

# **WHITE PAPER**

## **APPLICATION OF THE EMOLUMENTS CLAUSE TO DoD CIVILIAN EMPLOYEES AND MILITARY PERSONNEL**

### **INTRODUCTION**

In 1787, the Founding Fathers, concerned about the possibility of undue influence caused by foreign governments providing gifts to United States ambassadors, included a provision in the U.S. Constitution that prohibits Federal personnel from accepting compensated positions with a foreign state or from accepting any items of value -- such as travel and gifts -- from a foreign government, except as authorized by Congress. This little known provision, the “Emoluments Clause,” is still in effect today and applies to Federal civilian employees and active-duty military personnel. It also applies to retired military officers and enlisted personnel from the active and reserve components, including military officers, enlisted retirees and retired Reservists. Ethics counselors advising DoD personnel need to understand the Emoluments Clause, especially when advising retiring military personnel.

This paper explains how the U.S. Constitution’s Emoluments Clause applies to DoD personnel. Specifically, the paper: (1) introduces the Emoluments Clause; (2) describes the categories of DoD employees to which the Clause applies; (3) identifies common payments subject to the Emoluments Clause; (4) summarizes the types of entities that are considered “foreign states”; (5) outlines the requirement and process for receiving advance approval before accepting an emolument from a foreign government; (6) describes the penalty for violating the Emoluments Clause, along with the debt collection procedures that are followed in situations of noncompliance; and (7) describes the waiver process and appeal rights for situations where Federal personnel may have unwittingly accepted an emolument without prior approval. Finally, the paper explores several related issues that may arise once an employee obtains consent to receive an emolument.

### **DISCUSSION**

#### **I. The Emoluments Clause, U. S. Constitution**

The Emoluments Clause, U.S. Constitution, Art. I § 9, cl. 8 states:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Without the consent of Congress, an individual who holds an "Office of Profit or Trust"<sup>1</sup> in the Government may not accept a compensated position (an "emolument") from a foreign state unless Congressional consent is obtained. When Congressional consent is obtained, no violation of the Constitution occurs.

"Emoluments" is defined as "the profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private", except as authorized by Congress.<sup>2</sup> Thus, for example compensation<sup>3</sup> in the form of honoraria, travel expenses, household goods shipments at employer's expense, housing allowances, and gifts from a foreign state, except as authorized by Congress, are considered emoluments. As a result, most federal personnel, including retired military personnel, cannot accept outside compensated employment with, or receive gifts in excess of the minimal value from, a foreign government.<sup>4</sup>

Significantly, the Constitution provides an exception to this absolute ban on receipt of foreign gifts by authorizing Congress to consent to certain activities, gifts or honors through legislation. An example of Congressional consent is set forth in the Foreign Gifts and Decorations Act<sup>5</sup>. This statute permits all Federal personnel<sup>6</sup> to accept certain gifts from a foreign government: (1) a gift of "minimal value" or less (as of publication date, minimal value is \$375); (2) travel paid for by a foreign government, provided that none of the travel takes place

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<sup>1</sup> See *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 158, February 24, 1982 (see footnote 4, *infra*)

<sup>2</sup> Black's Law Dictionary, 2<sup>nd</sup> Edition.

<sup>3</sup> "Emolument" has been interpreted to include compensation for employment. See, e.g., 40 Op. Atty. Gen. 513 (1947). DoD Financial Management Regulation (FMR) Vol. 7B, Ch. 5, 050304, at pp. 5-6 defines "compensation."

<sup>4</sup> See footnote 4, *infra*.

<sup>5</sup> 5 U.S.C. § 7342

<sup>6</sup> Note that 5 U.S.C. § 7342 covers all civilian appointees appointed under 5 U.S.C § 2105 and all members of the uniformed services. See 6 Op. O.L.C. 156, 157-58 (1982) (accepting Congress' assumption that the Emoluments Clause applies to "any employee" who takes a gift from a foreign government). See discussion at II.

leaving from or coming back to the United States;<sup>7</sup> (3) meals provided by a foreign government; and (4) lodging provided by a foreign government overseas.<sup>8</sup>

Congress' consent is also set forth at 37 U.S.C. § 908, "Employment of Reserves and Retired Members by Foreign Governments." Retired members of the uniformed services and reservists may accept compensated civil employment from a foreign government if they obtain advance approval from both the Service and the Secretary of State.

