

VOLUME 7B, CHAPTER 5: “CONFLICT-OF-INTEREST, CONVICTIONS AND FOREIGN GOVERNMENT EMPLOYMENT”

SUMMARY OF MAJOR CHANGES

Changes are identified in this table and also denoted by [blue font](#).

Substantive revisions are denoted by an asterisk (*) symbol preceding the section, paragraph, table, or figure that includes the revision.

Unless otherwise noted, chapters referenced are contained in this volume.

Hyperlinks are denoted by [***bold, italic, blue, and underlined font***](#).

The previous version dated [December 2021](#) is archived.

PARAGRAPH	EXPLANATION OF CHANGE/REVISION	PURPOSE
All	Updated hyperlinks, statutes, and formatting in compliance with current administrative instructions.	Revision
Title	Renamed chapter to “Conflict-of-interest, Convictions and Foreign Government Employment.”	Revision
2.1.2	Deleted paragraph 2.1.2 since it was deemed vague and already detailed in Section 207 of Title 18 of the United States Code and all subsequent subparagraphs redesignated.	Deletion
4.0	Revised the entire section to include foreign payments and to provide clarity to stated laws, guidance, and the responsibilities of the Services and DFAS.	Revision
5.1	Deleted paragraph titled Determination of Newly Democratic Nation since it is already included later in the same section and all subsequent subparagraphs redesignated.	Deleted
References	Updated references where applicable.	Revision

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CHAPTER 5

CONFLICT-OF-INTEREST, CONVICTIONS AND FOREIGN GOVERNMENT
EMPLOYMENT

1.0 GENERAL

1.1 Purpose

This chapter addresses employment of personnel who are drawing military retired pay. This includes, but is not limited to foreign government employment, service in military forces of newly democratic nations, conflict-of-interest issues, and convictions of crimes affecting retired pay.

1.2 Authoritative Guidance

The pay policies and requirements established by the DoD in this chapter are derived primarily from and prepared in accordance with the United States Code (U.S.C.), including Titles 5, 10, 18, 37, and 42. Due to the subject matter in this chapter, the list of authoritative sources is extensive. The specific statutes, regulations, and other applicable guidance that govern each individual section are listed in reference section at the end of the chapter.

2.0 CONFLICT-OF-INTEREST

*2.1 Statutes

2.1.1. Conflict-of-interest statutes are intended to safeguard the integrity of public administration and prevent government officials from using their positions and influence for personal gain. [Some conflict-of-interest statutes apply to personnel who have left Government service.](#)

2.1.2. A comprehensive digest of laws, including conflict-of-interest laws applicable to retired military personnel, is set forth in the [DoD Regulation 5500.7-R](#), Joint Ethics Regulation (JER).

2.2 Withholding Military Retired Pay

Military retired pay may be withheld or forfeited when the employment falls under certain categories of activities prohibited under conflict-of-interest laws.

3.0 CONVICTION FOR CRIMES AFFECTING RETIRED PAY

3.1 Entitlement

Entitlement to military retired pay is directly affected when a retired member is convicted of violating the law under [5 U.S.C. §§ 8311 – 8322](#).

3.2 Violation of Title 5 U.S.C. § 8312

The receipt of military retired pay by the retired member, or receipt of the annuity by the retired member's survivor or beneficiary is prohibited, subject to certain exceptions described in 5 U.S.C. § 8311(2) or (3):

3.2.1. If a retired member is convicted of any crime as described in 5 U.S.C. § 8312(b) before, on, or after September 1, 1954, payment is prohibited. The prohibition on payment applies to the period after the date of conviction or after September 1, 1954, whichever is later.

3.2.2. If a retired member is convicted of any crime as described in 5 U.S.C. § 8312(c) before, on, or after September 26, 1961, payment is prohibited. The prohibition on payment applies to the period after the date of conviction or after September 26, 1961, whichever is later.

3.2.3. If an individual, who was convicted of an offense named by 5 U.S.C. § 8312, or an offense constituting a violation of 5 U.S.C. § 8314 or § 8315, is pardoned by the President, in accordance with 5 U.S.C. § 8318, the right of the individual and his survivor or beneficiary to receive annuity or retired pay previously denied under this paragraph is restored as of the date of the pardon or the effective date of restoration prescribed by the President.

