

## “Reckless, Shameless, and Blameless: Fixing the Appointed National Security Official’s Character and Fitness Problem”

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*Every public officer is presumed to act in obedience to his duty until the contrary is shown.*

*-[Martin v. Mott](#), 25 U.S. 19, 33 (1827)*

*Nothing can prepare you for being secretary of defense.*

*-Former Secretary of Defense Robert Gates*

This brief article aims to invigorate public and congressional conversation about the qualifications for holding civilian office as a senior national security official appointed by the President of the United States and confirmed by the U.S. Senate, such as the Secretary of Defense. Other than being appointed from civilian life, and a lengthy but waivable cooling off period between active-duty service as a commissioned military officer and service as Secretary, there are no statutory prerequisite qualifications – in experience, skills, knowledge, temperament, judgment, or maturity – for this position of extraordinary public trust. Indeed, there are more professional requirements to graduate basic training as a Private than there are to be named the person second only the President of the United States in the military’s chain-of-command. While Congress has wisely seen fit to [demand](#) by legislation that the nation’s senior military officer – the Chairman of the Joint Chiefs of Staff – must be of a certain rank and must have held certain positions of extreme trust and responsibility before being nominated to that role, no qualifications at all characterize the position of Secretary of Defense. This article proposes four modest changes to the statute regulating the qualifications and functions of the Secretary; it further suggests that these similar relevant amendments should be incorporated into the statutory authorizations for all Senate-confirmed civilian national security officials.

### “Out of his depth”

Peter Hegseth’s [surprise nomination](#), [contentious confirmation hearing](#), and subsequent scandals as Secretary of Defense in the first year of the second Trump Administration stood in stark relief to Trump’s defense secretary nominations in his first term. Hegseth’s relative youth, comparatively [slight managerial experience](#) and [limited national security service](#), as well as concerns for his [public views on women serving in combat](#), [support for war criminals](#), antipathy toward [rules of engagement](#) and the [laws of war](#), [excessive alcohol consumption](#), and hints of extreme [Christian Nationalist](#) views were [easy to contrast](#) against the more apparent experience, skill, knowledge, temperament, judgment, and maturity of a former Trump Defense Secretary, [James Mattis](#).

Concern over Hegseth’s aptitude and qualifications for office again became fodder for [public derision](#) and bipartisan calls from [some lawmakers to resign](#) when the editor-in-chief of

*The Atlantic* published a [story](#) describing how he had been inadvertently added to an unsecured group chat using the Signal messaging app. That chat – over the course of several days – revealed an ongoing conversation about planning and then executing an attack on Houthi rebels in Yemen. Besides Hegseth, the group chat included Vice President Nance, Secretary of State Marco Rubio, Director of National Intelligence Tulsi Gabbard, Director of the Central Intelligence Agency John Ratcliffe, Special Envoy to the Middle East and Ukraine Steve Witkoff (who was in Russia at the time of the chat), and Trump’s then-National Security Advisor Michael Waltz, among others. The White House [confirmed the chat’s authenticity](#), but repeatedly [downplayed the significance](#) of sharing war plans via an unsecured civilian messaging app and not realizing that a journalist had been included by mistake. Instead of resigning, Hegseth doubled-down: even in the face of an internal Department of Defense Inspector General [investigation](#), he [continued to deny any mistake](#) had been made (despite unequivocal [evidence](#) to the contrary), refused to accept responsibility, and [blamed](#), instead, the journalist who reported the story, and labeled the investigation a “[political witch hunt](#).” After several more months, the controversy had not abated but was instead aggravated by [additional stories of mismanagement](#) within the Pentagon, attributed ultimately to Hegseth. Senator Tom Tillis, a Republican who voted to confirm Hegseth, [remarked](#): “With the passing of time, I think it’s clear he’s out of his depth as a manager of a large, complex organization.”

We might add the Secretary of Homeland Security to the list of senior national security officials in whose ability and knowledge the public should be confident, even if they disagree with the official’s party or policy. Instead of Hegseth’s “[Signalgate](#)” scandal, we could discuss Homeland Security Secretary Kristi Noem’s [wrong explanation of “habeas corpus”](#) when questioned during congressional testimony, and the absence of any qualifications whatsoever in the federal statute that establishes her position ([6 U.S.C. § 112](#)). Or we might discuss the tumultuous tenure of Director of National Intelligence Tulsi Gabbard, a nominee [one senator described](#) as being so unqualified that to confirm her appointment would be to violate [50 U.S.C. § 3023](#), the statute that created the position. But for the sake of brevity, this article will focus exclusively on the qualifications for Secretary of Defense.

