

DOCUMENT RESUME

03808 - [B2914169]

Department of Defense Military Pay and Allowance Committee  
Action No. 538. B-172538. October 13, 1977. 6 pp.

Decision re: Department of Defense; by Paul G. Dembling, Acting  
Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation  
(305).

Contact: Office of the General Counsel: Military Personnel.

Budget Function: General Government: Central Personnel  
Management (805).

Authority: Foreign Gifts and Decorations Act of 1966, as amended  
(P.L. 95-105; 91 Stat. 844; 91 Stat. 862; 5 U.S.C. 7342). 37  
U.S.C. 801(c). U.S. Constitution, art. I, sec. 9, DOD  
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Comp. Gen. 715. 44 Comp. Gen. 130. 53 Comp. Gen. 753. 23  
Comp. Gen. 284. 37 Comp. Gen. 207. 38 Comp. Gen. 523. 49  
Comp. Gen. 819. 41 Comp. Gen. 717.

The Assistant Secretary of Defense requested a decision regarding the amount of retired pay to be withheld from certain retired members of the armed services who are employed by and receive compensation from foreign governments in violation of the Constitution of the United States. Retired pay should be withheld in an amount equal to the amount received from the foreign government. What constitutes amounts received from a foreign government in connection with a member's employment by that government must be given its broadest possible scope and application in determining the amount which is subject to withholding from the retired pay. (Author/SC)

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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-178F98

DATE: OCT 13 1977

MATTER OF: Department of Defense Military Pay and  
Allowance Committee Action No. 538

- DIGEST:
1. Article I, section 9, clause 8 of the Constitution of the United States prohibits the acceptance without the consent of the Congress of any present, emolument, etc., of any kind whatever by a person holding an office of profit or trust under the United States from a foreign state. When a retired military member violates this provision substantial effect may be given to the prohibition by withholding retired pay in an amount equal to the amount received from the foreign government.
  2. Article I, section 9, clause 8 of the Constitution of the United States prohibits the acceptance without the consent of the Congress of any present, emolument, etc., "of any kind whatever" by a person holding an office of profit or trust under the United States from a foreign government. What constitutes amounts received from a foreign government in connection with a member's employment by that government must be given its broadest possible scope and application in determining the amount which is subject to withholding from the retired pay of the member, whose action constitutes a violation of the constitutional provision.
  3. In circumstances when the retired pay of a member who receives emoluments for employment with a foreign government in violation of Article I, section 9, clause 8 of the Constitution exceeds the amount received from the foreign government, only the amount received

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from the foreign government should be withheld from the member's retired pay.

This action is in response to letters dated June 27, 1977, and July 19, 1977, from the Assistant Secretary of Defense in which a decision is requested concerning the amount of retired pay to be withheld from certain retired members of the armed services who are employed by and receive compensation from foreign governments in violation of Article I, section 9, clause 8 of the Constitution of the United States. The questions together with a discussion thereof are contained in Department of Defense Military Pay and Allowance Committee Action No. 538, enclosed with the letters.

The questions presented are as follows:

"1. When withholding the retired pay of a member employed by a foreign government, is the amount of retired pay to be withheld equal to the total wages paid by the foreign government or only the amount of retired pay accrued during the period of such employment?"

"2. If it is determined that the amount of a member's retired pay to be withheld in the circumstances described above is equal to the total wages paid by the foreign government, what amount, paid by the foreign government should be used to determine the amount of retired pay to be withheld?"

A third question was presented in the letter of July 19, 1977:

"If it is determined that the retired pay to be withheld is to be based on total wages paid by the foreign government, does the phrase 'in an amount equal to the foreign salary received' permit the payment of the difference between the monthly foreign salary and monthly gross retired pay if the foreign salary is less than the gross retired pay entitlement?"

Article I, section 9, clause 8 of the Constitution of the United States provides as follows:

"No Title of Nobility shall be granted by the United States: And, no Person holding any Office of Profit

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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."

Clearly the evil intended to be avoided by that constitutional provision was the exercise of undue influence by a foreign government upon officers of the United States. See 24 Op. Atty. Gen. 116 (1868). It has been the consistent and longstanding view of this Office that this clause is applicable to members of the armed services, including certain retired members. 41 Comp. Gen. 715 (1932); 44 id. 130 (1934); 53 id. 753 (1914); B-152844, December 12, 1963.

The basis for such conclusion is founded on the well established holding that a Regular officer who is retired from active service is still in the military service of the United States. United States v. Tyler, 106 U.S. 244 (1881); 10 U.S.C. 2075 (1970). See also Hooper v. United States, 184 Ct. Cl. 181 (1964). Also, this Office has consistently held that certain members of the armed services receive pay by virtue of their continuing status in the military service after their retirement. See 23 Comp. Gen. 204 (1943); 37 id. 207 (1957); 38 id. 523 (1959); and 41 id. 715 (1963).

