

No. 24-516C  
(Judge Hertling)

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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MICHAEL T FLYNN,  
Plaintiff,

v.

UNITED STATES,  
Defendant.

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DEFENDANT'S MOTION TO DISMISS

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL T. FLYNN,	)	
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Plaintiff,	)	
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v.	)	No. 24-516C
	)	(Judge Hertling)
UNITED STATES,	)	
	)	
Defendant.	)	

**DEFENDANT’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the complaint filed by plaintiff, retired Army Lieutenant General Michael T. Flynn (Lt. Gen. (Ret.) Flynn), ECF No. 1 (Compl.), for failure to state a claim upon which relief may be granted. In support of this motion, we rely upon the complaint and its attachments, this brief, and the exhibits attached to this brief.

**INTRODUCTION**

This case raises a straightforward claim of illegal exaction. Lt. Gen. (Ret.) Flynn challenges the collection of a debt of \$38,557.06 from his retired pay by the Defense Finance Accounting Service (DFAS). The collection is based on the United States Army’s (Army) determination that Lt. Gen. (Ret.) Flynn accepted compensation for a speaking engagement from a Russian government-controlled media company in 2015 without seeking advance approval, in violation of the Emoluments Clause of the United States Constitution and Federal law, specifically 37 U.S.C. § 908. Lt. Gen. (Ret.) Flynn alleges that the debt collection constitutes an illegal exaction that violates Army and Department of Defense (DOD) regulations.

Lt. Gen. (Ret.) Flynn’s complaint fails to state a claim upon which relief may be granted. An illegal exaction requires that Lt. Gen. (Ret.) Flynn plead the absence of a valid, enforceable debt, which he does not. Gen (Ret.) Flynn does not dispute that he accepted compensation from a Russian government-controlled media company, nor does he allege that he sought or received advanced approval for the emoluments he accepted. As such, he does not state a claim for illegal exaction in his complaint, and we therefore request that his complaint be dismissed with prejudice.

### **STATEMENT OF THE CASE**

#### I. Facts As Set Forth In The Complaint<sup>1</sup>

In April 2022, the Army informed the Defense Finance and Accounting Service (DFAS) that it had determined that Lt. Gen. (Ret.) Flynn violated the Emoluments Clause and 37 U.S.C. § 908 and therefore owed the United States a debt. Compl. ¶9; ECF No. 1-2 at 2; ECF No. 1-3 at 2. The Army explained that the debt arose from Lt. Gen. (Ret.) Flynn receiving a foreign emolument payment from Russia Today, a Russian government-controlled media company, for a

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<sup>1</sup> For purposes of this RCFC 12(b)(6) motion, we accept plaintiff’s factual allegations as true. Should the Court deny the motion, we respectfully reserve the right to challenge the factual allegations in the complaint, including by answering the complaint within the deadline prescribed by RCFC 12(a)(4). *See, e.g., Fed. Contracting, Inc. v. United States*, 128 Fed. Cl. 788, 797 (2016) (“[T]he filing of a motion that only addresses part of a complaint suspends the time to respond to the entire complaint, not just to the claims that are the subject of the motion.” (quoting Charles A. Wright & Arthur R. Miller, 5B Fed. Prac. & Proc. Civ. § 1346 (3d ed.))); *id.* (“[C]ourts have held that under the language of Fed. R. Civ. P. 12(a) (which is identical to RCFC 12(a)), a partial 12(b) motion enlarges the time to file an answer.”); *see also* RCFC 12(a)(4) (explaining that a “motion under this rule . . . alters the periods” for answering a complaint such that “the responsive pleading must be filed” 14 days after the court rules on the motion); *accord DKW Communications, Inc. v United States*, Case No. 21-787C, ECF No. 7 (Mar. 24, 2021) (“this Court clarifies that it interprets Rule 12(a)(4) as suspending Defendant’s obligation to file an answer until 14 days after the Court’s resolution” of the partial motion to dismiss).

speaking engagement in December 2015, without prior approval as required by law. *Id.* The Army requested that DFAS collect \$38,557.06 from Lt. Gen. (Ret.) Flynn's retired pay under 37 U.S.C. § 1007(c), which provides that the Army may recover, through monthly installments, amounts from a servicemember that are "administratively determined to [be] owe[d] the United States." ECF No. 1-3 at 2.