Congress also provided statutory consent for retired military members of the armed forces to accept employment by, or hold an office in, the military forces of a newly democratic nation<sup>9</sup> provided advance approval is obtained.<sup>10</sup>

### **Is An Honorific Title an Emolument?**

DoD personnel may accept an "honorific" title from a foreign government provided: (i) he or she has no duties that must be performed for the foreign government that are connected to the title and (ii) he or she obtains advance approval to accept the honorific title from the head of the component consistent with DoD Directive 1005.13 . Provided these conditions are met, then receipt of the honorific tile would not be considered a violation of the Emoluments Clause to the Constitution. For example, a DoD employee was offered the title of Honorary member of the Department of the Army for Bolivia. The employee is not from Bolivia, and did not perform any work for the Bolivian government. In this instance, the employee may accept the honorific title provided he or she receives advance approval from the head of the component.

## **II. Who is Covered by the Emoluments Clause?**

Only those persons holding an "Office of Profit or Trust" under the United States are subject to the Constitution's Emoluments Clause.

### **Civilian Employees**

The Department of Justice's Office of Legal Counsel (OLC) has opined that the term "Office of Profit or Trust" includes all full-time Federal employees.<sup>11</sup> It further concluded that the problem of divided loyalties can arise at any management level in the Government. Indeed

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<sup>7</sup> In other words, travel expenses may be paid by a foreign state only for travel which originates and ends outside of the U.S.

<sup>8</sup> See 5 U.S.C. § 7342.

<sup>9</sup> (10 U.S.C. § 1060)

<sup>10</sup> (See *infra* Section IV(d))

<sup>11</sup> See 6 Op. O.L.C., 156, 158 (1982)

OLC pointed out that Congress presumes that the Emoluments Clause applies to all Federal personnel because it enacted the Foreign Gifts and Decorations Act which applies to all Federal personnel in the Federal Government.<sup>12</sup> At DoD, this includes all civilian appointees.

### **Military Personnel**

Like their civilian counterparts, **active-duty** military personnel (officers and enlisted members) hold an “Office of Profit or Trust”, and are therefore subject to the Emoluments Clause.<sup>13</sup>

Significantly, **retired** regular military officers are also subject to the Emoluments Clause because they are subject to recall, and, therefore, hold an “Office of Profit or Trust” under the Emoluments Clause.<sup>14</sup> **Retired** regular military enlisted personnel are subject to the Emoluments Clause for the same reason as **retired** regular military officers.<sup>15</sup> Finally, reservists are also subject to the Emoluments Clause, even after reservists complete the requisite number of years to be eligible for retired pay and are transferred to inactive status.<sup>16</sup>

### **III. Types of Employment That May Involve an “Emolument”: Traps for the Unwary**

As noted above, an emolument includes compensation or other items of value. Whereas foreign travel, meals and lodging may present straightforward issues under the Emoluments Clause, other situations are less obvious, especially where the retired military member has not personally provided representational services to a foreign government. There are several types of scenarios in which an employee will be deemed to have received an “emolument” where the payment is indirectly received from a foreign state. Such scenarios include consulting, law, or

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<sup>12</sup> Id.

<sup>13</sup> See generally *Applicability of the Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 18 (March 1, 1994).

<sup>14</sup> See *Applicability of 18 U.S.C. § 219 to Retired Foreign Service Officers*, 11 Op. O.L.C. 67 (1987), footnotes 5 and 6.

<sup>15</sup> See *Comptroller General to the Secretary of the Navy*, 44 Comp. Gen. 227 (1964).

<sup>16</sup> 37 U.S.C. § 908. This statute requires advance approval before accepting an emolument from a foreign government “by members of a reserve component of the armed forces”. Other military members that may obtain advance approval under this statute include “retired members of the uniformed services.” Note that active duty military members may not obtain advance approval under this statute.

other partnership distributions, as well as payments (such as salary) from domestic professional corporations. Federal personnel, especially retired military personnel, need to be aware of these potential traps for the unwary.

### **Partnership Distributions**

Query: Does a retired military officer violate the Emoluments Clause by becoming a partner in a large U.S. law firm and accepting pro rata partnership profits that include representation of foreign government clients? Yes. OLC has opined that this would violate the Emoluments Clause.

