



APPLICATION OF THE EMOLUMENTS CLAUSE TO DOD CIVILIAN EMPLOYEES AND MILITARY PERSONNEL

March 2014

AGENDA

- **The Clause**
- **Who is covered by the Emoluments Clause?**
- **Types of employment/common payments**
- **Foreign State**
- **Advance Approval for Retired Military**
- **Penalty for violation**
- **Waiver and Appeal Rights**
- **Miscellaneous**

THE CLAUSE

The Emoluments Clause, U.S. Constitution, Article I, Section 9, Clause 8:

“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.”



THE CLAUSE

- Cannot accept Emolument without consent of Congress. Must hold an Office of Profit or Trust
- Generally, DOJ finds that most Federal personnel hold an Office of Profit or Trust
- If Congressional consent is obtained, no violation occurs





THE CLAUSE

“Emoluments” is defined as “the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private” 40 Op. Atty. Gen. 513 (1947)

THE CLAUSE



Congressional Consent:

5 U.S.C. § 7342, Foreign Gifts and Decorations Act
(accept gifts of “minimal value”) (travel entirely outside of US permitted)(meals and lodging) (personal relationship is not an exception under this law)

31 U.S.C. § 1353, a statute that permits a Federal employee to accept, on behalf of the Agency, travel, meals, lodging and/or registration fees from a non-conflicting Sponsor

37 U.S.C. § 908, Retired Military member may accept with advance approval of the Service Secretary and the Secretary of State approve

10 U.S.C. § 1060, permits retired military members to accept employment or office in the military forces of a newly democratic nation provided advance approval is obtained from Service Secretary and Secretary of State.

WHO IS COVERED BY THE EMOLUMENTS CLAUSE

Civilian Personnel

- Persons holding an “Office of Profit or Trust” which includes all full-time Federal employees (all civilians at DoD)

Military Personnel

- Active duty officers and enlisted
- Retired regular military officers
- Retired regular military enlisted personnel
- Reservists



TYPES OF EMPLOYMENT/COMMON PAYMENTS

✓ **Partnership Distributions**

✓ **Professional Corporation**



TYPES OF EMPLOYMENT

Partnership Distributions

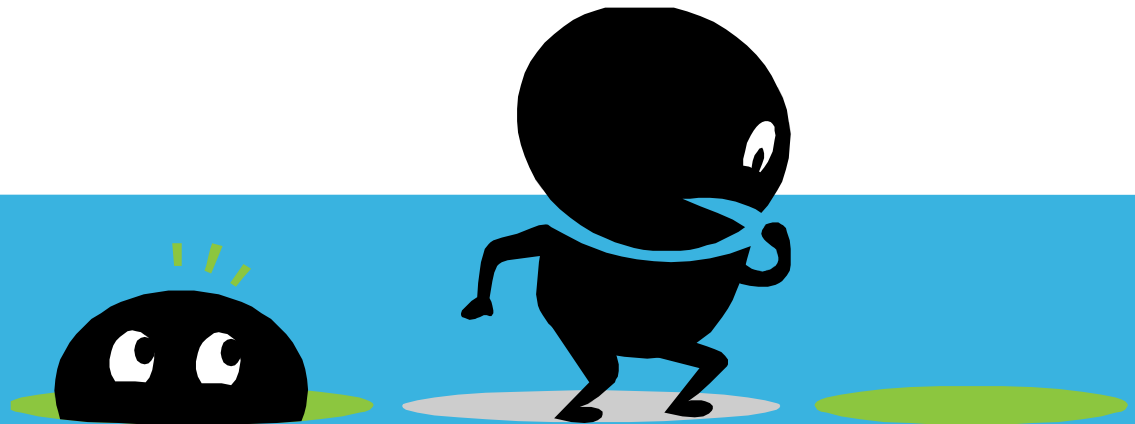
Accepting a share of partnership's profits is considered an emolument where some portion of the share is derived from the partnership's representation of a foreign government even if the individual subject to the Clause did not provide services to the foreign government. OLC found that the partnership could be a "conduit" for the foreign government payment. (similar to 18 U.S.C. 203)

❖ **This rationale would probably apply to limited liability corporations.**

TYPES OF EMPLOYMENT

Professional Corporation

Those subject to the Clause once retired cannot “hide” behind a law firm formed as a professional corporation (PC). The PC does not shield these former officers from the Clause.



WHAT IS A FOREIGN STATE?

- Includes Federal, regional and local level government
- Foreign Corporation in certain circumstances
- Foreign Public Universities
- Consultant to a Foreign Government
- International Organizations

FOREIGN STATE

Foreign Corporation

Does foreign government have active role?

Does foreign government make ultimate decision regarding the payment or emolument?

Is foreign government substantial source of funding for the corporation?

❖ DOD FMR, 7000.14-R

FOREIGN STATE

DOD FMR Vol 7B 5-5 and 5-6 lists this indicia based on Comp Gen opinions (e.g. who does the following) for determining if the foreign corporation is a foreign state:

- Selection and engagement of employee;
- Payment of wages;
- Power to discharge;
- Power to control employee's conduct;
- Relationship of the work to the employer's business, whether the work is a part of the regular business of the employee

FOREIGN STATE

Foreign University

Does the foreign government make the decision to award the emolument?

Does foreign government have active role in the management of the entity such as choosing the faculty or the Board of Governors?



FOREIGN STATE

Consultant to a Foreign Government

Control — Does the foreign government select the consultant?

FOREIGN STATE

International Organizations

Emoluments Clause does not apply to international organizations in which the U.S. is a member, e.g. World Bank, UN

4-Part test to Determine if the Emoluments Clause Does Not Apply:

1. U.S. cannot be a member of a foreign state
2. Organization must carry out U.S. foreign policy
3. U.S. participates in governance of organization
4. Congress approved participation, no concern about divided loyalty

ADVANCE APPROVAL FOR EMOLUMENT FROM FOREIGN GOVERNMENT FOR RETIRED MILITARY MEMBERS

Army:

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

Marines:

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

Navy:

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

Air Force:

AFPC/DPSOR
550 C Street West Joint Base
San Antonio-Randolph, Texas 78150-4739
Telephone: 210-565-2461
or DSN 665-2461



PENALTY FOR VIOLATION

Compensation from a foreign government is considered an erroneous payment creating a debt in the government's favor. Debt collection

by withholding pay (for civilians and active duty) and suspension of retirement pay for military members during the period of the violation.

PENALTY FOR VIOLATION

When the foreign government compensation exceeds retired pay, only the retired pay amount may be collected during the period of the violation

When the foreign government compensation is less than retired pay, only the retired pay amount received in foreign salary can be suspended

WAIVER AND APPEAL RIGHTS

- Debt collection up to \$10,000 is handled by the Defense Finance and Accounting Service.
- If the debt exceeds \$10,000, then the Defense Office of Hearings and Appeals issues the decision which may be appealed.

MISCELLANEOUS

Foreign Agents Registration Act

Retired military officers representing a foreign government must register.

One year cooling off as to foreign trade or treaties — for one year after leaving Government service, former employees or officers may not knowingly represent, aid or advise someone on the basis of covered information concerning any ongoing trade or treaty negotiation in which the employee participated personally and substantially in his or her last year of Government service. 18 U.S.C. § 207(b)

No behind-the-scenes assistance permitted.

MISCELLANEOUS

Retired Senior officers who represent a foreign government 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. 18 U.S.C. § 207(f)

No behind-the-scenes assistance permitted.

CONCLUSION

- When in doubt, seek advice for retired military.
- Any doubt can be solved by obtaining advance approval.

