

# Application of the Emoluments Clause to Department of Defense Civilian Employees and Military Personnel

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## I. 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 or any items of value—such as travel and gifts—from a foreign government, except as authorized by Congress.<sup>1</sup> This “little known” provision, the Emoluments Clause, is still in effect today and applies to federal civilian employees and active duty military personnel.<sup>2</sup> It also applies to retired military officers and enlisted personnel from the active and Reserve components. Accepting an emolument in violation of this clause may result in a retiree’s (or servicemember’s) incursion of a debt to the U.S. Government; hence, ethics counselors advising Department of Defense (DoD) personnel need to understand the Emoluments Clause, especially when advising retiring military personnel.

This article explains how the U.S. Constitution’s Emoluments Clause applies to DoD personnel. First, it introduces the Emoluments Clause in general and the three congressional exceptions to the clause. Then, the article discusses the applicability of the clause by discussing the interpretation of the three operative terms in the clause: (1) “Office of Profit or Trust”; (2) “Emolument”; and (3) “foreign State.” After addressing the clause’s applicability, the article then outlines the process of obtaining advance approval for retiring and retired military personnel to accept foreign emoluments: it then describes the penalty for violating the Emoluments Clause, along with the debt collection procedures that are followed in situations of noncompliance. It describes the waiver process and appeal rights for situations where federal personnel may have unwittingly accepted an emolument without prior approval. Finally, the article explores several related issues that may arise once an employee obtains consent to receive an emolument.

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<sup>1</sup> See The Constitutionality of Cooperative International Law Enforcement Activities Under the Emoluments Clause, 20 Op. O.L.C. 346 (1996), 1996 WL 33101198, at \*2 (providing historical background of inclusion of the Emolument Clause due to the King of France giving Benjamin Franklin, then Ambassador to France, a snuff box); Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC’s Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1, 4–5 (2006).

<sup>2</sup> Edles, *supra* note 1.

## II. The Emoluments Clause

The Emoluments Clause 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.<sup>3</sup>

Without the consent of Congress, an individual who holds an “Office of Profit or Trust” in the government may not accept a compensated position (an “emolument”) from a foreign state unless congressional consent is obtained.<sup>4</sup> When congressional consent is obtained, no violation of the Constitution occurs.

“Emolument” 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>5</sup> Thus, compensation<sup>6</sup> in the form of honoraria, travel expenses, household goods shipments at employer’s expense, housing allowances, and gifts from a foreign state are considered emoluments. As a result, most federal personnel, including retired military personnel, cannot accept outside compensated employment<sup>7</sup> with, or receive gifts in excess of the minimal value from, a foreign government.<sup>8</sup>

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<sup>3</sup> U.S. CONST. art. I § 9, cl. 8.

<sup>4</sup> See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156, 158 (1982) [hereinafter 1982 Office of the Legal Counsel (OLC) Opinion on Emoluments & Foreign Gifts Act]; see *infra* note 5.

<sup>5</sup> Apple v. Cnty. of Crawford, 105 Pa. 300, 303 (1884) (quoting definition of “emolument” from WEBSTER’S UNABRIDGED DICTIONARY (n.d.)).

<sup>6</sup> “Emolument” has been interpreted to include compensation for employment. See, e.g., Compensation of Employees Detailed to Assist Foreign Governments, 40 Op. Atty. Gen. 513 (1947). U.S. DEP’T OF DEF., REG. 7000.14-R, FIN. MGMT. REG., vol. 7B, ch. 5, para. 050304, at 5–6 (2011) [hereinafter DoD FMR] (defining “compensation”).

<sup>7</sup> See 18 U.S.C. § 219 (2011) (criminalizing federal employees to act as an agent or lobbyist for a foreign entity); see also Applicability of 18 U.S.C. § 219 to Retired Foreign Service Officers, 11 Op. O.L.C. 67, 68 n.2 (1987), 1987 WL 256396 [hereinafter 1987 OLC Opinion on § 219 Applicability] (discussing how § 219 criminalizes certain violations of Emoluments Clause but not in entirety).

<sup>8</sup> See *supra* note 4.

