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IN FOCUS

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Foreign Government Employment by Armed Services Retirees

Background

In 2021, the *Washington Post* filed Freedom of Information Act requests with the Department of Defense (DOD) and Department of State (DOS) for the records associated with retired general and flag officers who had obtained approvals required by federal law for employment with a foreign government. Information released by DOD and DOS was later published in a series of news articles [*see Washington Post*, "Foreign Servants" (Oct. 18, 2022)]. This In Focus examines the process through which a retiree of a regular component of an armed service in a military department of the United States (regular retiree) obtains approval to work for a foreign government. The In Focus also contains a review of other federal restrictions that apply to this work.

Regular Retirees and Continued Military Status

Regular retirees typically are servicemembers in the regular component of an armed service who qualified for retirement based on full-time service and are entitled to pay. This pay is based on the *permanent* obligation of a regular retiree to serve if recalled to duty (10 U.S.C. §688). As such, this service obligation places regular retirees in a *continued military status*. Consequently, they also remain subject to the Uniform Code of Military Justice [UCMJ; 10 U.S.C. §802 (Art. 2)].

Error! Not a valid bookmark self-reference. lists the laws and policies applicable to DOD and DOS approval processes for regular retirees.

Table 1. Foreign Government Employment
Regular Retiree Approval Process

Law and Policy	Purpose
U.S. Cons., Art. I, Sec. 9, Cl. 8	Employment Prohibition
37 U.S.C. §908	Employment Exception
22 C.F.R. Part 3a	DOS Process
AR 600-291	Army Process
AFI 36-2913	Air Force Process
NAVSOP-1778	Navy Process
DOD 7000.14-R, V. 7B, Ch. 5, 6	Loss of Retired Pay

Emoluments Clause Prohibitions

Due to concerns over possible undue influence by foreign nations, the emoluments clause of the U.S. Constitution prohibits *federal office holders* from receiving gifts, salary, honoraria, consulting fees, or travel expenses from a foreign government, unless otherwise authorized by Congress. Members of the armed services, including active, reserve, and National Guard forces, are classified as office holders under this clause. Regular retirees are included in this classification based on their continued military status.

Exception to the Emoluments Clause Prohibitions

Although foreign emoluments generally are prohibited, Congress has authorized foreign government employment by regular retirees in certain cases (P.L. 95-105, §509). Under this consent, if the service secretary concerned approves a request to work for a foreign government, the Secretary of State must then make the final decision on this request, but must first establish whether the employment would harm U.S. foreign relations given the continued military status of the regular retiree (22 C.F.R. §3a.5).

Unintended Foreign Government Employment

Even if the links between a foreign state and foreign employer are not apparent, unwittingly accepting foreign government employment is still prohibited. DOD cautions regular retirees to exercise due diligence by ensuring a foreign employer that ostensibly is not affiliated with a foreign state is not in fact owned, operated, or controlled by a foreign government.

Loss of Retired Pay for Actions in a Foreign State

DOD will reduce the retired pay of regular retirees found to have accepted unapproved foreign government employment by the amount received as compensation for this work; however, these retirees can still request approval of this employment. The full entitlement to retired pay will resume if a belated request is approved, but DOD will not restore previously reduced amounts as such approvals cannot be retroactive. Whether foreign government employment is approved or unapproved, regular retirees who relinquish U.S. citizenship to work for a foreign state, or for any other reason, will lose their entitlement to regular retired pay, as DOD deems loss of U.S. nationality incompatible with the continued military status of regular retirees.

Employment Does Not Include Military Service

The congressional consent for regular retirees to accept *civil employment* with a foreign government does not extend to activities that DOD or DOS would consider military service. Currently, the only congressional authorization for regular retirees to perform foreign military service is in the armed forces of a newly democratic nation (10 U.S.C. §1060). DOD policy requires loss of retired pay if a retiree's foreign military service is unapproved, but there is no specific offense in the UCMJ that makes such service subject to punitive measures.

Persons not Prohibited by the Emoluments Clause

Former servicemembers who no longer have a military status are not considered federal office holders based on their former service. Except for reasons other than military service, foreign government employment by these former servicemembers typically would not be prohibited:

- Reserve Component retirees (receiving retired pay);
- Disability retirees of the armed services; and

- Persons who leave the armed services without retired pay eligibility or further military service obligations.

Foreign Employment Restrictions

Even if regular retirees obtain secretarial approval to accept foreign government employment, they may also be subject to federal restrictions limiting this type of employment by persons who are not federal office holders.

