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The Position of Secretary of Defense: Statutory Restrictions and Civilian-Military Relations

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Summary

The position of Secretary of Defense is unique within the U.S. government; it is one of two civilian positions within the military chain of command, although unlike the President, the Secretary of Defense is not elected. Section 113 of the *United States Code* states that the Secretary of Defense is to be "appointed from civilian life by the President, by and with the advice and consent of the Senate." The section goes on to elaborate a key mechanism by which civilian control of the Armed Forces is maintained:

> 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.

The proposed nomination of General (Ret.) Lloyd Austin, United States Army, who retired from the military in 2016, to be Secretary of Defense may lead both houses of Congress to consider whether and how to suspend, change, or remove that provision.

This provision was originally contained in the 1947 National Security Act (P.L. 80-253), which mandated that 10 years pass between the time an officer is relieved from active duty and when he or she could be appointed to the office of the Secretary of Defense. In 2007, Section 903 of the FY2008 National Defense Authorization Act (P.L. 110-181), Congress changed the period of time that must elapse between relief from active duty and appointment to the position of Secretary of Defense to seven years.

Two exceptions to this provision have been made. Enacted on September 18, 1950, at the special request of President Truman during a time of conflict, P.L. 81-788 authorized the suspension of statutory requirements otherwise prohibiting General of the Army George C. Marshall from serving as Secretary of Defense. In 2017, President Trump nominated James Mattis, a retired United States Marine Corps General, to serve as Secretary of Defense. As his retirement from military service was within the seven year window, Congress subsequently deliberated, and ultimately agreed, to waive the statutory requirement otherwise prohibiting Mattis from serving in that capacity (P.L. 115-2).

As a waiver requires separate legislation, both houses of Congress would potentially be involved in the consideration of Austin for the role of Secretary of Defense, should he be officially nominated. There are at least four possible options that Congress may pursue as it considers the nomination of a retired military officer within the seven years after relief from active duty:

- suspending the statutory requirement that seven years elapse between relief from active duty and appointment to position of Secretary of Defense;
- eliminating entirely or reducing the statutory requirement that seven years elapse between relief from active duty and appointment to position of Secretary of Defense;
- changing statute to increase the length of time that must elapse between relief from active duty and appointment to position of Secretary of Defense; and
- choosing not to pass legislation that would suspend the provision in Title 10 that seven years elapse between relief from active duty and appointment to position of Secretary of Defense.

Related to the latter, the Senate might also choose to consider Austin's nomination, regardless of whether or not Congress passes legislation designed to suspend or remove the relevant provision in Title 10 of the *United States Code*. Should the Senate choose to pursue this option, it is not clear what the legal implications might be.

Historically, the restriction relating to the prior military service of the Secretary of Defense appears to be a product of congressional concern about preserving the principle of civilian control of the military, a fundamental tenet underpinning the design and operation of the American republic since its inception in 1776, if not before. At the conclusion of World War II, some observers believed that the operational experience during the war pointed to the need for better integration of the military services, and therefore argued for the establishment of what would become the Department of Defense. Others, however, voiced concern that this greater degree of integration might overly empower the military, and thus threaten civilian control of the military. Accordingly, as the 81st Congress considered whether, and how, it should create a National Military Establishment, it determined to enact several provisions to mitigate the risk that greater military integration would come at the expense of civilian control. These included restrictions on military servicemember eligibility for the position of Secretary of Defense and limitations on the powers of the Chairman of the Joint Chiefs of Staff.

The nomination of Mattis in 2017 generated a debate among policymakers, scholars, and practitioners regarding what civilian control of the military means in a contemporary context, and how to best uphold that principle. Today, the proposed Austin nomination has prompted a similar discussion regarding the health of contemporary civil-military relations and whether, and to what extent, the principle of civilian control of the military might have been eroded over the past four years. An added dimension of the current debate is the extent to which a nominee, if confirmed, might help begin to address long-standing concerns some observers have raised about minority underrepresentation, particularly at senior levels of the Department of Defense. This report serves as a guide to help Congress engage with the debates surrounding the "waiver" requirement as applied to Austin's proposed nomination.

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Introduction

This report is designed to assist Congress as it considers how to proceed with the proposed nomination of General (Ret.) Lloyd Austin to be Secretary of Defense. After exploring the history of the statutory restriction and its evolution over time (see "Preserving Civilian Control of the Military in the 1947 Act and Restricting the Position of Secretary of Defense"), it touches upon some of the broader questions that have recently been raised in the public debate on whether, and how, this proposed nomination might impact civilian-military relations and the principle of civilian control of the military.

The Principle of Civilian Control of the Military

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 has been a central question since the founding of the United States, if not before. The principle of *civilian control* of the military places ultimate authority over 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. In some ways, the relationship between the military and the civil society it serves can be thought of as a paradox: the military, by its very nature, has coercive power that could threaten civil society. Yet without a sufficiently strong and capable military, civil society becomes vulnerable to attack, and the former might not be able to defend the latter. The United States has balanced this tension through formulating and promulgating the principle of civilian control of the military.[1] The fact that this principle has remained relatively unchallenged over the course of American history is, by most accounts, remarkable.[2] This section briefly outlines the history of the principle of civilian control of the military, and how it influenced legislation over time.

Civilian Control of the Military vs. "Civil-Military Relations"

Austin's proposed nomination, similar to Mattis's nomination in 2017, has brought up two separate but related concepts. *Civilian control of the military* refers to the principle upon which the United States founded its relationship between the military and the civil society it serves. In the United States, the military is ultimately subordinate to civilian authority.

By contrast, *"civil-military relations"* is an umbrella term that refers to the discussion and exploration of issues associated with how a military interacts with society and its governing institutions. Issues that students of civilian-military relations explore include, but are not limited to, who controls the military; how influential should a military be within society; what is the appropriate role of the military; what behavioral patterns and processes best ensure military effectiveness and the preservation of civilian control; and who serves in the military. While scholars have explored various tensions and stresses in civil-military relations over the course of U.S. history, those tensions have not resulted in a meaningful, direct threat to the principle of civilian control of the American military. Some scholars have expressed concern about growing military influence in policy debates.

[1] See Mackubin Thomas Owens, *U.S. Civil-Military Relations after 9/11: Renegotiating the Civil-Military Bargain* (New York: Continuum International Publishing Group) 2011, and Rosa Brooks, "Civil-Military Paradoxes," as found in Jim Mattis and Kori N. Schake (eds), *Warriors and Citizens: American Views of Our Military*, (Stanford, CA: Hoover Institution Press, 2016), pp. 21-68.

[2] While there have been tensions and differences of view between the military and its civilian counterparts, none have resulted in a direct threat to the civilian leadership of the United States, such as a coup or a putsch. Arguably one instance where it was a close call was President Lincoln's dismissal of General McClellan during the early stages of the Civil War. Although McClellan's troops threatened to throw leaders in Washington into the Potomac for dismissing McClellan, McClellan himself encouraged his men to support his successor.

Origins of the American Principle of Civilian Control of the Military[3]

The designers of the Constitution were deeply skeptical of a standing military as, much like Oliver Cromwell demonstrated in 1653 when he used his army to disband Parliament, such a military instrument could also overthrow the government it professed to serve. Consternation regarding the British deployment of its military to the American colonies without the consent of local governing officials was among the key grievances listed in the Declaration of Independence and helped inform the Third Amendment of the Constitution.[4] Applied to the context of a new, experimental, and democratic Republic, the military to the authority of civil masters was considered critically important in order to prevent the emergence of a new form of tyranny or dictatorship.[5]

The principle was put to the test even before the American state was founded. During the Revolutionary War, particularly, upon the surrender of Cornwallis at Yorktown, the prestige of the American military was at its height, while regard for the Continental Congress—the civilian authority to which General George Washington reported—was dwindling. Had Washington, a popular figure at the time, been any less devoted to democratic principles, a New World variety of despotism might have been established. There were ample opportunities for General Washington to install himself as a dictator—which would likely have had the end result of swapping one form of monarchical rule for another. As the war drew to a close, a group of his associates, cognizant of the impotence of the American Confederation, begged him to set himself up as the authoritarian head of a new government.[6] Washington refused, arguably preventing the emergence of a military-authoritarian government in the process.[7]

Subsequent to the Revolutionary War, the fragility of the Confederation government was highlighted by the 1786 Shays rebellion, the first armed rebellion in the post-Revolutionary United States. The Shays Rebellion was a local uprising in Massachusetts in response to high taxes and difficult economic conditions. In September 1786, Captain Daniel Shays, along with

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[3] Much of the material used in this section is drawn from a report authored by David E. Lockwood, *A Brief History and Analysis of Civilian Control of the Military*, Congressional Research Service, Library of Congress, January 20, 1974.

[4] The Declaration of Independence, in cataloging the tyrannical acts of George III, argued that "[h]e has kept among us, in times of peace, Standing Armies without the consent of our legislature. He has affected to render the military independent of and superior to the Civil Power."

[5] The June 12, 1776, Virginia Declaration of Rights, which influenced the Declaration of Independence, states "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power." https://www.loc.gov/exhibits/treasures/tr00.html#obj6.

[6] Ralph H. Gabriel, "Chapter XIV: Laying the Foundations of the American Nation," in *School of the Citizen Solider: Adapted from the Education Program of the Second Army, Lieutenant General Ben Lear, Commanding*, ed. Robert A. Griffin (New York: D. Appleton-Century Company, 1942), p. 187. https://catalog.hathitrust.org/Record/000314517.

[7] Washington also played a critical role in preventing the 1783 Newburgh conspiracy from taking root. Revolutionary officers, frustrated with overall deprivation and the Continental Congress's seeming unwillingness to pay their salaries or post-war pensions, threatened to (1) not fight if the war continued and (2) not to demobilize after the war until their accounts were settled. Washington interceded at a meeting of these potentially insubordinate officers, pleading to their patriotism. As a result, a compromise was struck between the military and the Continental Congress regarding pay; however, the incident also created further fears that a standing army might be a threat to a civilian government. See Richard W. Steward (ed), American Military History Volume 1: The United States Army and the Forging of a Nation, 1775-1917, (Washington, DC: Center for Military History, 2005) p. 109. http://www.history.army.mil/books/AMH-V1/ch05.htm.

other Massachusetts leaders, led several hundred armed men to close some local courts in order to prevent the execution of foreclosures and other debt processes. In January 1787, Shays led approximately 1,200 men in an attack on the federal arsenal at Springfield, MA. The local Massachusetts government put down the rebellion in February 1787. While the rebellion itself was small, and was quickly suppressed, for some it became a compelling argument for why the United States needed a stronger national-level government, including a standing army and militia. The challenge was how to do so while at the same time preventing the emergence of a national military that could threaten the new Republic.[8]

Civilian Control of the Military: Congressional and Executive Branch Responsibilities[9]

Accordingly, the Founding Fathers designed a system of civilian control of the military in a manner that conformed with its overall architecture of checks and balances. An elected President was designated the Commander-in-Chief of the nation's Armed Forces.[10] This had the dual advantage of ensuring that an elected civilian leader presided over the nation's army while at the same time enhancing unity of command over the military. The President was also granted the ability to commission military officers, authority to appoint Secretaries to preside over military services, and the responsibility to regularly report to Congress on the state of the union.[11]

Many of the Founding Fathers also expressed concern about unitary executive control of the military. The desire to ensure that the military reflected, and was subordinate to, the will of the people also led to considerable congressional powers on matters concerning the armed services. Congress was granted the power to lay and collect taxes for the common defense.[12] Congress was also given the sole power to declare war, the ability to raise and support armies, advise and consent on appointments, establish rules and regulations for the army, navy, and militias when in service of the United States.[13] Also, to hamper the establishment of a permanent, standing military, a provision was made specifying that no appropriation of money could be made for the army for a period longer than two years.[14]

The Military Culture of Respecting Civilian Control

This governance architecture was necessary, but not sufficient, to ensuring civilian control of the military. Here again, George Washington played a vital role in establishing the norms and culture that formed the foundation for American relationships between the military and the civilian

[8] The Encyclopedia Britannica, "The Shays Rebellion," December 9, 2016, https://www.britannica.com/event/Shayss-Rebellion.

[9] A further aspect of checks and balances in this area concerns the raising of militias, which were arguably viewed at the time as the centerpiece of the new American military establishment. As Steward writes, "... authority over the militia was a shared power. Congress could provide for organizing, arming, and disciplining the militia and governing "such Part of them as may be employed in the Service of the United States," but the Constitution specifically reserved to the states the authority to appoint militia officers and to train the militia "according to the discipline prescribed by Congress," pp. 112-113.

[10] CRS In Focus IF10535, *Defense Primer: Congress's Constitutional Authority with Regard to the Armed Forces*, by Jennifer K. Elsea.

[11] Article II, Section 2 of the U.S. Constitution.

[12] Article I, Section 8 of the U.S. Constitution.

[13] Article I, Section 8 of the U.S. Constitution.

[14] Article I, Section 8 of the U.S. Constitution.

leadership it served (also referred to as "civil-military" or "civilian-military" relations). For example, in putting down the 1794 Whiskey Rebellion in western Pennsylvania,[15] President Washington ensured that his subordinates understood the importance of upholding civil rule of law while doing so.[16] Despite disagreements—sometimes vehement—between military and civilian leaders throughout the nation's history, contemporary scholars of civil-military relations have noted that these norms, inculcated and promulgated by Washington and his successors, remain robust, even though the details of their implementation have evolved over time.[17]

Keeping the Standing Army Small

Another reflection of American skepticism towards a standing army—and the desire to ensure that it remained under civilian control—was a general policy to keep the peacetime active duty army relatively small.[18] Indeed, from the founding of the nation to the Cold War era, the bulk of force structure was maintained in the reserve component (especially the militia/National Guard), except in times of major conflicts. When major conflicts arose—such as the Civil War, World War I, and World War II—the comparatively small active component was expanded through the activation of militia and federal reserves, recruitment of additional volunteers for the active component, and the use of conscription. At the end of the conflict, active force levels were dramatically reduced. For example, in 1916, the end strength of the active duty military was approximately 179,000 personnel; over the course of World War I, this grew to nearly 2.9 million. After the war's conclusion, U.S. military end strength decreased to approximately 250,000.[19] Similarly, in 1939, there were fewer than 350,000 active duty personnel in all branches of the U.S. Armed Forces. During World War II, this number grew, reaching over 12 million servicemembers on active duty by 1945.[20]

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[15] The Whiskey Rebellion was an insurrection against a federally imposed excise tax on distilled spirits. By 1794, the rebellion threatened the viability of the newly established United States. After several attempts to resolve the dispute peacefully, President Washington himself led the U.S. militia to western Pennsylvania to put down the rebellion. See Peter Kotowski, "Whiskey Rebellion," George Washington's Mount Vernon Digital Encyclopedia of George Washington Website, http://www.mountvernon.org/digital-encyclopedia/article/whiskey-rebellion/.