The Constitution provides an exception to this absolute ban by authorizing Congress to consent to federal employees accepting certain foreign gifts or honors through legislation. One such congressional consent is set forth in the Foreign Gifts and Decorations Act.<sup>9</sup> This statute permits all federal personnel<sup>10</sup> to accept certain gifts from a foreign government: (1) a gift of “minimal value” or less (as of publication date, minimal value is \$350);<sup>11</sup> (2) travel paid for by a foreign government, provided that none of the travel takes place leaving from or coming back to the United States and is consistent with the employing agency regulations and rules;<sup>12</sup> (3) meals provided by a foreign government; and (4) lodging provided by a foreign government overseas.<sup>13</sup>

In addition to its consent for foreign gifts acceptance by federal employees, Congress also legislated a general consent in regards to retired military members employment with foreign governments: provided the affected military member seeks advance approval from both the employee’s Service and the Secretary of State, retired members of the uniformed services and Reservists may accept compensated civil employment from a foreign government.<sup>14</sup> 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>15</sup> provided advance approval is obtained.<sup>16</sup>

To advise DoD employees on the applicability of this constitutional clause with congressional exceptions, ethics counselors should understand how the operative terms of the Clause are interpreted authoritatively. The next three parts explain each term and its application.

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<sup>9</sup> 5 U.S.C. § 7342 (2012).

<sup>10</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* 1982 OLC Opinion on Emoluments & Foreign Gifts Act, *supra* note 4, 157–58 (accepting Congress’s assumption that the Emoluments Clause applies to “any employee” who takes a gift from a foreign government). *See* discussion *supra* Part II.

<sup>11</sup> 5 U.S.C. § 7342(a)(5) (designating General Service Administration (GSA) to change the minimal value based on the change to the consumer price index in the preceding three year period); Federal Management Regulation; Change in Consumer Price Index Minimal Value, 76 Fed. Reg. 30,550 (May 26, 2011) (codified at 41 C.F.R. § 102-42.10 (2012)) (setting the minimal value at \$350 for three-year period starting on 1 January 2011).

<sup>12</sup> In other words, travel expenses may be paid by a foreign state only for travel which originates and ends outside of the United States. 5 U.S.C. § 7342(c)(1)(B)(ii).

<sup>13</sup> *See id.* § 7342.

<sup>14</sup> 37 U.S.C. § 908 (2011).

<sup>15</sup> 10 U.S.C. § 1060(c) (2012) (“The [Service] Secretary . . . and the Secretary of State shall jointly determine whether a nation is a newly democratic nation for the purposes of this section.”)

<sup>16</sup> *Id.* § 1060. *See infra* Part IV.B.4.

### III. Office of Profit or Trust: 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. The Department of Justice’s Office of Legal Counsel (OLC), which advises the executive departments and agencies on constitutional matters,<sup>17</sup> has opined that the term “Office of Profit or Trust” includes all full-time federal employees, and is not limited to those who were appointed as “Officers” under the Appointment Clause under Article II of the Constitution.<sup>18</sup> It concluded that the Emoluments Clause, designed to curb foreign undue influence, would apply to both appointed officials as well as their subordinate employees because “[t]he problem of divided loyalties can arise at any level.” Further, the OLC deduced its interpretation from the enactment of the Foreign Gifts and Decorations Act, which applies to all federal personnel, as congressional consent under the Emoluments Clause: Congress presumes that the Emoluments Clause applies to all federal personnel.<sup>19</sup> Hence, within the DoD, the Emoluments Clause applies to all civilian personnel, both political appointees as well as civilian employees.

Like their civilian counterparts, the application of this clause within the uniform personnel is not limited to the officers: active duty military personnel, both officer and enlisted members, hold an “Office of Profit or Trust” and are therefore subject to the Emoluments Clause.<sup>20</sup> This prohibition applies even after retirement: retired regular military officers and enlisted personnel 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>21</sup> Finally, Reservists are also subject to

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<sup>17</sup> *Office of Legal Counsel*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/olc/> (last visited May 31, 2013) (“The Office also is responsible for providing legal advice to the Executive Branch on all constitutional questions and reviewing pending legislation for constitutionality.”); Edles, *supra* note 1, at 4.

<sup>18</sup> *See* 1982 OLC Opinion on Emoluments & Foreign Gifts Act, *supra* note 4, at 158.

<sup>19</sup> *Id.*

<sup>20</sup> *See generally* Applicability of the Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 18 (Mar. 1, 1994) [hereinafter 1994 OLC Opinion on Foreign Public Universities].