## **The Functions of the Secretary of Defense**

To understand the scope of the Defense Secretary’s duties is to understand why certain qualities and qualifications are important. The Constitution does not create the position, though a civilian appointed to oversee national security has been a member of the President’s cabinet since President Washington’s first term in 1789 (Henry Knox, a former Continental Army general himself). In fact, the position pre-dates the Constitution’s ratification, first established by the [Congress of the Confederation](#). Post-ratification, the [first Act of Congress, Chapter VII](#), on August 7, 1789, established the Department of War to be led by the “Secretary for the Department of War.” Between other regular and mundane reporting, accounting, and inspecting tasks Congress assigned to this cabinet principal, that first Congress left the first and every subsequent President significant discretion to decide what support the Secretary would provide day-to-day. The original Act stated that the Secretary:

shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces,

ships, or warlike stores of the United States, or to such other matters respecting military or naval affairs, as the President of the United States shall assign to the said department . . . [and] furthermore, that the said principal officer shall conduct the business of the said department in such manner, as the President of the United States shall from time to time order or instruct.

Congress [created a parallel cabinet position](#) in 1798 to oversee a new Department of the Navy; both the Secretary of War and this new Secretary of the Navy served as cabinet members until the [1949 amendments to the National Security Act of 1947](#) consolidated the departments – overseeing the Army, the Air Force, and the Navy – into a single behemoth Department of Defense, under the administration of a single Secretary of Defense.

Today, the duties of the Secretary of Defense are found in [10 U.S.C. § 113](#), and in many ways reflect this same construct as in 1789: a mix of statutory reporting, accounting, inspecting, and strategic planning duties assigned by Congress, but ultimately leaving this cabinet official responsible for military affairs to serve at the pleasure of the President “under his direction.” Section 113(c) requires, *inter alia*, the Secretary to report annually to Congress on the “expenditures, work, and accomplishments of the Department” and include a report from each of the subordinate Departments of the Army, Navy, and Air Force. Section 113(e)(1) adds specific content requirements to that report. Section 113(g) requires the Secretary to produce a “national defense strategy” at least every four years, in consultation with the Chairman of the Joint Chiefs of Staff, nested within the President’s overarching national security strategy. Section 113(g)(1)(B) lists ten specific subjects that the national defense strategy must include – like major investments in technological innovation and force structure, a “strategic framework” that guides the Department’s prioritization of threats and missions. There are several other mandatory reporting requirements, including Section 113(i)(1)’s direction to produce and share an annual “comprehensive net assessment of the defense capabilities and programs of the armed forces of the United States and its allies as compared with those of their potential adversaries.”

But more generally, Section 113(b) assigns the Secretary two primary and very general responsibilities. First, as an agent of sorts: to be the “principal assistant to the President in all matters relating to the Department of Defense” as a member of the President’s cabinet. Second, as an executive branch organization’s principal officer in charge: to exercise “authority, direction, and control over the Department of Defense.” The Secretary’s sole superior in government is the President and obeys only lawful direction by him and the dictates of federal laws. As such, the Secretary of Defense is the second in the national chain-of-command behind the President. The Secretary’s duties therefore naturally include cultivating relationships and communicating with the senior combat commanders, the civilian service secretaries and the members of the Joint Chiefs of Staff, with the press, with Congress, with the President’s national security advisor and chief of staff, with the Director of the Office of Management and Budget, and with other cabinet officials. Any account by a former Secretary of Defense will acknowledge these implied tasks, but [Robert Gates’ \*Memoirs of a Secretary at War\*](#) (especially pages 82-92) are a particularly candid account of serving under both a Republican and Democratic president.