[16] President Washington wrote, "It has afforded me great pleasure to learn, that the general conduct and character of the Army [of militia sent against the Pennsylvania Whiskey Rebellion insurrectionists] has been temperate and indulgent; and that your attention to the quiet and comfort of the western inhabitants has been well received by them. Still, it may be proper constantly and strongly to impress upon the Army that they are mere agents of Civil power; that out of camp, they have no other authority, than other citizens that offences against the law are to be examined, not by a military officer, but by a Magistrate; that they are not exempt from arrests and indictments for violations of the law; that officers ought to be careful, not to give orders, which may lead the agents into infraction of law; that no compulsion be used towards the inhabitants in the traffic, carried on between them and the army; that disputes be avoided, as much as possible, and be adjusted as quickly as may be, without urging them to an extreme; and that the whole country is not to be considered as within the limits of the camp." Letter from President George Washington to Major General Daniel Morgan, as found in George Washington, The Writings of George Washington from the Original Manuscript Sources, 1745-1799, volume 34, Edited by John C. Fitzpatrick, Washington, GPO, 1931-1944, p. 159.

[17] Before his nomination to be Secretary of Defense, James Mattis directed a YouGov public opinion survey of military and civilian attitudes—the first of its kind produced in over a decade, and one of the more comprehensive looks at these "norms" that help guide military attitudes and behavior toward civil society and civilian leaders. See Jim Mattis and Kori N. Schake, "A Great Divergence?," in *Warriors and Citizens: American Views of Our Military*, ed. Jim Mattis and Kori N. Schake (Stanford, CA: Hoover Institution Press, 2016), p. 289.

[18] President Jefferson could not see a need for a permanent military body during peacetime, instead believing that state militias could be called upon to repel invasions, if necessary.

[19] Data prepared by Kristy Kamarck, Analyst in Military Manpower, Congressional Research Service.

[20] CRS Report R43808, *Army Active Component (AC)/Reserve Component (RC) Force Mix: Considerations and Options for Congress*, by Andrew Feickert and Lawrence Kapp.

While this approach to organizing for military campaigns generally suited the preferences of the American people and its leaders—and in particular, their overall skepticism towards a standing army—it was also seen to have come at the expense of preparedness.[21] At the time, some experts, along with President Truman, argued that underpreparedness resulted in the expenditure of more American blood and treasure during wartime than would have happened if there had been greater peacetime investment in the Armed Forces, an issue that was apparently not of great concern until World War II.[22]

World War II and the National Security Act of 1947

For the first century and a half of the United States' history, the architecture designed at the Constitutional Convention, combined with the American military cultural norm of respecting civilian control of the military and the preference to disband the military after cessation of hostilities, served to largely circumscribe the Armed Forces and prevent them from becoming overly dominant within the U.S. government. After World War I, the concept of a single defense establishment was considered around Washington, but the military services opposed such proposals and blocked their serious consideration.[23] Yet it was the experience of World War II—the surprise of Pearl Harbor, America's initial lack of preparedness, and a deficiently structured military organization to wage the campaign—that resulted in a serious reconsideration of the design of U.S. institutions associated with national security, and in particular, the military.[24] The old way of doing business was no longer viewed as sufficient by most observers at the time.[25] To that end, Congress began considering how to restructure its national security institutions as early as 1944, although it did not entertain serious recommendations and proposals until after the conclusion of the war.[26]

On December 6, 1945, President Truman submitted a letter to Congress arguing that the existing War and Navy Departments should be combined into a single Department of National Defense. Until that time, 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

[21] David E. Lockwood, *A Brief History and Analysis of Civilian Control of the Military,* Library of Congress, Congressional Research Service, January 20, 1974.

[22] David E. Lockwood, *A Brief History and Analysis of Civilian Control of the Military,* Congressional Research Service Library of Congress, January 20, 1974; "President Truman's Message to the Congress," December 19, 1945, as found in Alice Cole, Alfred Goldberg, Samuel A. Tucker, and Rudolph A Winnacker, *The Department of Defense: Documents on Establishment and Organization, 1944-1978*, Office of the Secretary of Defense Historical Office, October 23, 1979.

[23] Between 1921 and 1945, some 50 bills were considered by Congress on the subject of unifying the military departments; because of military service opposition, only one of those bills reached the floor of the House of Representatives, where it was defeated. Congress, U.S. Senate, Committee on Armed Services, *Defense Organization and the Need for Change*. Staff Report, 99th Congress, 1st Session, Washington, DC: GPO, 1985. p. 49.

[24] House Select Committee on Post-War Military Policy, Post-War Military Policy, H. Rept. 1765, 78th Congress, 2nd Session.

[25] Roger R. Trask and Alfred Goldberg, *The Department of Defense 1947-1997 Organization and Leaders*, (Washington, DC: Office of the Secretary of Defense Historical Office) 1997 pp. 3-4. http://history.defense.gov/Portals/70/Documents/other/DOD1947-1997OrgLeaders.pdf?ver=2014-06-24-093417-610.

[26] House Select Committee on Post-War Military Policy, Post-War Military Policy, H. Rept 1765, 78th Congress, 2nd Session, p. 3.

department, which would report to a new Cabinet-level advisor on matters of national defense.[27] The merits and risks of creating a new Department headed by a single individual were therefore vigorously debated by the military services, the executive branch, and Congress between 1944 and 1947.

Opposition to a New Department of National Defense[28]

> "One of the lessons which have most clearly come from the costly and dangerous experience of this war is that there must be unified direction of land, sea and air forces at home as well as in other parts of the world where our Armed Forces are serving. We did not have that kind of direction when we were attacked four years ago—and we certainly paid a high price for not having it."
>
> President Harry S. Truman, "Message to Congress," December 19, 1945.

Although the United States has utilized a variation of Truman's proposed system of military governance for the past 60 years, there was, at the time, considerable pushback against his ideas. The proposal was controversial for at least three reasons. First, while demobilization of the Armed Forces took place at a rapid pace,[29] peacetime force levels after 1947 were still at around 1.5 million—considerably higher than the 1939 end strength of less than 350,000. Although the public tended to support a standing military of this size, this larger standing military, combined with Truman's proposal for universal military training, cultivated a sense of unease about departing from the country's tradition of peacetime mobilization as a component of maintaining civilian control of the military.[30] This sense was compounded in the wake of the use of atomic weaponry, which highlighted the notion that future wars might not be decided by armies in the field.

> "We can now begin I think, to see the pattern intended by our forefathers. They were unwilling to limit the Army to a specific number ... but they did want a small army. Therefore they gave Congress the power of the purse which they deemed a sufficient control... the framers of the Constitution were unwilling to give the Federal Government control of the general manpower-militia-in time of peace, but they would give it the right to call forth the militia in wartime. It was their opinion that a large standing army or force which could be called for other purposes than to repel invasion would invite attack. This policy, of avoiding aggressive war or excuse for attack, was sound then and is sound now."
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> Statement of Theodore Paulin, Assistant Professor of History, Swarthmore College, before the House of Representatives, Select Committee on Postwar Military Policy, Tuesday, June 5, 1945

The second concern about this new military organization was the notion of centralization of military governance, especially considering the enormous popularity of the military and its senior U.S. general and flag officers at the conclusion of World War II. Five-star officers such as the Army's George C. Marshall, Douglas MacArthur, Henry (Hap) Arnold and Fleet Admirals William D. Leahy, Ernest King, Chester Nimitz, and William F. (Bull) Halsey Jr. had commanded millions of men and thousands of tanks, airplanes, and ships—both U.S. and allied—in an unprecedented endeavor to defeat the Axis powers. In addition to field command, they played a central role in formulating

[27] President Harry S. Truman, "Special Message to the Congress Recommending the Establishment of a Department of National Defense," December 19, 1945, https://www.trumanlibrary.org/publicpapers/index.php?pid=508&st=&st1=.

[28] The Department of National Defense eventually became the "National Military Establishment" in the 1947 Act. In 1949, the title of the new department was amended to become the Department of Defense.

[29] President Truman noted that the demobilization was proceeding at the rate of 1,500,000 per month.

[30] Truman himself was anxious not to over-militarize American society, which was one reason for the rapid demobilization which, in the view of some, proceeded too quickly. See Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954* (New York: Cambridge University Press, 1998), pp. 71-72.

both U.S. and allied grand strategies and military strategies in Washington and abroad. These men enjoyed a heroic reputation and were treated to ticker tape parades, addressed joint sessions of Congress, and some were even considered as presidential contenders.[31]

By contrast, outside Presidents Roosevelt and Truman, few if any senior Administration officials or Members of Congress enjoyed a similar status among the American people, during or after the war. At a personal and political level, these current and future senior general and flag officers might have been viewed as being a bit too powerful—not unlike the proconsuls of the Roman Empire. Given these concerns, legislators might have considered a ten year gap in service as ample time for their "stars to fade" as well as for their influence to diminish to an acceptable level.[32]

Mixed in with the debate on how to best design a new military organizational structure were service rivalries which translated into deep differences of opinion between the Departments of War and the Navy about whether to reorganize under a single department. While the Army argued for bringing the departments together under a single civilian authority, the Navy maintained that doing so—thereby removing the Cabinet-level status of Service secretaries—would overly empower a single individual.[33] Ultimately, as 1947 approached, it became clear that President Truman's preference for a single civilian Secretary of National Defense would prevail, against the protests of the Department of the Navy. Subsequently, debates about the new Secretary of National Defense were occasionally peppered with concerns about whether, under this new construct, the Department of the Navy might have primacy over the Department of War (or vice-versa), especially if the new Secretary had served in one service or the other.[34]

Taken together, these three factors appear to have raised concerns that one byproduct of World War II might be the over-militarization of American society—a development that Truman himself feared. Added to this, the creation of a new Department of National Defense, under a single Secretary, caused many to wonder whether doing so might make the new defense establishment too powerful relative to the rest of the U.S. government, thereby undermining the principle of civilian control of the military. Yet several key post-war developments, in particular the rise of Soviet aggression, the belief that occupation and reformation of Germany and Japan was necessary to produce long-term peace, and the near-collapse of the British empire, underscored to many American leaders that the United States would need to assume a greater share of the burden for promoting international stability than ever before. Greater U.S. involvement in the world

[31] Discussion with Andrew Feickert, CRS Specialist in Military Ground Forces.

[32] Discussion with Andrew Feickert, CRS Specialist in Military Ground Forces.

[33] Roger R. Trask and Alfred Goldberg, *The Department of Defense 1947-1997: Organization and Leaders*, U.S. Department of Defense, Historical Office of the Office of the Secretary of Defense) 1997. See also Testimony of Brig. Gen. Merritt A. Edson, United States Marine Corps, on Wednesday, May 7, 1947 in which he states, "Another thing which I would like to point out is that in my opinion, if we set up a joint staff, at the head of all the armed forces, which again in my opinion follows the footsteps of those nations which have become militaristic, that there will immediately ensue within that staff, a struggle for supremacy, Army, Navy, or Air, and eventually one of them will come out on top. Normally it is the ground forces who predominate because the ground forces in war, through sheer weight of numbers and the fact that decision is made on the ground, gain that control. In my opinion, sir, it would be just as bad to have any other branch dominate your national general staff. It makes no difference whether it is the Army, Navy, Marine Corps, or the Air Force, no single service, especially in a nation like ours, which is a maritime and an insular nation, should gain supremacy over all of the armed forces." p. 634; "National Defense Establishment (Unification of the Armed Services): Hearings before the Committee on Armed Services, Senate, Eightieth Congress, First Session, on S . 758, Part 3, various dates in April and May 1947.

[34] See ibid. p. 8; Alice C. Cole, et al. (eds), *Department of Defense: Documents on Establishment and Organization, 1944-1978* (Washington, DC, 1978, pp. 17-21.; Ed Cray,. *General of the Army: George C. Marshall, Soldier and Statesman*. Rowman & Littlefield, 2000.

therefore necessitated more serious consideration of how the institutions governing the military might be better organized. The problem of peacetime military and national security organization could no longer be ignored. The question then became how to establish this new, overarching department in a manner that addressed the concerns of the day—in particular, managing inter-service rivalry—while preserving the principle of civilian control of the military.

Preserving Civilian Control of the Military in the 1947 Act and Restricting the Position of Secretary of Defense

The overall intention of the 1947 National Security Act was to ensure that the American instruments of national security and defense might be better prepared and organized in order to meet the challenges presented by the post-war period and the dawn of the Cold War. As such, in designing a new National Military Establishment (which would subsequently be redesignated as the Department of Defense), Congress sought to create greater unity of command while at the same time ensuring that the institution they were creating—and the individuals they would be empowering to lead it—would not threaten the principle of civilian control of the military.[35]

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." Historic congressional documentation is silent on the *specific* reasons for arriving at this compromise. However, one can infer from the statements made by Members of Congress as they debated the 1947 act, as well as the historical context at the time, that some viewed a break between military service and a Secretary of Defense appointment as desirable. This would help ensure that no one military service dominated the newly established Defense Department; ensure that the new Secretary of Defense was truly the President's (rather than a service's) representative; and, again, preserve the principle of civilian control of the military at a time when the United States was departing from its century-and-a-half long tradition of a small standing military.

Suspending the Restrictions on Prior Military Service of the Secretary of Defense: The Appointment of General Marshall

The new national security apparatus—and the restrictions imposed upon the new Secretary of Defense position—were quickly put to the test as the United States became involved in the Korean War. Increasingly displeased with Secretary of Defense Louis A. Johnson, and recognizing the need to "choose a person of great national prestige to head the Department of Defense" in light of the "controversy surrounding Johnson's performance" and U.S. military readiness deficits exposed by the first months of the Korean War, President Truman approached General Marshall in early September 1950 to ask if he would "act as Secretary of Defense through the crisis [of the Korean War] if [President Truman] could get Congressional approval."[36]

[35] Other measures designed to ensure that the principle of civilian control was upheld included preserving the civilian service secretaries and ensuring that the Chairman of the Joint Chiefs of Staff was a relatively weak position compared to the other service chiefs, and out of the chain of command.