<sup>21</sup> *See* 1987 OLC Opinion on § 219 Applicability, *supra* note 7, at 68 n.5 (stating that retired military officers are regarded as holding an “Office of Profit and Trust,” citing the following cases and a comptroller general’s opinion: *United States v. Tyler*, 105 U.S. 244 (1881); *Morgenthau v. Barrett*, 108 F.2d 481 (D.C. Cir. 1939); *To Brenningstall*, 53 Comp. Gen. 753 (1974), 1974 WL 8569; 1987 OLC Opinion on § 219 Applicability, *supra* note 7, at 69 n.6 (stating that the fact of being subject to recall to active duty makes retired officers still officers of the United States while in retirement) (citing *Tyler*, 105 U.S. at 246); *Sec’y of the Navy*, 44 Comp. Gen. 227 (1964), 1964 WL 1808 (stating that reserve or retired enlisted members who

the Emoluments Clause, even after completing the requisite number of years to be eligible for retired pay and having been transferred to inactive status.<sup>22</sup>

#### IV. Emolument: Traps for the Unwary

As noted above, an emolument includes compensation or other items of value. Whereas foreign governments' offers of employment, travel, meals, and lodging are straightforward, 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. There are two types of employment that have the potential of violating the Emoluments Clause: partnership distributions for consulting firms or law firms, and payments (such as salary) from domestic professional corporations. Federal personnel, especially retired military personnel, need to be aware of these potential traps.

##### A. Partnership Distributions

According to the OLC, a retired military officer violates 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. 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>23</sup> The OLC has determined that the partnership would "be a conduit" for that foreign government; therefore, a portion of the recipient's income could be attributed to a foreign government.<sup>24</sup> 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>25</sup> The DoD Standards of Conduct Office (SOCO) believes that this same rationale applies to distributions from limited liability corporations,

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are subject to recall to active duty hold "Office of Profit and Trust" under the Emoluments Clause).

<sup>22</sup> 37 U.S.C. § 908 (2011) (requiring 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." *Id.* Note that active duty military members may not obtain advance approval under this statute.

<sup>23</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, 120 (1993) [hereinafter 1993 OLC Opinion on ACUS].

<sup>24</sup> *Id.* at 119.

<sup>25</sup> *Id.*

although this view has not been officially sanctioned by the Department of Justice.<sup>26</sup>

##### B. 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 U.S. 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 the PC represented a foreign government.<sup>27</sup> The Comptroller General concluded that the law firm's incorporation did not shield these retired 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>28</sup> In addition, the Comptroller General pointed out that the attorneys' loyalty was to their client directly, so the structure of the PC did not shield the attorneys from the Emoluments Clause. Accordingly, the retired Marine Corps lawyers were required to obtain consent under 37 U.S.C. § 908 if they wanted to represent the foreign government.

##### V. Foreign State: What Is It?

In interpreting the applicability of Emoluments Clause, there is little doubt that "foreign State" includes foreign sovereign governments and their subdivisions. Both the OLC and the U.S. Comptroller General have opined that the term "foreign State" applies to both national governments and to sub-national governmental units, e.g., regional, provincial/state, and local level governments.<sup>29</sup> Again, the applicability of the clause is obvious when it comes to any emoluments from foreign government authorities; however, it is less clear when the entity offering the emolument is either funded or controlled by a foreign government

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<sup>26</sup> This assertion is based on the author's current professional experience as a senior attorney at DoD SOCO [hereinafter Professional Experience].

<sup>27</sup> Matter of: Retired Marine Corps Officers, B-217096, 1985 WL 52377 (Comp. Gen. Mar. 11, 1985).

<sup>28</sup> *Id.*

<sup>29</sup> See Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development, 2010 WL 4963117, at \*2 n.3 (O.L.C. Oct. 6, 2010) [hereinafter 2010 OLC Opinion on Göteborg Award], available at [http://www.justice.gov/olc/2010/goteborg\\_award.pdf](http://www.justice.gov/olc/2010/goteborg_award.pdf); 1994 OLC Opinion on Foreign Public Universities, *supra* note 20, at 19 (noting that "foreign state" should include any political governing entity within that foreign state); Major James D. Dunn, B-251084, 1993 WL 426335, at \*3 (Comp. Gen. Oct. 12, 1993).

authority but is seemingly unrelated to the foreign sovereign's function, e.g., commercial activities or educational institutions. In 1993, the OLC opined that, though a foreign government may not be exercising "powers peculiar to sovereigns" through its business or educational instrumentalities, "nothing in the text of the Emoluments Clause limits its application solely to foreign governments acting as sovereigns."<sup>30</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.