3.2.4. After January 6, 1996, the spouse of an individual, whose annuity or retired pay is forfeited under 5 U.S.C. § 8312 or § 8313, may have his or her rights to a spousal survivor benefit plan restored, if the U.S. Attorney General determines that the spouse fully cooperated with Federal authorities in the conduct of a criminal investigation and subsequent prosecution of the individual which resulted in the forfeiture. In no event will the spousal survivor benefit plan benefits be paid to the spouse before the retired member has passed away.

3.3 Convictions Under Other Statutes

3.3.1. An individual, or his or her survivor or beneficiary, may not be paid annuity or retired pay on the basis of the service of the individual, which is creditable toward the annuity or retired pay, subject to the exceptions in 5 U.S.C. § 8311 (2) and (3), if the individual before, on, or after September 1, 1954:

3.3.1.1. Refuses, or knowingly and willfully fails to appear, testify, or produce documents relating to his or her service as an employee, before a Federal grand jury, U. S. court, court-martial, or congressional committee, in a proceeding concerning:

3.3.1.1.1. Past or present relationship with a foreign government; or

3.3.1.1.2. A matter involving or relating to a plan or attempt to interfere with or endanger, the national security or defense of the United States, in accordance with 5 U.S.C. § 8314; or

3.3.1.1.3. The prohibition on payment of annuity or retired pay under subparagraph 3.3.1.1, applies to the period after the date of the failure or refusal of the individual, or after September 1, 1954, whichever is later.

3.3.1.1.4. The prohibition of payment of an annuity or retired pay under subparagraph 3.3.1.2 applies to the period after the statement, representation, or concealment of fact is made or occurs, or after September 1, 1954, whichever is later.

3.3.1.2. Knowingly and willfully makes false, fictitious, or fraudulent statements or representations, concealing material facts concerning his or her past or present membership, affiliation, association with, or support of the Communist Party, chapter, branch, or subdivision, in or outside the United States, or other organization, party, or group advocating:

3.3.1.2.1. The overthrow, by force, violence, or other unconstitutional means, of the Government of the United States;

3.3.1.2.2. The establishment, by force, violence, or other unconstitutional means, of a Communist totalitarian dictatorship in the United States; or

3.3.1.2.3. The right to strike against the United States; as stated in 5 U.S.C. § 8315.

3.3.2. Fines levied for convictions under other statutes may result in debts to the United States. However, they do not affect a convicted member's entitlement to receive retired pay.

3.4 Repayment of Annuity or Retired Pay Properly Paid; Waiver

An individual, to whom payment of retired pay is denied due to a conviction under 5 U.S.C. §§ 8311 – 8322, is not required to repay amounts received before the date of conviction. Any amounts of retired pay paid in error after the conviction that, but for the conviction, were otherwise proper, may be subject to repayment.

*4.0 FOREIGN GOVERNMENT EMPLOYMENT AND/OR FOREIGN PAYMENTS

4.1 Background

4.1.1. Employment of retired members by a foreign government is restricted. The primary restriction is in Article I, section 9, clause 8 of the Constitution of the United States ([known as the Emoluments Clause](#)), which reads: “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 Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” The Comptroller General interpreted this to prohibit employment of all retired personnel, including members of the Fleet Reserve or Fleet Marine Corps Reserve, by a foreign government unless congressional consent is granted. [In addition to the Emoluments Clause, there are other laws that may apply to restrict the foreign government employment of certain former DoD personnel. For example, 50 U.S.C. § 3073a places restrictions on post-service employment of](#)

members of the intelligence community who previously held certain intelligence positions. The information in paragraph 4.0 only addresses the restrictions on retirees under the Emoluments Clause.

4.1.2. The conditions for accepting foreign employment were modified by Public Law [\(PL\) 95-105, section 509\(a\)\(1\) and \(2\)](#), codified in 37 U.S.C. § 908. The Congress granted consent for retired members to accept employment or compensation from foreign governments if the members obtain the approval of the Secretary of the Military Department concerned (or designee) and the Secretary of State before accepting employment or compensation. [PL 116-283, section 641](#), further amended 37 U.S.C. § 908 to permit retired members of the uniformed services to accept payment from foreign governments for speeches, travel, meals, lodging, registration fees, or non-cash awards (hereinafter “foreign payments”), if the payment and/or award is approved in advance by the Secretary concerned.

