



**RSC Memorandum**  
***The Case Against a Waiver for Gen. Lloyd Austin (Ret.)  
to Serve as Secretary of Defense***

**What is the “Waiver” and when has it been given?**

After World War II, Congress passed the National Security Act of 1947, which implemented major reforms to the structure of the nation’s military and intelligence agencies. Congress merged the Department of War and the Department of the Navy together into what was later named the Department of Defense in 1949, established the Joint Chiefs of Staff, and made each of the secretaries of the services subordinate to the Secretary of Defense.

As part of the National Security Act, Congress required that the Secretary of Defense come “from civilian life.” Yet, during congressional debates, it was pointed out that the “spirit” of this rule could be undermined by an active duty career officer resigning and then being nominated shortly thereafter.<sup>1</sup> For this reason, Congress added a further limitation “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.”<sup>2</sup> In 2008, Congress shortened the period to seven years, from ten, such that the statute reads “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.”<sup>3</sup>

Technically, the temporal limitation does not have a “waiver” provision. However, Congress has passed legislation on two separate occasions to waive this requirement: (1) President Truman’s nomination of General George Marshall in 1950, who was serving as an active duty General at the time, and (2) President Trump’s nomination of General Jim Mattis in 2017, who had retired in 2013, only 4 years earlier. In the case of General Marshall, the Senate rejected a proposal by Senator Joseph Tydings (D-MD), which would have made an exception to the prohibition “in times of war.”<sup>4</sup> Instead, Congress made clear that it is “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...[and] that after General Marshall leaves the office of Secretary of Defense, no additional appointments of military men to that office shall be approved.”<sup>5</sup> In the case of General Mattis, Congress also passed legislation suspending the National Security Act’s temporal

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<sup>1</sup> United States. Congress. Senate. Committee on Armed Services. (1950). *Nomination of General of the Army George C. Marshall To Be Secretary of Defense: hearings before the United States Senate Committee on Armed Services, Eighty-First Congress, second session, on Sept. 19, 1950*. Washington: U.S. G.P.O.

<https://babel.hathitrust.org/cgi/pt?id=umn.31951d020978462&view=1up&seq=20&q1=Cain>

<sup>2</sup> Public Law 80-253; <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/61/STATUTE-61-Pg495.pdf#page=6>

<sup>3</sup> 10 U.S. Code § 113

<sup>4</sup> Congressional Research Service. *Statutory Restrictions on the Position of Secretary of Defense: Issues for Congress*. <http://crsreports.congress.gov/product/pdf/R/R44725/5#page=27>

<sup>5</sup> Public Law 81-788; <https://www.loc.gov/law/help/statutes-at-large/81st-congress/session-2/c81s2ch951.pdf>

limitation specifically for Mattis.<sup>6</sup> The legislation containing the General Mattis “waiver” passed the House 268 - 151, and the Senate 81-17. Notably, in the House, 150 Democrats voted no on the Mattis “waiver.”<sup>7</sup>

### **What is the reasoning behind the prohibition?**

Congress instituted the prohibition in the wake of World War II when the popularity of a number of Generals began to rise. The idea, according to the Congressional Research Service, was to allow some time for “their stars to fade” and their influence to wane ensuring effective civilian control of the military. The concept of civilian control of our military stems from our nation’s founding and is intended to ensure that our armed forces do not undermine the practice of American democracy.<sup>8</sup> Prior to the prohibition, a number of military officers had begun to be appointed to important civilian national security roles, including as Ambassadors, or cabinet Secretaries (General Marshall had been Secretary of State prior to being Secretary of Defense).

### **The Marshall and Mattis experiences**

Both the Marshall and Mattis “waivers” were argued to be exceptional, once in a generation situations. In the case of Marshall, the Korean War was going badly, with President Truman finding Secretary of Defense Louis Johnson’s performance to be largely at fault. It was argued that Former General Mattis, whose extraordinary career and vast experience confronting novel military challenges, made him uniquely equipped to advise the newly elected President Trump. Yet despite important accomplishments under the tenure of both men, both experienced problems rooted in their career military backgrounds. Marshall’s refusal to confront General Douglas MacArthur, the top General responsible for the Korean War, and a friend and military colleague of Marshall, led to a full-fledged civilian-military crisis between President Truman and General MacArthur, which culminated in Truman firing MacArthur. Mattis insulated himself in a coterie of military advisers,<sup>9</sup> often pushing away civilian leadership, and in many cases was out of tune with the policy vision of the elected Commander in Chief, creating tensions. For example, the Pentagon under Mattis carried on many Obama-era ISIS policies, including deprioritizing the countering of Iranian militias in Iraq, and opposing the designation of the Iranian Islamic Revolutionary Guard Corps and many of its backed militias as terrorist organizations.<sup>10</sup>