DFAS notified Lt. Gen. (Ret.) Flynn on May 5, 2022, of the debt due and its basis and proposed to Lt. Gen. (Ret.) Flynn that he either pay by lump-sum payment or enter into a voluntary payment plan to avoid collection by offset from his retired pay. Compl. ¶11; ECF No. 1-4 at 2. DFAS also informed Lt. Gen. (Ret.) Flynn that he could request a waiver or review of the debt by June 4, 2022, and included a computation of the debt. *Id.* at 2, 5, 9.

On June 3, 2022, Lt. Gen. (Ret.) Flynn's counsel requested all records of the debt in DFAS's possession. ECF No. 1-5 at 2-3 and 1-7 at 2. Lt. Gen. (Ret.) Flynn renewed his request for records in a letter dated September 12, 2022. ECF No. 1-7 at 2. DFAS responded on September 28, 2022, and on October 20, 2022, forwarded two Army memoranda to Lt. Gen. (Ret.) Flynn's counsel. Compl. ¶17; ECF No. 1-8 at 2, 3, 13, 14. On January 30, 2023, DFAS notified Lt. Gen. (Ret.) Flynn's counsel after its internal review of its conclusion that Lt. Gen. (Ret.) Flynn's debt was valid, the amount was correct, and collection would commence on March 1, 2023. ECF No. 1-13 at 2-3. On April 4, 2024, Lt. Gen. (Ret.) Flynn filed a complaint in this Court. Compl. at 1.

II. Statutory And Regulatory Background<sup>2</sup>

A. The Emoluments Clause

The Foreign Emoluments Clause, U.S. Constitution, Art. I § 9, cl. 8, states:

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 of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

An emolument is “the profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private,” except as authorized by Congress.<sup>3</sup> *See Apple v. Cnty. of Crawford*, 105 Pa. 300, 303 (1884) (quoting definition of “emolument” from WEBSTER’S UNABRIDGED DICTIONARY (n.d.)). Most federal personnel, including retired military personnel, cannot accept outside compensated employment with, or receive gifts in excess of the minimal<sup>4</sup> value from, a foreign government. *See* 18 U.S.C. § 219 (2011) (criminalizing federal

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<sup>2</sup> For the Court’s convenience and reference, we attach the relevant statutes and constitutional provision in an appendix to this motion. The appendix will also include Exhibits 1-7, as referenced in this motion.

<sup>3</sup> “Emolument” has been interpreted to include compensation for employment. *See, e.g.*, Exhibit 1, Compensation of Employees Detailed to Assist Foreign Governments, 40 Op. Atty. Gen. 513 (1947).

<sup>4</sup> The Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 permits Federal personnel to accept certain gifts from a foreign government: (1) a gift of “minimal value” or less (as of this writing, “minimal value” is set by the General Services Administration at \$480; see <https://www.gsa.gov/policy-regulations/policy/personal-property-policy-overview/special-programs/foreign-gifts>); (2) travel paid for by a foreign government, if none of the travel takes place leaving from or coming back to the United States and is consistent with the employing agency regulations and rules; (3) meals provided by a foreign government; and (4) lodging provided by a foreign government overseas. This applies to all members of the uniformed services, including retired military officers. *See* Exhibit 2, *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. OLC 156, 157-58 (1982) (accepting Congress’s assumption that the Emoluments Clause applies to “any employee”

employees acting as an agent or lobbyist for a foreign entity); *see also* Exhibit 3, *Applicability of 18 U.S.C. § 219 to Retired Foreign Service Officers*, 11 Op. O.L.C. 67, 68 n.2 (1987), 1987 WL 256396 (discussing how § 219 criminalizes certain violations of the Emoluments Clause).

