

EXHIBIT M

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How to Avoid Losing Your Retirement by Going to Work for an Entity of a Foreign Government¹

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Update on Sam Wright

INTRODUCTION

The so-called “Emoluments Clause” reads as follows:

No Title of Nobility shall be conferred by the United States; And no Person holding any Office of Profit or Trust under them [the United States] shall, without the Consent of Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.³

The Framers of the Constitution may have envisioned that Congress would consider individual requests for consent to receive compensation from foreign governments for work done for those governments. Considering individual requests may have been feasible in the opening years of our government, after the ratification of the Constitution, but it is certainly not feasible in the 20th and 21st centuries. Accordingly, as I will explain further below, Congress established a procedure whereby affected persons can make written requests for permission and such requests can be given due consideration before they are granted or denied.

The Emoluments Clause applies to all federal employees, including full-time, part-time, and “special” federal employees. It also applies to regular and reserve members of the uniformed services, without regard to whether they are on active duty, and thus it applies to military retirees for life and to reservists even when they are not on active duty. This article will focus on reserve and retired uniformed services personnel (RRUSP).

In early 2017, the Emoluments Clause was much in the news concerning Lieutenant General (LTG) Michael Flynn, the controversial retired Army officer who briefly served as the National Security Advisor at the start of the Trump Administration. After he retired from the Army, and before his service as National Security Advisor, LTG Flynn allegedly received large sums of

¹ Please see www.roa.org/lawcenter . You will find more than 1600 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

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³ United States Constitution, Article I, Section 9, Clause 8. Yes, it is capitalized just that way, in the style of the late 18th Century.

money from entities that were reportedly controlled by the governments of Russia and Turkey. LTG Flynn apparently did not request prior approval before working for these entities and receiving this compensation. LTG Flynn's situation has not yet been adjudicated. It is possible that he will be required to return compensation that he received from foreign entities or that he will lose his military retired pay for a time.

In our country, with its free enterprise system, it is usually (but not always) easy to distinguish between a governmental entity and a private sector entity. In other countries, with other systems, this distinction can be most difficult and ambiguous. I urge caution in this area, because as a reserve or retired member of one of the U.S. uniformed services you have a lot at stake. You should not blithely assume that a foreign entity is nongovernmental, just because it calls itself a "company" or "corporation."

I invite the reader's attention to the 2013 17-page Department of Defense (DOD) "white paper" called "Application of the Emoluments Clause to DOD Civilian Employees and Military Personnel."⁴ There is a two-page summary that gives examples of how a military retiree might inadvertently run afoul of the Emoluments Clause.⁵

For example, let us consider the case of a retired military judge advocate who is a partner at a law firm. Her compensation from the firm is based on her own work and on a percentage of all the "billable hours" of all partners and other attorneys at the firm. Some of the other attorneys at the firm billed and collected on work for foreign government entities. The retired military judge advocate may have an Emoluments Clause issue even though she did not personally work on any matters for foreign clients.

It is very important that you request permission *in advance* because retroactive approvals are not granted. For example, Captain I.B. Ignorant retired from the Navy as a Medical Corps officer and accepted a position as a professor at a foreign public medical school. He was unaware of the Emoluments Clause and the requirement to seek prior approval for such employment. He worked for the foreign public university for six months before the Emoluments Clause was brought to his attention, and he promptly requested permission after he became aware of the requirement. Captain Ignorant will be required to forfeit his Navy retired pay received during the six-month period when he was employed by a foreign governmental entity without prior approval, although if he had requested prior approval such approval almost certainly would have been granted. Ignorance of the law is no excuse.

A reserve or retired service member should request prior approval through his or her Service, and if necessary the Service will consult with the United States Department of State (DOS). There are three possible responses to the prior approval request. The Service can inform the service member that no prior approval is required in the service member's situation. The

⁴ See http://ogc.osd.mil/defense_ethics/resource_library/emoluments_clause_applications.pdf?j.

⁵ See http://ogc.osd.mil/defense_ethics/resource_library/summary_emoluments_clause_restrictions.pdf

service and DOS can give prior approval in writing. If the service or DOS sees a potential problem, they will deny prior approval.