### **What are the concerns with granting another “waiver?”**

During debate over issuing a “waiver” to General Marshall, many worried a “waiver” would set precedent that would undo the spirit of the law. It was for this reason that Congress expressed its intent that it did not approve of further “waivers” for future candidates, which remained the case for over 60 years until the nomination of General Mattis. However, in granting yet another “waiver” only 4 years after the Mattis experience, a new precedent will effectively be put in place which will make it very likely that Congress may regularly waive the prohibition, undermining the spirit of the law altogether. While exceptional circumstances were argued to exist in both the Marshall and Mattis cases, it is difficult to argue that any special or exigent circumstances presently exist that would

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<sup>6</sup> Public Law 115-2; <https://www.congress.gov/115/plaws/publ2/PLAW-115publ2.pdf>

<sup>7</sup> U.S. House of Representatives. Roll Call 59. 115th Congress, 1st Session. Jan 13, 2017. <https://clerk.house.gov/Votes/201759>

<sup>8</sup> Supra Note 4 at 11 [crsreports.congress.gov/product/pdf/R/R44725/5#page=11](https://www.crsreports.congress.gov/product/pdf/R/R44725/5#page=11)

<sup>9</sup> Brooks, Rosa. *The Pentagon needs more civilian control over the military now, not less*. The Washington Post. December 9, 2020. <https://www.washingtonpost.com/outlook/2020/12/09/lloyd-austin-civil-military-control/>

<sup>10</sup> Morgan, Wesley and Toosi, Nahal. *Trump again overrules top brass*. Politico. April 8, 2019. <https://www.politico.com/story/2019/04/08/trump-iran-revolutionary-guard-pentagon-1261448>

require granting a third “waiver,” this time for retired General Lloyd Austin. Furthermore, with the problematic Mattis experience, a number of conservatives have expressed their regret for voting for a “waiver” for Mattis.

Potential problems that could stem from granting a third “waiver” may include the following:

*Army generals auditioning politically.* If senior career officers see serving as Secretary of Defense as a new career path, it risks politicizing the military as Generals begin to audition for political roles for future administrations. Yet the role of a cabinet secretary, an inherently political role that answers to the elected President and is involved in political decisions, contradicts the role of a military officer who is required to avoid politicization and obey the chain of command. This could lead to a situation where there are “Democratic Generals” and “Republican Generals.” It is already the case that a number of ex-Generals have become much more political in recent years, with former Generals speaking at both parties’ political conventions and signing letters for and against presidential candidates. These trends could become much worse by undermining the National Security Act’s temporal limitation with another “waiver.”

*Reduction of creative thinking.* President Trump’s National Defense Strategy has affirmed that we have entered into a new era of great power competition with China and Russia, something we have not seen since the end of the Cold War and fall of the former Soviet Union.<sup>11</sup> Competition with China will require creative thinking, major reforms, and ultimately a number of inherently political decisions to institute reforms inside the Pentagon and “shake things up,” which may encounter resistance from traditional military brass. A further weakening of civilian leadership, and reliance on a former military officer insulated with mostly military advisers, would make it difficult to think creatively and put in place the reforms necessary to counter China and modernize the Department of Defense.

*Resistance to political decision making.* The Secretary of Defense is primarily a civilian political appointment and reports to the President and Commander in Chief. The Mattis experience illustrated a number of problems that even retired military officers have serving in such a position. Mattis avoided the cabinet level politics necessary in a cabinet position including refusing to debate fiscal hawks in the Trump cabinet regarding the funding of his own Department. Mattis held less press briefings than prior Secretaries, and often kept both the White House and Congress in the dark on the rationales behind his decisions.

*One service taking primacy over another.* Finally, future “waivers” risk that Secretaries of Defense may favor one of the services (Air Force, Navy, Army, etc.) over another because they recently served in it. Even in cases where actual bias did not exist, the very appearance of bias could be problematic.

### **General Lloyd Austin is not the man for the job**

General Austin has served his country admirably in combat and as a military officer. However, a cursory look at his record makes clear that the case for issuing a “waiver” for Austin is not warranted.