Accepting a share of partnership profits is considered an emolument where some portion of the share is derived from the partnership's representation of a foreign government.<sup>17</sup> OLC has determined that because the partnership would "be a conduit" for that foreign government payment, a portion of the recipient's income could be attributed to a foreign government. This is so even if the individual subject to the Emoluments Clause did not actually provide services to the foreign government. In other words, a distribution from a partnership that includes some proportionate share of revenues generated from the partnership's foreign government clients is an emolument.<sup>18</sup> We believe that this same rationale applies to distributions from limited liability corporations although this view has not been officially sanctioned by the Department of Justice

### **Payments from a Professional Corporation**

The Emoluments Clause also applies to payments received by a professional corporation for services rendered to a foreign government. The Comptroller General found that retired Marine Corps lawyers, who were "of counsel" to a law firm that had been formed as a professional corporation (PC), were subject to the Clause if they represented a foreign government.<sup>19</sup> The Comptroller General concluded that the law firm's incorporation did not shield these former officers from the applicability of the Clause. While the monies from the foreign government would be paid to the PC, these attorneys would benefit from the payments. The opinion states that "where equity dictates, the corporate entity will be disregarded, for example, where there is such interest and ownership that the separate personalities of the corporation and its shareholders no longer exist."<sup>20</sup> In addition, the Comptroller General pointed out that the attorneys' loyalty was to their client directly, so the structure of the professional corporation did not shield the

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<sup>17</sup> *Applicability of the Emoluments Clause to Non-Government Members of the Administrative Conference of the United States (ACUS)*, 17 Op. O.L.C. 114, at 120 (October 28, 1993).

<sup>18</sup> *Id.*

<sup>19</sup> *Matter of Retired Marine Corps Officers*, Comp. Gen. B-217096 (Mar. 11, 1985) (1985 Comp. Gen. Lexis 1483).

<sup>20</sup> *Id.*

attorneys from the Emoluments Clause. The retired Marine Corps lawyers were required to obtain consent under 37 U.S.C. § 908 if they wanted to represent the foreign government.

#### **IV. What is a “Foreign State”?**

Except as authorized by Congress, the Emoluments Clause prohibits covered personnel from accepting a position with, or an emolument from, any king, prince, or “foreign state.” A foreign state includes any organization that is owned or operated by a foreign government, including federal, regional and local level governments. Both OLC and the Comptroller General have opined that the term “foreign state” in the Emoluments Clause applies to both national governments and to sub-national governmental units.<sup>21</sup> Thus, foreign governmental entities, such as commercial entities owned or controlled by a foreign government and foreign public universities controlled by a foreign government, can be considered instrumentalities of “foreign states” for purposes of the Emoluments Clause.

##### **Foreign Corporation**

In general, business corporations owned or controlled by foreign governments are considered part of a foreign state for purposes of the Emoluments Clause.<sup>22</sup> By contrast, the Emoluments Clause does not apply to privately-owned foreign corporations.

OLC has articulated several factors to consider when assessing whether a foreign entity should be deemed a “foreign state” for purposes of the Emoluments Clause.<sup>23</sup>

These factors include: (1) whether a foreign government has an active role in the management of the decision-making entity; (2) whether a foreign government, as opposed to a private

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<sup>21</sup> See *Memorandum Opinion For Assistant General Counsel for the Department of Commerce from Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Goteborg Award for Sustainable Development (“Goteborg Award”)* 34 Op. O.L.C. at 3 (Oct. 6, 2010); *Foreign Public Universities*, 18 Op. O.L.C. 13, 19 (noting that “foreign state” should include any political governing entity within that foreign state)(March 1, 1994); Major James D. Dunn, B-251084, 1993 WL 426335, at \*3 (Comp. Gen. Oct. 12, 1993).

<sup>22</sup> *Applicability of the Emoluments Clause to Non-Government Members of the American Conference of the United States (ACUS)*, 17 Op. O.L.C. 114, at 121 (1993).

<sup>23</sup> See *Goteborg Award*, 34 Op. O.L.C. at 3 (October 6, 2010) (neither the Emoluments Clause nor the Foreign Gifts and Decorations Act barred an employee of NOAA from accepting the 2010 Goteborg Award on Sustainable Development because the award was not from a king, prince, or foreign state).

intermediary, makes the ultimate decision regarding the gift or emolument; and (3) whether a foreign government is a substantial source of funding for the entity.<sup>24</sup>

### ***DoD Financial Management Regulation: What Constitutes Foreign Control***

One way to show foreign control is through an employer-employee relationship. At DoD, to determine whether an employer-employee relationship exists between the retired military member and a foreign government, DoD relies upon the DoD Financial Management Regulation 7000.14-R (DoD FMR) which implements the Clause. DoD FMR 7000.14-R provides that the employment analysis will follow the common law rules of agency. The analysis involves the evaluation of the following factors:

- the selection and engagement of the employee;
- the payment of wages;
- the power to discharge;
- the power to control the employee's conduct; and
- the relationship of the work to the employer's business, whether the work is a part of the regular business of the employer.