If you have *any* doubts in this area, you need to contact your Service's designated point of contact (POC), which I provide later in this article. You might first want to visit the closest military legal assistance office. The Air Force operates a service to locate nearby legal assistance offices of all five armed forces. If you are eligible for military legal assistance, you can use the most convenient office, even if it is operated by a service other than your own. See <http://legalassistance.law.af.mil/content/locator.php>. You plug in your zip code, and the service will show you a list of military legal assistance offices, with exact locations and telephone numbers. You must call and make an appointment and then show up in person, because military legal assistance attorneys will not give advice by telephone.

Captain I.B. Smart is the Fleet Surgeon for the Commander, United States Fifth Fleet/Naval Forces Central Command in Bahrain. He is still on active duty but is approaching his retirement date. In anticipation of his retirement, the Government of Bahrain offers Captain Smart a civilian position. While still on active duty, Captain Smart can begin the approval process by submitting his request through the Chain of Command, and the Staff Judge Advocate can assist in this process. If Captain Smart will be providing medical care or teaching medical students in his proposed Government of Bahrain position, prior approval will likely be granted. If the position would require Smart to make or advise on policy, approval will likely be denied.

I strongly recommend that you get something in writing from the uniformed service of which you are member either telling you that you do not need approval or that your activity has been approved.

While on active duty, I frequently conducted retirement briefs regarding post-employment restrictions. One aspect of that briefing was explaining the Emoluments Clause and the requirement for prior approval before working for a foreign government or entity owned, controlled, or operated by a foreign government.

On February 1, 2017, several Members of Congress wrote to Secretary of Defense James Mathis to express their concerns about the Flynn situation. Here is a copy:

https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-02-01.%20EEC%20Smith%20Conyers%20Thompson%20Schiff%20&%20engel%20to%20Mattis.DOD_re_Flynn.pdf

Here is a link to two February 14 and 16, 2017, letters to and from Congress <https://oversight.house.gov/wp-content/uploads/2017/02/2017.02.16.Chaffetz-EEC-to-Leading-Authorities-Inc-re.-Flynn.pdf>.

Here is a link to numerous articles on General Flynn's situation <http://www.bing.com/search?q=michael+flynn+emoluments+clause&src=IE->

[TopResult&FORM=IETR02&conversationid=&adlt=strict](#). There has not yet been a final resolution to the controversy.

There are several agencies that have RRUSP, and some may surprise you. The uniformed services include the Army, Navy, Air Force, and Marine Corps. RRUSP of those services must get approval from the Service Secretary (like the Secretary of the Navy) or his or her designee. There are three others: Homeland Security for the Coast Guard, Commerce for the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA), and Health and Human Services for the commissioned corps of the U.S. Public Health Service (USPHS).

It is my opinion that Congress should consider enacting legislation that declares that RRUSP are not subject to the Emoluments Clause unless they are recalled to active duty. I do not think the drafters of the Constitution intended the Clause to be applied to RRUSP but only to those who are presently working for the government. Such an amendment would simplify things for everyone and avoid problems for RRUSP who inadvertently run afoul of the Clause as it is currently applied.

As interpreted, the Emoluments Clause prohibits receipt of consulting fees, gifts, travel expenses, honoraria, or salary by current Federal employees, active-duty uniformed personnel, and **retired uniformed personnel as defined above**, regular and reserve, **unless Congressional consent is first obtained**.

When and from whom is consent required?

Consent has been explained by Congress in several different statutes. The following list is illustrative but should not be taken as complete.

- A person subject to the Emoluments Clause must obtain advance approval from the relevant Service Secretary (or designee) **AND** the Secretary of State **before** accepting consulting fees, gifts, travel expenses, honoraria or salary from a foreign government. [37 U.S.C. 908](#). The physical location you are working from is irrelevant. One could never leave our country and still be in violation. For example, retired Sergeant Terry Technician works at a U.S. airport for a foreign government-owned airline, servicing the airline's aircraft. Technician needs prior approval, which would almost certainly be granted.
- The Foreign Gifts and Decorations Act, [5 U.S.C. 7342](#), outlines consent to a narrow class of foreign gifts such as certain free meals offered by a foreign government to U.S. government officials and personnel.
- The 1993 law *Military service of retired members with newly democratic nations: consent of Congress* was passed so retired uniformed personnel could help the former Warsaw Pact countries and the new countries that were created when the Soviet Union

dissolved in 1991. [10 U.S.C. 1060](#). This law also requires approval by both the relevant Service Secretary and Secretary of State for uniformed service retirees.