B. 37 U.S.C. § 908 (2019)<sup>5</sup>

Congress has codified its consent for retired members of the uniformed services and others to receive compensation for employment from a foreign government at 37 U.S.C. § 908. 37 U.S.C. § 908(a)(1) (2019) (Retired members of the uniformed services may, with the consent of Congress, “accept[] civil employment (and compensation for that employment)”). However, such retired members “may accept employment or compensation described in that subsection only if the Secretary concerned and the Secretary of State approve the employment.” 37 U.S.C. § 908(c). Army Regulation 600-291, Foreign Government Employment (September 7, 2020) sets forth procedures for retired Army officers to request advance approval to compensation for employment from foreign governments through Army Human Resources Command. Exhibit 4, AR 600-291, ¶ 2-1.

If the retired member does not seek or receive advance approval, retired military members who take an emolument are by regulation deemed to accept a gift to the United States from a foreign government and will then owe a debt to the United States. *See* Exhibit 5,

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who takes a gift from a foreign government).

<sup>5</sup> This statute has been amended multiple times. In this motion we rely the version of the statute that was in place in 2015, when Lt. Gen. (Ret.) Flynn accepted the payments in question. Beginning in 2021 and continuing through the current version, § 908 distinguishes between “accepting civil employment (and compensation for that employment)” and accepting “payment for speeches, travel, meals, lodging, or registration fees, or accepting a non-cash award.” *Compare* 37 U.S.C. § 908 (2019) *with* 37 U.S.C. § 908 (2021) and 37 U.S.C. § 908 (2023).

Department of Defense Financial Management Regulation (DOD FMR), Volume 7B, Chapter 5, para. 5.4.1.B.2 (June 2015),<sup>6</sup> which states in relevant part:

The compensation received from the foreign government without approval 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 retired pay.* The debt is an amount equal to the compensation received from the foreign government.

*Id.* (emphasis added). Paragraph 2-7 of Army Regulation 600-291 also provides that withholding of retired pay is the mechanism by which the United States receives the return of the gift the retiree accepted on behalf of the United States. Exhibit 4, AR 600-291, ¶ 2-7.

## ARGUMENT

### I. Legal Standards

Lt. Gen. (Ret.) Flynn’s claims fail to state a claim under RCFC 12(b)(6). To survive a motion to dismiss under RCFC 12(b)(6) for failure to state a claim, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Id.*; see also *Twombly*, 550 U.S. at 555 (requiring a pleading to offer “more than labels and conclusions”). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Rather, a plaintiff must plead sufficient factual matter to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

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<sup>6</sup> This is the version of the DoD FMR that was in effect when Lt. Gen. (Ret.) Flynn accepted the payments in question from Russia Today in December 2015.

II. Lt. Gen. (Ret.) Flynn Fails To State A Claim Upon Which Relief May Be Granted Because He Has Failed To Plead The Absence Of A Valid, Enforceable Debt

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The sole claim in Lt. Gen. (Ret.) Flynn’s complaint is one count of illegal exaction. Compl. at 11.<sup>7</sup> Lt. Gen. (Ret.) Flynn claims the debt collection constitutes an illegal exaction. Compl. ¶¶52-56. But even assuming the truth of his factual pleadings, his complaint does not describe an illegal exaction or state a claim for relief for illegal exaction.

To assert a valid illegal exaction claim, a plaintiff must show that: (1) money was taken by the government and (2) the exaction violated a provision of the Constitution, a statute, or a regulation. *See Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). In addition, a plaintiff must show that the statute or provision causing the exaction provides, either expressly or by necessary implication, that the remedy for its violation is the return of money unlawfully exacted. *Id.* (citing *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).

The absence of a valid, enforceable debt is a prerequisite to pleading an illegal exaction. *See Kipple v. United States*, 102 Fed. Cl. 773, 777 (2012) (“an illegal exaction would arise if there was no legally enforceable debt”); *Bank One, Michigan v. United States*, 62 Fed. Cl. 474, 480 (2003) (“the offset against Bank One is only an illegal exaction if Bank One is not a debtor to the United States in the amount of the offset”); *see also Lawrence v. United States*, 69 Fed. Cl.

