



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

# 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
- Conclusion

# 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

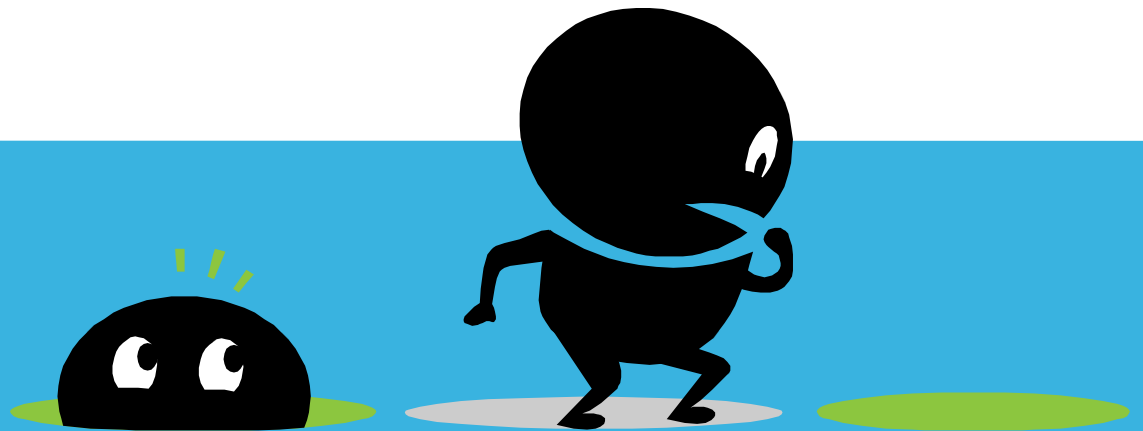
Accepting a share of partnership's profits is considered an emolument where some portion of the share is derived from the partnership's representation of a foreign government even if the individual subject to the Clause did not provide services to the foreign government. OLC found that the partnership could be a "conduit" for the foreign government payment. (similar to 18 U.S.C. 203). Justice made this determination in 1993; however in 2010, Justice had determined that the Clause does not apply to Special Government Employees who are not generating classified information, reviewed and overruled the 1993 opinion because most SGEs were no longer subject to it. But the full-time military retiree would be subject to this restriction.

- ❖ 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 Chapter 5, Section 4.23 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. citizenship is required
  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
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# GIFTS AND APPROVALS

The Emoluments Clause applies to anyone in the Government holding an office of Profit or Trust. The Justice Department interprets that to mean all Federal Personnel on the basis that the exceptions apply to all personnel.

The Foreign Gifts and Decorations Act was passed by Congress to permit accepting gifts of minimal value. Currently, that is \$480 or less. Anything over \$480 must be turned over to the Department and ultimately to the GSA. See DoDI 1005.13.

- a. Flights inside a foreign country
- b. Lodging and meals in a foreign country only

# GIFTS AND APPROVALS (CONT)

If a retired military member wants to work for a foreign country, they must follow the approval process set forth in 37 U.S.C. 908 requiring both the service Secretary and the State Department's approval **and approval is not contrary to the national interests of the United States.**

If the retired military member will be accepting lodging, meals, travel, registration fees, cash for speeches or non-cash awards, then approval only comes from the service Secretary



# ADVANCE APPROVAL FOR EMOLUMENT FROM FOREIGN GOVERNMENT FOR RETIRED MILITARY MEMBERS

## Army:

Commander

U.S. Army Human Resources Command  
Army Service Center Division  
1600 Spearhead Division Avenue  
ATTN: AHRC-PDR (Department 420)  
Fort Knox, KY 40122-5402  
Telephone: 502-613-8979

## Marines:

Head, Retired Services and Pay

Headquarters, U.S. Marine Corps  
Manpower & Reserve Affairs  
(MMSR-6)  
3280 Russell Road  
Quantico, VA 22134

## Navy:

Chief of Naval Personnel, Office of Legal  
Counsel (Pers-OOL),  
Naval Support Facility Arlington

701 South Courthouse Road, Room 4T035  
Arlington, VA 22204  
703-604-0443

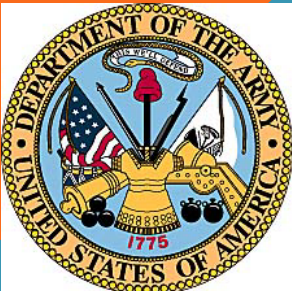
## Air Force:

AFPC Directorate of Airmen and Family Care

Airmen and Family Readiness Division  
550 C Street West


Joint Base San Antonio-Randolph, Texas 78150-4739

Telephone: 210-565-4725  
or DSN 665-2273



# 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

All debt owed to the government must be paid in full on the date specified. The penalty includes retired pay in the amount of the debt.

If there is a prohibition from working for the foreign government, and the retiree works for that country anyway, then the penalty includes retired pay and revocation of any security clearance.



# 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.

# 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.

As for current employees, consult your ethics official