DoD FMR Vol. 7B 5-5 to 5-6. The regulation further provides that the “decisive test” is whether the employer has “the right to control and direct the employee in the performance of his or her work and in the manner in which the work is to be done.”<sup>25</sup>

#### **a. Foreign Public University**

Payments from a foreign public university influenced or controlled by a foreign government may be a prohibited emolument.<sup>26</sup> OLC opinions addressing whether the Emolument Clause extends to foreign public universities have come to contrary conclusions depending on the facts. The key for OLC has been the extent of influence or control by the foreign government. OLC reasoned that improper “influence” occurs when the foreign government, and not the university, is making the payment. OLC explained that “control” is based on whether the foreign government selects the faculty members. OLC enumerated two factors to be considered in determining when a foreign government influences or controls a university: 1) whether a foreign government, as opposed to a private intermediary, makes the ultimate decision regarding the gift or emolument; and 2) whether a foreign government has an

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<sup>24</sup> *Goteborg Award*, p. 3.

<sup>25</sup> DoD FMR Vol. 7B 5-5 to 5-6.

<sup>26</sup> *ACUS*, 17 Op. O.L.C. 114, at 121-22.

active role in the management of the entity, such as choosing the faculty or the Board of Governors.<sup>27</sup>

By contrast, for example, OLC opined that two NASA scientists could teach at the University of Canada without violating the Emoluments Clause. OLC concluded that evidence clearly demonstrated that the University acted independently from the Canadian Government, and the University selected its own faculty members independent from the Canadian government.<sup>28</sup> Similarly, a Federal officer serving as a consultant at Harvard on a project funded by the Government of Indonesia did not violate the Clause because the Indonesian Government had no veto power over Harvard's selection of consultants. In other words, Indonesia funded a Harvard study. Harvard selected a Federal employee who also was a consultant to Harvard. Harvard determined which consultant would participate in the project. The Indonesian Government never took part in the selection or rejection of the consultant; rather, it just provided funding to Harvard for the study. Because Harvard selected the Federal employee, and the Indonesian Government did not select or reject whom Harvard offered, the Federal employee was not considered to have violated the Emoluments Clause.<sup>29</sup> In sum, the foreign public university is generally considered part of a foreign state unless there is evidence that the university is independent of the foreign government on decisions regarding the terms and conditions of faculty appointments, and it is clear that the gift given is from the university and not from the foreign government.

#### **b. Consultant to a Foreign Government**

OLC also focuses on “control” for purposes of determining if an employee is subject to the Clause when he or she consults for a foreign government. Ultimate control is exercised when a foreign government selects the consultant. For example, the Government of Mexico specifically wanted a Nuclear Regulatory Commission (NRC) employee to serve as a consultant on a project.<sup>30</sup> Knowing that paying him directly could be a problem, the Mexican Government hired a consulting firm, and requested that the Federal employee be hired by the consulting firm for the sole purpose of providing consulting services to the Mexican Government. OLC concluded that, in this instance, the “ultimate control, including selection of personnel, remains with the Mexican government. That is because the principal reason for the Mexican government

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<sup>27</sup> *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, December 7, 2009 (“Nobel”).

<sup>28</sup> *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities* (“Public University”), 18 Op. O.L.C. 13 (1994)

<sup>29</sup> Nobel at page 9.

<sup>30</sup> 6 Op. O.L.C 156 (1982).



to hire the consulting firm was the selection of the Nuclear Regulatory Commission’s employee.” Therefore, OLC concluded that the Nuclear Regulatory Commission employee would violate the Emoluments Clause if he served as a consultant in this circumstance.<sup>31</sup> Note that Congress has not provided the option of advance approval for the career NRC employee.