Instead of making a blanket ruling that all entities owned or controlled by a foreign government are foreign States under the Clause, however, the OLC focused on foreign control<sup>31</sup>—the level of control that foreign government exerts to the affected officer through such entity. The 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>32</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 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>33</sup>

### 1. 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>34</sup> The OLC rationalized that corporations are susceptible to becoming agents of the foreign sovereign because the corporate

leadership are typically selected by the foreign government.<sup>35</sup> In the *Matter of: Lieutenant Colonel Marvin S. Shaffer, USAF, Retired*, however, the Comptroller General has ruled that a retiree does not trigger the Emoluments Clause when a U.S. domestic corporation that is majority-owned by a foreign government's instrumentality employs him, provided "the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government."<sup>36</sup> The ruling relied on the general rule that "a corporation is a legal entity separate and distinct from its shareholders" unless "there is such unity of interests and ownership that the separate personalities of the corporation and its shareholders no longer exist."<sup>37</sup> Because the domestic corporation "appear[ed] to be a separate legal entity from its dominant shareholder, and the power to control and direct his employment is with the domestic corporation," it ruled that the retiree did not violate the Emoluments Clause. Hence, the applicability of the clause to foreign corporations depends on the degree of foreign instrumentalities' control over the corporation.

### 2. Foreign Public University

Payments from a foreign public university influenced or controlled by a foreign government may be a prohibited emolument.<sup>38</sup> There is a presumption that foreign public universities are foreign States under the Clause.<sup>39</sup> The 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. The OLC reasoned that improper influence occurs when the foreign government, and not the university, is making the payment.<sup>40</sup> The OLC explained that "control"

<sup>30</sup> 1993 OLC Opinion on ACUS, *supra* note 23, at 120 (emphasis in original).

<sup>31</sup> One way to show foreign control is through an employer-employee relationship. To determine whether an employer-employee relationship exists between the retired military member and a foreign government in violation of the Clause, DoD relies on DoD FMR which implements the Clause. It provides that the employment analysis will follow the common law rules of agency evaluating the following five factors: "1. The selection and engagement of the employee. 2. The payment of wages. 3. The power to discharge. 4. The power to control the employee's conduct. 5. 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, *supra* note 6, vol. 7B, ch. 5, subpara. 050302C. 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." *Id.* subpara. 050302D.

<sup>32</sup> See 2010 OLC Opinion on Göteborg Award, *supra* note 28, at \*4 (neither the Emoluments Clause nor the Foreign Gifts and Decorations Act barred an employee of NOAA from accepting the 2010 Göteborg Award on Sustainable Development because the award was not from a king, prince, or foreign state).

<sup>33</sup> *Id.*

<sup>34</sup> 1993 OLC Opinion on ACUS, *supra* note 23, at 121.

<sup>35</sup> *Id.* ("We believe that Emoluments Clause should be interpreted to guard against the risk that occupants of Federal office will be paid by corporations that are, or are susceptible of becoming, agents of foreign States, or that are typically administered by boards selected by foreign States. Accordingly, we think that, in general, business corporations owned or controlled by foreign governments will fall within the Clause.")

<sup>36</sup> *In re Shaffer*, 62 Comp. Gen. 432, 432 (1983) (holding that a retired Air Force officer did not violate the Emoluments Clause when he was employed by a U.S. corporation whose 46.9 percent (majority) of its stocks were owned by a French government-owned corporation, sharing common directors).

<sup>37</sup> *Id.* at 434 (citing *FMC Corp. v. Murphree*, 632 F.2d 413 (1980)).

<sup>38</sup> *Id.* at 121–22.

<sup>39</sup> 1994 OLC Opinion on Foreign Public Universities, *supra* note 20, at 15.

<sup>40</sup> See *id.* at 17–19; see also 1993 OLC Opinion on ACUS, *supra* note 23, at 122 ("Any emoluments from a foreign State, whether dispensed through its political or diplomatic arms or through other agencies, are forbidden to Federal office-holders . . . . Further, it serves the policy behind the Emoluments Clause to construe it to apply to foreign States even when they act through instrumentalities which, like universities, do not perform political or diplomatic functions. Those who hold offices under the United

is based on whether the foreign government selects the faculty members.<sup>41</sup> The 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 active role in the management of the entity, such as choosing the faculty or the Board of Governors.<sup>42</sup>

For example, the OLC opined that two NASA scientists could teach at the University of Victoria, a Canadian provincial university, without violating the Emoluments Clause.<sup>43</sup> It concluded that the university acted independently from the British Columbia's provincial government and the university selected its own faculty members independent of the government.<sup>44</sup> Similarly, the OLC concluded that a federal officer serving as a consultant at Harvard University 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 University determined which consultant would participate in the project and selected a federal employee to participate in its study for Indonesia; the Indonesian government never took part in the selection or rejection of the consultant. Because Harvard University 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>45</sup> In sum, foreign public universities are 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.

