



GENERALS AND DEFENSE SECRETARIES

DR. MAREN LEED, CIVIL-MILITARY FACULTY FELLOW

DECEMBER 2021

The current secretary of defense, Lloyd Austin, was a notable nominee not only as the first black person to hold the position but because of his prior military experience. Like his recent predecessor, Secretary James Mattis, Secretary Austin's confirmation required not only U.S. Senate confirmation but the passage of a waiver of Sec. 113 of Title 10, U.S. Code. It states that "[a] person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force."^[1]

The restriction against recent active duty service for civilian secretaries of defense has been in place since the 1947 National Security Act created the position. It has been waived three times. In 1950, Congress waived the restriction to pave the way for the confirmation of George C. Marshall, who had retired from the Army five years before.^[2] Congress also waived the restrictions for Secretaries Austin and Mattis.

Initially, the prohibition was longer than it is today – ten years.^[3] It was a compromise between the U.S. House of Representatives (whose version of the bill precluded the secretary from having *any* prior active-duty service) and the Senate.⁽⁴⁾ In 2008, Congress shortened the restriction to seven years and extended it to the deputy secretary of defense and under secretary of defense for policy.^[5]

The most frequently cited justification for this restriction is consistent with the deeply held American principle of civilian control over the military.^[6] Legal scholar Lieutenant

[1] Sec. 113, 10 U.S. Code, <https://www.law.cornell.edu/uscode/text/10/113>

[2] "George C. Marshall" Historical Office, Office of the Secretary of Defense, Department of Defense: Washington, D.C.), <https://history.defense.gov/Multimedia/Biographies/Article-View/Article/571266/george-c-marshall/>

[3] Sec. 202, National Security Act of 1947 (U.S. Congress: Washington, D.C.), p. S-7. <https://www.docsteach.org/documents/document/act-of-july-26-1947-national-security-act-public-law-80253-61-stat-495-to-promote-the-national-security-by-providing-for-a-secretary-of-defense-for-a-national-military-establishment-for-a-department-o>

[4] Kathleen McInnis, "Statutory restrictions relating to the Secretary of Defense," (Congressional Research Service: Washington, D.C.) 13 Dec 2016, p. 2. <https://sgp.fas.org/crs/natsec/IN10613.pdf>

[5] Sec. 903, National Defense Authorization Act for Fiscal Year 2008 (U.S. Congress: Washington, D.C.), 28 Jan 2008. <https://www.congress.gov/110/statute/STATUTE-122/STATUTE-122-Pg3.pdf>

[6] See, for example, Lyle Deniston, "Constitution Check: Why is the Pentagon usually led by a civilian?" Constitution Daily, 4 Dec 2016. <https://constitutioncenter.org/blog/constitution-check-why-is-the-pentagon-usually-led-by-a-civilian>

Colonel (LTC) Dan Maurer offers a more detailed breakdown of the many variations on this theme, identifying nine basic forms for this argument.[7] Maurer cites objections that range from the argument that presidents gain (unwarranted) political or policy credibility based on high public regard for the military and to the view that a career in uniform, and the perspective that evolves as a result of that experience, cannot be overcome or expanded without significant time in post-retirement civilian life (if ever at all). Maurer argues, however, that the restrictions in current law are best viewed as an opportunity for Congress to engage in a deep and thorough assessment of the appropriate civil-military relationship in the context of the individual nominee, rather than as an inviolate prohibition against recently retired officers.

This argument is also how President Biden made his case for selecting Secretary Austin and requesting a congressional waiver. Biden argued that Austin's experience and "intimate knowledge of the Department of Defense" made him "uniquely matched" to the challenges of the day.[8] Ultimately, on January 21, 2021, the House and Senate approved waiving the section of U.S. Code that would have precluded Secretary Austin from serving. [9] He was confirmed by a vote of 93-2 the next day.[10]

The debate that Secretary Austin's nomination generated, especially given how recently a similar waiver had been requested for Secretary Mattis, appears to have had the effect that LTC Maurer argued is best. It sparked a robust conversation about the merits of Lloyd Austin as an individual in the context of a broader discussion about the appropriate balance between civil and military expertise. The role of the secretary of defense is an important element of the broader civil-military relationship, and recent history suggests that the professional backgrounds of nominees to this critical position will remain a focus of Congress in this and future administrations.

[7] Dan Maurer, "The military waiver requirement for Secretary of Defense shouldn't substitute individuation," Lawfare, 22 December 2020. <https://www.lawfareblog.com/military-waiver-requirement-secretary-defense-shouldnt-substitute-individuation>

[8] Joe Biden, "Why I Chose Lloyd Austin as Secretary of Defense," The Atlantic, 8 Dec 2010. <https://www.theatlantic.com/ideas/archive/2020/12/secretary-defense/617330/>

[9] "Brakkton Booker and Claudia Grisales, "House and Senate approve waiver for Lloyd Austin, Biden's pick to head Pentaon," npr.org, 21 Jan 2021. <https://www.npr.org/sections/president-biden-takes-office/2021/01/21/959232498/house-approves-waiver-for-lloyd-austin-bidens-pick-to-head-pentagon>

[10] Roll call vote 117t Congress- 1st session (United States Senate: Washington, D.C.), undated. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00005