[36] As reported in Forrest C. Pogue, *George C. Marshall: Statesman, 1945-1959* (New York: Viking, 1987), p. 422; see

By 1950, General Marshall already had a distinguished career, having served in senior civilian and military positions, both in and out of the U.S. government. General Marshall was one of four World War II-era Army generals first temporarily designated as a five-star General of the Army in 1944, retiring in 1947 from that rank.[37] In November 1945, Truman sent Marshall to China in an unsuccessful attempt to mediate the civil war between Nationalists and Communists. He returned to the United States in January 1947 to become secretary of state for two years, a position without statutory restrictions. In that capacity, he presided over the formulation of the Truman Doctrine, the Marshall Plan, the Inter-American Treaty of Reciprocal Assistance, and negotiation of the NATO pact. After he left the State Department he achieved further distinction as president of the American Red Cross.[38]

In 1949, General Marshall was returned by his request to "the active [duty] list of the Regular Army on March 1, 1949."[39] For administrative purposes following his restoration to the Army active duty list, General Marshall was assigned to the Office of the Chief of Staff of the Army.[40] In this role, General Marshall had no official position in the Army command structure, and had minimal official military duties and responsibilities.

General Marshall accepted President Truman's request to nominate him as Secretary of Defense, on the condition that if confirmed, his tenure would be limited to a period of six months to a year.[41] Accordingly, on September 13, 1950, President Truman forwarded a legislative proposal to the House and Senate Armed Services Committees that addressed two restrictions in statute that would otherwise prevent Marshall's nomination. These included 10 U.S.C. §113 (described earlier in this report) 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. In a cover letter accompanying the proposal, the President addressed the committee heads, Truman noted:

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also Roger R. Trask and Alfred Goldberg, *The Department of Defense, 1947-1997: Organization and Leaders*, (Washington, DC: Historical Office of the Office of the Secretary of Defense, 1997), p. 64. A full analysis of the circumstances contributing to Johnson's removal as Secretary of Defense is outside the scope of this report—for a brief discussion of Johnson's tenure as Secretary of Defense, see the biographical overview provided by the Historical Office of the Office of the Secretary of Defense at http://history.defense.gov/Multimedia/Biographies/Article-View/Article/571265/louis-a-johnson/.

[37] In addition to Marshall, Douglas MacArthur, Dwight D. Eisenhower, and Henry H. "Hap" Arnold were all designated as a five-star General of the Army in December 1944. Through P.L. 81-59, in following with the establishment of the U.S. Air Force as a separate and distinct military service branch through the National Security Act of 1947, Arnold's rank and grade as a five-star General of the Army was re-designated, making him the first (and to date only) five-star General of the Air Force.

[38] Roger R. Trask and Alfred Goldberg, *The Department of Defense, 1947-1997: Organization and Leaders*, (Washington, DC: Historical Office of the Office of the Secretary of Defense, 1997), p. 64; see also "Harry S. Truman Administration: George C. Marshall," at http://history.defense.gov/Multimedia/Biographies/Article-View/Article/571266/george-c-marshall/.

[39] See P.L. 79-333, Section 1. Section 4 of P.L. 78-482 specified that individuals appointed under the act "shall, while on active duty, receive the same pay and allowances as a rear admiral of the upper half, plus a personal money allowance of $5,000 per annum." Section 5 of P.L. 78-482 specified that those officers serving in the grade or rank of Fleet Admiral or General of the Army "shall, upon retirement or revision to the retired list, as the case may be, have on the retired list the highest grade or rank held by him on the active list or active duty: *Provided,* That each officer shall be entitled to retired pay equal to 75 per centum of the active-duty pay provided herein for an officer."

[40] U.S. Congress, House Armed Services Committee, *Authorizing Appointment of General of the Army George C. Marshall as Secretary of Defense*, 81st Cong., 2nd sess., September 15, 1950, H.Rept. 81-3094, p. 2.

[41] Forrest C. Pogue, *George C. Marshall: Statesman, 1945-1959* (New York: Viking, 1987), p. 422.

> Attached is a draft of legislation which would permit General George C. Marshall to serve as Secretary of Defense. I request that you lay this matter before your committee with a view of obtaining early and favorable action by the Congress. I am a firm believer in the general principle that our national defense establishment should be headed by a civilian. However, in view of the present critical circumstances and General Marshall's unusual qualifications, I believe that the national interest will be served best by making an exception in this case.[42]

While the measure had the support of many Members, it also encountered significant opposition from other Members, both at the committee and floor levels in each chamber. 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 and exceptionally 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. (For a detailed legislative history, see the **Appendix**.) 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.

President Truman submitted the nomination of General Marshall to be Secretary of Defense to the Senate on September 18, 1950.[43] The Senate Armed Services Committee held a confirmation hearing for General Marshall on September 19, 1950, and favorably reported the nomination to the Senate on the same day.[44]

While the question of civilian control of the military was discussed during the confirmation hearing, it was not the only issue raised, as General Marshall was also asked to address questions on a variety of other topics. When asked by Senator Lyndon B. Johnson if he had made any public statements "on the necessity for ... civilian control" of the Department of Defense, Marshall replied:

> I just made one reference, not with respect to the Secretary of Defense himself, but in connection with representation on the National Security Council, that I objected in writing, when I was Secretary of State, to having three representatives of the fighting services on that Council.[45] I thought that representation was out of balance. It ought to be more civil and less military. I made that representation about the second week I was Secretary of State. I also suggested, although I do not think that it was done in writing, that the Council should

[42] As reproduced in U.S. Congress, Senate Armed Services Committee, *Report of Proceedings: Presentation of Scroll to Senator Gurney*, 81st Cong., September 13, 1950, pp. 4-5.

[43] *Congressional Record*, September 18, 1950, p. 15026.

[44] U.S. Congress, Senate Armed Services Committee, *Nomination of General of the Army George C. Marshall to be Secretary of Defense*, 81st Cong., 2nd sess., September 19, 1950.

[45] Marshall is referencing the National Security Act of 1947, which originally placed the secretaries of the military departments on the National Security Council. 1949 amendments to the National Security Act removed the secretaries of the military departments from the National Security Council.

> have two or three men, civilians you might say without portfolio, sitting on it. I thought that would be a very valuable contribution.
>
> Now, to go directly to your question, the only statement I recall having made was when as a second lieutenant, that I thought we would never get anywhere in the Army unless a solider was Secretary of War. As I grew a little older and served through some of our military history, particularly the Philippine Insurrection, I came to the fixed conclusion that he should never be a solider.[46]

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

Statutory Changes to the Restriction on Secretary of Defense Eligibility in the FY2008 National Defense Authorization Act (P.L. 110-181)

Since the enactment of the National Security Act of 1947, the statutory qualification provision associated with prior military service of the Secretary of Defense has been modified once.

In January 2007, Representative Walter B. Jones Jr. introduced H.R. 417, which would have reduced the eligibility requirement to three years. The provision was adapted and included in the House Armed Services Committee (HASC) Chairman's mark of H.R. 1585, the initial House committee version of the FY2008 National Defense Authorization Act (NDAA).[47] As reported to the House on May 11, 2007, by the HASC, H.R. 1585 contained a provision (Section 903) that would amend Sections 113, 132, and 134 of Title 10 of the *United States Code*, to reduce from 10 years to 5 years the period of time following active duty military service before a commissioned officer of a regular component could be appointed as Secretary of Defense, Deputy Secretary of Defense, or Under Secretary of Defense for Policy. In a May 2007 press release, Representative Jones described the language as "[reducing] an outdated prohibition and [enabling] the President to choose from a greater pool of qualified candidates with relevant military expertise."[48]

As the Senate amendment to the House bill contained no similar provision, a compromise was reached during conference committee negotiations. As enacted, 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, Deputy Secretary of Defense, or Under Secretary of Defense for Policy.

Congress and Civilian-Military Relations

Federalist Papers 46 and 59 show that the Founding Fathers were also concerned about unitary executive control of the military. The desire to ensure that the military reflected, and was subordinate to, the will of the people therefore led to considerable congressional powers on matters concerning the armed services. These include the power to lay and collect taxes for the common defense, the sole power to declare war, the ability to raise and support armies, and the authority to establish rules and regulations for the army, navy, and militias when in service of the United States. To further strengthen civilian control of the military, a provision prohibited the appropriation

[46] U.S. Congress, Senate Armed Services Committee, *Nomination of General of the Army George C. Marshall to be Secretary of Defense*, 81st Cong., 2nd sess., September 19, 1950, p. 10.

[47] CRS Report RL33999, *Defense: FY2008 Authorization and Appropriations*, by Pat Towell, Stephen Daggett, and Amy Belasco.

[48] Office of Congressman Walter Jones, "Defense Bill Passes Committee, Jones Authors Several Provisions for Military," press release, May 10, 2007, https://jones.house.gov/press-release/defense-bill-passes-committee-jones-authors-several-provisions-military-1.

of money for the army for a period longer than two years. In the post-World War II era, Congress has exercised this constitutional authority in a number of ways, including (but not limited to) the following:

- Annual strategy and posture hearings overseeing the Department of Defense's (DOD's) plans and programs.
- Annually authorizing the scope and priorities for the military's budget and appropriating monies accordingly.
- Establishing new service branches of the U.S. military, such as the U.S. Space Force in 2019 (P.L. 116-92).
- Establishing new components of the U.S. military, such as U.S. Special Operations Command (P.L. 99-661).
- Setting key DOD strategy production requirements, such as the National Defense Strategy (P.L. 114-328).
- Consenting upon the nominations of senior leaders to DOD civilian and military positions.
- Cancellation of weapons systems, as with the MBT-70 Supertank in 1971.
- Establishing authorities for DOD's noncombat cooperative activities with other nations' military and security establishments (Title 22 *U.S. Code*; Title 10 *U.S. Code*, Chapter 16).
- Organizing the military chain of command, for example through the 1986 Goldwater-Nichols Act (P.L. 99-433).
- Requiring reporting on key issues and areas of interest to Congress, such as the semi-annual Report on Stability and Progress in Afghanistan (P.L. 110-181).
- Setting criteria for military promotions, for example by requiring military staff in a "joint" position before becoming eligible for a General or Flag Officer position in the 1986 Goldwater-Nichols Act (P.L. 99-433).
- Setting personnel policies, including repealing DOD's "Don't Ask, Don't Tell" policy toward gay servicemembers in the military (P.L. 111-321).
- Granting specific authorities for the legal conduct of military operations, such as the 2001 Authorization for the Use of Military Force (P.L. 107-40).

Source: CRS In Focus IF11566, *Congress, Civilian Control of the Military, and Nonpartisanship*, by Kathleen J. McInnis.

The Nomination of Then-General Mattis

Similar to the debates surrounding the nomination of General Marshall in 1950, many observers agreed that General Mattis was qualified to take on the role of Secretary of Defense. The key contrast between the debates in the early 1950s and 2017 was that the public discussion surrounding the proposed nomination of Mattis was *less* about preserving the principle of civilian control of the military (although that was certainly debated), and *more* about civilian-military relations more generally. Few observers, if any, appeared to express concern that Mattis, if appointed to the position of Secretary of Defense, would compromise the long-standing American tradition of ensuring that the military remains subordinate to the authority of civilian leaders. Instead, the debate surrounding the appointment of Mattis was a more wide-ranging discussion on a key question he raises in his own book: whether over 40 years of an all-volunteer force—of which, the last 15 had seen continuous war—significantly altered the ways in which the U.S. military, civil society, and civilian leaders relate to each other.[49] Several observers maintained that after the end of the Cold War, but particularly since the terrorist attacks of September 11, 2001, frictions and unhealthy tensions emerged between the military and its civilian leadership, although few contended at the time that these tensions might meaningfully challenge the principle of civilian control.[50] Some of those issues and tensions were discussed

[49] Jim Mattis and Kori S. Schake (eds), *Warriors and Citizens: American Views of our Military*, (Stanford: Hoover Institution Press) 2016.

[50] Richard H. Kohn "Out of control: the crisis in civil-military relations." *The National Interest* 35 (1994): 3-17.

during a January 10, 2017, Senate Armed Services Committee hearing on civilian control of the Armed Forces.[51] Views raised during that hearing include the following:

- **Concerns Regarding Possible Politicization of the Military.**

  Senator Jack Reed: During this past presidential election cycle, both Democrats and Republicans came dangerously close to compromising the non-partisan nature of our military when the nominating conventions featured speeches from recently retired general officers advocating for a candidate for President. As former Chairman of the Joint Chiefs of Staff, General Martin Dempsey, stated shortly after the conventions, "If senior military leaders, active and retired, begin to self-identify as members or supporters of one party or another, than the inherent tension built into our system of government between the executive branch and the legislative branch will bleed over into suspicion of military leaders by Congress and a further erosion of civilian-military relations.[52]

  Kathleen Hicks: Were recently retired or Active Duty military officers routinely selected for Secretary of Defense or to widely populate senior civilian positions in government, it would risk furthering incentives for Active Duty officers to politicize their speech and/or actions and for civilians to seek to ascertain the political viewpoints as part of the recruitment and hiring process for political positions.[53]

- **Concerns Regarding Establishing Precedent.**

  Senator Jack Reed: Finally, if Congress provides an exception for General Mattis, a question this committee must address is the precedent this action sets for such waivers in the future. The restriction was enacted into law for good reason. General George Marshall is the only retired military officer to receive this exception. I personally believe such waivers would destroy the principle that is so critical to the central tenet of our civil-military relations.[54]

- **Concerns regarding Diversity of Opinion in National Security Policymaking.**

  Eliot Cohen: … there is a breadth of view and perspective essential to running the military and making war that is not likely to be found in someone who has spent 30 or 40 years in uniform. The Armed Forces are what one sociologist has called a 'total institution,' comparable in some ways to the priesthood in the Catholic Church. A career of military service affects every feature of one's life, down to how one wears one's hair. Living in such an institution and removed from civil society through the prime of one's life can be a narrowing as well as a broadening experience, and it certainly leaves an indelible mark. It is one reason why, in a certain sense, generals never retire.[55]

  Senator Perdue: … I think we're facing a very unique and dangerous global security crisis today. I can't compare it to 1950. It's different. They didn't have cyberwarfare back then. They didn't have a nuclear North Korea. They didn't have an arms race in space. I think the need for integration between diplomacy and development and military capability has

[51] U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

[52] Senator Jack Reed, Opening Statement, U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

[53] Kathleen Hicks, Opening Statement, U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

[54] Senator Jack Reed, Opening Statement, U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

[55] Eliot Cohen, Opening Statement, U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

never been greater or more complicated. Because of that unique circumstance, I think, like General Marshall, General Mattis offers us a unique combination of skillsets and mindsets that make him an ideal candidate…[56]

Eliot Cohen: … countries that have routinely installed generals as Ministers of War or Defense have often had problematic patterns of civil-military relations, and suffered military failures as well.[57]

- **Impact on Department of Defense Politics.**

  Eliot Cohen: Having a recently retired general officer as Secretary of Defense poses all kinds of practical problems. Would they be inclined to favor the Joint Chiefs of Staff, military, over the Office of the Secretary of Defense, civilian? Would they be inclined to favor their own service over the others? Would they bypass the Chairman of the Joint Chiefs of Staff as the senior military advisor to the President? Would they allow the normal rivalries or close friendships of their military career to affect their position of civilian head of the Department? Even the appearance of such biases, let alone the reality, would make effective leadership of the Department of Defense difficult or indeed impossible.[58]

- **The dynamic nature of civilian-military relations.**

  Senator John McCain: Indeed, the separation between civilian and military positions has not always been so clear. Twelve of our Nation's Presidents previously served as generals in the Armed Forces. Over the years, numerous high-ranking civilian officials in the Department of Defense have had long careers in military service… The proper balance in civil-military relations is difficult to achieve and, as history has taught us, achieving that balance requires different leaders at different times.[59]

Ultimately, many in Congress at that time, despite expressing some concern with the possible negative impacts upon civil-military relations, did not block passage block passage of "waiver" legislation allowing Mattis to serve as Secretary of Defense. The House of Representatives voted 268-151 and the Senate recorded 60 votes in the affirmative in favor of the waiver legislation (S.84). P.L. 115-2 was passed on January 20, 2017.