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States must give the government their unclouded judgment and their uncompromised loyalty. . . . That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government, even when those benefits took the form of remuneration for academic work or research.”) (emphasis in original) (citation omitted).

<sup>41</sup> Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 2009 WL 6365082, at \*8 (O.L.C. Dec. 7, 2009) [hereinafter 2009 OLC Opinion on Nobel Peace Prize], available at <http://www.justice.gov/olc/2009/emoluments-nobel-peace.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> 1994 OLC Opinion on Foreign Public Universities, *supra* note 20, at \*22.

<sup>44</sup> *Id.*

<sup>45</sup> 2009 OLC Opinion on Nobel Peace Prize, *supra* note 41, at \*8 (discussing Memorandum from Deputy Assist. Att'y Gen., OLC, to Gen. Counsel, Commodity Futures Trading Comm'n, re: Expense Reimbursement in Connection with Trip to Indonesia (Aug. 11, 1980)).

### 3. Consultant to a Foreign Government

The OLC also focuses on control for purposes of determining if an employee is subject to the clause when he consults for a foreign government: The consultant violates the Clause when the foreign government has the authority to select 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>46</sup> The Mexican government hired a consulting firm and requested that the particular federal employee be hired by the consulting firm to provide consulting services to the Mexican government. The OLC noted that the principal reason for the Mexican government hiring the consulting firm was the selection of the Nuclear Regulatory Commission's employee; hence, it concluded that, in this instance, the “ultimate control, including selection of personnel, remains with the Mexican government.”<sup>47</sup> Therefore, the OLC concluded that the NRC employee would violate the Emoluments Clause if he served as a consultant in this circumstance.<sup>48</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 University for consulting services without selecting or rejecting any consultant the university 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, the 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>49</sup>

### 4. International Organizations

The 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 a “foreign State.”<sup>50</sup> The 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

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<sup>46</sup> 1982 OLC Opinion on Emoluments & Foreign Gifts Act, *supra* note 4, at 158.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 2009 OLC Opinion on Nobel Peace Prize, *supra* note 41, at \*8.

<sup>50</sup> Emoluments Clause and World Bank, 2001 WL 34610590, at \*1 (O.L.C. May 24, 2001).

participates in the governance of the organization and undertakes a leadership role in its decision-making; and finally, the 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.<sup>51</sup> By contrast, the OLC advised that the Emoluments Clause would prohibit employees from receiving a salary or a gift from an international organization in which the United States 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.<sup>52</sup>

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

Congress has consented to retired and Reserve military personnel accepting foreign state salary, payment, or gifts in excess of the minimal value, provided that advance approval is obtained from the relevant military secretary and the Department of State.<sup>53</sup> There is no corresponding consent for current members to accept foreign governmental emoluments while on active duty except as authorized by the Foreign Gifts and Decorations Act.<sup>54</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

Air Force Instruction 36-2913, *Request for Approval of Foreign Government Employment of Air Force Members*, 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.<sup>55</sup> To request advance approval, contact:

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

### B. Army

Army Regulation (AR) 600-291 governs the need for and process by which a retiring Soldier or a military retiree should obtain advance approval before working for a foreign government.<sup>56</sup> To request advance approval, contact:

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.

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<sup>51</sup> *Id.* at \*3.

<sup>52</sup> Professional Experience, *supra* note 26.

<sup>53</sup> 37 U.S.C. § 908 (2011).

<sup>54</sup> 5 U.S.C. § 7342 (2012) (permitting active duty members to accept gifts of minimal value).

<sup>55</sup> U.S. DEP'T OF AIR FORCE, INSTR. 36-2913, REQUEST FOR APPROVAL OF FOREIGN GOVERNMENT EMPLOYMENT OF AIR FORCE MEMBERS (19 Nov. 2003), available at [http://static.e-publishing.af.mil/production/1/af\\_a1/publication/afi36-2913/afi36-2913.pdf](http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2913/afi36-2913.pdf).

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<sup>56</sup> U.S. DEP'T OF ARMY, REG. 600-291, FOREIGN GOVERNMENT EMPLOYMENT (1 July 1978), available at [http://www.apd.army.mil/pdf/files/r600\\_291.pdf](http://www.apd.army.mil/pdf/files/r600_291.pdf).

## D. Marine Corps

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

## VII. 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.<sup>57</sup> This part will focus on government's remedy when retired servicemembers fail to obtain advance approval for accepting foreign emoluments.