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<sup>7</sup> Lt. Gen. (Ret.) Flynn refers generally to due process throughout his pleading and attachments, but he does not raise a Constitutional due process claim. *See generally* Compl. Nor would the Court have jurisdiction over such a claim raised under the Tucker Act, as the Court of Federal Claims does “not have jurisdiction over money claims that are based upon an alleged violation by the government of the due process clause. This is so because the due process clause does not obligate the government to pay money damages.” *Collins v. United States*, 67 F.3d 284, 288 (Fed. Cir. 1995); *see also Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997) (“The Court of Federal Claims . . . does not have jurisdiction to hear . . . due process or seizure claims under the Fifth Amendment to the United States Constitution.”).

550, 557 (2006) (same). Importantly, it is not sufficient for a plaintiff to plead that the Government improperly retained payments, the plaintiff must also plead sufficient facts to demonstrate that the retention was contrary to law. *Gulley v. United States*, 150 Fed. Cl. 405, 421 (2020) (dismissing illegal exaction claim on the merits pursuant to RCFC 12(b)(6)).

Far from establishing the absence of a valid, enforceable debt, as would be required to maintain an action for an illegal exaction, Lt. Gen. (Ret.) Flynn’s complaint establishes a valid, enforceable debt did, in fact, exist. Lt. Gen. (Ret.) Flynn does not allege that he received advance approval before accepting payment and travel expenses from Russia Today, a Russian government-controlled media company,<sup>8</sup> for a speaking engagement in December 2015. ECF No. 1-3 at 2. Lt. Gen. (Ret.) Flynn also admits in his complaint that he accepted the payment from Russia Today. Compl. ¶41 (“[Lt. Gen. (Ret.)] Flynn was paid funds from a source that was not the United States”). Under the law governing foreign emoluments, Gen. (Ret.) Flynn’s acceptance of the payment from Russia Today without prior approval from both the Secretary of the Army and the Secretary of State generated a valid, enforceable debt to the United States that DFAS is authorized to collect under governing regulations.

The Comptroller General has repeatedly opined that retired military members must seek approval under 37 U.S.C. § 908 or risk losing retired pay when they accept foreign payments without approval. *See Matter of: Major Marvin L. Friedman, USAF, Retired*, B- 198557, 1980

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<sup>8</sup> Corporations owned or controlled by foreign governments are considered part of a foreign state for purposes of the Emoluments Clause. *See Exhibit 6, Applicability of the Emoluments Clause to Non-Government Members of the Administrative Conference of the United States* (ACUS), 17 Op. O.L.C. 114, 121 (1993) (“We believe that Emoluments Clause should be interpreted to guard against the risk that occupants of Federal office will be paid by corporations that are, or are susceptible of becoming, agents of foreign States, or that are typically administered by boards selected by foreign States. Accordingly, we think that, in general, business corporations owned or controlled by foreign governments will fall within the Clause.”).

WL 16290, at \*2 (Comp. Gen. 1980) (“if [retired military officers] accept, without the consent of Congress, employment and compensation . . . from a foreign government, they are subject to a withholding of their retired pay in an amount equal to the amounts received from the foreign government.”); *see also Matter of: Dep’t of Def. Military Pay & Allowance Comm. Action No. 538*, 1977 WL 12064, at \*4 (Comp. Gen. 1979). For example, Retired Marine Corps lawyers who were “of counsel” to a law firm that had been formed as a professional corporation were found to be subject to the Emoluments Clause and were required to obtain consent under 37 U.S.C. § 908 if they wanted to represent the foreign government. *Matter of: Retired Marine Corps Officers*, B-217096, 1985 WL 52377 (Comp. Gen. Mar. 11, 1985). And in a situation in which an employment agreement stated the Saudi Arabian government could control and direct a former Marine Corps officer and then pay him for his services, the Marine Corps suspended the retired member’s retirement pay because the American corporation he was contracted through was just a shell or sham. *In re Hartnett*, 65 Comp. Gen. 382 (1986). In that situation, the Comptroller General advised the retired member to seek approval under 37 U.S.C. § 908 if he desired to have his retirement pay resumed. *Id.* Lt. Gen. (Ret.) Flynn does not allege or establish that he sought or received approval to accept any emoluments from Russia Today. Accordingly, Lt. Gen. (Ret.) Flynn fails to state a claim upon which relief may be granted, and his complaint must be dismissed.