Recent Tensions in the U.S. Civil-Military Relationship

According to many observers, the strategic and political context in which Austin's nomination may be considered is one that is markedly different from that of four years ago.

Civil-Military Roles and Responsibilities

In particular, some contend that civil-military relations have experienced such significant tensions and setbacks in recent years as to require a recalibration of the roles of civilian and military positions and organizations within the Department of Defense. For example, the National Defense

[56] Senator David Perdue, U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

[57] Eliot Cohen, U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

[58] Ibid.

[59] Senator John McCain, Opening Statement. U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

Strategy Commission, a congressionally mandated bipartisan group of external experts charged with reviewing the National Defense Strategy, argues in its 2018 report that "civilian voices have been relatively muted on issues at the center of U.S. defense and national security policy, undermining the concept of civilian control."[60] At issue are concerns regarding military dominance over defense policy decisions and an attendant view that the civilian components of DOD have been diminished in recent years. Observers point to both policy and human capital dimensions of the issue. With respect to the former, some maintain that the Chairman of the Joint Chiefs of Staff (CJCS), as well as the organization that supports him, have been assigned—or taken on—tasks that are inappropriate given the Chairman's role as a military advisor. The CJCS is a position that was initially designed to be a neutral arbiter between the military services and the principal military advisor to the President rather than an operationally focused one; this is why the Chairman is not in the military chain of command. Yet recent augmentations to the statutory role of the Chairman to lead joint force development and global force integration have led to concerns by some that CJCS may be becoming more an inherently more directive position (and therefore more political) than initially envisioned in statute.[61] According to this view, the cumulative result of these actions is "weakening significantly" the civilian oversight of key DOD posture and planning decisions.[62] The NDSC, for its part, pointed to insufficient civilian oversight of DOD's force management as argued for the need to improve civil-military relations:

> The implementation of the NDS must feature empowered civilians fulfilling their statutory responsibilities, particularly regarding issues of force management. Put bluntly, allocating priority—and allocating forces—across theaters of warfare is not solely a military matter. It is an inherently political-military task, decision authority for which is the proper competency and responsibility of America's civilian leaders. Unless global force management is nested under higher-order guidance from civilians, an effort to centralize defense direction under the Chairman of the Joint Chiefs of Staff may succeed operationally but produce profound strategic problems. It is critical that DOD—and Congress—reverse the unhealthy trend in which decision-making is drifting away from civilian leaders on issues of national importance. [63]

A (Very) Brief History of the U.S. Military Chain of Command

The division of labor between military and civilian leaders in the way that the United States commands and controls its forces is in large part a product of an inherent tension between improving the effectiveness of U.S. forces, on the one hand, and preserving civilian control of the military, on the other. The experience of World War II convinced President Truman, among others, that a greater degree of coordination and integration between the U.S. military services was necessary to improve the conduct of military operations. Yet there was concern at the time that integrating these institutions might result in an overly powerful military staff element that could threaten the principle of civilian control of U.S. forces.

The resulting compromise was to create a Joint Chiefs of Staff, comprising all the military service chiefs, and headed by a Chairman, serving as an advisory body only. As a corporate body, it was specifically *not* designed to exercise command; the Chairman of the Joint Chiefs of Staff (CJCS) had no command authority. The Secretary of Defense remained the only civilian in the chain of command besides the President of the United States.

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[60] Eric Edelman and Gary Roughead (co-chairs), *Providing for the Common Defense: The Report of the National Defense Strategy Commission*, United States Institute for Peace, November 2018.

[61] Chairman of the Joint Chiefs of Staff Instruction 3050.1, *Implementing Joint Force Development and Design*, December 3, 2019. Mara Karlin, Alice Hunt Friend and Loren Dejonge Schulman, "Two Cheers for Esper's Plan to Reassert Civilian Control of the Military," *Defense One* September 9, 2019.

[62] Mara Karlin, Alice Hunt Friend and Loren Dejonge Schulman, "Two Cheers for Esper's Plan to Reassert Civilian Control of the Military," *Defense One* September 9, 2019.

[63] Eric Edelman and Gary Roughead (co-chairs), *Providing for the Common Defense: The Report of the National Defense Strategy Commission,* United States Institute for Peace, November 2018, p. xi.

The Joint Chiefs of Staff did, however, have responsibility for establishing "unified combatant commands," which were charged with executing military operations in different parts of the world and combining the capabilities of two or more military services. Different service chiefs were assigned executive and administrative responsibilities for these combatant commands, which gave them a de facto mechanism through which they could influence ongoing military operations. By 1953, the authority to establish Combatant Commands (COCOMs) was assigned to the Secretary of Defense, although the relative ambiguity of the chain of command remained a feature of DOD operations until 1986.

Perceived shortcomings in the U.S. chain of command led to demonstrable failures during several incidents in the late 1970s and early 1980s. The military services, in the view of many observers, failed to effectively plan or conduct operations jointly due to confusion over whether the military services or unified combatant commanders were ultimately in charge of operations. These incidents include the operation in Grenada, the Iranian hostage rescue attempt (often referred to as "Desert One"), and the bombing of the Marine Barracks in Beirut, Lebanon. In 1986, Congress passed the Goldwater-Nichols Defense Reform Act (P.L. 99-433), which mandated clarifications to the chain of command. The current command and control architecture for DOD is a product of these congressionally mandated changes.

The Chain of Command in Statute

Title 10 U.S.C. §162 specifies that the chain of command goes from the President, to the Secretary of Defense, to Commanders of Combatant Commands. The Chairman of the Joint Chiefs of Staff acts as an intermediary, transmitting orders between the Secretary of Defense and the Commanders of Combatant Commands. Each Combatant Commander is a four-star Flag or General Officer, whose appointment is confirmed by the Senate.

Source: CRS In Focus IF10542, *Defense Primer: Commanding U.S. Military Operations*, by Kathleen J. McInnis.

With respect to the personnel dimensions of recent civil-military tensions, some express concern regarding departure of key civilian mid- and senior-level positions in DOD, as well as the overall declining health of the DOD civil service, have contributed to a shift away from robust civilian oversight, practically speaking.[64] Some of these trends have spanned multiple Administrations. According to one observer, "Budget cuts under the Budget Control Act of 2011 led to a series of hiring freezes and cuts to the civil service, which depleted the workforce and contributed to poor morale."[65] Another observer argues that "civilian oversight of the military was already weakening in the last administration, and I think it basically fell off a cliff.…"[66] Others point to the Trump Administration's frequent description of civil servants as the "deep state" with their own agenda as further compounding issues of low morale—and relatively low workforce retention—in the national security civil service.[67]

Overreliance Upon Military Servicemembers on Policy Matters?

One criticism many scholars and practitioners raise with respect to then-Secretary Mattis's tenure as Secretary of Defense: an overreliance upon advice from uniformed military colleagues at the expense of that of civil servants. This issue has both structural and personality-oriented dimensions. With respect to the former, concepts like "Best Military Advice"—a term that has become more frequently used in recent years—are viewed by some as inherently problematic, as the term has come to connote that military advice on strategic matters is more valuable than comparable guidance formulated and promulgated by civilian leaders.[68] With respect to the latter,

[64] Lara Seligman, "How the Generals are Routing the Policy Wonks at the Pentagon," *Foreign Policy*, November 15, 2018.

[65] Brian McKeon, as quoted in ibid.

[66] Loren Dejonge Schulman, *Managing the National Security Workforce Crisis*, Center for a New American Security, May 15, 2019.

[67] Loren Dejonge Schulman, as quoted in Lara Seligman.

[68] As Mara Karlin and Jim Golby note, "First, the emphasis on 'best' in best military advice creates an impression,

some observers contend that Secretary Mattis exacerbated these structurally misalignments in the civilian-military relationship by delegating key civilian policymaking and other tasks to the Joint Staff rather than empowering his civilian leaders.[69][70] According to some, these tendencies were arguably exacerbated by the Trump Administration's reliance on acting officials and delays in civilian appointments, and continued after Mattis departed office.[71] Some observers contend, however, that these aspects of Mattis's tenure are overshadowed by his overall successful management and leadership of the Department of Defense, particularly given complex national security crises such as the 2017 North Korean test of an intercontinental ballistic missile thought capable of reaching the continental United States.[72]

Military Involvement in Domestic Politics?

Some scholars have argued that the appointment of recently retired generals to civilian political positions further blurs the lines between appropriate civilian and military roles, and between foreign and domestic politics. A recent study notes that large numbers of Americans could not differentiate whether Secretary Mattis had retired or whether he was still on active duty, which some say was exacerbated by President Trump's frequent referring to Mattis by his military rank.[73] Further, there is an ongoing debate about whether blurred lines between active duty military officers and partisan politics are influencing societal perceptions about the military's role in domestic and electoral politics.

The possible use of federal Armed Forces as part of the U.S. executive branch's response to incidents of violence during June 2020 protests and unrest also raised questions about how the military is controlled by domestic political institutions and the U.S. military's relationship with American society. For example, the June 1, 2020, photographing of Chairman of the Joint Chiefs of Staff Milley in Lafayette Square immediately after protestors had been forcibly removed from the area was seen by some (including, on June 11, Milley himself) to have created a perception of

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perhaps unintentionally, that military advice is superior to civilian perspectives. Given that there is no civilian corollary to this term, its use suggests that military voices should carry more weight than civilian voices during policy debates. It also suggests that military advice is both more certain, and more unified, than it often is in reality. These perceptions often serve to undermine trust with civilian leaders and interagency counterparts, and they call into question professional norms related to humility and selfless service." Mara Karlin and Jim Golby, "Why 'Best Military Advice' is Bad for the Military—and Worse for Civilians" *Orbis*, vol. 62, issue 1, 2018, pp. 137-153.

[69] Jim Golby, "In the Wake of Chaos: Civil-Military Relations Under Secretary Jim Mattis," *War on the Rocks*, February 4, 2019.

[70] In the American system of civilian control of the military, the relationship between civilian and military leaders is intended to be unequal in that the military is subordinate to civilian leadership and direction. Some observers contend, however, that an unintended consequence of the 1986 Goldwater-Nichols DOD Reform Act, the Joint Staff has been empowered and strengthened relative to their civilian counterparts. See, for example: Luke Strange, "The Office of the Secretary of Defense and the Joint Chiefs: An Unequal Dialogue in Which Direction?" *The Strategy Bridge*, January 15, 2019.

[71] Jim Golby, "In the Wake of Chaos: Civil-Military Relations Under Secretary Jim Mattis," *War on the Rocks*, February 4, 2019.

[72] CRS Report R44994, *The North Korean Nuclear Challenge: Military Options and Issues for Congress*, coordinated by Kathleen J. McInnis; Peter Feaver, "Mattis Was the Best Secretary of Defense Trump Could Have Had," *Foreign Policy*, February 12, 2019, https://foreignpolicy.com/2019/02/12/mattis-was-the-best-secretary-of-defense-trump-could-have-had/.

[73] Heidi Urben, "Generals Shouldn't Be Welcome At These Parties: Stopping Retired Flag Officer Endorsements," *War on the Rocks*, July 27, 2020, https://warontherocks.com/2020/07/generals-shouldnt-be-welcome-at-these-parties-stopping-retired-flag-officer-endorsements/.

the military's involvement in domestic politics.[74] In the wake of June 1, several retired senior military leaders, including former Secretary of Defense Mattis, voiced their concern about the use of National Guard personnel in a manner that appeared to infringe on Americans' constitutional right to free assembly. General Milley and then-Secretary of Defense Esper also subsequently expressed regrets at being perceived as part of a partisan political act and affirmed that the U.S. military remains a nonpartisan institution.[75] In retrospect, most observers contend that the incident itself was an unfortunate misstep. Still, questions regarding the appropriate—and inappropriate—use of the military to respond to domestic political unrest by senior political leaders is now a factor in the discourse surrounding civilian control of the military.