### A. Remedies

Generally, a retired pay received while receiving an emolument from a foreign government without advance approval is deemed an "erroneous payment," a payment that is not in compliance with applicable laws and regulations.<sup>58</sup> The rationale is that the retired member is accepting a foreign government's emolument on behalf of the United

States and receives overpayment of retired pay equal to the amount of the emolument.<sup>59</sup> Such an erroneous payment creates a debt in favor of the government. Specifically, the DoD Financial Management Regulation (FMR) explains how the Emoluments Clause applies to retired military personnel.<sup>60</sup> If "[t]he compensation received from the foreign government without approval is considered received by the retired member for the United States . . . a debt in favor of the [U.S.] government is created which is to be collected by withholding from retired pay."<sup>61</sup>

The Comptroller General has issued opinions regarding debt collection when an employee accepts an emolument from a foreign government. For example, if a retired military member accepts an emolument from a foreign government without consent, 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>62</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 paid during the period of the violation may be collected or withheld.<sup>63</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 Marine Corps found that

<sup>57</sup> A DoD personnel's acceptance of an improper emolument violates the Constitution and may violate the federal criminal code, such as 18 U.S.C. § 219 (2011) ("Officers and employees acting as agents of foreign principals") and other regulations prohibiting current members to be employed by a foreign government. See, e.g., U.S. DEP'T OF DEF., REG. 5500.07, JOINT ETHICS REG. paras. 2-206, 2-303 (30 Aug. 1993) (C7, 17 Nov. 2011) [hereinafter JER] (regulating current DoD employees' outside employments and activities). See generally *In re Dunn*, B-251084, 1993 WL 426335, at \*4 (Comp. Gen. Oct. 12, 1993) (holding that two Air Force personnel's acceptance of foreign emoluments while on terminal leave without prior congressional consent created debt in favor of the U.S. Government as erroneous payment). This article will not cover other administrative actions to enforce the Emoluments Clause.

<sup>58</sup> *In re Dep't of Def. Military Pay & Allowance Comm. Action No. 538*, B-178538, 1977 WL 12064, para. 1 (Comp. Gen. Oct. 13, 1977) ("When a retired military member violates [Emoluments Clause] . . . substantial effect may be given to the prohibition by withholding retired pay in an amount equal to the amount received from the foreign government."); *Dunn*, 1993 WL 426335, at \*4; see U.S. DEP'T OF DEF., INSTR. 1340.23, WAIVER PROCEDURES FOR DEBTS RESULTING FROM ERRONEOUS PAY AND ALLOWANCE subpara. E2.1.5 (14 Feb. 2006) [hereinafter DoDI 1340.23] (defining "erroneous payment").

<sup>59</sup> *Dep't of Def. Military Pay & Allowance Comm. Action No. 538*, 1997 WL 12064, at \*3 ("We have previously stated in the applicable rule in terms of withholding retired pay in amounts equal to those received from the foreign government. The basis for such rule is that the emoluments are accepted on behalf of the United States.").

<sup>60</sup> DoD FMR, *supra* note 6, vol. 7B, ch. 5, sec. 0503.

<sup>61</sup> *Id.* para. 050301B2.

<sup>62</sup> *In re Hartnett*, 65 Comp. Gen. 382 (1986); see also *Dep't of Def. Military Pay & Allowance Comm. Action No. 538*, 1977 WL 12064, at \*4 ("[I]f the gross retired pay of the member subject to the provision exceeds that which is given by the foreign government, the retired member may be paid the difference.").

<sup>63</sup> *In re Friedman*, 61 Comp. Gen. 306 (1982) (affirming its prior decision that Air Force should withhold current retired pay of retired Air Force officer, who started his foreign employment prior to Secretary of State's approval, in the amount equal to his "retired pay received during the period of foreign employment, if the emolument exceed his retired pay entitlement"); see also *In re Dunn*, B-251084, 1993 WL 426335 (Comp. Gen. Oct. 12, 1993) (holding that retired pay of retired Air Force noncommissioned officer should be withheld in the amount equal to the foreign emolument received from the start of his employment until the secretarial approval was final); DoD FMR, *supra* note 6, vol. 7B, ch. 13, para. 130202 ("A retiree's pay is suspended . . . if he or she . . . [i]s employed by a foreign government (to include local government units within a foreign country, as well as the national government itself) without applicable congressional or secretarial approvals.").

