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IN FOCUS

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U.S. Nationals and Foreign Military Service

Background

International law grants rights to and imposes duties upon a neutral state during an armed conflict between belligerent nations. One of these duties is that neutral states shall not furnish troops to belligerent states, except this duty does not include independent actions by a neutral state's citizens. A state's neutrality is usually unaffected if its citizens willingly serve in a belligerent state's armed forces. International law permits such service, but a state's internal law may prohibit it. U.S. nationals (including both citizens and other persons owing allegiance to the United States (8 U.S.C. §1101)) have performed foreign military service at various times since 1788. This In Focus examines the laws governing U.S. national foreign military service during armed conflicts.

Neutrality Act of 1794

The principle that a state may lose its claim to neutral status if it fails to prevent in its territory a belligerent state's troop recruitment or military expeditions is a contribution to international law originally posited by the United States in 1793 through George Washington and Thomas Jefferson. A year later, this principle became federal law as part of the Neutrality Act of 1794. Observers debate whether the principle of neutrality continues to be viable as customary international law. The Neutrality Act remains enforceable, however, and generally prohibits the fitting out of vessels of war or the launch of an expedition from a U.S. territory to engage in hostilities abroad.

Among other things, the Neutrality Act prohibits persons within the jurisdiction of the United States from enlisting in foreign militaries (18 U.S.C. §959):

> Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined under this title or imprisoned not more than three years, or both.

This law apparently applies to anyone in the United States who joins a foreign military but not those who enlist while in another country. Accepting a commission while in U.S. territory from a nation at war against a state with which the United States is at peace is also prohibited, but this law applies only to U.S. citizens (18 U.S.C. §958). The United States has historically prevented enlistment and appointment activity by other nations within U.S. territory, but it has rarely enforced these prohibitions against individuals. On the other hand, U.S. nationals serving in the military of a nation at war with the United States can be charged with treason (18 U.S.C. §2381). The enlistment in foreign service prohibition does not apply to citizens of countries at war with the United States, except to the extent they enlist others. The prohibition also does not apply to transient nationals of belligerent countries. Agreeing with non-state groups to travel overseas and engage in an insurgency is not covered by the foreign enlistment law.

Expatriation

Congress has the power to designate certain voluntary acts by U.S. nationals as *expatriating*, whereby committing those acts would result in the loss of U.S. nationality. Since 1941, one such expatriating act has been service in the armed forces of a foreign state under specific conditions. The exact conditions necessary for foreign military service to be expatriating have changed over time, notably with the enactment of the Immigration and Nationality Act of 1952 (INA) and the 1986 amendments to the INA. One consistent requirement, however, is that any such foreign military service must be *voluntary*—actions taken under duress will not result in expatriation. The Department of State, in its *Foreign Affairs Manual* (*FAM*), states that conscription into a foreign military, while not dispositive, "will be considered as a factor highly relevant to possible duress."

Historical Expatriation for Foreign Military Service

Under Section 401(c) of the Nationality Act of 1940 (1940 Act), U.S. nationals would lose their nationality by serving in the armed forces of a foreign state (1) unless expressly authorized by U.S. law and (2) only if the U.S. national had or acquired the nationality of the foreign state. Individuals who were not—or did not become—nationals of the foreign state were not subject to expatriation.

In 1952, Congress repealed the 1940 Act and replaced it with the INA. As originally enacted, Section 349 of the INA provided that U.S. nationals would lose their nationality by serving in the armed forces of a foreign state unless such service was "specifically authorized in writing" by the Secretaries of State and Defense. In contrast to the 1940 Act, the INA required case-by-case authorization, which, per the *FAM*, "appears never to have been granted." The INA removed the exception for service performed by individuals who were not also nationals of the foreign state, instead applying the provision equally to all U.S. nationals. The INA created a new exception, however, for individuals who entered foreign military service before the age of 18, providing for expatriation only if such individuals voluntarily remained in the foreign military service after turning 18.

Current Law

Since Congress amended the INA in 1986, a U.S. national who enters or serves in the armed forces of a foreign state

will be expatriated if (1) those armed forces are engaged in hostilities against the United States or (2) the U.S. national serves as a commissioned or non-commissioned officer (8 U.S.C. §1481). The 1986 amendments also removed the requirement that such service be approved by the Secretaries of State and Defense but required that an individual *intend* to relinquish U.S. nationality.

As noted in the *FAM*, the State Department has determined that voluntary service in the armed forces of a state engaged in hostilities against the United States is "strong evidence of intent to relinquish U.S. citizenship." In addition, it has interpreted *armed forces of a foreign state* under the INA to include the forces of unrecognized states but not paramilitary organizations.

