the possibility that they might not serve as a basis for a deterrent under military law if there is a failure to utilize the military justice system to investigate them.

Flynn, McNerney, and Tata appear to have had analogous desires to Ludendorff's but, luckily, they hardly approximated Ludendorff's military successes in their careers. Nonetheless, the dangers of this type of conduct exist now as then, and Ludendorff provides a poignant addition to the *lex non scripta* for the question of their liability under the UCMJ. In the third season of the acclaimed German historic crime series *Babylon Berlin*, the end of the Weimar Republic is presented as being caused not by an enemy from outside

³³⁶ 53 CONG. REC. 12844–45 (1916).

³³⁷ Joseph W. Bishop, *Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PENN. L. REV. 317, 334–35 (1964).

³³⁸ *Id.* Professor Joseph Bishop taught law at Yale University and had opposed both McCarthyism as well as the “New Left.” See R.K. Winter, *Joseph Warren Bishop, Jr.*, 95 YALE L. REV. 4, 4–6 (1985), and *Joseph W. Bishop, Law Professor and Author*, N.Y. TIMES, May 21, 1985.

of Germany, but through internal forces desirous of its overthrow.³³⁹ A communist movement was bent on imposing the doctrines of Karl Marx on Germany,³⁴⁰ as portrayed in the series. Beginning in late 1918, with the revolt of the Kaiser's Navy and the subsequent Spartacist Revolt, there were real fears of a communist state forming in Germany.³⁴¹ But by 1924, communism in the Weimar Republic had considerably weakened as the bulk of the population turned to political affiliations that ranged from the left-leaning Social Democratic Party to the parties of the center and right.³⁴²

Babylon Berlin also suggests that a plot to overthrow a government does not need a large conspiracy to take effect. In the third season's sixth and seventh episodes, a political police officer, Oberst Wendt, meets with Franz von Papen and General Kurt von Schleicher. During a card game, Wendt opines that the conservative politicians and the Reichswehr need the Nazis to create chaos and unrest so that "everyone will cry out for order." In other words, von Papen and von Schleicher, both of whom would serve short terms as chancellor on the eve of Hitler's Nazi takeover of Germany, believed that once placed in fear of a communist versus Nazi "street war," Germany's population would welcome the return of the "Old Order," whether that be a restored Hohenzollern monarchy or something akin to it.³⁴³ The plotters went so far as to design attacks on the centrist and left-leaning newspapers, including one against a journalist who had uncovered that Lufthansa, the German national airline, was being used as a front for training Germany's illicit Luftwaffe, which had been prohibited per the Versailles Treaty.³⁴⁴ But because Wendt had played both sides, neither von Papen (who became Hitler's vice chancellor and then ambassador to Turkey) nor von Schleicher (who was assassinated by the Nazis in the 1934 in the Night of the Long Knives) predicted that chaos would empower the Nazi Party to dominate rather than the "Old Order."³⁴⁵

³³⁹ *Babylon Berlin* is based on German author Volker Kutscher's novels and set in Weimar Germany. See Germany's 'Babylon Berlin' Crime Series Is Like 'Cabaret' On Cocaine, NAT'L PUB. RADIO (Jan. 30, 2018), <https://www.npr.org/2018/01/30/581543050/germanys-babylon-berlin-crime-series-is-like-cabaret-on-cocaine>.

³⁴⁰ See, e.g., ERIC D. WEITZ, CREATING GERMAN COMMUNISM, 1890–1990: FROM POPULAR PROTESTS TO SOCIALIST STATE 233–35, 249–50 (1997).

³⁴¹ See HOWARD M. SACHAR, THE ASSASSINATION OF EUROPE, 1918–1942, 11–15 (2015); *The Keil Mutiny*, in VOL. X, THE MARSHALL-CAVENDISH ILLUSTRATED ENCYCLOPEDIA OF WORLD WAR I, 3113 (1984); see also BERNARD WASSERSTEIN, BARBARISM AND CIVILIZATION: A HISTORY OF EUROPE IN OUR TIME 93–94 (2007).

³⁴² See Conan Fisher, *Turning the Tide? The KPD and Right Radicalism in German Industrial Relations, 1925–28*, 24 J. CONTEMP. HIST., 575–79 (1989); see also Jürgen W. Falter, *The Two Hindenburg Elections of 1925 and 1932: A Total Reversal of Voter Coalitions*, HIST. SOC. RES. / Historische Sozialforschung, Supplement (1990).

³⁴³ *Id.* For more discussion, see also BERNHARD FULDA, PRESS AND POLITICS IN THE WEIMAR REPUBLIC 199 (2009); JOSEPH J. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH 114–15 (1983).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

Babylon Berlin is entertainment. Ludendorff's role in the upending of the Weimar Republic and his enabling of Hitler's early rise to power is a historic fact. Flynn's conduct, as well as that of McInerney's, Tata's, and perhaps others, if not addressed through a criminal justice process, will make it possible for a new Ludendorff to undermine the United States. The constitutional mechanisms are in place to prosecute Flynn and any other like-acting military retiree in a fair trial, the court-martial. Doing so ensures the military remains subordinate to the civil government and the Constitution as a loyal subject and not an erstwhile overseer. The failure to extend military jurisdiction over these actors may have long-term disastrous ramifications for the military, if not the nation.