By contrast, as discussed above, the Indonesian government paid Harvard for consulting services without selecting or rejecting any consultant Harvard assigned to the project. Harvard assigned the project to the Federal employee who happened also to be a consultant to Harvard. Because the Indonesian government did not select or reject the consultant who provided consulting services to Harvard, OLC concluded that the Federal employee did not violate the Clause because the Indonesian government had no veto power over Harvard’s selection of consultants.<sup>32</sup>

### **c. International Organizations**

OLC has concluded that the Emoluments Clause does not apply to emoluments from international organizations such as the World Bank, the United Nations, and other entities in which the United States is a member because those organizations are not deemed to be “foreign governments.”<sup>33</sup> OLC reached that conclusion by making four points. First, the United States could not be a member of a “foreign state.” Second the organization in which the United States is a member plays an important role in carrying out United States foreign policy. Third, the United States actually participates in the governance of the organization and undertakes a leadership role in its decision-making. Finally, OLC reasoned that because Congress approved participation by the United States in the World Bank, employment of government employees by the organization would not directly raise the concerns about divided loyalty that the Emoluments Clause was designed to address. By contrast, OLC advised that the Emoluments Clause would prohibit employees from receiving a salary or a gift from an international organization in which the U.S. is not a member because that organization could be considered a foreign state when none of the four points above would be applicable and there is evidence of foreign government control.

### **d. Newly Democratic Nations**

Finally, a retired military member may be able to work for a “newly democratic nation” without violating the Emoluments Clause, but must comply with 10 U.S.C. § 1060, which also

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<sup>31</sup> 6 Op.O.L.C. 156, 158 (1982).

<sup>32</sup> Nobel at 9.

<sup>33</sup> Memorandum for John E. Huerta, General Counsel, Smithsonian Institution. from Daniel Koffsky, Acting Assistant Attorney General, May 24, 2001.

requires advance approval from the Service Secretary and the Secretary of State. This statute does not extend to non-retired Reservists.<sup>34</sup>

## **V. Getting Advance Approval for an Emolument from a Foreign Government**

If current personnel violate the Emoluments Clause by accepting a salary, payment or gift in excess of the minimal value from a foreign state, they would be subject to debt collection procedures. That is because the Congress has not consented to current employees' accepting such foreign payments or gifts. By contrast, Congress has consented to permitting retired military personnel to accept foreign state salary, payment or gifts in excess of the minimal value provided that advance approval is obtained from the Service Secretary and the Department of State.<sup>35</sup>

The process for obtaining advance approval is slightly different for each of the Services and requires contacting specific components within each Service as follows:

### **a. Air Force**

The Department of the Air Force Instruction, AFI 36-2913, Request for Approval of Foreign Government Employment (19 Nov. 2003), provides guidance and explicitly requires advance approval from the Secretary of the Air Force and the Secretary of State for military retirees to accept an emolument. To request advance approval, contact:

AFPC/DPFFF  
550 C Street West  
Joint Base San Antonio-Randolph, Texas 78150-4713  
Telephone: COM 210-565-2273 or DSN 665-2273

### **b. Army**

An Army regulation<sup>36</sup> governs the need for and process by which a military retiree should obtain advance approval before working for a foreign government.<sup>37</sup>

To request advance approval, contact:

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<sup>34</sup> See 0505 of Volume 7B, of Chapter 5, <http://www.defenselink.mil/comptroller/fmr/07b/index.html> (last viewed on September 10, 2012).

<sup>35</sup> 37 U.S.C. 908.

<sup>36</sup> AR 600-291.

<sup>37</sup> See [http://www.apd.army.mil/pdf/files/r600\\_291.pdf](http://www.apd.army.mil/pdf/files/r600_291.pdf) (last viewed on September 10, 2012).

U.S. Army Human Resources Command  
ATTN: AHRC-PDR  
1600 Spearhead Division Avenue  
Department 420  
Fort Knox, KY 40122-5402  
Telephone: 502-613-8980

**c. Navy**

The Department of the Navy has no pertinent instruction. However, in 1981, then-Navy Secretary Lehman delegated authority to the Chief of Naval Personnel (CNP) to act on requests from Navy retirees to accept emoluments from foreign governments. The delegation letter provides some guidance on how the Navy will process requests. When the Navy receives an inquiry, it provides a questionnaire to the requesting individual. Then, after reviewing the request, Navy counsel makes a recommendation to CNP. If CNP approves, the Navy transmits the matter to the State Department (Political/Military) for a final determination. To seek advance approval, a retired Navy member should submit a written request to:

Navy Personnel Command, Office of Legal Counsel (Pers-OOL)  
Naval Support Facility Arlington  
701 South Courthouse Road, Room 4T035  
Arlington, VA 22204  
(703) 604-0443

The request should contain a full description of the contemplated employment and the nature and extent of the involvement of the foreign government.