4.1.2.1. The approval to accept foreign employment/foreign payments is only effective prospectively from the date the approval is granted and may not be made retroactively to authorize foreign employment, compensation, or payments received before approval is granted. For foreign employment (and compensation for that employment) approval by both the Secretary of the Military Department concerned (or designee) and Secretary of State are required. For foreign payments (for speeches, travel, meals, lodging, or registration fees/non-cash awards described 10 U.S.C. § 908) approval by the Secretary of the Military Department concerned is required.

4.1.2.2. Compensation received from a foreign government without the required approval from both the Secretary concerned and Secretary of State is considered received by the retired member for the United States. A debt in favor of the government is created which is to be collected by withholding from military retired pay. The debt is an amount equal to the compensation received from the foreign government. When the compensation earned during the period of unauthorized employment exceeds the amount of military retired pay accrued during the same period, the retired member may not retain the pay earned from that employment.

4.1.2.3. What constitutes compensation received from a foreign government in connection with a member's employment by that government must be given its broadest possible scope and includes (but is not limited to) salary, transportation, household goods shipments at employer's expense, housing allowances, consulting and other fees, proportionate profit-sharing, and gratuities. Value should be set fairly, considering the actual value or estimates of the compensation received.

4.2 Legislative History

4.2.1. The history of the constitutional provisions under consideration indicates that the condition intended to be avoided is the exercise of undue influence by a foreign government upon the United States [Government](#).

4.2.2. In determining the existence of an employer-employee relationship between a retired member and a foreign government, or instrumentality thereof, the common law rules of agency are

applied to determine whether such instrumentality has the right to control and direct an employee in performance of his or her work and the manner in which the work is done.

4.2.3. When determining whether the relationship of employer and employee exists, there are at least five criteria that may be considered:

4.2.3.1. The selection and engagement of the employee;

4.2.3.2. The payments of wages;

4.2.3.3. The power to discharge;

4.2.3.4. The power to control the employee's conduct; and

4.2.3.5. The relationship of the work to the employer's business, whether the work is a part of the regular business of the employer.

4.2.4. The decisive test to determine the existence of an employer-employee relationship 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.

4.3 Types of Employment

4.3.1. Employment by educational or commercial institutions that are owned, operated, or controlled by a foreign government is included within the scope of this restriction.

4.3.2. Employment with a foreign government which requires foreign citizenship results in forfeiture of entitlement to retired pay. See Chapter 6 for additional information.

4.3.3. Employment by international agencies, such as the United Nations, is not prohibited.

4.4 Adjustment to Retired Pay

4.4.1. A member's military retired pay will not be suspended or adjusted unless the Secretary concerned makes a determination that a member has accepted foreign employment/foreign payments without first obtaining the required prior approval, prepares a memorandum advising DFAS of the determination, and requests that DFAS establish a debt (to include the amount of the debt to be established).

4.4.2. The Secretaries of the military departments are responsible to investigate any instances in which a retired member is believed to have accepted foreign employment/foreign payments without first obtaining the required prior approval. If substantiated, the Secretary concerned will:

4.4.2.1. Determine the dollar amount of compensation/foreign payments received from the foreign government without approval.

4.4.2.2. Prepare a memorandum to the Director DFAS advising of the determination that a violation has occurred and requesting that DFAS establish a debt for the amount of the compensation/foreign payments received as determined by the Secretary concerned. The debt determined by the service will normally be an amount equal to the amount of compensation received from the foreign government without approval. The memorandum to DFAS should include a determination regarding the rate of collection of the debt as further explained by subparagraph 4.4.3.

4.4.2.3. Notify the member of the service determination that a violation has occurred, the amount of the debt owed to the United States, and the action the Secretary has taken to initiate the establishment and collection of the debt by DFAS.

4.4.3. Upon receipt of the memorandum from the Secretary concerned, DFAS will establish the debt in the amount specified by the service and provide the member with written notice of all due process rights prior to collection by offset pursuant to Volume 16. The notice will provide the member with the debt amount, the reason for the debt, repayment options, an explanation of the review process available to contest the validity and/or amount of the debt, an explanation and instructions on how the member may seek a waiver of the obligation to repay the debt under 10 U.S.C. § 2774, and any other information required by Volume 16.