In considering the language of the constitutional provision, it seems clear that actions contrary to its mandate may not be ignored even though the Constitution itself does not provide for a specific sanction. The position has been advanced that the appropriate sanction in the case of retired members who receive emoluments from foreign governments incident to their employment by such government or its instrumentality would be a suspension of retired pay for the period during which the emoluments are received. In the absence of specific statutory authority (e.g., 37 U.S.C. 201(c) (1970)), we are not aware of any grounds for suspending retired pay for the term of the prohibited activities and then reinstating it following cessation of those activities.

Also, to hold that a member engaging in actions subject to the constitutional provision would only be subject to the loss of retired pay during the period while accepting that which is prohibited by the Constitution would not accomplish the intent of the provision, i.e., to prevent the exercise of undue influence by foreign governments on officers of the United States. For example, if the retired

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member's emoluments from the foreign state are substantially greater than his retired pay, there would be little deterrent from accepting such emoluments, and as a result the constitutional prohibition would be virtually meaningless.

Accordingly, we find no basis to support a holding that the withholding of retired pay during the period of employment is the sanction to be applied when a retired member accepts emoluments arising from employment by a foreign state contrary to the provisions of Article I, section 9, clause 8 of the Constitution.

Another position which could be advanced is that acceptance of that which is prohibited by Constitution creates such incompatibility that the very status of the person holding an office of profit or trust is thereby lost with any entitlements attaching thereto. If such were the case reinstatement of the individual to his former military status would not be authorized simply on the basis of his termination of the relationship with the foreign state since once military status is lost it may be restored only pursuant to law. Further, the automatic loss of status has not been required in our decisions (see, for example, 44 Comp. Gen. 130, *supra*,) and the Congress by enactment of the Foreign Gifts and Decorations Act of 1936, now codified at 5 U. S. C. 7342, as amended by section 506 of Public Law 85-106, August 17, 1977, 91 Stat. 844, 762, has recognized that the loss of office or status as an officer of the United States does not automatically result from the receipt of gifts from a foreign state.

It is our view that the rule expressed in 44 Comp. Gen. 130, *supra*, is more in line with the intent of the constitutional provision and does in fact give substantial effect to the prohibitions contained therein. That is, the constitutional provision states that without congressional consent a person holding an office of profit or trust under the United States may not accept "any present, Emolument, Office or Title\* \* \*." We have previously stated 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. Our conclusion that a retired member does not lose his status by the acceptance of emoluments from a foreign state likewise is predicated on the same basis. Cf. 5 U. S. C. 7342.

In connection with the views expressed in the Committee Action concerning our answer to the question of withholding retired pay,

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It has never been our intent in cases involving Article I, section 9, clause 8 of the Constitution to conclude that the retired pay of a member employed by a foreign government without the consent of Congress should be withheld only for the duration of the employment. The statement that retired pay should be withheld while a retired member is employed indicates only that such action is necessary pending an accounting for the full amount received from the foreign state.

Accordingly, question 1 is answered by stating that the amount of retired pay to be withheld from members coming within the purview of the constitutional provision--employed by foreign governments without the consent of the Congress--is an amount equal to the present or emolument received from the foreign government.

In response to question 2 regarding exactly what amounts paid by the foreign government should be withheld from retired pay, it is our view that the wording of the constitutional provision requires the broadest possible scope and application, since the provision prohibits the acceptance by public officers of presents, emoluments, office or title, "of any kind whatever" from a foreign state. See 49 Comp. Gen. 819 (1970). Therefore, any amounts received from a foreign state without the consent of the Congress should be considered in withholding retired pay, unless such would come within the purview of 5 U. S. C. 7242 and would then be subject to the provisions of that act. Question 2 is answered accordingly.

Since Article I, section 9, clause 8 is implemented in these circumstances by treating any amount received by an officer as being received on behalf of the United States, it follows that, if 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. Question 3 is answered accordingly.

The answers to these questions are based on our understanding that they relate to the acceptance of emoluments from a foreign state as a result of employment which would not be considered incompatible with the individual's status and duty as an officer of the United States. We have held, for example, that a retired officer who abandons his United States citizenship by becoming a citizen of a foreign country may not continue to receive retired pay because his act is inconsistent and "repugnant to a continuation of his status in a Reserve organization, Ready, Standby or Retired." 41 Comp. Gen. 715, 717, supra, 37 id. 207, supra.

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In connection with the granting of the consent of Congress, we invite your attention to section 100 of Public Law 95-166, approved August 17, 1977, 91 Stat. 844, 850. That section authorizes the employment by and receipt of compensation from foreign governments by retired members of the uniformed services if such employment is approved by the Secretary of State and the Secretary of the department concerned.

PAUL W. Dembling

Acting Comptroller General  
of the United States