The Proposed Nomination of General Lloyd Austin (Ret.), U.S. Army

As was the case when General Mattis was nominated, perceptions regarding the wisdom of nominating a recently retired military officer to the position of Secretary of Defense tend to be largely predicated upon one's opinions on the overall health of the broader civilian-military relationship. In the view of some, overreliance upon recently retired generals to fill key national security and government leadership positions—including that of the Secretary of Defense—is "dangerous," as doing so might upset the balance between the military and the rest of the government.[76] To others, focusing on whether an individual has had prior military experience obfuscates a more important and substantive conversation on the meaning of the principle of civilian control of the military today, and that there are more, and more effective, mechanisms for underscoring civilian control than the statutory "cooling off" period.[77] Others have maintained that rigid adherence to a formal, and superficial, interpretation of civilian-military relations is "dangerous" in an era when both state and non-state actors possess means of coercion and the lines between "civilian" and "military" spheres is increasingly blurred.[78] Still others contend that the possibility of addressing long-standing, societal-wide civilian-military issues associated with inadequate racial diversity and inclusion in the Department of Defense outweigh the drawbacks associated with placing another recently retired General Officer in the position of Secretary of Defense.

Another school of thought suggests that the *process* for considering a recently retired military officer for the position of Secretary of Defense is just as important—if not more so—than the appointment itself. Civilian control of the military in the United States can be thought of as a set of norms that are, at least in part, underpinned by legal requirements.[79] As norms are a social

[74] CRS In Focus IF11566, *Congress, Civilian Control of the Military, and Nonpartisanship*, by Kathleen J. McInnis.

[75] General Mark Milley, "Statement on Lafayette Square," as linked by Helene Cooper, "Milley Apologizes for Role in Trump Photo Op: 'I Should Not Have Been There,'" *The New York Times*, June 11, 2020.

[76] Loren DeJonge Schulman and Phillip Carter, "Trump is Surrounding Himself with Generals. That's Dangerous," *The Washington Post*, November 30, 2016.

[77] Mark Nevitt, "Important Context Missing from the Austin Nomination," *Just Security*, December 17, 2020.

[78] Rosa Brooks, "Don't Freak Out About Trump's Cabinet Full of Generals," Foreign Policy, December 2, 2016, http://foreignpolicy.com/2016/12/02/the-founding-fathers-wouldnt-freak-out-about-trumps-cabinet-full-of-generals/. It should be noted that in recent commentary on the possible appointment of Austin, Ms. Brooks has argued that a waiver ought not be granted. See Rosa Brooks, "The Pentagon Needs More Civilian Control Over The Military, Not Less," *The Washington Post*, December 9, 2020.

[79] According to one scholar, norms are "beliefs shared by a community about who they are, what the world is like, and given these two things, what they can and should do in given circumstances…. Norms function to regulate behavior by

construct that can be difficult to pinpoint, a measure by which some analysts gauge the existence and strength of a norm is by the discussions surrounding their possible violation. In other words, absent the existence of norms, actors would not feel compelled to mention the issue at all.[80] Applied to the issue at hand, some might maintain that the vibrancy of the public debate surrounding Austin's proposed nomination is an indication that the norm of civilian control of the military remains healthy. According to this view, ensuring appropriate ventilation of the issues and risks associated with the appointment of a recently retired general to the position of Secretary of Defense is a key aspect of underscoring the importance of the norm for American democracy. Relatedly, some others also contend that the norm of civilian control of the military could be strengthened by a public commitment by Austin to healthy civilian-military relations, should he be confirmed.[81]

Civilian Control of the Military

Some questions Congress may explore when considering the overall health of civil-military relations today, and whether to waive statutory provisions associated with Mr. Austin's nomination, include the following:

- **Might the appointment of a recently retired General create the risk of politicizing the military?** Overall, the military, as a profession, takes great pains to ensure that it stays nonpartisan so as to help ensure that the Commander-in-Chief has respect for the integrity of the military advice provided to them.[82] In taking a senior Cabinet-level position such as that of Secretary of Defense, might this change the President's view regarding whether the advice they are receiving from their military advisors is truly nonpartisan? Kori Schake, citing her book on civil-military relations that she co-edited with James Mattis, finds that political elites are increasingly viewing the military as "just another actor in political debates."[83] Somewhat related, what are the messages that the military forces more broadly are taking from this appointment? Might it suggest to some that affiliation with a political party is key to advancement to senior levels of the government, especially given the 2017 appointment of retired General Mattis to the position of Secretary of Defense?[84]
- **Has U.S. foreign policymaking been over-militarized, and would the appointment of another recently retired General make it even more so?**

defining the rules of the game." See Theo Farrell, *The norms of war: cultural beliefs and modern conflict* (Boulder: Lynne Rienner Publishers, 2005).

[80] Finnemore M, Sikkink K. "International norm dynamics and political change," *International Organization*, 1998 October 1:887-917.

[81] Peter Feaver, "Why Generals Shouldn't Be a Lock to Lead the Pentagon—And How Lloyd Austin Can Ease Those Concerns" Politico, December 9, 2020, https://www.politico.com/news/magazine/2020/12/09/generals-pentagon-defense-secretary-military-civilian-norm-443989; letter from Elissa Slotkin, Member of Congress, Colin Allred, Member of Congress, and Salud Carbajal, Member of Congress, et al. to Lloyd Austin, Secretary-Designee, December 18, 2020, http://www.slotkin.house.gov/sites/slotkin.house.gov/files/wysiwg_uploaded/FILE_7387.pdf.

[82] General Martin Dempsey (USA, Ret), "Keep your Politics Private, My Fellow Generals and Admirals," Defense One, August 1, 2016. http://www.defenseone.com/ideas/2016/08/keep-your-politics-private-my-fellow-generals-and-admirals/130404/.

[83] Kori Schake, "All the President's Generals," *Foreign Policy*, December 3, 2016, http://foreignpolicy.com/author/kori-schake/.

[84] Michael Robinson, Risa Brooks and Heidi Urben, "How Biden's Pick for Defense Secretary Might Shake Up Civil-Military Relations," *Political Violence at a Glance*, December 8, 2020.

Particularly after the terrorist attacks of September 11, 2001, many scholars and practitioners have argued that U.S. foreign policy has become more "militarized."[85] As evidence, these observers point to (among other things) the growth of DOD's role in security cooperation,[86] the heightened stature and power of combatant commanders relative to ambassadors,[87] and the dominance of defense spending relative to other international affairs spending.[88] According to this view, the militarization of foreign policy also represents an ends-ways-means disconnect, as many of the security challenges the United States faces requires comprehensive, "whole-of-government," rather than solely military, solutions.[89] Some therefore maintain that the appointment of a recently retired General to the position of Secretary of Defense might further exacerbate that trend.[90]

- In formulating and executing national security policy, what are the appropriate roles and responsibilities between civilian leaders and the military? Four years ago, a number of observers shared the view that civilian leaders and institutions in the U.S. national security community, particularly in the National Security Council, were "micromanaging" the Department of Defense. This led the Congress to pass a provision in P.L. 114-328, the FY2017 National Defense Authorization Act, limiting the size of its professional staff to 200 persons.[91]

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[85] See, for example, Gordon Adams and Shoon Murray (eds), *Mission Creep? The Militarization of U.S. Foreign Policy*, (Washington, DC: Georgetown University Press) 2014; U.S. Congress, House Committee on Armed Services, Hearing on Department of Defense and Department of State Partnership, 110th Cong., April 15, 2008; Rosa Brooks, How the Pentagon Became Walmart," *Foreign Policy*, August 9, 2016.

[86] John R. Deni, "Obama's Failure to Demilitarize U.S. Foreign Policy," *War on the Rocks*, October 30, 2015, https://warontherocks.com/2015/10/obamas-failure-to-demilitarize-u-s-foreign-policy/; Nina M. Serafino, "Foreign Assistance in Camouflage? Measuring the Military Security Cooperation Role," as found in Gordon Adams and Shoon Murray (eds), *Mission Creep? The Militarization of U.S. Foreign Policy*, (Washington, DC: Georgetown University Press) 2014.

[87] See, for example, Charles Ray, "Defining Lines of Authority," *Armed Forces Journal*, February 1, 2009. Available at http://armedforcesjournal.com/defining-lines-of-authority/. Shoon Murray and Anthony Quintain, "Combatant Commanders, Ambassadorial Authority, and the Conduct of Diplomacy," as found in Gordon Adams and Shoon Murray (eds), *Mission Creep? The Militarization of U.S. Foreign Policy*, (Washington, DC: Georgetown University Press) 2014. On pp. 185-186, the authors argue, "If the question is whether the role of the combatant commander has become so expansive that it fundamental challenges the traditional role of the Ambassador as the principal interlocutor between the US government and a foreign government, the answer is 'No.'... But if the question is whether the combatant commanders and the activities of the COCOMS influence US relations at the country level, in some cases playing an agenda-setting role, or more often, pushing a focus on security issues, then our answer is 'Yes.'"

[88] See Micah Zenko, "Don't Gut the Foreign Operations Budget," *Politics, Power and Preventive Action Blog*, Council on Foreign Relations, August 6, 2013, http://blogs.cfr.org/zenko/2013/08/06/dont-gut-the-foreign-operations-budget/; Charles B. Cushman Jr., "Congress and the Politics of Defense and Foreign Policy Making," as found in Gordon Adams and Shoon Murray (eds), *Mission Creep? The Militarization of U.S. Foreign Policy*, (Washington, DC: Georgetown University Press) 2014.

[89] Clark A. Murdock, Michéle A. Flournoy, et al. *Beyond Goldwater-Nichols: US Government and Defense Reform for a New Strategic Era, Phase 2 Report*. Center for Strategic and International Studies, 2005; James R. Locher, "Forging a new shield," *Project on National Security Reform. Washington, DC: Center for the Study of the Presidency* (2008).

[90] Loren DeJonge Schulman and Phillip Carter, "Trump is Surrounding Himself with Generals. That's Dangerous," *The Washington Post*, November 30, 2016.

[91] The conference report for S. 2943, Section 1089, notes that "a larger NSC staff has created bureaucratic inefficiencies, incentivized staff involvement in operational and tactical national security decisions, weakened national security prioritization, and undermined strategic guidance that the country's national security apparatus requires to integrate and implement policy successfully." Chairman Thornberry put forward a similar provision in H.R. 4909, noting in a press release that, "reforming the National Security Council (NSC) In recent years, the NSC has been repeatedly criticized for micromanagement. It has evolved from an advisory and coordinating body to a large,

Today, the overriding concern appears to be the lack of personnel in key roles to perform civilian oversight over plans, priorities and other DOD activities. Are responsibilities, authorities and resources appropriately aligned between governmental civilian and military institutions, both *within* DOD and *between* the Department of Defense and the broader interagency national security community?

- Relatedly, does the U.S. military's all-volunteer force, in which a relatively small proportion of the population has served, make it harder for the public to understand the military as an institution, and vice-versa? Is it making it more difficult for civilian leaders to understand the military as a profession and the utility of force in accomplishing national security objectives?

- **Might the appointment of a recently retired General favor one service above others in key decisions?** Most key leaders bring their own networks of colleagues and subordinates into their organization and rely upon them to accomplish their strategic priorities. According to some observers, this aspect of DOD leadership can become problematic when a Secretary of Defense is reliant upon members of their former service in this manner.[92] This is because many of the key political debates within DOD are between military services as they advocate for resources; in that context, a neutral Secretary of Defense who can adjudicate disputes is generally thought to be advantageous.
- **What is the role of Congress in the civilian-military relationship?** Debates and discussions on civil-military relations have tended to focus on the military's relationship with civil society broadly, or with the commander-in-chief and their political appointees. The Constitution, by providing that key responsibilities for the raising and maintenance of U.S. Armed Forces were granted to the legislative branch, arguably intends for Congress to also play a role in exercising civilian control of the military which, in turn, can influence the overall health of civil-military relations. Some policymakers and observers have said the manner and process through which Congress considers this appointment may have a bearing on whether the principle of civilian control of the military is upheld.[93]

Diversity, Inclusion, and the Proposed Nomination

Some observers contend that an insufficiently diverse and inclusive national security workforce is a significant challenge to the overall health of the Department of Defense.[94] Related, some maintain that the above civilian-military issues, although important, should be weighed against larger, societal, race-oriented civilian-military issues that might begin to be addressed by a

operational bureaucracy with no oversight or accountability. The NDAA restores the NSC to its original purpose by capping its staff at 200 people," https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/NDAA%20final%20passage%20Summary%20FINAL.pdf.

[92] Jim Golby, "Sorry, Gen. Lloyd Austin, A Recently Retired General Should Not Be Secretary of Defense," *The New York Times*, December 7, 2020, https://www.nytimes.com/2020/12/07/opinion/biden-defense-secretary-dod.html.

[93] Mark Nevitt, "Important Context Missing from the Austin Nomination Debate," *Just Security*, December 17, 2020.

[94] Trevor Sutton and Carolyn Kenney, "Diversifying and Strengthening Our National Security Workforce," Center for American Progress, January 10, 2017, https://www.americanprogress.org/issues/security/news/2017/01/10/296300/diversifying-and-strengthening-our-national-security-workforce/. See also H.R. 6395 *National Defense Authorization Act for Fiscal Year 2021*, Sections 551-558.

Secretary of Defense nominee, should he or she choose to prioritize diversity and inclusion within DOD.[95] In announcing Austin's proposed nomination, President-Elect Joseph R. Biden argues

> And the next secretary of defense will have to make sure that our armed forces reflect and promote the full diversity of our nation. Austin will bring to the job not only his personal experience, but the stories of the countless young people he has mentored. If confirmed, he will ensure that every member of the armed forces is treated with dignity and respect, including Black, Latino, Asian American, Native American, women, and LGBTQ service members.[96]

One national security expert, Bishop Garrison, asserted

> Since the official announcement on Dec. 8, the nomination of retired Gen. Lloyd Austin for secretary of defense has elicited a wide range of responses. Many in the national security community have, rightfully, raised concerns about nominating a general officer so recently out of uniform, potentially weakening proper civilian oversight of the department and bringing the military deeper into partisan politics. However, as this dialogue continues, we cannot and should not lose sight of what Austin's selection also means for a country that finds itself engulfed in societal discourse and upheaval focused largely on race in a way the United States has not engaged the topic, arguably, since the 1960s Civil Rights Movement.[97]

For many observers, the 2020 George Floyd protests highlighted the disparate treatment by security institutions (in that instance, local police forces) of Black citizens. The protests, in turn, prompted DOD and other government agencies and departments to reflect on issues related to systemic racism, racial issues, and racial/ethnic representation.[98] Statistics from the Department of Defense show that as of May 2018, racial minorities made up 30.9% of the Active Duty force yet 12.5% of the General/Flag officer Corps.[99] Of those, Black servicemembers composed 16.8% of the total Active Duty force and 8.1% of the General/Flag Officer Corps. White Americans composed 87.5% of the General/Flag Officer Corps at that time.[100] In June 2020, of the 41 four-star level officers in the U.S. military, 2 were Black.[101]

Similarly, according to the Office of Personnel Management's data on the federal civilian workforce, of the 721 persons who served at the General Schedule (GS-15) level in the Office of the Secretary of Defense in September 2019, 142 were minorities; of those, 61 were Black Americans.[102] With respect to the Senior Executive Service (SES) in the entire Department of Defense, 87.3% of the SES-level personnel in 2013 were White; 6.2% of that workforce were

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[95] See, for example, Press Release: House Armed Services Vice Chair Anthony Brown: "Gen Lloyd Austin Has the Character and Competence Necessary to Lead the Department of Defense," December 8, 2020, https://anthonybrown.house.gov/news/documentsingle.aspx?DocumentID=1124.