The clear majority of [section 908](#) and [section 1060](#) approval applications are from retired military personnel and thus DOD is the recognized expert in this area. An excellent 17 page “white paper” on this subject that explains this matter in detail was written by Jeffrey Green, Senior Attorney, Standards of Conduct Office (SOCO), Office of General Counsel, U.S. Department of Defense (DoD), Washington, D.C. The paper was reviewed and approved by the Department of Justice (DOJ). [Application of Emoluments Clause to DoD Civilian Employees and Military Personnel](#) (March 2013). Here is a two page summary http://ogc.osd.mil/defense_ethics/resource_library/summary_emoluments_clause_restrictions.pdf.

I strongly recommend that anyone planning to work for any entity with foreign ties, including a foreign corporation or an entity doing business with a foreign government, to read the above referenced “white paper” as it contains numerous examples--cases where people innocently ran afoul of the Emoluments Clause and lost thousands of dollars. I provide some examples at the end of this article. If you have ANY questions you need to contact your Service’s office to get a **written decision** from the Service saying you either do not need prior approval or that you do need one and get the dual approval from your Service and the State Department **before** commencing the activity.

To obtain advance approval from your Service, contact the relevant office below – Current as of April 2017:

NOTE: One should apply early at least 70 business days before the proposed job start because the approval process may take that long – it must go through both one’s own branch of service AND the Department of State. Apply early so you do not miss out on the job opportunity or end up losing some of your retired pay if you start working prior to getting approval.

Air Force:

AFPC/DPFFF
550 C Street West
Joint Base San Antonio-Randolph, Texas 78150-4739

Telephone: COM 210-565-2311/2461 or DSN 665-2461 or 1-800-525-0102 and ask for DPFFF.

Packages can also be faxed to 210-565-2322 or DSN 665-2322, or emailed to afpc.retiree@us.af.mil

Retired Airmen with questions about foreign government employment can send email to afpc.retiree@us.af.mil. To protect personal privacy, applicants are asked not to include Social Security numbers or any other personally identifiable information in emails

See also Air Force Instruction (AFI 36-2913) REQUEST FOR APPROVAL OF FOREIGN GOVERNMENT EMPLOYMENT OF AIR FORCE MEMBERS http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2913/afi36-2913.pdf

AFTERBURNER - News for USAF Retired Personnel, Spring - September 2017 Issue, "Retirees seeking employment with foreign government need approval" by Tammy Cournoyer, Air Force Retiree Services.

Army:

Gerald I. Sims
Deputy Chief, Army Personnel Records Division
The Adjutant General Directorate
U.S. Army Human Resources Command
Fort Knox, KY 40122
Phone: 502 613-8983/80

Lisa Hooks 502-613-8957

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

For more info on how to submit an "Army Foreign Government Employment Request" see: <https://www.hrc.army.mil/content/Foreign%20Government%20Employment>

Navy:

Chief of Navy Personnel
Office of Legal Counsel (N00L)
Naval Support Facility Arlington
701 South Courthouse Road, Room 4T035
Arlington, VA 22204
(703) 604-0443

The Navy will take e-mail packages through LNCS Harrold Henck
Harrold.henck@navy.mil

Marine Corps:

Judge Advocate Division (JCA)
Headquarters, U.S. Marine Corps
3000 Marine Corps Pentagon (Room 4D558)

Washington, DC 20350-3000
Telephone: 703-614-2510

Current USMC POC
MICHAEL D. GRAHAM
Senior Attorney/Ethics Counselor
Deputy, Civil & Administrative Law Branch (JCA)
Judge Advocate Division, Headquarters Marine Corps
3000 Marine Corps Pentagon (Room 4D558)
Washington, DC 20350-3000
Tel: (703) 614-2510; DSN 224-
Fax: (703) 693-3262; DSN 223-
BB: (571) 465-6536
Email: michael.d.graham@usmc.mil

Coast Guard:

USCG Commandant (CG-13)
U.S. Coast Guard (Attn: Retiree Services Program)
2703 Martin Luther King Jr. Ave. SE
Washington, DC 20593-7907

Robert (Bob) C. Hinds, MS, PMP
USCG CWO4 (Ret), Honorary CG MCPO
Retiree Services Program Manager
<http://www.uscg.mil/retiree/>
202-475-5471/5451, cell 410-627-3039
Robert.c.hinds@uscg.mil

See also http://cgretirenw.org/cgretireweb_020.htm

National Oceanic and Atmospheric Administration

U.S. Department of Commerce
Ethics Law and Programs Division
Office of General Counsel
14th Street & Constitution Avenue, NW
Washington, DC 20230
Office: (202) 482-5207

Current POC is
David Brodian, Attorney-Advisor
Ethics Law and Programs Division

Mobile: (202) 322-2792

Public Health Service

Director

Division of Commissioned Corps Personnel & Readiness (DCCPR)

ATTN: Chief (currently CDR Tracy Farrill, USPHS), Officer Support Services

U.S. Public Health Service (USPHS)

1101 Wootton Pkwy, Plaza Level

Rockville, MD, 20852

Phone: 240-276-8233

CDR Tracy Farrill, PharmD, DPh, BCPS

Email: tracy.farrill@hhs.gov

USPHS Instructions for seeking advance approval are found at the following links:

[Civil Employment by a Foreign Government of Retired Regular and Reserve Corps Officers and Inactive Reserve Corps Officers](#)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=0ahUKEwiMi-a1w9jRAhWn7oMKHc7CADkQFggcMAA&url=https%3A%2F%2Fdcpc.psc.gov%2Feccis%2Fdocuments%2FCCPM26_9_1.pdf&usg=AFQjCNHQkelumlQ7qWWsYaCDrV7IA7t5zA

https://dcp.psc.gov/eccis/documents/CCPM26_9_1.pdf

U.S. Department of State Approval Contact:

Director, Bureau of Politico-Military Affairs, ATTN: Peggy E. Pope, U.S. Department of State, Bureau of Political-Military Affairs, Office of International Security Operations, 2201 C Street, NW, Washington, DC 20520; (202) 647-5551, PopePE@state.gov

For further readings see these links

A retired USPHS Officer who worked for a Canadian Department of Agriculture University prior to AUGUST 15, 1977, the date of enactment of SECTION 509 OF THE FOREIGN RELATIONS AUTHORIZATION ACT (codified under [37 U.S. Code § 908](#)) that allows for such activity WITH prior approval of the agency and State Department . Comp Gen Opinion B-175166, APR 7, 1978 <http://www.gao.gov/16/fl0079334.php>. The ACT was passed AFTER the Health Education and Welfare (HEW) doctor's death and it was his widow/estate that was trying to get his back USPHS officer retired pay that was stopped when HEW learned of his Canadian job. HEW no longer exists and USPHS officers are now under HHS. The Comptroller General held the ACT was not retroactive.

A retired USMC major got a job in Saudi Arabia without prior approval after the 1977 law was passed Comp Gen Opinion B-220860, MAR 10, 1986

<http://www.gao.gov/assets/480/470824.pdf>. Here the Marine major refused to seek the required prior approval even after he was told to do so – he disagreed with the Marines’ view that he was working for a foreign government controlled entity and his retirement was stopped. He appealed having his retirement being stopped and the Marine Corps seeking to recoup what retirement payments he had already received. He lost the appeal.

https://en.wikipedia.org/wiki/Title_of_Nobility_Clause

https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-02-01.%20EEC%20Smith%20Conyers%20Thompson%20Schiff%20&%20engel%20to%20Mattis.DOD_re_Flynn_.pdf

[https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/8145be92efe1f71985257bc700455cb3/\\$FILE/By%20Jeffrey%20Green.pdf](https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/8145be92efe1f71985257bc700455cb3/$FILE/By%20Jeffrey%20Green.pdf)

Trust or Profit: How Military Officers are Bound by the Constitution, by Michael C. McNerney, May 12, 2009, American University Washington College of Law. The Emoluments Clause Places Strong Prohibitions including on retired uniformed service members working for or receiving monies from foreign government.

https://works.bepress.com/michael_mcnерney/2/download/