But beyond merely having good relations with external actors and being a competent communicator, the Secretary’s duties include making decisions with both immediate and long-term consequences, including those of life-or-death: about force structure, weapons procurement, strategic deployment of forces, personnel (both uniformed and civilian members of the

Department, as well as private contractors), good order and discipline within the ranks, unit cohesion, morale, health of the force, recruitment, retention, installation management and base closures, budgets and fiscal accountability, engagements with partner nations and allies, deterrence of enemies and forecasting of foreign threats, and the actual lethal use of force consistent with both the Constitution (when used domestically) and international humanitarian law (when used abroad). This includes, as former Secretary of Defense [Donald Rumsfeld testified](#) to Congress regarding the 2004 Abu Ghraib prisoner abuse scandal, “being accountable” and taking “full responsibility” for illegal actions and mistakes made under his leadership. Secretaries of Defense must, in managing operations both within the Pentagon and outside it, understand and oversee (if not exercise personally to some degree) the functions of a diplomat, statesman, strategist, tactician, project manager, organizer, public relations spokesman, negotiator, and policy wonk, all with a sense of obligation to serve the public good and partisan policy objectives of the President, promote the institutional norms of the military while maintaining civilian supremacy, and obey legal constraints. As Gates wrote (page 82):

Nothing can prepare you for being secretary of defense, especially during wartime. The size of the place and its budget dwarf everything else in government . . . its programs and spending reach deeply into every state and nearly every community. Vast industries and many local communities are dependent on decisions made in the Pentagon every day . . . [but] more important than any [other decision], the secretary makes life-and-death decisions every day – and not just for American military forces . . . [i]t is an unimaginably powerful position.

And, as Leon Panetta wrote in his [memoirs](#) covering his time as Secretary of Defense: “[t]he tasks of managing such an immense organization are thus monumental” (page 345).

### **Current Statutory Qualifications for the Secretary of Defense**

Former Secretary Gates’ caveat that “nothing can prepare you for being secretary of defense” should be taken tongue-in-cheek, not literally. He later wrote (page 578) that “the secretary has to master the details and fully understand the issues and problems. The challenge is to maintain a high-level, broad perspective, understand enough details to make sensible and executable decisions, and then delegate responsibility for implementation.” Prior to serving in that role, Gates was arguably one of the most well-prepared private citizens to be nominated. Earlier in life, he served as a junior Air Force officer, then CIA intelligence analyst, an intermission serving on the National Security Council staff, later deputy director of the CIA, then deputy national security advisor, and his public service culminating as director of the CIA. Once out of government, he worked as a university lecturer (he earned a PhD in Russian and Soviet history during his early days at the CIA,) then dean and later President of Texas A&M University before President George W. Bush appointed him defense secretary after Rumsfeld’s resignation.

But no such experience or expertise – be it technical, managerial, administrative, or educational – is demanded of the person nominated to be the Secretary. [Section 113\(a\)\(1\)](#) only requires that the person be “appointed from civilian life.” Amended by the National Defense Authorization Act for Fiscal Year 2022 ([section 901\(a\)](#)), section 113(a)(2) now requires a seven

or ten year cooling off period for a person who previously served as an officer on active duty, the length depending on whether the nominee left the service below the rank of brigadier general or rear admiral (lower half). That requirement has been waived by Congress [only three times](#): for generals George Marshall, James Mattis, and Lloyd Austin. In contrast, the statutory qualifications for the Director of National Intelligence ([50 U.S.C. 3023\(a\)\(1\)](#)) requires that the nominee have “extensive national security expertise.”

### **Current Entry Guardrails are Inadequate**

Only four guardrails keep a person lacking relevant experience, skills, knowledge, temperament, judgment, and maturity from ascending to – and keeping – the job of Secretary of Defense: (1) the President’s refusal to nominate an unqualified candidate; (2) the Senate’s refusal to consent to such an appointment; (3) assuming an unqualified candidate is both nominated and confirmed, the person’s self-awareness and humility to resign when his or her incompetencies manifest; and (4) Congress’s ability to remove the Secretary via impeachment by the House and conviction by the Senate. Only [norms](#), not laws, have historically anchored these guardrails. They have been anchored so firmly in fact that a Defense Secretary, once in office, [has rarely been fired](#) (or been [asked to resign](#)) by the President who appointed him; only one person nominated to the position of Secretary of Defense [has failed to be confirmed](#) by the Senate (John Tower in 1989; two others failed to get confirmed as Secretary of War in the nineteenth century: Thomas Ewing in 1868 and James Porter in 1844)); only one has been [impeached](#) by the House of Representatives (the Senate did not convict); and no modern Defense Secretary has ever resigned of their own volition in disgrace following a strategic or operational blunder that demonstrated a failure of judgment, skill, or management ability atop of the national security establishment (though [it is possible](#) Les Aspin resigned in late 1993 due in large part to the disastrous [Battle of Mogadishu](#)).