*Lack of experience in great power competition and in civilian policy debates.* Austin’s experience as the former head of CENTCOM was mostly focused in the Middle East and on the anti-ISIS fight while the main threats we face today come from great power competition from China and Russia. Indeed, in President-elect Joe Biden’s op-ed in *The Atlantic* making the case for General Austin, the word China

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<sup>11</sup> Mattis, Jim. *Summary of the 2018 national defense strategy of the United States of America*. Department of Defense Washington United States, 2018. <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>

was not mentioned a single time.<sup>12</sup> Unlike General Mattis who regularly commented on defense and foreign policy issues as a Hoover Institution fellow after leaving the Pentagon in both speeches and public writings, General Austin has rarely if ever commented on the defense or foreign policy debates of the day, making it difficult to understand where he stands on important issues. Austin has mostly spent his post-Pentagon tenure running a consulting business, Austin Strategies LLC, and serving on a number of corporate boards including Nucor, a steel company that is a subcontractor to at least two major defense contractors and United Technologies Corporation, which includes a defense segment as well as business interests in the elevator and air conditioning industries.<sup>13</sup>

*Failure on ISIS.* As Commanding General of U.S. Forces in Iraq from 2010-2011, during President Obama's premature withdrawal, and as head of CENTCOM from 2013-2016, General Austin presided over a rocky period which witnessed the emergence of ISIS. At CENTCOM, Austin was accused of intentionally downplaying intelligence regarding the rise of ISIS. While the Department of Defense's Inspector General did not find enough evidence to substantiate allegations that Austin was suppressing intelligence on the ISIS campaign, it did find that a number of witnesses "believed that GEN Austin was the source of pressure to present a rosier picture of the effects of USCENTCOM's operations against ISIL."<sup>14</sup> As Mike Pregent of the Hudson Institute has pointed out, as part of the anti-ISIS fight, General Austin implemented a number of the Obama Administration's failed strategies in the Middle East, including turning a blind eye to the expansion of Iranian backed militias in Iraq which occurred under his watch.<sup>15</sup>

*Failure on Syria.* In Syria, General Austin was criticized for his reluctance to support military options earlier on in the Civil War, which if undertaken could have led to a better outcome. During a hearing before the Senate Armed Services Committee in 2015, former Senator John McCain famously told Austin "I've never seen a hearing that is as divorced from the reality of every outside expert in what you are saying," in response to assertions by Austin opposing the creation of a buffer zone in Syria. McCain added "Basically General, what you're telling us is everything is fine as we see hundreds of thousands of refugees leave and flood Europe as we're seeing now – 250,000 Syrians slaughtered."<sup>16</sup>

## **Conclusion**

In conclusion, the prohibition on active duty or recently retired career officers from serving as Secretary of Defense has served us well. This prohibition was respected during some of the most tumultuous times throughout the Cold War and the Global War on Terrorism. It is a foundational principle of U.S. defense policy and has its roots all the way back to the views of the Founding Fathers on civilian control of the military. In the two instances where a "waiver" was provided to this prohibition, it was meant to address an exceptional circumstance and not become the "norm." Still, significant problems resulted during the tenures of both waiver recipients that illustrate the wisdom of the prohibition. Giving yet another "waiver," just a few years after the Mattis "waiver," would undermine the temporal limitation and establish a new dangerous precedent. Furthermore, regardless of the "waiver," General Austin is not the right person for the job of Secretary of Defense.

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<sup>12</sup> Biden, Joseph. *Why I Chose Lloyd Austin as Secretary of Defense*. The Atlantic. December 8, 2020.

<https://www.theatlantic.com/ideas/archive/2020/12/secretary-defense/617330/>

<sup>13</sup> Lipton, Eric, Kenneth P. Vogel, and Michael LaForgia. *Biden's Choice for Pentagon Faces Questions on Ties to Contractors*. The New York Times. The New York Times, December 9, 2020.

<https://www.nytimes.com/2020/12/08/us/politics/lloyd-austin-pentagon-military-contractors.html>.

<sup>14</sup> Department of Defense Inspector General. *Unclassified Report of Investigation on Allegations Relating to USCENTCOM Intelligence Products*. January 31, 2017. <https://media.defense.gov/2017/Feb/01/2001714315/-1/-1/1/DODIG-2017-049.pdf>

<sup>15</sup> Pregent, Mike. @MPPregent. Twitter. <https://twitter.com/mppregent/status/1336352006903132163>

<sup>16</sup> *Exchange between Sen. John McCain and General Lloyd Austin (C-SPAN)*. CSPAN. September 16, 2015. <https://www.youtube.com/watch?v=oeBEzeyV80w>

He lacks civilian experience, has no experience in countering China, and has a track record of failures as the CENTCOM head in Syria and Iraq and in the war on ISIS. For all of these reasons, conservatives should not vote to grant a “waiver” for General Austin.

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**NOTE:** *RSC Backgrounders are for informational purposes only and should not be taken as statements of support or opposition of any piece of legislation from the Republican Study Committee.*