Moreover, in this matter, the factual allegations in the complaint establish the Army used proper debt collection procedures to satisfy this debt, further confirming the existence of the debt. The Army provided DFAS with notice via memorandum dated April 2022 that Lt. Gen. (Ret.) Flynn had accepted a foreign emolument in the amount of \$38,557.06. ECF No. 1-2 at 2.

In accordance with DoD and Army regulations, the memorandum requested that DFAS therefore collect<sup>9</sup> \$38,557.06 from Lt. Gen. (Ret.) Flynn's retired pay. *Id.*

DFAS, in turn, complied with the due process provisions of Volume 16, Chapter 2 of the DOD FMR by providing Lt. Gen. (Ret.) Flynn with notice via a letter dated May 5, 2022, that included a statement of facts regarding the explanation of the amount, reason, and authority for the indebtedness, a request for a lump sum payment, a due date by which to avoid any interest, penalties, fees, and collection, and the right to request a review or hearing, when it notified Lt. Gen. (Ret.) Flynn of his debt. *See* ECF No. 1-4 at 2-9; Exhibit 7, DOD FMR Volume 16, Chapter 2, para. 5.3 and 5.5 (April 2021). Lt. Gen. (Ret.) Flynn requested documents and a review from DFAS and he received that review. *See* ECF No. 1-5 and ECF No. 1-6. After its review, DFAS concluded the debt and the amount were valid and recommenced the debt collection, which continues as of this writing. *See* ECF No. 1-13.

Because Lt. Gen. (Ret.) Flynn received the process from DFAS dictated by the regulations, the allegations in his complaint do not state an illegal exaction claim. *Accord Lawrence*, 69 Fed. Cl. at 557 (similarly dismissing an illegal exaction claim under RCFC 12(b)(6) because the plaintiff did not effectively dispute that his debt was due and owing). While Lt. Gen. (Ret.) Flynn asserts the Army and DFAS had no basis to collect this debt from his retired pay, this mere assertion does not amount to a claim of illegal exaction. *See Gulley*, 150 Fed. Cl. at 421.

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<sup>9</sup> We note that in some instances, "recoupment" and "collect" are used interchangeably, however "recoupment" is not at issue here, as Lt. Gen. (Ret.) Flynn agrees. *See* Compl. ¶41 ("this is plainly not an action for recoupment"). DFAS is collecting Lt. Gen. (Ret.) Flynn's debt from his retired pay.

Thus, on the factual record before the Court, even taking Lt. Gen. (Ret.) Flynn's allegations in the complaint as true, he cannot state a claim for illegal exaction. Lt. Gen. (Ret.) Flynn fails to plead the necessary facts that he received the required advance approval from both the Secretary of the Army and the Secretary of State to accept a speaking fee and travel expenses from Russia Today,<sup>10</sup> and he does not plead facts that even suggest, let alone establish, that accepting these payments without advance approval is consistent with his statutory and Constitutional obligations relating to the Emoluments Clause.

### **CONCLUSION**

For all of these reasons, we respectfully request that the Court dismiss Lt. Gen. (Ret.) Flynn's complaint for failure to state a claim for illegal exaction upon which relief may be granted under RCFC 12(b)(6).

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<sup>10</sup> In the correspondence with DFAS that Lt. Gen. (Ret.) Flynn attaches to his complaint, he asserts that he did not have to seek approval to accept the foreign emolument from Russia Today because he was working with the Defense Intelligence Agency to collect intelligence during his 2015 speaking engagement in Russia and because he received a threat briefing prior to his trip from the Federal Bureau of Investigation. ECF No. 1-12 at 11. However, there is no exception in the rules requiring approval before acceptance of foreign emoluments for either of these reasons. Simply coordinating a foreign visit with an agency or agencies of the federal government does not satisfy the requirements of 37 U.S.C. § 908. A retired military officer must always receive advance approval of an emolument payment with the Service Secretary and with the Department of State to avoid indebtedness to the United States. *See* 37 U.S.C. § 908.

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