**d. Marines**

Like the Navy, the Marine Corps has no specific instruction providing guidance on receipt of emoluments from foreign governments, but in keeping with the Navy guidance, the retired Marine is well-served by providing a full description of the contemplated employment and the nature and extent of the involvement of the foreign government. A retired Marine Corps member seeking advance approval for a payment from a foreign government should write to:

Judge Advocate Division (JAR)  
Headquarters, U.S. Marine Corps  
3000 Marine Corps Pentagon  
Washington, DC 20350-3000  
Telephone: 703-614-2510

**VI. Government Remedy for Failure to Obtain Advance Consent**

The Government's remedy when an employee accepts an emolument from a foreign state without consent varies depending upon the circumstances.

**a. Remedies**

Generally, compensation received from a foreign government without advance approval is deemed an "erroneous payment," a payment that is not in compliance with applicable laws and regulations. Such an erroneous payment creates a debt in favor of the Government. Specifically, the DoD Financial Management Regulation<sup>38</sup> explains how the Emoluments Clause applies to retired military personnel. "[I]f the compensation received from a foreign government without approval is considered received by the retired member for the United States, a debt in favor of the Federal Government is created which is to be collected by withholding from retired pay."<sup>39</sup>

The Comptroller General of the United States has issued opinions regarding debt collection when an employee accepts an emolument from a foreign government. For example, if the employee who accepts an emolument from a foreign government without consent is a retired military member, the Comptroller found that the Government can suspend the member's retirement pay up to the amount of the foreign salary (or other emoluments) received if the foreign salary is less than or equal to his retirement pay.<sup>40</sup> By contrast, when the compensation earned during the period of unauthorized employment with a foreign state exceeds the amount of retired pay accrued during the same period, only the retired pay amount may be collected during the period of the violation.<sup>41</sup>

In one particular case, a retired Marine major went to work for an American corporation, Frank E. Basil, Inc., where he served as an instructor for the Royal Saudi Naval Forces by way of an employment agreement with Frank E. Basil, Inc. Even though the retired officer was working for an American corporation, and had an employment agreement with the corporation, the

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<sup>38</sup> (FMR) Volume 7B, Chapter 5 (June 2011).

<sup>39</sup> FMR, Chapter 5, Section 0503.

<sup>40</sup> 65 Comp. Gen. 382 (1986, affirmed in 1990).

<sup>41</sup> See Comp. Gen. Op., B-193562 (the penalty imposed on a retired officer who violated the Emoluments Clause was suspension of military pay at the time the violation occurred, but not the payments from the foreign government). See also Comp.Gen. Op., B-251084 (applying the same remedy). Also, see the DoD Financial Management Regulation (FMR), Vol. 7B, Ch. 13. Note that loss of citizenship may occur if an oath is taken to uphold allegiance to the foreign state by a Federal employee (Coast Guard employee agreed to teach a course in Tasmania while still a US employee on leave, but did not take the foreign oath so did not lose citizenship). Comp Gen B-1542132 (December 28, 1964) and DoD FMR Vol. 7B, Ch. 6

Marine Corps found that the Saudi Arabian Government could control and direct him and then pay him for his services. The agreement specifically stated that the Saudi Arabian government may direct the employee. The Marine Corps suspended the retired member's retirement pay. The Comptroller General agreed with the Marine Corps view that the American corporation was just a shell or sham, and that the Saudi government's payments to the shell corporation went directly to the former retiree for work he performed on behalf of the Saudis. The Comptroller General advised the retired member to seek approval under 37 U.S.C. § 908 if he desired to have his retirement pay resumed.<sup>42</sup>

Similarly, in another case,<sup>43</sup> a regular retired officer was employed and paid by a U.S. corporation, which then assigned him to work for Israeli Aircraft Industries (IAI), an instrumentality of the Government of Israel. It was shown that the U.S. corporation was, in effect, merely an employment agency that procured personnel for IAI. The Comptroller General concluded that the officer and IAI had an employee-employer relationship and that IAI had the right to exercise supervision and control over the retired military officer. The Comptroller General opined that the retired officer's retired pay should be withheld until such time as the withholdings equaled the amount of foreign salary received since the foreign salary was less than the retired military pay.

