

## **LAW REVIEW 25047**

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### **The Constitution's Emoluments Clause Was Never Intended To Apply to Military Retirees.**

**By Commander Wayne L. Johnson, JAGC, USN (Ret.)<sup>1</sup>**

#### **9.0—Miscellaneous.**

The United States Constitution provides:

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 any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State.<sup>2</sup>

The Heritage Foundation, a conservative think-tank in our nation's capital, has published a comprehensive treatise about the United States Constitution, including a chapter about each clause. The chapter about the Emoluments Clause includes the following instructive paragraph:

The delegates at the Constitutional Convention specifically designed the clause as an antidote to potentially corrupting foreign practices of the kind that the Framers had observed during the period of the [Articles of] Confederation. Louis XVI [King of France] had the custom of presenting expensive gifts to

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<sup>2</sup> United States Constitution, Article I, Section 9, Clause 8. Yes, it is capitalized in just that way, in the style of the late 18<sup>th</sup> Century. This Clause is called the "Emoluments Clause."

departing ministers who had signed treaties with France, including American diplomats. In 1780, the King gave Arthur Lee a portrait of the King set in diamonds above a gold snuff box; and in 1785 he gave Benjamin Franklin a similar miniature portrait, also set in diamonds. Likewise, the King of Spain presented John Jay (during negotiations with Spain) with the gift of a horse. All these gifts were reported to Congress, which in each case accorded permission to the recipients to accept them. Wary, however, of the possibility that such gestures might unduly influence American officials in their dealings with foreign states, the Framers institutionalized the practice of requiring the consent of Congress before one could accept “any present, Emolument, Office or Title, of any kind whatever, from ... a foreign State.”<sup>3</sup>

During the summer of 1787, delegates from 12 States (all of the original States except Rhode Island) met in Philadelphia and drafted the proposed United States Constitution, which was then sent to the States for ratification. All 13 original States ratified, but Rhode Island was the last to ratify. The other 37 States effectively ratified the Constitution when they applied for and were granted admission to the Union as States.

It is most unlikely that anyone participating in the drafting or ratification of the Constitution ever considered the possibility that the Emoluments Clause would apply to Retired Uniformed Services Personnel (RUSP). Military retirement did not exist until the Civil War, three generations later.

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<sup>3</sup> David F. Forte, Senior Editor, and Matthew Spalding, Executive Editor, *The Heritage Guide to the Constitution, Fully Revised Second Edition*, The Heritage Foundation, 2014, page 216. The chapter of the Emoluments Clause was written by Robert Delahunty and David E. Forte.

I propose that Congress enact legislation exempting uniformed services retirees from the requirement to obtain prior approval before accepting jobs with foreign governments. The legislation I am proposing would benefit not only retired military personnel but foreign countries, which would benefit from having the expertise of our retired military personnel. Such people have a variety of skills. In addition to warfare related skills, their skills cover all professions including medicine, law, science, and engineering, to name just a few.

## **LEGISLATIVE PROPOSAL**

It is the sense of Congress that the drafters of the Constitution never intended for the Emoluments Clause of the Constitution (Article I, § 9, clause 8) to apply to officers or enlisted personnel who have retired from the uniformed services and are drawing retired or retainer pay.

Based on this sense, such retirees (RUSP) may work for foreign governments or entities owned, controlled, or operated by them without first obtaining prior approval from both the service they hold retired status with and the State Department. Thus 37 U.S. Code § 908; 5 U.S. Code § 7342; and 10 U.S. Code § 1060 are amended or repealed as needed to reflect this.

These retirees would still remain subject to all post-employment and ethics laws and regulations as well as other laws and regulations they remain subject to, such as prohibitions on revealing classified or confidential information, trade secrets, or engaging in espionage. They must also register as foreign agents if they will be representing foreign

governments or interests to Congress or the Executive Branch of the Federal Government.

## **CURRENT STATE OF FEDERAL LAW REGARDING THE EMOLUMENTS CLAUSE AND RUSP.**

The current state of law regarding the Emoluments Clause as it applies to retired Uniformed Services personnel (RUSP) is overdue for reconsideration. The Emoluments Clause is a Constitutional restriction that prohibits a person “holding any office of profit or trust” in the Federal Government from accepting any gift, emolument, office, or title of any kind from any king, prince, or foreign state without the consent of Congress. U.S. Constitution Article I, § 9, Clause 8.

The Clause was made part of the Constitution when our country was founded. The major concern at that time was to ensure our ambassadors remained loyal to the United States by not allowing them to become beholden to a foreign power; RUSP were not even an afterthought. That is still a valid concern for any actual working federal employees, including Reserve personnel.

