

# Statutory Restrictions Relating to Prior Military Service of the Secretary of Defense

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By law, the Secretary of Defense, who has authority, direction, and control over the Department of Defense, is a civilian appointed by the President with the advice and consent of the Senate.

Section 113 of Title 10 of the *U.S. Code* provides that "[a] person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force." Since such [statutory qualification provisions](#) are created by law, they may also be changed, or alternatively, temporarily suspended for the benefit of a specific individual.

Since the establishment of the position of Secretary of Defense by the National Security Act of 1947, Congress has acted in one instance to suspend this provision. Enacted on September 18, 1950, at the request of President Truman during the Korean War, P.L. 81-788 authorized the suspension of certain statutory requirements otherwise prohibiting General of the Army George C. Marshall from serving as Secretary of Defense.

## National Security Act of 1947 and Recent Changes

The principle of *civilian control* of the military is fundamental to the manner in which the United States is governed. The Founding Fathers themselves wrestled with how to advance the nation's security while at the same time ensuring that instruments of force do not undermine the practice of American democracy. The principle places ultimate authority over the U.S. armed services in the hands of civilian leadership, with civilian responsibility and control of the military balanced between the executive and legislative branches of the government. Upon the conclusion of World War II, this principle may have been especially important to U.S. leaders, given the political popularity of many World War II General and Flag officers. Accordingly, as Congress sought to reorganize U.S. national security institutions, it did so while trying to find the best manner to preserve the principle of civilian control of the military.

The 1947 National Security Act created a newly unified National Military Establishment (renamed the Department of Defense in 1949). Prior to 1947, the Departments of War and Navy operated separately, each headed by a Cabinet-level

Secretary, with the effective execution of military operations relying on voluntary coordination between the departments. President Truman contended that such voluntary coordination was inadequate and argued for the integration of the military services into a single department, which would report to a new Cabinet-level advisor on matters of national defense. This proposition was controversial. The merits and risks of creating a new department headed by a single individual were vigorously debated by the military services, the executive branch, and Congress between 1944 and 1947. Ultimately, President Truman's preference for a single civilian Secretary of Defense prevailed.

As enacted in 1947, Section 202 of the National Security Act (later codified as 10 U.S.C. §113) stipulated that a person "who has within ten years been on active duty as a commissioned officer in a Regular component of the armed services shall not be eligible for appointment as Secretary of Defense." This provision emerged from conference negotiations—while both the House and Senate bills required the Secretary of Defense to be a civilian appointed by the President, the House bill specified that the Secretary of Defense "shall not have held a commission in a Regular component of the armed services." Statements made by Members of Congress as they debated the 1947 Act suggest that they sought to ensure an unambiguous break between an individual's active duty military career and service as a civilian Secretary of Defense in order to ensure that no one military service dominated the newly established Defense Department. They also sought to ensure that the new Secretary of Defense was truly the President's representative and, above all, to preserve the principle of civilian control of the military.

Section 903 of the FY2008 NDAA ([P.L. 110-181](#)) reduced from 10 to 7 years the required interval between an individual's retirement from active duty as a commissioned officer of a regular component of the armed services and eligibility for service as Secretary of Defense. It also applied those restrictions to the Deputy Secretary and Under Secretary for Policy positions.

#### Appointment of General George Marshall as Secretary of Defense

On September 13, 1950, President Truman forwarded a legislative proposal to Congress that would authorize [General of the Army George C. Marshall](#), who was at that time an active duty member of the Armed Forces, to serve as Secretary of Defense. At the time, two statutory provisions would have prevented the consideration of his nomination without congressional intervention. These included 10 U.S.C. §113 (described above) and 10 U.S.C. §576, which, at the time, barred officers on the active list of the Army from holding civil office, either by election or by appointment, and stipulated that officers who accepted or exercised the functions of a civil office had to vacate their commissions, thereby ceasing to be an officer of the Army.

While the measure had the support of many Members, it encountered significant opposition from others, both at the committee and floor levels. Supporters of the bill contended that the crisis of the ongoing Korean War justified making an exception to the relevant statutes for General Marshall, who was viewed as uniquely qualified for the position. Opponents of the measure asserted that the principle of civilian control over the military superseded all other considerations, including General Marshall's personal qualifications and the pressure of external circumstances.

As enacted, P.L. 81-788 suspended, for General Marshall's nomination only, those two statutory provisions preventing his consideration for the position of Secretary of Defense. P.L. 81-788 also included a nonbinding section outlining congressional intent in providing President Truman with the authority to nominate General Marshall:

It is hereby expressed as the intent of the Congress that the authority granted by this Act is not to be construed as approval by the Congress of continuing appointments of military men to the office of Secretary of Defense in the future. It is hereby expressed as the sense of the Congress that after General Marshall leaves the office of Secretary of Defense, no additional appointments of military men to that office shall be approved.

Following a September 19, 1950, confirmation hearing, the Senate voted to confirm General Marshall's nomination as Secretary of Defense on September 20, 1950, by a vote of 57-11, with 28 Senators not voting.