[96] Joe Biden, "Why I Chose Lloyd Austin as Secretary of Defense," *The Atlantic*, December 8, 2020.

[97] Bishop Garrison, "Representation At The Top: The Importance of Race in the Austin Nomination Debate," *Just Security*, December 11, 2020, https://www.justsecurity.org/73833/representation-at-the-top-the-importance-of-race-in-the-austin-nomination-debate/.

[98] Helene Cooper, "African-Americans Are Highly Visible in the Military But Nearly Invisible At the Top," *The New York Times*, June 9, 2020, https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html.

[99] CRS Report R44321, *Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background and Issues for Congress*, by Kristy N. Kamarck.

[100] Ibid.

[101] Helene Cooper, "African-Americans Are Highly Visible in the Military But Nearly Invisible At the Top," *The New York Times*, June 9, 2020, https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html.

[102] Office of Personnel Management, "Diversity Cube," FedScope Data Set, accessed December 28, 2020.

Black.[103] In 2019, DOD reported that 6.6% of the SES workforce was Black American.[104] As national security expert Bishop Garrison notes, "No Black person has ever served as deputy secretary of defense or undersecretary of defense for policy."[105] Meg Guliford, another national security expert, writes, "But the further I progressed in my career, the less diverse it became. I have never had a Black or Brown boss and have rarely had Black or Brown co-workers who were not in purely administrative or support roles."[106]

Some contend that this absence of representation at senior levels of DOD has led to blind spots when it comes to race-related issues in the military.[107, 108] Some observers refer to the testimony of General John Hyten in July 2019:

> When I came into the military, I came in from Alabama, into Alabama, and racism was a big problem in the military. Overt racism. It's still a systemic problem in our society, but I watched commander after commander after commander take charge, own that, and anytime they saw it, eliminated it from the formation…Now when I'm in uniform, I—I feel colorblind, which is amazing.[109]

This characterization arguably contrasts with recent polling conducted by the *Military Times*, which reports that

> [t]he 2019 survey found that 36 percent of troops who responded have seen evidence of white supremacist and racist ideologies in the military, a significant rise from the year before, when only 22 percent—about 1 in 5—reported the same in the 2018 poll... Poll participants reported witnessing incidents including racist language and discriminatory attitudes from peers, but also more specific examples like swastikas being drawn on service

[103] Department of Defense Office of Diversity Management and Equal Opportunity, *DOD Diversity and Inclusion Summer 2013 Report*, B6, https://web.archive.org/web/20200606192308/https://diversity.defense.gov/Portals/51/Documents/ODMEO%20Diversity%20and%20Inclusion%20Summary%20Report%20FINAL.pdf.

[104] Department of Defense, "Portrait of Black /African American Active Duty Service Members," available at https://diversity.defense.gov/Portals/51/Images/AA%202020_ACC.pdf?ver=2020-02-18-072209-043.

[105] Bishop Garrison, "Representation At The Top: The Importance of Race in the Austin Nomination Debate," *Just Security*, December 11, 2020, https://www.justsecurity.org/73833/representation-at-the-top-the-importance-of-race-in-the-austin-nomination-debate/.

[106] Meg Guliford, "What Lloyd Austin's Nomination Really Reveals And What It Means For Me," *Inkstick Media*, December 23, 2020.

[107] Helene Cooper, "African-Americans Are Highly Visible in the Military But Nearly Invisible At the Top," *The New York Times*, June 9, 2020, https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html.

[108] Similar statements were made in the 1970s by senior DOD leaders. A Navy Z-Gram from December 17, 1970, written by Admiral Zumwalt notes, "Last month, Secretary Chafee and I, along with other senior officials of the Navy Department, met on one occasion with Representative Black Navy Officers and their wives and later with a representative group of Black Enlisted men and their wives. Prior to these meetings, I was convinced that, compared with the civilian community, we had relatively few racial problems in the Navy. However, after exploring the matter in some depth with these two groups, I have discovered that I was wrong—we do have problems… What struck me more than anything else was the depth of feeling of our Black personnel that there is significant discrimination in the Navy. Prior to these meetings, I sincerely believed that I was philosophically prepared to understand the problems of our Black Navymen and their families, and until we discussed them at length, I did not realize the extent and deep significance of many of these matters." U.S. Department of the Navy Library, Z Gram #55; dated December 17, 1970, "Equal Opportunity," https://www.history.navy.mil/content/history/nhhc/research/library/online-reading-room/title-list-alphabetically/z/list-z-grams/z-gram-66.html.

[109] U.S. Congress, Senate Committee on Armed Services, *Senate Armed Services Committee Holds Hearing on the Nomination of John Hyten to be Vice Chairman of the Joint Chiefs of Staff*, 116th Cong., 1st sess., July 30, 2019. This hearing excerpt was also cited by Helene Cooper (above).

members' cars, tattoos affiliated with white supremacist groups, stickers supporting the Ku Klux Klan and Nazi-style salutes between individuals.[110]

Participants in the *Military Times* poll are self-selecting; that is, respondents chose to be part of the polling sample and are therefore subject to self-selection bias. In their description of survey methodology, researchers note that they accounted for that aspect of the data in accordance with routine social science survey practice, although this is difficult to verify using the publicly available information released by the *Military Times*. By comparison, a survey conducted by DOD in 2017 reports that 17.9% of active duty members experienced racial/ethnic harassment or discrimination in the previous year. It further notes that "Black (31.2%) and Asian (23.3%) [service] members were more likely to indicate experiencing racial/ethnic harassment and/or discrimination than other active duty members, whereas White members (12.7%) were less likely."[111]

Possible Legislative Options

In considering the nomination of a recently retired military officer to be Secretary of Defense, Congress may pursue a number of legislative options, including choosing to (1) suspend the statutory limitation, (2) eliminate entirely or reduce the limitation, (3) increase the statutory limitation, or (4) take no action regarding the statutory limitation.

- **Suspend the statutory requirement that seven years elapse between relief from active duty and appointment to position of Secretary of Defense**. This would require the enactment of legislation similar in nature to P.L. 81-788, which created a one-time suspension of statutory requirements for General Marshall. Proponents of this option believe this would enable the Senate to proceed with confirming a recently retired military officer while at the same time upholding the principle of civilian control of the military by requiring participation of the House of Representatives in the process. Opponents might suggest that the provision is, itself, outdated.
- **Eliminate entirely or reduce the statutory requirement that seven years elapse between relief from active duty and appointment to position of Secretary of Defense.** Much like the discussion surrounding the FY2008 National Defense Authorization Act, proponents of this option would likely maintain that the provision in Title 10 of the *United States Code* is outdated, and that the President should have maximum flexibility to appoint whomsoever they might wish to the position. Opponents to this course of action might maintain that doing so could risk the politicization of the military.
- **Increase the statutory requirement that seven years elapse between relief from active duty and appointment to the position of Secretary of Defense.** During the Mattis confirmation process, several observers argued that increasing the statutory "cooling off" period to a length of time beyond seven years would

[110] Leo Shane III, "Signs of White Supremacy, Extremism Up Again in Poll of Active-Duty Troops," *The Military Times*, February 6, 2020, https://www.militarytimes.com/news/pentagon-congress/2020/02/06/signs-of-white-supremacy-extremism-up-again-in-poll-of-active-duty-troops/.

[111] U.S. Department of Defense *Office of People Analytics, 2017 Workplace and Equal Opportunity Survey of Active Duty Members Executive Report*, Defense Technical Information Center, August 2019, p. 14.

strengthen the norms of civilian control over the Armed Forces and enhance civilian-military relations.[112]

- **Choosing not to pass legislation that would remove statutory barriers to the appointment of a recently retired General as Secretary of Defense, thereby "blocking" his nomination.** Proponents of this option might contend that a recently retired military officer serving in the position of Secretary of Defense might undermine the principle of civilian control of the military. Opponents would likely maintain that, much like the nominations of Marshall and Mattis, a nominee like Austin may be exceptionally qualified and supports the principle of civilian control of the military.
    - Relatedly, should Congress choose not to pass relevant legislation, the Senate may choose to allow the nomination of a recently retired military officer to proceed, regardless. It is currently unclear what the legal implications of pursuing this option might be. Still, proponents of this option might contend that the language contained within Title 10 *United States Code*. is unconstitutional, as it restricts the ability of the President to nominate whomsoever they might wish to their Cabinet.[113] Opponents maintain that the Constitution gives Congress considerable authority over military matters, and that the provision has been in statute since 1947.[114]

[112] U.S. Congress, Senate Committee on Armed Services, *Civilian Control of the Armed Forces*, 115th Cong., 1st sess., January 10, 2017.

[113] Shannon W. Coffin, "On the Legality of the Mattis Nomination," *National Review*, December 1, 2016, http://www.nationalreview.com/corner/442657/trump-can-nominate-whoever-he-wants-secdef.

[114] Andrew C. McCarthy, "Trump Needs a Congressional Waiver to Appoint Mattis as Defense Secretary," *National Review*, December 3, 2016, http://www.nationalreview.com/corner/442734/trump-needs-waiver-appoint-mattis-defense-secretary.

Appendix. Legislative History of the Appointment of General George C. Marshall to the Position of Secretary of Defense[115]

This appendix provides the legislative history associated with the September 18, 1950, enactment of P.L. 81-788 ("An act to authorize the President to appoint General of the Army George C. Marshall to the office of Secretary of Defense"), which authorized the suspension of certain statutory requirements otherwise prohibiting General of the Army George C. Marshall from serving as the Secretary of Defense.

P.L. 81-788 was introduced at the request of President Harry Truman, and it was considered by the House and Senate over a period of four days in September 1950. While the measure had the support of many Members, it encountered significant and, at times, heated opposition by other Members, both at the committee and floor levels in each chamber.

Background

Increasingly displeased with Secretary of Defense Louis A. Johnson, and recognizing the need to "choose a person of great national prestige to head the Department of Defense" in light of the "controversy surrounding Johnson's performance" and U.S. military readiness deficits exposed by operations during the first months of the Korean War, President Truman approached General Marshall in early September 1950 to ask if he would "act as Secretary of Defense through the crisis [of the Korean War] if [President Truman] could get Congressional approval."[116] General Marshall accepted, on the condition that if confirmed, his tenure as Secretary of Defense would be limited to a period of six months to a year.[117]

President Truman informally requested Johnson's resignation in a private meeting on September 11:

> Although Truman initially granted Johnson's request for a few days to think it over, the president called [Deputy Secretary of Defense Stephen T.] Early on 12 September to urge that Johnson resign immediately and recommend George C. Marshall as his successor. Resigning forthwith himself, Early gathered a small [Office of the Secretary of Defense] group to help compose a letter of resignation for Johnson to take to the Cabinet session that afternoon. Still hoping for a reprieve, Johnson took the unsigned letter with him, but when the two men met alone, Truman told the reluctant and distraught Johnson that he would have to sign.[118]

[115] This section was authored by Heidi Peters, Research Librarian, Congressional Research Service.

[116] As reported in Forrest C. Pogue, *George C. Marshall: Statesman, 1945-1959* (New York: Viking, 1987), p. 422; see also Roger R. Trask and Alfred Goldberg, *The Department of Defense, 1947-1997: Organization and Leaders*, (Washington, DC: Historical Office of the Office of the Secretary of Defense, 1997), p. 64. A full analysis of the circumstances contributing to Johnson's removal as Secretary of Defense is outside the scope of this report—for a brief discussion of Johnson's tenure as Secretary of Defense, see the biographical overview provided by the Historical Office of the Office of the Secretary of Defense at http://history.defense.gov/Multimedia/Biographies/Article-View/Article/571265/louis-a-johnson/.

[117] Ibid.

[118] Doris M. Condit, *The Test of War: 1950-1953*. Vol. 2 of *History of the Office of the Secretary of Defense*, edited by Alfred Goldberg. (Washington, DC: Historical Office of the Office of the Secretary of Defense, 1988), pp. 33-34.

As instructed, Johnson's resignation letter recommended that General Marshall should succeed him as Secretary of Defense:

> it is my recommendation that [you] name as my successor a man of such stature that the very act of naming him to be Secretary of Defense will promote national and international unity. Such a man, in my opinion, is General George Marshall.... I recognize, of course, that many will argue that one of our great Generals should not be Secretary of Defense. I do not believe that this argument has validity in the case of General Marshall, who has already rendered distinguished service to his country, in a civilian capacity, as Secretary of State. I recognize also that an amendment to the National Security Act will be necessary, in order to make it legally permissible for General Marshall to serve as Secretary of Defense—but I believe that Congress will speedily amend the law in General Marshall's case, if you should so recommend.[119]

Johnson's letter references Section 202 of the National Security Act of 1947 (P.L. 80-253), which specified that the Secretary of Defense was to be "appointed from civilian life by the President, by and with the advice and consent of the Senate," and provided 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."

George Catlett Marshall, General of the Army

General Marshall was

> born in Uniontown, Pennsylvania, on 31 December 1880. He entered the Virginia Military Institute in 1897, graduated in 1901, and took a commission as second lieutenant in the United States Army in 1902.... Marshall had extensive combat experience in Europe during World War I, and between 1919 and 1924 he was aide-de-camp to General John J. Pershing. After three years in China (1924–27), he served for the next dozen years at posts in the United States.... He became a brigadier general in 1936. In 1939 just as World War II began in Europe, President Roosevelt appointed Marshall Army Chief of Staff. In that position and as a member of the Joint Chiefs of Staff beginning in 1942, Marshall labored unceasingly to build up U.S. defenses.... President Truman later described him as the 'architect of victory' in World War II.
>
> …in November 1945 Truman sent him to China [as the Special Representative of the President to China] in an unsuccessful attempt to mediate the civil war between the Nationalists and Communists and to establish a coalition government. He returned to the United States in January 1947 to become secretary of state [during two years] marked by the Truman Doctrine, the Marshall Plan, the Inter-American Treaty of Reciprocal Assistance, and negotiation of the NATO pact. After he left the State Department he achieved further distinction as president of the American Red Cross.[120]

[119] U.S. President (Truman), "Letter Accepting Resignation of Louis Johnson as Secretary of Defense," September 12, 1950, as provided by the American Presidency Project at http://www.presidency.ucsb.edu/ws/index.php?pid=13618.