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>64</sup>

Similarly, in another case, 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.<sup>65</sup>

#### B. DoD Debt Collection Procedures

Despite the requirement that the service secretary and Secretary of State approve requests for advance consent to retirees' acceptance of foreign emoluments, each Service does not have separate instructions or regulations for debt collection against retirees accepting emoluments without congressional consent. Rather, they follow the debt collection procedures in the DoD FMR, volume 7B, chapter 28.<sup>66</sup> Any debt collection of up to \$10,000 is handled by the Defense Finance and Accounting Service (DFAS).<sup>67</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.<sup>68</sup> Defense Finance and Accounting Service must receive

notice of the debt, which would be the obligation incurred for violating the Clause. To establish the retiree's employer-employee relationship with a foreign instrumentality, 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.<sup>69</sup> After it receives information about the debt, DFAS has five days to notify the debtor about the debt.<sup>70</sup> The debtor then becomes subject to the due process procedures set forth at section 2805 of the DoD FMR.<sup>71</sup> The collection procedures for DFAS are set forth in sections 2806 and 2807.<sup>72</sup>

### VIII. 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>73</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, 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.<sup>74</sup>

<sup>64</sup> *In re Hartnett*, 65 Comp. Gen. 382 (1986).

<sup>65</sup> *Breningstall*, 53 Comp. Gen. 753 (1974).

<sup>66</sup> DoD FMR, *supra* note 6, vol. 7B, ch. 28. This process applies also to current active duty members. *Professional Experience*, *supra* note 26.

<sup>67</sup> U.S. DEP'T OF DEF., DIR. 5118.05, DEFENSE FINANCE AND ACCOUNTING SERVICE (DFAS) para. 6m (20 Apr. 2012) [hereinafter DoDD 5118.05] (referencing service secretary's waiver authority under 10 U.S.C. § 2774(a)(2) (2012)).

<sup>68</sup> *Professional Experience*, *supra* note 26.

<sup>69</sup> *See supra* note 33 and accompanying text.

<sup>70</sup> DoD FMR, *supra* note 6, vol. 7B, para. 280502.

<sup>71</sup> *Id.* sec. 2805.

<sup>72</sup> *Id.* secs. 2806, 2807.

<sup>73</sup> *To Ward*, B-154213, 1964 WL 1865, at \*1 (Comp. Gen. Dec. 28, 1964) (rejecting reconsideration request on the basis of acting in good faith and having no knowledge of the Emoluments Clause prohibition)

<sup>74</sup> *In re Sanders*, B-231498, 1989 WL 240844, at \*1 (Comp. Gen. June 21, 1989).

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 approval, but was not withholding its approval. Concluding that the retiree acted in good faith and attributing the delay to the Air Force, the Comptroller General waived the debt pursuant to 10 U.S.C. § 2774 and the estate did not have to pay.<sup>75</sup>

At DoD, DFAS has authority to grant waivers for all or a portion of an individual's debt, including Emolument Clause debt, of \$10,000 or less as part of the debt collection procedures.<sup>76</sup> As such, 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 or did not know he had a debt. Section 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.<sup>77</sup>

## 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, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowance*.<sup>78</sup> Final administrative appeals, pursuant to 31 U.S.C. § 3702, may be made to DOHA under its Claims Division.<sup>79</sup> Detailed procedures for the settlement of claims are set forth in DoD Instruction 1340.21, *Procedures for Settling Personnel and General Claims and Processing Advance Decision Requests*.<sup>80</sup>

<sup>75</sup> *Id.* at \*\*2–3.

<sup>76</sup> DOD FMR, *supra* note 6, vol. 7B, sec. 2810; DODD 5118.05, *supra* note 67, para. 6m; Professional Experience, *supra* note 26.

<sup>77</sup> DoD FMR, *supra* note 6, vol. 7B, sec. 2810.

<sup>78</sup> See DoDI 1340.23, *supra* note 58, encl E8.

<sup>79</sup> U.S. DEP'T OF DEF., INSTR. 1340.21, PROCEDURE FOR SETTLING PERSONNEL AND GENERAL CLAIMS AND PROCESSING ADVANCE DECISION REQUESTS para. 5.2.1. (12 May 2004).

<sup>80</sup> See *id.*

## IX. Other Issues Related to Accepting Foreign Government Emoluments

There are several restrictions that a military retiree may face if he or she decides to do work for a foreign entity. These restrictions are not born out of the Emoluments Clause but might be helpful to be shared during the post-government employment briefing. Such constraints 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.