4.4.4. Rate of Collection. In the event that the debt must be collected through administrative offset of retired pay, then the rate of collection will be established as follows:

4.4.4.1. If the service has determined that the member was at fault, then up to two-thirds (2/3) of a member's disposable monthly military/retired pay (as specified by the service) may be deducted and applied to the indebtedness. The service will specify the rate, but it may not exceed 2/3.

4.4.4.2. If the service has determined that the member was not at fault, (or if the service makes no finding), then the amount deducted may not reduce a member's disposable monthly retired pay by more than fifteen percent (15%).

4.4.5. Amounts of retired pay withheld from **retired** members of the uniformed services who accept foreign employment **and/or foreign payments** without congressional consent, as required by the United States Constitution, should be treated as though the retired member has no entitlement to them and should not be "held in trust" for them pending possible future congressional consent to their receipt.

5.0 SERVICE IN MILITARY FORCE OF NEWLY DEMOCRATIC NATIONS

5.1 Consent of Congress

5.1.1. Consent. Under 10 U.S.C. § 1060, Congress **has consented** to a retired member of the uniformed services accepting:

5.1.1.1. Employment by, or holding an office or position in, the military forces of a newly democratic nation as jointly determined by Secretary of the Military Department concerned (or designee) and the Secretary of State; and

5.1.1.2. Compensation associated with such employment, office, or position.

5.1.2. Approval Required. The consent provided for a retired member of the uniformed services to accept employment or hold an office or position applies to a retired member only if the Secretary of the Military Department concerned (or designee) and the Secretary of State jointly approve the employment or the holding of such office or position.

5.2 Continued Entitlement to Retired Pay and Benefits

The eligibility of retired members to receive retired or retainer pay and other benefits, arising from the retired member's status as a retired member of the uniformed services, may not be terminated by reason of employment or holding of an office or position consented to in paragraph 5.2. The eligibility of such retired member's dependents to benefits may not be terminated based on the retired member's status consented to in this section.

*REFERENCES

CHAPTER 5 – EMPLOYMENT

2.0 – CONFLICT-OF-INTEREST

- 2.1.1 [10 U.S.C. § 207](#)
[Section 1045 of the National Defense Authorization Act for Fiscal Year 2018](#)
 39 Comptroller General (Comp Gen) 366,
 B-140581, November 9, 1959
 PL 104-106, section 4304(b)(3),
 February 10, 1996
 PL 100-180, December 6, 1987
 PL 103-335, section 5001, October 13, 1994
- 2.1.2 DoD Regulation 5500.07-R, August 1993

3.0 – CONVICTION OF CRIMES AFFECTING RETIRED PAY

- 3.2 5 U.S.C. §§ 8311 - 8322
 18 U.S.C. §§ 2151 - 2156
 42 U.S.C. §§ 2272 - 2276
- 3.3 5 U.S.C. §§ 8311 - 8318
 10 U.S.C. § 1450
- 3.4 5 U.S.C. § 8317

4.0 – FOREIGN GOVERNMENT EMPLOYMENT

- 4.1.2 37 U.S.C. § 908
- 4.1.2.2 61 Comp Gen 306, March 25, 1982
 Comp Gen B-231498, June 21, 1989
 69 Comp Gen 220, B-220860, February 2, 1990
[Comp Gen B-178538, October 13, 1977](#)
- 4.1.2.3 53 Comp Gen 753, B-178538, April 9, 1974
 Comp Gen, B-152844, December 12, 1963
- 4.2.1 *Maloof v. United States*,
 242 F. Supp. 175, 181 (1965)
- 4.2.2 41 Comp Gen 715, B-147777, May 1, 1962
 44 Comp Gen 130, B-154213, September 11, 1964
 53 Comp Gen 750, B-180419, April 8, 1974
 62 Comp Gen 432, B-210346, June 2, 1983
- 4.3.1 Comp Gen, B-152844, December 12, 1963
- 4.4 5 U.S.C. § 7342
 Comp Gen, B-178538, October 13, 1977
- 4.4.2 58 Comp Gen 487, B-193562, December 4, 1979

REFERENCES (Continued)

5.0 – SERVICE IN MILITARY FORCE OF NEWLY DEMOCRATIC NATIONS

10 U.S.C. § 1060