[120] Roger R. Trask and Alfred Goldberg, *The Department of Defense, 1947-1997: Organization and Leaders*, (Washington, DC: Historical Office of the Office of the Secretary of Defense, 1997), p. 64; see also "Harry S. Truman Administration: George C. Marshall," http://history.defense.gov/Multimedia/Biographies/Article-View/Article/571266/george-c-marshall/.

General Marshall's Status as a Five-Star General of the Army

General Marshall was also one of four World War II-era Army generals first temporarily designated as a five-star General of the Army in 1944.[121]

First authorized on December 14, 1944, as a temporary wartime grade by P.L. 78-482, the grade of General of the Army was made permanent on March 23, 1946, by P.L. 79-333. As established by P.L. 79-333, upon retirement General Marshall was entitled to continue to receive the same pay and allowances he had received while on active duty as General of the Army:

> The officers appointed under the provisions of this section ... shall receive the pay and allowances prescribed by section 4 of [P.L. 78-482].... Any officer on the active list, or any retired officer, who is appointed under the provisions of this section and who has been or may hereafter be retired or relieved from active duty, shall be entitled to have his name placed on the retired list with the highest grade or rank held by him on the active list or while on active duty, and shall be entitled to receive the same pay and allowances while on the retired list as officers appointed under this section are entitled to receive while on active duty.[122]

General Marshall retired in the grade of General of the Army on February 28, 1947, but was returned by his request to "the active [duty] list of the Regular Army on March 1, 1949" through P.L. 80-804, which provided that the

> laws requiring retirement of Regular Army and Regular Air Force officer because of age shall not apply to officers of the Regular Army or Regular Air Force appointed in the grade of General of the Army pursuant to the Act of March 23, 1946 … the President may, in his discretion, upon the request of the officer concerned, restore to the active list of the Regular Army or Regular Air Force any officer of the Regular Army or Regular Air Force on the retired list who was appointed in the grade of General of the Army pursuant to the Act of March 23, 1946.[123]

For administrative purposes following his restoration to the Army active duty list, General Marshall was assigned to the Office of the Chief of Staff of the Army.[124] In this role, General Marshall had no official position in the Army command structure, and had minimal official military duties and responsibilities.[125]

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[121] In addition to Marshall, Douglas MacArthur, Dwight D. Eisenhower, and Henry H. "Hap" Arnold were all designated as a five-star General of the Army in December 1944. Through P.L. 81-59, in following with the establishment of the U.S. Air Force as a separate and distinct military service branch through the National Security Act of 1947, Arnold's rank and grade as a five-star General of the Army was redesignated, making him the first (and to date only) five-star General of the Air Force.

[122] See P.L. 79-333, Section 1. Section 4 of P.L. 78-482 specified that individuals appointed under the act "shall, while on active duty, receive the same pay and allowances as a rear admiral of the upper half, plus a personal money allowance of $5,000 per annum." Section 5 of P.L. 78-482 specified that those officers serving in the grade or rank of Fleet Admiral or General of the Army "shall, upon retirement or revision to the retired list, as the case may be, have on the retired list the highest grade or rank held by him on the active list or active duty: *Provided*, That each officer shall be entitled to retired pay equal to 75 per centum of the active-duty pay provided herein for an officer."

[123] Letter from Colonel R.C. Bing, Chief of the Legislative Liaison Office, to the Hon. William F. Knowland, United States Senate, September 15, 1950, as reproduced in the *Congressional Record*, September 15, 1950, p. 14922; see also P.L 80-804, Section 1.

[124] U.S. Congress, House Armed Services Committee, *Authorizing Appointment of General of the Army George C. Marshall as Secretary of Defense*, 81st Cong., 2nd sess., September 15, 1950, H.Rept. 81-3094, p. 2.

[125] David T. Zabecki, "Appendix B: Military Ranks," in *The Encyclopedia of the Vietnam War: A Political, Social, and Military History* (2nd ed, vol. 4), ed. Spencer C. Tucker (Santa Barbara, CA: ABC-CLIO, 2011), p. 1685.

Legislative Consideration of P.L. 81-788

Tuesday, September 12, 1950

Presidential Activities

After President Truman accepted Johnson's resignation, contemporary press accounts report that the President telephoned General Marshall late in the afternoon on September 12, 1950, and formally asked him to serve as Secretary of Defense.[126] General Marshall is reported to have immediately accepted the President's call to service.[127]

Johnson's letter of resignation, together with an acceptance letter from President Truman, was made public that evening.[128]

Wednesday, September 13, 1950

Presidential Activities

On September 13, 1950, as press reports regarding Johnson's resignation and the President's selection of General Marshall to serve as Secretary of Defense circulated, President Truman forwarded a legislative proposal to Representative Carl Vinson (Georgia-6th District), then Chairman of the House Armed Services Committee, and Senator Millard Tydings (Maryland), then Chairman of the Senate Armed Services Committee. In a cover letter accompanying the proposal, the President addressed the committee heads:

> Attached is a draft of legislation which would permit General George C. Marshall to serve as Secretary of Defense. I request that you lay this matter before your committee with a view of obtaining early and favorable action by the Congress. I am a firm believer in the general principle that our national defense establishment should be headed by a civilian. However, in view of the present critical circumstances and General Marshall's unusual qualifications, I believe that the national interest will be served best by making an exception in this case.[129]

The text of President Truman's draft legislation was not preserved in electronically available House or Senate committee documents.

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[126] See for example Joseph H. Short, "Truman Drops Johnson from Post in Cabinet: The Latter's Feud with Acheson is Called Factor in Change," *The Baltimore Sun*, September 13, 1950, p. 1 and Robert J. Donovan, "Johnson Resigns, Attacks His 'Enemies;' Truman Picks Marshall to Head Defense," *New York Herald Tribune*, September 13, 1950, p. 1.

[127] U.S. President (Truman), "The President's News Conference," September 14, 1950, as provided by the American Presidency Project at http://www.presidency.ucsb.edu/ws/index.php?pid=13624.

[128] See Walter Trohan, "Marshall is Defence [sic] Boss: Truman Drops Johnson as Member of Cabinet," *Chicago Daily Tribune*, September 13, 1950, p. 1.

[129] As reproduced in U.S. Congress, Senate Armed Services Committee, *Report of Proceedings: Presentation of Scroll to Senator Gurney*, 81st Cong., September 13, 1950, pp. 4-5.

House Activities

Meeting of the House Armed Services Committee

While Senate Armed Services Committee documents and the *Congressional Record* make reference to a meeting of the House Armed Services Committee during the morning of September 13, 1950—presumably to review and discuss the President's legislative proposal—this meeting appears to have taken place as an executive session, with no record of the committee's discussions or debate preserved through electronically available committee documents.[130]

In floor remarks on September 15, 1950, Representative Paul J. Kilday (Texas-20th District), seeking to correct the "impression that ... [Representative Vinson] had attempted to rush this matter through the committee without an opportunity for everyone to be heard," noted that "[on the 13th] this matter was brought up and thoroughly discussed. Not only was each Member given an opportunity to speak upon it, but [Representative Vinson] called upon each member of the committee individually to state his views."[131]

Floor Activity and Introduction of H.R. 9646

During the September 13, 1950, House session, Representative John McSweeney (Ohio-16th District) made floor remarks generally supporting General Marshall's reported nomination, while Representative John E. Rankin (Mississippi-1st District) made floor remarks criticizing General Marshall's record of service during World War II and as Secretary of State.[132] Representative Rankin characterized General Marshall's appointment as Secretary of Defense as a "serious mistake," and called for the nomination to be withdrawn.[133]

Representative Vinson also introduced H.R. 9646 ("A bill to authorize the President to appoint General of the Army George C. Marshall to the office of Secretary of Defense"), which was referred to the House Armed Services Committee.[134]

Legislative Provisions of H.R. 9646

As introduced, H.R. 9646 waived certain requirements associated with two statutory provisions specifically and only for General Marshall's nomination to the office of Secretary of Defense.

These requirements would have automatically made General Marshall ineligible for the position due to an insufficient period of time elapsing between his military service and appointment as Secretary of Defense (Section 202 of the National Security Act of 1947, which stipulated that a person who had, within 10 years, served on active duty as a commissioned officer in the regular armed services was ineligible for appointment as Secretary of Defense). Other statutory requirements would have forced him to relinquish his commission as an active duty Army officer in order to serve as Secretary of Defense (10 U.S.C. §576, which then barred officers on the active list of the Army from holding civil office, either by election or by appointment, and

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[130] U.S. Congress, Senate Armed Services Committee, *Report of Proceedings*: *Hearing held before Committee on Armed Services on S. 4147*, 81st Cong., September 13, 1950, pp. 4-5. See also the *Congressional Record*, September 15, 1950, p. 14957.

[131] *Congressional Record*, September 15, 1950, p. 14957.

[132] *Congressional Record*, September 13, 1950, pp. 14750-14751.

[133] Ibid.

[134] *Congressional Record*, September 13, 1950, p. 14771.

stipulated that officers who accepted or exercised the functions of a civil office vacated their commissions, thereby ceasing to be an officer of the Army).[135]

H.R. 9646 further provided that, so long as he held the office of Secretary of Defense, General Marshall would retain his rank and grade as a General of the Army, would continue to receive the pay and allowances to which he was entitled by virtue of such rank and grade, and would be authorized to receive any difference between such pay and allowances and the salary prescribed by law for the office of the Secretary of Defense.[136]

H.R. 9646 also specified that General Marshall would be subject to "no supervision, control, restriction, or prohibition (military or otherwise) other than would be operative with respect to him if he were not an officer of the Army" in the performance of his duties as Secretary of Defense.[137]

Senate Activities

Meeting of the Senate Armed Services Committee

At 11:30 a.m. on September 13, 1950, the Senate Armed Services Committee convened for a brief public meeting. After the meeting, Senator Tydings read out President Truman's letter to the committee "so that the press will have the information that has been sent up" by the President. Following a short question and answer period with members of the press in attendance, the Senate Armed Services Committee recessed and immediately reconvened in a closed executive session.[138]

Although the committee was in executive session, the Senate Armed Services Committee preserved a transcript of session discussion and debate in committee documents.[139] Senator Tydings opened the executive session by noting that upon hearing the news of General Marshall's potential nomination, he had requested the "Legislative Counsel to draw different bills touching the matter different ways."[140] As General Marshall was still considered to be on active duty status, Senator Tydings noted that a legislative approach was quickly discarded that would have modified the existing law to "[make] it so that if a man was out of the service on the retired list for three or four years" he could be nominated to the office of Secretary of Defense.

Senator Tydings then presented two potential legislative options to the committee:

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[135] While a full legislative history of 10 U.S.C. §576 is outside the scope of this report, similar statutory provisions are now codified as 10 U.S.C. §973 ("Duties: officers on active duty; performance of civil functions restricted").

[136] As later clarified in the *Congressional Record* by Representative Vinson, General Marshall then received annual pay and allowances totaling $18,771 in his rank and grade as General of the Army. The annual salary of the Secretary of Defense at that time was $22,500—meaning that as Secretary of Defense, Marshall would continue to receive the annual sum of $18,771 from the Department of the Army, and would further receive the annual sum of $3,729 from the Department of Defense. See *Congressional Record*, September 15, 1950, p. 14958.

[137] During House floor debate on September 15, 1950, Representative Vinson described this provision as "completely [divorcing] General Marshall from the military altogether. The language is intended for that purpose, so that he will not be subject to court-marshal, and he cannot be ordered around. He gets completely free of all military attachments, as far as the statute is concerned." See *Congressional Record*, September 15, 1950, p. 14969.

[138] U.S. Congress, Senate Armed Services Committee, *Report of Proceedings*: *Presentation of Scroll to Senator Gurney*, 81st Cong., September 13, 1950, pp. 4-5.

[139] U.S. Congress, Senate Armed Services Committee, *Report of Proceedings*: *Hearing held before Committee on Armed Services on S. 4147*, 81st Cong., September 13, 1950.

[140] Ibid., p. 1.

- modifying the existing statute to insert the phrase "except in time of war"; or
- passing legislation making an exception to the relevant statutes for General Marshall "alone, so that the law will remain intact and nobody else can get in, even in time of war, unless we pass a special act."[141]

The first proposal received little attention during the recorded committee discussion.

Committee attention chiefly focused on the second proposal, with many Senators, including Senator Tydings, contending that the present "time of great crisis" justified making a specific, personal exception to the relevant statutes for General Marshall, who was viewed as having a record of service and leadership that made him uniquely and exceptionally qualified to take up the duties and responsibilities of the office of Secretary of Defense. General Marshall was further seen as having "the confidence of the people" to lead the Department of Defense during wartime, with one Member asserting that his appointment would "spread confidence throughout our [allies and would] cause our enemies to be a great deal more cautious before they make any overt movements right at this time."[142] Other Senators looked beyond General Marshall's qualifications to support the procedural approach taken by the second proposal—one Member stated that providing a specific exception for General Marshall alone "indirectly serves notice to the people that this bill is designed for only one man, for only one appointment, and to meet an emergency."[143]

However, others objected, with Senator William F. Knowland (California) pointing to the "fundamental question" of civilian control of the military establishment raised by General Marshall's proposed nomination, especially in light of his status as an active duty military officer.[144] On a procedural level, Senator Knowland objected to Truman "asking, upon twenty-four hours' notice, without prior consultation with this Committee or with the Congress, a change in the fundamental law of the land," and further charged that the committee was being

> rushed off its feet, without a chance to explore all of the implications of this suggested change ... in less than one day's notice we are being asked to waive [the relevant section of the National Security Act of 1947], and I believe, regardless of the fact that you write this in for one man, it is the old story of the camel getting his head in under the tent. Once having waived the law, it is going to be far easier for the President or any President to ask for its waiver a second time.... I think it is a very serious step we are being asked to take. The committee may in its judgement—and apparently is prepared to go ahead and approve this and send it to the floor. But I want to emphasize that I think we are taking an unprecedented step and one that may rise to plague this nation in the years ahead, when it may not be George Marshall who is being suggested for the position.[145]

Senator Knowland, while acknowledging General Marshall's qualifications, contended that equally well qualified candidates could be identified whose service as the Secretary of Defense would not require the suspension or alteration of existing United States law. Senator Harry P. Cain (Washington), in voicing his support for Senator Knowland's views, further objected to the

[141] Ibid., p. 2.