Intelligence Community (IC)

Since about 80% of the IC workforce is within the IC elements in DOD, previous service in the IC is common for regular retirees. From 2014 to 2022, former IC employees (including servicemembers) were required to report their employment with a foreign government in the two-year period after occupying a *covered position*, which was defined broadly to include most IC positions (P.L. 113-293, §305). In 2022, a 30-month ban on such employment by former IC employees superseded this requirement (50 U.S.C. §3073a). Violations of this ban can be prosecuted criminally and result in security clearance revocation. The Director of National Intelligence may grant waivers to the ban, but former IC employees who also are regular retirees would still require secretarial approvals for foreign government employment. Among other limitations, the proposed Intelligence Authorization Act for fiscal year 2023 contains further restrictions which would prohibit working for certain foreign countries, and would require yearly reporting of foreign government work that does not require a waiver (H.R. 7776 (EAH), §6301).

Defense Trade Controls

DOS oversees the export licensing of certain defense articles and services (22 U.S.C. §2778). In the International Traffic in Arms Regulations (ITAR; 22 C.F.R. Subchapter M), military advice and training are among the services subject to defense trade controls. Accordingly, regular retirees who intend to export defense services while working for a foreign government would need two separate approvals from the Secretary of State as each activity is controlled by a distinct DOS legal regime. Convictions for willful criminal violations of the military export control statutes can result in imprisonment up to 20 years and a fine for as much as one million dollars (22 U.S.C. §2778(c)).

Foreign Agent

Persons working for a foreign government may be required by the *Foreign Agents Registration Act of 1938* (FARA) to register with the Department of Justice (DOJ) as a foreign agent of a foreign principal (22 U.S.C. §§611-621). Within the United States, a foreign agent is a person who serves the interests of a foreign principal by:

- Engaging in its political activities;
- Acting as its political consultant;
- Overseeing its pecuniary interests; or
- Representing it before a federal agency or official.

Anyone who fails to register as a foreign agent if required under the FARA may be subject to criminal prosecution for false statements or willful omissions (22 U.S.C. §618).

Restrictions on Former Federal Officials

For the first year after leaving their positions, certain former federal officials cannot represent a foreign entity before the U.S. government or attempt to influence U.S. officials on behalf of this entity (18 U.S.C. §207(f)). Willful violation of this provision can result in fines and imprisonment up to five years (18 U.S.C. §219).

Loss of Nationality

Under the Immigration and Nationality Act of 1952 (INA), U.S. nationals aged 18 or older who work for a foreign state may lose this nationality by committing acts of expatriation, which include acquisition of this state's nationality or swearing, affirming, or declaring allegiance to this state (8 U.S.C. §1481(a)(4)). Yet in practice, loss of nationality for foreign government employment is unlikely as various judicial decisions and DOS policy implementing them have narrowed the scope of this INA provision to a point that its limits on foreign government employment would be rare. For example, an administrative presumption established by DOS in 1980 asserts that a U.S. national cannot lose this nationality unless its relinquishment is intended (22 CFR §50.40(a)). Thus, the expatriating acts related to foreign government employment would not result in loss of U.S. nationality without further evidence of intent. However, DOS will not apply this presumption to foreign government employment in a policy level position (7 FAM §1285(a)). Though even without such a presumption, a U.S. national in a policy making role who affirms an intent not to relinquish this nationality may ultimately avoid its loss, unless serving as a foreign minister or head of government.

Congressional Considerations

Employment with a foreign government is not prohibited under federal law generally beyond these specific federal restrictions and the emoluments clause prohibitions on federal office holders. Departmental review of requests for the approval of foreign government employment normally is limited to whether the employment will have adverse political or security effects on the United States. However, some commentators have suggested that certain actions by regular retirees during and after their foreign government employment could conflict with U.S. foreign relations and national security interests.

While the current departmental standard of review for requests to approve foreign government employment is meant to avoid harm to the United States, Congress could consider adopting the IC waiver standard which requires the employment to be necessary for advancing U.S. national security interests (50 U.S.C. §3073a(2)). One option for addressing possible concerns that may arise from such approved employment could be establishing additional conditions with the intent of preventing potential conflicts. For example, existing provisions in the DOD Joint Ethics Regulation (JER) could be extended to cover regular retirees before, during, and after approved employment (DOD 5500.07-R). Alternatively, Congress could require the establishment of specific standards of conduct for foreign government employment by regular retirees, as well as other categories of federal office holders who must receive congressional consent to work for a foreign state (DOD Directive 5500.07).

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