U.S. and International Law

Although the United States has never prosecuted anyone under the War Crimes Act (18 U.S.C. §2441), U.S. nationals serving in a foreign military should be aware certain conduct may be considered a war crime. The Act prohibits certain breaches of the Geneva Conventions of 1949, including Common Article 3, and other international agreements. These crimes include violations of obligations during war to protect civilians, prisoners, and other protected persons, as well as civilian property not used for military purposes. War crimes include certain conduct against combatants, such as a perfidious attack or misuse of a flag of truce or emblems of the Geneva Convention (see CRS Legal Sidebar LSB10709, *War Crimes: A Primer*, by Jennifer K. Elsea). U.S. nationals assisting a belligerent state would also be subject to other extraterritorial federal laws. **Table 1** includes salient offenses.

Table 1. Selected Extraterritorial Federal Offenses

18 U.S.C.	Offense
§175	Prohibitions with respect to biological weapons
§229	Prohibited activities (chemical weapons)
§956	Conspiracy to kill ... in a foreign country
§1091	Genocide
§1203	Hostage taking
§1651	Piracy under law of nations
§2332a	Use of weapons of mass destruction
§2340A	Torture

Source: CRS analysis of Title 18, *U.S. Code, Part I–Crimes.*

U.S. Military Personnel

Among other prohibitions, the *emoluments clause* in the U.S. Constitution bars all servicemembers from foreign military service (FMS) without congressional consent (U.S. Const., art. I, §9, cl. 8). They "must give the government their unclouded judgment and their uncompromised loyalty" (18 Op. O.L.C. 13, p. 18, March 1, 1994). The FMS bar applies to active, reserve, and national guard forces, as well as all regular component and certain reserve component retirees from these forces. Also, the Department of Defense (DOD) deems unauthorized FMS inconsistent with regular retired status and will discontinue retired pay (DOD 7000.14-R, Vol. 7B, §060502). Reserve retirees *entitled* to retired pay, but not yet eligible to receive it, are barred from FMS (called *gray area retirees* as retirement occurs before retired pay starts, usually at age 60). Reserve retirees *receiving* retired pay are not barred; their FMS is restricted. Reserve retirees forfeit retired pay, if, while receiving pay, FMS is performed (1) as a commissioned or noncommissioned officer or (2) for a nation engaged in hostilities against the United States (Ibid, §060401; see also 8 U.S.C. §1481(a)(3)). Being a citizen of the FMS country has no effect on an *emoluments clause* prohibition; consent from Congress is still required for this service. Multiple citizenship by itself is not a basis for discontinuing or forfeiting military retired pay. However, regular retirees who renounce U.S. citizenship may not receive pay, but reserve retirees, as well as disability retirees, who renounce U.S. citizenship would continue to receive retired pay (Ibid, Vol. 7B, §§060101, 060401).

Authorized Foreign Military Service (FMS)

Congressional consent is granted for FMS by military retirees in newly democratic nations (10 U.S.C. §1060). The Secretary concerned and the Secretary of State must approve it (22 C.F.R. Part 3a). Former servicemembers with no military status and not entitled to military retired pay can perform FMS on the same basis as a U.S. national who never served in the armed services, with some exceptions (see "U.S. Intelligence Personnel").

Foreign Government Employment (FGE)

Congressional consent is granted for FGE by regular retirees, *gray area retirees*, and reserve component members (P.L. 95-105, §509). FGE is approved through the same process as authorized FMS (22 C.F.R. Part 3a). A reserve member who accepts unapproved FGE would be subject to military discipline. Regular retired pay is reduced by the compensation received if the FGE is not approved (DOD 7000.14-R, Vol. 7B, §050404). Military departments must submit annual reports to Congress of FGE approved for retired general or flag officers (37 U.S.C. §908).

U.S. Intelligence Personnel

Since 2014, former employees, contractors, and servicemembers of the intelligence community (IC) were required to report their FMS and FGE in the two years after occupying a *covered position*, which is any IC role with access to intelligence sources or methods information (50 U.S.C. §3073a). In March 2022, Congress replaced this reporting rule with a 30-month ban on FMS and FGE (P.L. 117-103, Division X, Title III, §308). The Director of National Intelligence can grant waivers to the IC ban but not to an *emoluments clause* prohibition. Individuals violating this ban may be fined or prosecuted, and their security clearance is to be revoked by the head of the IC element concerned.

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