### A. Prohibition Against Acting as Agents of Foreign Principals (18 U.S.C. § 219)

Section 219 of Title 18 of the U.S. Code criminalizes<sup>81</sup> acts of U.S. public official serving as an “agent of a foreign principal”<sup>82</sup> as defined by the Foreign Agents Registration Act or as a “lobbyist”<sup>83</sup> for a foreign entity required to

<sup>81</sup> 18 U.S.C. § 219(c) (2011) (“For the purpose of this section ‘public official’ means . . . an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof . . . in any official function, under or by authority of any such department, agency, or branch of Government.”).

<sup>82</sup> 22 U.S.C. § 611(c) (2011) (“[T]he term . . . means—(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—(i) engages within the United States in political activities for or in the interests of such foreign principal; (ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal; (iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or (iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and (2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.”).

<sup>83</sup> 2 U.S.C. § 1602 (2012) (“The term ‘lobbyist’ means any individual who is employed or retained by a client for financial or other compensation for services that include more than one *lobbying contact*, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.”) (emphasis added). “Lobbying contact” is defined as:

[A]ny oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals); (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government; (iii) the administration or execution of a

register under the Lobbying Disclosure Act.<sup>84</sup> In other words, a DoD employee may not represent a foreign government or foreign political party before the U.S. Government as well as other activities conducted on behalf of foreign entities with respect to influencing the U.S. Government. Theoretically, this prohibition applies to retired military officers and enlisted personnel as they are subject to recall to active duty, making them a “public official” of the United States.<sup>85</sup> Retired officers who represent a foreign government or foreign entity are required to register as foreign agents under Foreign Agents Registration Act (FARA).<sup>86</sup>

#### B. One-year Restrictions on Aiding or Advising Trade or Treaty Negotiation (18 U.S.C. § 207(b))

For a period of one year after leaving government service, former employees or officers may not knowingly represent, aid, or advise someone other than the United States concerning any ongoing trade or treaty negotiation in which the employee participated personally and substantially in his last year of government service.<sup>87</sup>

#### C. One-year Restrictions for Senior Officers Relating to Foreign Entities (18 U.S.C. § 207(f))

Retired general or flag officers<sup>88</sup> and senior executive service (SES) employees who represent a foreign

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Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

*Id.*

<sup>84</sup> 18 U.S.C. § 219.

<sup>85</sup> See 1987 OLC Opinion on § 219 Applicability, *supra* note 7, at 68–69, nn.5–6 (citing *United States v. Tyler*, 105 U.S. 244 (1881) (holding that retired military officer is “still a member of the armed forces for the purpose of a statutory pay increase”) and *Morgenthau v. Barrett*, 108 F.2d 481 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 672 (1940) (holding that “retired military officers are officers of the United States and subject to all conflict of interest laws form which they have not been exempted”)); see also Lieutenant David M. Irwin, *Retired Military Personnel—New Restrictions on Foreign Employment*, 21 JAG J. 83, 83, 85–90 (1967) (analyzing the applicability of section 8(b) of Pub. L. No. 89-486, 80 Stat. 244 (1966), later codified at 18 U.S.C. § 219, to retired servicemembers). See generally Major Joseph P. Creekmore, *Acceptance of Foreign Employment by Retired Military Personnel*, 42 MIL. L. REV. 111 (1969).

<sup>86</sup> 28 C.F.R. § 5.2 (2013) (designating Assistant Attorney General for National Security to respond to inquiries regarding the application of the Foreign Agents Registration Act (FARA)). The FARA Registration Unit, Criminal Division, Department of Justice, [fara.public@usdoj.gov](mailto:fara.public@usdoj.gov) can provide further information.

<sup>87</sup> 18 U.S.C. § 207(b).

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>89</sup>

#### D. Compensation from Representational Entity (18 U.S.C. § 203)

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>90</sup> 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.<sup>91</sup>

#### X. 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. For retired military personnel, the Emoluments Clause continues to apply to them because they are subject to recall. The OLC construes 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. 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 has violated the clause, but wants to continue to perform compensated work for a foreign state, he 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.

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<sup>88</sup> *Id.* § 207(f)(1) (subjecting individuals restricted under, *id.* § 207(c)(2)(iv), which applies to active duty officers in the grade of O-7 and above).

<sup>89</sup> See Applicability of 18 U.S.C. 207(f) to Public Relations Activities Undertaken by a Foreign Corporation Controlled by a Foreign Government, 2008 WL 6760171 (O.L.C. Aug. 13, 2008).

<sup>90</sup> Exec. Order No. 13,490, 74 Fed. Reg. 4673, 4673–4678 (Jan. 21, 2009); 5 C.F.R. pt. 2641 (2013).

<sup>91</sup> 18 U.S.C. § 203.