But when the norms holding those traditional guardrails in place are [ignored](#), what remains is an underqualified public servant possessing broad administrative and operational authority – quite literally life and death decisions – who made a clear and avoidable error, refuses to admit an error in the face of inculpatory evidence, refuses to accept responsibility, lays blame on others, and minimizes the consequences or implications of his failure. That norms are not enough of a check on incompetence and mendacity is the lesson of the “Signalgate” scandal.

### **New Guardrails: Adding Character and Fitness, and Similar Qualifications, to Section 113**

Four modest statutory changes to the provision already describing the Defense Secretary’s position, role, and duties in 10 U.S.C. § 113 could easily fill the gap left by eroded and ignored norms. Amending the law to require experience serving in the military – or in some senior national security-related role – is not necessary. Nor is some specific educational credential. Instead, as the first change, Section 113 must require the same thing that the DNI statute requires of nominees: “extensive national security expertise.” Given the duties of the office, anyone arguing that such a qualification is unnecessary should have the burden of supporting that specious claim. However sensible, this statutory qualification is not further defined; what does “extensive,” or “expertise,” really mean? Moreover, it was not enough to prevent President Trump from nominating Gabbard for DNI nor the Senate in confirming her

despite some members' public reservations. This qualification is best considered, therefore, necessary but insufficient.

In addition to including "extensive national security expertise," an amended Section 113 might also be modeled after the "[character and fitness](#)" considerations that state bar examiners use to assess candidates seeking admission to practice law in their jurisdictions. For example, the [Ohio bar has ten such considerations](#). The provision might be best articulated in similar terms. For example, Section 113 could be amended to add:

*In fulfilling its constitutional obligations for investigating whether a nominee for the position of Secretary of Defense possesses the requisite character, fitness, and moral qualifications, the Senate considers the following to be essential eligibility requirements in exercising "authority, direction, and control" over the Department of Defense:*

- 1. The ability to communicate clearly and honestly with members of Congress, uniformed members of the armed services and civilian employees of the Department of Defense, other senior national security officials, and the general public;*
- 2. The ability to exercise good judgment in conducting one's professional business;*
- 3. The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;*
- 4. The ability to conduct oneself with respect for and in accordance with the federal Code, the U.S. Constitution, Department of Defense regulations, and the [recognized norms and best practices of healthy civil-military relations](#);*
- 5. The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;*
- 6. The ability to conduct oneself diligently and reliably in fulfilling all obligations imposed by statute and under the lawful "direction" of the President;*
- 7. The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession of arms.*

As the Virginia Board of Bar Examiners [state](#) in explaining their own character and fitness requirements: "A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission."

But reforms need not, and should not, stop there. The Defense Secretary holds a special place of public trust as the President's agent in charge of the Armed Forces. It seems reasonable to expect this triggers commensurate duties of integrity, care, competence, accountability, and good faith – the kind of duties that lawyers impose upon themselves, and which form the basis for the profession's self-regulation and public expectation. Fidelity to these professional duties becomes strikingly salient when the lawyer finds herself needing to interpret laws in a field with which she is unfamiliar or when counseling a client on a legal question that is particularly complex or novel. So too would they be vital for a relatively inexperienced civilian serving as Secretary of Defense. Therefore, "character and fitness" and the undefined "extensive expertise" requirements for nominees might be supplemented with elements analogized from state codes of professional responsibility for lawyers. [Virginia's Rules of Professional Conduct](#) provide a starting point, and might be restated for the Secretary of Defense as follows:

With regard to the duty of “competence:”

*In the Secretary’s role as “principal assistant to the President in all matters relating to the Department of Defense,” and in exercising “authority, direction, and control” over the Department’s personnel and activities, the Secretary shall provide competent, informed, and lawful advice to the President and management over subordinates. Competent performance requires the knowledge, skill, thoroughness, temperament, judgment, and preparation reasonably necessary under the circumstances.*

*In determining whether a Secretary employs the requisite knowledge, skill, thoroughness, temperament, judgment, and preparation in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the Secretary’s general experience, training and experience in the field in question, the preparation and study the Secretary is able to give the matter, and the advice provided by the Secretary’s legal and professional counselors and advisors, including members of the Joint Chiefs of Staff, and the service secretaries and their professional staffs.*

A revised Section 113 might also speak to duties of candid communication with Congress and the press, the Secretary’s responsibility to maintain the integrity and public respect for the Department and its operations, and conflicts of interest. Regardless of the specific “lawyerly” duty Congress might analogize and adapt, this incorporation of “professional conduct” rules would emphasize that, like lawyers, an external body representing the public demands compliance with basic duties that ensure the Secretary’s attention and actions – wielding what Gates referred to as “unimaginably powerful” authorities – is ultimately aimed at the public good. It is a bulwark against recklessness.