## **b. DoD Debt Collection Procedures**

### *1. Army*

The Department of the Army's Deputy General Counsel for Fiscal and Ethics Law works with Army Financial Management Command to establish the debt incurred by accepting the emolument. That information is then sent to the Defense Finance and Accounting Agency (DFAS). DFAS can waive a portion or all of the debt per AR 37-104-4, paragraph 32-6 e(3). The regulation can be found on the web.<sup>44</sup>

### *2. Air Force, Navy and Marines*

These Services do not have separate instructions or regulations for debt collection. Rather, these Services follow the debt collection procedures in the DoD FMR, Chapter 28.

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<sup>42</sup> 65 Comp. Gen. 382 (1986).

<sup>43</sup> 53 Comp. Gen. 753 (1974).

<sup>44</sup> [http://www.apd.army.mil/pdffiles/r37\\_104\\_4.pdf](http://www.apd.army.mil/pdffiles/r37_104_4.pdf) (last viewed on September 28, 2012).

Any debt collection of up to \$10,000 is handled by the Defense Finance and Accounting Agency (DFAS).<sup>45</sup> Any debts in excess of \$10,000 (up to any amount) are handled by the Defense Office of Hearings and Appeals (DOHA). Regardless of the amount of the debt, all cases must go through DFAS because DFAS prepares information that DOHA would need if the debt is in excess of \$10,000. DFAS debt collection procedures are set forth in Chapter 28 of the FMR. DFAS must receive notice of the debt, which would be the obligation incurred for violating the Clause. Consistent with Chapter 5, the debt submission to DFAS should include, in practice, the elements for determining if a violation has occurred: selection and engagement of the employee, payment of wages, power to discharge, power to control the employee's conduct and the relationship of the work to the employer's business. After it receives information about the debt, DFAS has five days to notify the debtor about the debt. The debtor then becomes subject to the due process procedures set forth at section 2805 of the FMR. The collection procedures for DFAS are set forth in chapters 2806 and 2807.

## **VII. Waiver or Appeal of the Debt Collection Decision**

### **a. Waivers**

What if a retired military member did not know about the Emoluments Clause and has already accepted post-Government employment with a foreign-owned company? What if a retired military member asked for advice about an upcoming foreign trip but was misinformed by his ethics official? In these types of scenarios, an individual may seek a waiver of the debt resulting from the erroneous payment and, in some circumstances, a waiver may be granted. Good faith and ignorance of the law are not defenses.<sup>46</sup> However, equitable waiver of indebtedness may be granted in certain circumstances.

For example, the Comptroller General waived a debt where the retired military officer asked for prior approval to work for a foreign company that was an instrumentality of the foreign government, but he did not receive approval in a timely manner from the Air Force. In this case,<sup>47</sup> a retired Air Force major worked for an independent oil company, ARAMCO, in Saudi Arabia. When the major learned that the Saudi Arabian Government was preparing to nationalize his employer, ARAMCO, the Air Force major requested advance approval from the Air Force to perform work for the nationalized ARAMCO. At the time the major submitted his advance approval request, ARAMCO was yet to be nationalized.

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<sup>45</sup> 10 U.S.C. § 2774. The DFAS web site for debt collection can be found at: <http://www.dfas.mil/civilianpay/debts/informationondebtwaivers.html>.

<sup>46</sup> Comp. Gen. Op. B-154213 (Dec. 28, 1964).

<sup>47</sup> *Matter of: Major Gilbert S. Sanders, U.S.A.F. (Retired) (Deceased) – Employment by a Federal Government*, Comp. Gen. B-231498 (June 21, 1989) (1989 WL 240844).

Ultimately, while the major was waiting to hear from the Air Force, the Government of Saudi Arabia took over control of ARAMCO. The major then worked for the nationalized entity, ARAMCO. The major subsequently passed away, and the question was whether the estate was responsible for the Emoluments Clause debt. While the major never received advance approval during his lifetime to work for the nationalized ARAMCO, the major had responded each time the Air Force had questions about his application for advance approval. The Comptroller General held that the retired major had acted in good faith by seeking advance approval -- the Air Force had not given it, but was not withholding its approval. Concluding that a “waiver was in equity and in good conscience, and [the retired major] responded whenever Air Force contacted him to complete the requisite form,” the Comptroller General waived the debt pursuant to 10 U.S.C. § 2774 and the estate did not have an obligation to pay.

At DoD, DFAS has authority to grant waivers for all or a portion of an individual’s debt, including Emolument Clause debt, pursuant to chapter 2810 for debts of \$10,000 or less as part of the debt collection procedures. Likewise, DFAS may grant waivers of the debt incurred because of the Emoluments Clause violation, especially where the employee did not know about the Emoluments Clause and/or did not know he had a debt. Chapter 2810 includes instructions on how to apply for a waiver, as well as a link to DD Form 2789, which is a form that must be completed to begin seeking the waiver. The debtor has an opportunity to challenge whether he or she is subject to debt collection before DFAS consistent with the FMR.