[142] Ibid., selected quotations drawn from remarks by Senator Tydings on p. 4 and Senator Richard B. Russell (Georgia) on p. 14.

[143] Ibid., selected quotation drawn from remarks by Senator Lester C. Hunt (Wyoming) on p. 10.

[144] Ibid., p. 6.

[145] Ibid., pp. 7-10.

"pre-merchandising" of the appointment by Truman to the public, describing Truman's actions as placing the committee in an "impossible situation."[146]

By a vote of 10 to 2, with one member not voting, the Senate Armed Services Committee voted to proceed in reporting the committee's original bill to the Senate. Although Senator Tydings pressed for unanimous support of the bill, both Senator Knowland and Senator Cain refused to vote in support of the measure. Procedural and administrative remarks made by Senator Tydings during the session also call attention to his view that the committee and the Senate should expedite passage of the measure, with an eye to confirming General Marshall's appointment in the Senate before the September 23 congressional recess for the 1950 elections.[147]

Floor Activity and Reporting of S. 4147

The bill was reported as S. 4147 during the afternoon Senate session, accompanied by a committee report including the minority views of Senator Knowland and Senator Cain.[148]

Legislative Provisions of S. 4147

Using legislative text identical to H.R. 9646, S. 4147 waived certain statutory requirements specifically and only for General Marshall's nomination to the office of Secretary of Defense.

Thursday, September 14, 1950

House Activities

Committee Activity

During the morning of September 14, 1950, the House Armed Services Committee conducted a full committee hearing on two pending pieces of legislation—S. 4135, which would have authorized the President to appoint General Omar N. Bradley as a General of the Army, and S. 4136, which would have included the Coast Guard within the provisions of the Selective Service Act of 1948, and would have further authorized the President to extend enlistments in the Coast Guard.

In concluding the hearing, Representative Vinson noted that the Committee's consideration of the two bills "[disposed] of everything that I know of that is on our calendar up to this hour, except the bill that we will vote on tomorrow, the bill in regard to General Marshall."[149]

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[146] Ibid., p. 17.

[147] Senator Tydings sought to avoid a recess appointment of Marshall, which would see "General Marshall appointed without the right of confirmation by the Senate," which he saw as not being "a good way to do business." See ibid., p. 19.

[148] U.S. Congress, Senate Armed Services Committee, *Authorizing the President to Appoint General of the Army George C. Marshall to the Office of the Secretary of Defense*, 81st Cong., 2nd sess., September 13, 1950, S.Rept. 81-2564.

[149] U.S. Congress, House Armed Services Committee, *Full Committee Hearings on S. 4135 and 4136*, 81st Cong., 2nd sess., September 14, 1950, H.Hrg. 81-220.

Floor Activity

During the afternoon House session, Representative Clare E. Hoffman (Michigan-4th District) made floor remarks characterizing General Marshall's nomination to serve in the office of Secretary of Defense as a "tragic mistake." Representative Hoffman's remarks outlined his stance against General Marshall's appointment, questioning General Marshall's World War II service record, his physical capability to assume the duties and responsibilities of the office of Secretary of Defense, and his view of General Marshall as "[favoring] the Communist policy of the conquest of China" through his actions as Special Representative of the President to China in 1945 and 1946.[150]

Also during the afternoon House session, Representative Jacob K. Javits (New York-21st District) briefly mentioned General Marshall's nomination in the context of extended remarks on the Korean War. While Representative Javits expressed his view that General Marshall would do an "effective job" if confirmed, he noted the "troublesome problems involving the continued civilian control of the military" invoked by General Marshall's nomination.[151]

Senate Activities

Floor Activity

Although the Senate briefly considered S. 4147 during its September 14, 1950, session, Senator Walter F. George (Georgia) requested that action on a motion to reconsider a vote by which the Senate voted to disagree to a House amendment to Senate amendment 191 to the Revenue Act of 1950 (H.R. 8920) be given precedence in order to expedite the work of a conference committee for the measure. Senator Harry F. Byrd (Virginia), who was serving as floor manager for S. 4147 in Senator Tydings' absence, agreed—provided that S. 4147 would be the next order of business following Senate action on the motion to reconsider.

However, due in part to the Senate's consideration of the motion to reconsider consuming more time than had been anticipated, the Senate ultimately moved to stand in recess until the next day, with S. 4147 considered to be pending business for the next legislative day.[152]

Friday, September 15, 1950

House Activities

Meeting of the House Armed Services Committee

At 10 a.m. on September 15, 1950, the House Armed Services Committee met in executive session to consider H.R. 9646. In opening the session, Representative Vinson noted that it was the "first time" he had "ever heard of the House of Representatives having an opportunity to pass upon an executive appointment ... [ordinarily] the Senate has that right, but this bill is so drafted that we, for the first time, act on the question of confirmation by repealing a law."[153]

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[150] *Congressional Record*, September 14, 1950, pp. 14835-14836.

[151] *Congressional Record*, September 14, 1950, p. 14867.

[152] *Congressional Record*, September 14, 1950, pp. 14810-14828.

[153] U.S. Congress, House Armed Services Committee, *Executive Session Regarding H.R. 9646*, 81st Cong., 2nd sess.,

During the session, discussion and debate was limited to an extended statement from Representative Dewey Short (Missouri-7th District) objecting to the pending legislation.[154] Among other objections, Representative Short questioned General Marshall's physical capability to serve as Secretary of Defense, and advocated for the principle of civilian control of the military establishment. Following Representative Short's remarks, the House Armed Services Committee voted 18 to 7 to proceed in reporting H.R. 9646 to the House.

Floor Debate

Representative Vinson reported H.R. 9646, together with a committee report, back to the House during the afternoon House session.[155]

After the conclusion of routine House business, H.R. 9646 was brought to the floor after a two-thirds vote in favor of adopting standard procedural considerations outlined by H.Res. 853.[156]

The ensuing floor debate was contentious and at various times strongly supportive or sharply critical of General Marshall. Opposition to the bill in light of General Marshall's personal qualifications focused on questioning General Marshall's physical capability to assume the duties and responsibilities of the office of Secretary of Defense; challenging General Marshall's record of service as Special Representative of the President to China and as Secretary of State; and allegations that General Marshall would be unable to set aside any prior "special attachments" to the U.S. military establishment and effectively lead the combined military and civilian elements of the Department of Defense.

Most representatives voicing opposition for the bill strongly advocated for holding the principle of civilian control of the military establishment above the personal qualifications of General Marshall, with some charging that the bill represented a "[weakening] of the Constitution" and a "first step toward a military state."[157] Some further contended that Marshall was not the "indispensable" man to serve in the office of Secretary of Defense at that time, as equally well qualified candidates could be identified whose service as the Secretary of Defense would not require the suspension or alteration of existing United States law.[158]

Supporters of the bill, such as Representative Vinson, argued that in light of the "[critical] present international situation," and the need for "[restoration of] confidence in our military leadership," General Marshall's record of service and leadership would allow him to

> undertake this vast responsibility and, without the slightest postponement of urgently needed defense programs now under way, get the defense effort on a steady keel and carry it through with efficiency and dispatch.... The Nation cannot afford to take out time to educate a new Secretary of Defense. At least a year would pass before a new person could

September 15, 1950, p. 2.

[154] Ibid., pp. 2-9. Short also advocated for Representative Vinson's service as Secretary of Defense.

[155] U.S. Congress, House Armed Services Committee, *Authorizing Appointment of General of the Army George C. Marshall as Secretary of Defense*, 81st Cong., 2nd sess., September 15, 1950, H.Rept. 81-3094.

[156] As reported by the House Committee on the Rules and accompanied by H.Rept. 81-3089, H.Res. 853, among other procedural considerations, limited general debate on the bill to a period of two hours, which was to be equally divided and controlled by the chairman and ranking minority member of the House Armed Services Committee.

[157] Remarks from Representative Herbert A. Meyer (Kansas-3rd District), *Congressional Record*, September 15, 1950, p. 14962.

[158] *Congressional Record*, September 15, 1950, p. 14961. Several Representatives advocated for the service of House Armed Services Committee Chairman Carl Vinson as Secretary of Defense.

> be truly effective. The Nation cannot now afford to indulge itself in a year of indecision and delay.[159]

Representative Vinson also addressed the issue of civilian control of the Department of Defense:

> With General Marshall as Secretary of Defense there can be no sensible case made that he, as a military man is likely to perform dangerously as regards our national institutions. Not only does his own background and personal convictions and public record shout the denial to that, but just what is the practical situation in the Government? We still have the President, a civilian.... We still have the National Security Council which formulates the Nation's military and foreign policies, headed by the President and composed of civilians outnumbering the Secretary of Defense. And of course we still have…the Senate and the House of Representatives, and the Supreme Court as well, all of which exercise civilian control over the Armed Forces and over the Secretary of Defense. So, while I subscribe to the principle set out in the Unification Act, the fact remains that this temporary suspension of the law cannot and assuredly will not have any hurtful impact on our governmental processes ... the question before the committee remains ... whether or not the pressure of time is such that the Nation should resort to a draft of General Marshall.[160]

Amendments Proposed

Two procedural motions that would have returned H.R. 9646 to committee were introduced and defeated, while four amendments to H.R. 9646 were offered during floor debate.

Representative James G. Fulton (Pennsylvania-31st District) offered an amendment that would have authorized the appointment of Representative Vinson to the office of Secretary of Defense instead of General Marshall—Representative Vinson then made a point of order that the amendment was not germane to the bill. The House Chair sustained the point of order, and the amendment was dismissed.

Representative Vinson offered an amendment that would insert a new section to the bill expressing the intent and sense of the Congress in granting the President the authority to appoint General Marshall as Secretary of Defense:

> 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.

In offering the amendment, Representative Vinson stated that he wished it to be

> distinctly understood that this bill shall not be a continuing precedent for the appointment of military men. We want to adhere to the viewpoint expressed in the President's letter, civilian control. For that reason I want the sense of the Congress affirmatively expressed not only in the committee report but also in the very heart of the bill.[161]

Representative Javits then offered a substitute amendment to Representative Vinson's amendment that would state that

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[159] Ibid., p. 14954.

[160] Others argued that General Marshall had effectively retired after stepping down as Army Chief of Staff in November 1945, meaning that Congress had only been asked to determine if there was "anything sacred" about the requirement for 10 years to elapse between an individual's military service and appointment as Secretary of Defense. See ibid., pp. 14954-14955, and 14966.

[161] Ibid., pp. 14969-14970.

> [i]t is the intent of Congress that the authority granted to the President by this act shall not constitute a precedent or reversal of the policy of our Government that there shall be civilian control of the National Military Establishment.

Representative Javits's substitute amendment was rejected by voice vote; Representative Vinson's amendment was agreed to by voice vote.

Representative Short offered an amendment that would have inserted a sunset clause into the legislation: "This bill shall terminate 1 year after its enactment."

Representative Short's amendment was defeated by a vote of 136 to 61.

Vote and Passage

By a vote of 220-105, with 101 representatives not voting and three representatives answering "present" to the roll call, H.R. 9646 passed the House and was sent to the Senate.

Senate Activities

Floor Debate

On September 15, 1950, the Senate resumed consideration of S. 4147. Senator Byrd, continuing to act as floor manager for the bill in Senator Tydings's absence, offered an extended explanation of the bill, which summarized the Senate Armed Services Committee's consideration of the legislation, and advocated for the passage of the measure in light of the "crisis" of the Korean War and General Marshall's "supreme qualifications" to take up the duties and responsibilities of the office of Secretary of Defense.

As in the House, the ensuing floor debate was contentious, extensive, and at various times strongly supportive or sharply critical of General Marshall.[162] Debate brought up many of the same issues raised in committee meetings, and chiefly focused on the question of holding the principle of civilian control of the military establishment above the personal qualifications of General Marshall.

Substitution of House Bill

As the Senate debate continued, a message from the House Clerk to the Senate announced that the House had passed H.R. 9646.[163] By unanimous consent, the Senate accordingly substituted H.R. 9646 for S. 4147, and resumed its consideration of the measure.

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[162] Senator William E. Jenner (Indiana) delivered a series of highly personal attacks against General Marshall, including making assertions that General Marshall was "eager to play the role of a front man for traitors"; that General Marshall was "a living lie"; and that he acted as an "errand boy, a front man, a stooge, or a coconspirator for this administration's crazy assortment of collectivist cutthroat crackpots and Communist ... appeasers." See ibid., p. 14914 and 14917. These allegations were immediately repudiated by other senators, including Senator Leverett Saltonstall (Massachusetts), who rose following Senator Jenner's remarks to state that he wished he had the "words and the voice to express how strongly I disagree ... if there is any man in America who is decent and clean it is General George C. Marshall.... I wish I had the vocabulary to answer the statement that General Marshall's life is a lie, because if there ever was a life spent in the interest of our country, a life that is not a lie, it is the life of George C. Marshall." See ibid., pp. 14917-14918.

[163] Ibid., p. 14924.

Vote and Passage

By a vote of 47-21, with 28 Senators not voting, H.R. 9646 passed the Senate.

Enactment of H.R. 9646 and Confirmation of General Marshall

H.R. 9646 was signed into law by President Truman on September 18, 1950, as P.L. 81-788.

Following a confirmation hearing held on September 19, 1950, the Senate voted to confirm General Marshall's nomination to the office of Secretary of Defense on September 20, 1950, by a vote of 57-11, with 28 Senators not voting.[164]

General Marshall took office as the third Secretary of Defense on September 21, 1950, and would serve in that role until September 12, 1951.

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[164] See U.S. Congress, Senate Armed Services Committee, *Nomination of General of the Army George C. Marshall To Be Secretary of Defense*, 81st Cong., 2nd sess., September 19, 1950, and *Congressional Record*, September 20, 1950, p. 15182.