These models can also easily be supplemented by demanding that the Defense Secretary comport with the existing statutory “[requirements for exemplary conduct](#)” already expected of commanding officers and other military leaders throughout the rest of the chain-of-command in each of the services. Though each service has its own statute (identical in wording), an overarching requirement on the Secretary of Defense is certainly reasonable, for it would say:

*In exercising as his role as “principal assistant to the President in all matters relating to the Department of Defense,” and in exercising “authority, direction, and control” over the Department’s personnel and activities, the Secretary is required to —*

- (1) demonstrate a good example of virtue, honor, patriotism, and respect for subordination of the military to lawful command of legitimate civilian authority;*
- (2) to be vigilant in inspecting the conduct of all persons who are placed under “authority, direction, and control;”*
- (3) to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Department of Defense, all persons who are guilty of them; and*

*(4) to take all necessary and proper measures, under the laws, regulations, and customs of the Department of Defense, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under the Secretary's authority, direction, and control.*

This makes such qualifications a bulwark against shamelessness and blame-shifting.

Together, the revised set of qualifications provides a far more reliable screening filter at both the nomination and confirmation stages of selecting a new Defense Secretary. They provide quite specific standards on which to build questions and against which the nominee's answers would be assessed. Should the interest in impeachment of a defense secretary ever arise again, these same standards – all of which reflect certain professional values, qualifications, and expectations – establish the grounds on which articles of impeachment may be levied. The same holds for any other senior civilian national security official requiring Senate confirmation.

### **Congress has the Authority to Demand Nominees are Fully Qualified**

Aside from common sense and recent history justifying qualifications for these senior officials, nothing in the Constitution or federal statute would stand in the way of this reform. Imposing a new set of qualifications is well within Congress's enumerated powers over matters of war and defense – specifically, [Article I, section 8, clause 14's](#) “rules for the government and regulation of the land and naval forces.” In other words, if Congress has the constitutional authority to establish any of the *current* pre-requisite qualifications found in 10 U.S.C. § 113(a), it has the authority to impose the heightened qualification standards set forth above. Imposing qualification standards, moreover, does not meaningfully impair the President's discretion over whom to nominate for such positions. It simply narrows the potential pool from literally tens of millions to – conservatively – tens of thousands of candidates (on either side of the partisan divide), all of whom would, presumptively, be well-qualified for the role.

### **Conclusion: the Wisdom of Qualifications for Appointed National Security Officials**

This article has offered four additional qualifications that ought to be included in the statute defining the position of Secretary of Defense. First, a requirement of “extensive national security expertise” just as the DNI statute already does. Second, “character and fitness” conditions akin to those that screen applicants for the legal profession. Third, professional duties and standards of conduct analogous to those regulating the profession of law. Fourth, an adapted version of the statutory “requirement for exemplary conduct” that already covers commanders and other “leaders” in the armed forces. These requirements do not, of course, prevent law-breaking, poor judgment, or incompetence in office, any more than criminal laws prevent crime. But they offer several salutary benefits that are not easily dismissed.

Constraining the President to a narrower menu of choices and demanding that a nominee possess certain enumerated characteristics and qualities enhances a President's credibility and reflects better on his or her discretionary judgment. No President wants the public or the Senate to [openly question the wisdom of a nomination](#) even before confirmation hearings have commenced. Additionally, enhanced qualification requirements do not remove the Senate as the key check on the President's senior staffing decisions. Instead, these requirements improve the Senate's opportunity to express prudent reservations or endorsements. The statutory

qualifications would serve as a better grading rubric for assessing both the strengths and weaknesses of the nominee in articulable professionalism terms that transcend partisan affiliations, ideological commitments, and questions of personal loyalty to the President. Moreover, they provide articulable standards on which to ground explicit impeachment charges. Finally, imposing a new set of qualifications should reassure Americans (including career civil servants in the Department of Defense and uniformed members of Armed Services) – whether they voted for the President or not – that those appointed to positions of extraordinary responsibility for national security can be trusted to use it responsibly.