#### **b. Appeals**

A current or former DoD employee who wants to challenge the initial determination denying all or part of a waiver application may appeal the decision. Appeals for waivers of a debt created by receiving an emolument are governed by DoD Instruction 1340.23 (Feb. 14, 2006).

Final administrative appeals, pursuant to 31 U.S.C. § 3702, may be made to the Defense Office of Hearings and Appeals (DOHA) under its Claims Division pursuant to DoD Directive 1340.20 (July 14, 2003) and codified at 32 C.F.R. part 281. Detailed procedures for the settlement of claims are set forth in DoD Instruction 1340.21 (effective May 12, 2004) and codified at 32 C.F.R. part 282.

### **VIII. Other Issues to Consider**

There are several other legal restrictions that a military retiree may face if he or she decides to do work for a foreign entity. These are not related to the Emoluments Clause but might be helpful to share during the post-government employment briefing. These include: registering as a foreign agent; representing a foreign government concerning an ongoing trade or

treaty negotiation; enhanced representational restrictions for political appointees; and receiving representational funds earned from Government contracts by his or her new private employer.

1. An employee cannot act as an “agent of a foreign principal” as defined by the Foreign Agents Registration Act (FARA) (22 U.S.C. § 611) or as a “lobbyist” for a foreign entity required to register under the Lobbying Disclosure Act (LDA). The FARA ban prohibits representation of a foreign government or foreign political party before the United States Government as well as other activities conducted on behalf of foreign entities with respect to influencing the United States Government. Retired officers who represent a foreign government or foreign entity before the United States are required to register as foreign agents under FARA.<sup>48</sup>
2. For a period of 1 year after leaving Government service, former employees or officers may not knowingly represent, aid, or advise someone else on the basis of *covered information*, concerning any ongoing *trade or treaty negotiation* in which the employee participated personally and substantially in his last year of Government service. (18 U.S.C. § 207(b))
3. Retired officers who represent a foreign government or government-controlled entity may face post-employment restrictions under 18 U.S.C. § 207(f) because they cannot represent those entities before the Federal Government during their first year after retirement if the entity at issue is either a foreign government or it exercises control and sovereignty like a foreign government.<sup>49</sup>
4. Non-career SES members and Presidential appointees confirmed by the Senate have enhanced representational restrictions that prohibit them from representing another before the Defense Department for two years after leaving service.<sup>50</sup>
5. Retired military officers who are employed by a representational entity (e.g., law, public relations, lobbying, advertising firms) that represents clients before the Executive or Judicial branches of the Federal Government and who are paid in the form of partnership shares based on those representations may violate 18 U.S.C. § 203 unless they accept their first year’s compensation in the form of a straight salary.

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<sup>48</sup> 28 C.F.R. § 5.2. The FARA Registration Unit, Criminal Division, Department of Justice, [fara.public@usdoj.gov](mailto:fara.public@usdoj.gov) can provide further information.

<sup>49</sup> *See Applicability of 18 U.S.C. 207(f) to Public Relations Activities Undertaken by a Foreign Corporation Controlled by a Foreign Government*, Op. O.L.C. (August 13, 2008).

<sup>50</sup> Executive Order 13490.



## CONCLUSION

The Emoluments Clause to the Constitution applies to all Federal personnel. The Clause prohibits receipt of foreign gifts unless Congress consents such as in the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342. For retired military personnel, the Emoluments Clause continues to apply to them because they are subject to recall. The Justice Department opinions referred to in this paper construe the Emoluments Clause broadly. Specifically, the Justice Department construes the Clause to include not only gifts of travel and food, but also payments such as proportionate profit-sharing. To avoid an Emoluments Clause problem resulting in suspension of retired pay, retired military personnel should seek advance consent through their respective Service consistent with 37 U.S.C. § 908. It is prudent for retired military personnel to obtain advance approval even when there is uncertainty about the Clause's applicability.

Finally, if a retired military member suspects that he or she has violated the Clause, but wants to continue to perform compensated work for a foreign state, he or she should expeditiously seek advance consent for future compensated work, and terminate current compensated employment with the foreign government until such approval is granted. This would be done to avoid increasing the amount of an erroneous payment.