Under the current laws, the Clause applies not only to all federal employees but it also affects the foreign government employment (FGE) of retired uniformed service personnel (RUSP) such as military officers and enlisted personnel, National Oceanographic and Atmospheric Administration (NOAA) officers, and U.S. Public Health Service (USPHS) officers. This is because they are still considered federal employees as their retirement pay is considered "retainer pay." Military retirement did not exist until the Civil War.

The Clause does not apply to retired civil service employees, political appointees, or former military who are not drawing retirement or retainer pay. Anyone drawing retainer pay is subject to being recalled back to active duty and those retired from the armed forces remain subject to the UCMJ and court-martial. There are over two million RUSP. Fewer than 0.1% are recalled back to active duty or to be court-martialed.

As currently applied and interpreted, the Emoluments Clause prohibits the receipt from foreign governments of consulting fees, gifts, travel expenses, honoraria, or foreign government employment (FGE) by current Federal civilian employees, active-duty uniformed personnel, and RUSP, Regulars and Reserves, unless Congressional consent is first obtained.

Rather than seeking private legislation from Congress for each individual consent, as was the case until 1977; Congress has passed three laws over the years that delegate to each service secretary (Army, Navy, Air Force, Homeland Security for Coast Guard, Commerce for NOAA, or Health and Human Services for retired USPHS officers) AND the Secretary of State the authority to grant consent. The three laws are 37 U.S. Code § 908; 5 U.S. Code § 7342; and 10 U.S. Code § 1060.

The way these laws work is you lose your retirement or retainer pay for the time frame you were working for a foreign government without prior approval from the Service Secretary for your branch of the service and the Secretary of State. There are no other penalties. There are no criminal charges applicable either.

The three laws' approval processes can take several months. In 2020 and 2021, I assisted a retired Army officer who is a physician to obtain the prior approval needed. He was offered a medical position by the government of New Zealand in the fall of 2020 for when he retired in May 2021. He submitted his request to the Army Human Resources Command in January 2021 and it took until July 2021 (six months) to be approved by the Army and State Department. He had already retired from the Army for two months by the time it was approved. This entire process should not have taken more than 90 days as his military work did not involve anything remotely classified and his overseas job was to practice medicine. I cannot imagine why anyone would object to his going to work for the New Zealand Government.

In July 2025, the Government Accountability Office (GAO) issued a report (GAO-25-107145 [GAO-25-107145https://www.gao.gov/assets/gao-25-107145.pdf](https://www.gao.gov/assets/gao-25-107145.pdf)) regarding the processing of Emoluments Clause requests. Over the past several years more than 99% of the requests for approval of FGE employment have been approved. Congress should enact a law saying that the Emoluments Clause does not apply to retired uniformed service personnel (RUSP).

To show you how absurd the current policies are I provide this example. A retired enlisted Air Force jet engine mechanic working for Qatar Airlines must get prior approval from the Air Force and State Department. If the individual takes the airline job without prior approval, he or she loses military retired pay until approval is granted. This applies even if the mechanic works at Dulles International Airport and never leaves the USA. The reason for this is Qatar Airlines is wholly

or partially owned/controlled by the government of Qatar. Most foreign airlines are largely owned by their governments.

I seriously doubt this was the intent of our country's Founding Fathers. They were not thinking about RUSP as none would exist until the Civil War. Passing a law like the one I have suggested above will garner the support of all of the active duty and retired military across the USA for those in Congress who vote for it. It will even save the government money since approval requests will no longer have to be processed.

For more detailed information on the Emoluments Clause and how it currently applies to RUSP retirees see <https://cdn.ymaws.com/roa.site-ym.com/resource/resmgr/LawReviews/2017/17043-LR.pdf> Reserve Organization of America LAW REVIEW 17043, May 2017, "How to Avoid Losing Your Retirement by Going to Work for an Entity of a Foreign Government."

### **Please join or support ROA.**

This article is one of 2,300-plus "Law Review" articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members),

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).<sup>4</sup>

ROA is more than a century old. On 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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<sup>4</sup> See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight<sup>5</sup> uniformed services, you are eligible for membership in ROA,<sup>6</sup> and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at <https://www.roa.org/page/memberoptions> or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America  
1 Constitution Ave. NE  
Washington, DC 20002<sup>7</sup>

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<sup>5</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>6</sup> Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join. The ROA Constitution was recently amended to make ancestors and lineal descendants of members of the United States armed forces eligible to join ROA.

<sup>7</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).