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March 28, 2006

The Honorable Trent Lott  
Chairman  
Committee on Rules and Administration  
United States Senate

Subject: *United States Capitol Police—Waiver of Erroneous Salary Payments*

Dear Mr. Chairman:

This responds to your request of March 6, 2006, for our legal opinion with regard to the waiver of erroneous salary payments to an employee of the United States Capitol Police (USCP). Specifically, you asked us:

- (1) Is the waiver authority a “function, duty, or authority” of a disbursing officer that was transferred to the Capitol Police Chief as a result of Public Law 108-7?
- (2) If not, then does the waiver authority remain with the Secretary of the Senate and the Speaker of the House?
- (3) If the waiver authority remains with the Secretary of the Senate and the Speaker of the House, then what is the procedure by which they exercise this authority?

This issue arose because the USCP appears to have made salary payments to an employee in violation of 5 U.S.C. § 3110.<sup>1</sup>

As we explain below, waiving erroneous payments is not a statutory function, duty, or authority of a disbursing officer. The authority to waive erroneous payments must be explicit in statute. Therefore, the passage of Public Law 108-7 did not transfer the waiver authority for USCP employees, and the Speaker of the House and the Secretary of the Senate have concurrent authority to waive erroneous payments to USCP employees. To avoid implementation problems, we recommend that Congress

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<sup>1</sup> Section 3110, commonly known as the antinepotism statute, prohibits the payment of an individual who is appointed to a position in the federal government by a relative.

consider addressing the issue of the concurrent waiver authority to reduce duplication of effort and the potential for conflicting results.

## BACKGROUND

Since 1974, the Secretary of the Senate and the Speaker of the House have had the authority to waive the collection of erroneous payments of salary or allowances for employees of the Senate and the House, respectively. 2 U.S.C. §§ 130c, 130d. Under this statutory authority, the Secretary and the Speaker may waive erroneous payments if collection would be against equity and good conscience and not in the best interests of the United States. 2 U.S.C. §§ 130c(a), 130d(a).

Prior to 2003, USCP employees were considered employees of either the House of Representatives or the Senate and their salaries were disbursed by either the Chief Administrative Officer of the House or the Secretary of the Senate. *See, e.g.*, Pub. L. No. 107-68, 115 Stat. 560, 575 (Nov. 12, 2001). Therefore, before 2003, USCP employees who received an erroneous payment could apply for waiver to either the Speaker of the House or the Secretary of the Senate, depending on whether the Chief Administrative Officer or the Secretary disbursed their salary.

In 2003, Congress designated the Chief of Police as the single disbursing officer for the USCP. Pub. L. No. 108-7, div. H, title I, § 1018, 117 Stat. 11, 366-69 (Feb. 20, 2003), 2 U.S.C. § 1907. This provision stated:

“Any statutory function, duty, or authority of the Chief Administrative Officer of the House of Representatives or the Secretary of the Senate as disbursing officers for the Capitol Police shall transfer to the Chief of the Capitol Police as the single disbursing officer for the Capitol Police.”

2 U.S.C. § 1907(a)(2). The same statute also granted the Chief the authority to hire USCP employees, who are no longer considered to be House or Senate employees. 2 U.S.C. § 1907(e).

## ANALYSIS

(1) Is the waiver authority a “function, duty, or authority” of a disbursing officer that was transferred to the Capitol Police Chief as a result of Public Law 108-7?

In designating the Chief of Police as the single disbursing officer for the USCP, Congress transferred all statutory functions, duties, and authorities of the Chief Administrative Officer and the Secretary “as disbursing officers for the Capitol Police.” 2 U.S.C. § 1907(a)(2). However, the authority to waive erroneous payments is not a function of a disbursing officer.

Congress designated by statute the Chief Administrative Officer of the House as a disbursing officer, and, as such, he is responsible for drawing funds from the

Treasury, disbursing these funds for the compensation and mileage allowances of Members of the House of Representatives, and accounting for these funds. 2 U.S.C. § 80. The Secretary of the Senate's role as disbursing officer for the Senate is also recognized by statute, and her duties include drawing funds from the Treasury, disbursing these funds for the compensation of Senators and Senate officers, and accounting for these funds. Act of Feb. 10, 1854, ch. 11, § 1, 10 Stat. 267.

There is no governmentwide statutory definition of the term "disbursing officer," probably because "it is self-definitive." *Romney v. United States*, 167 F.2d 521, 526 (D.C. Cir. 1948). Generally, it means "an officer who is authorized to disburse funds of the United States." *Id.* Congress has, in several instances, defined the duties of disbursing officers in statute. For example, in the executive branch, disbursing officials are authorized to deposit funds in and draw funds from the Treasury, disburse funds as provided by a certified voucher, and examine vouchers to determine if they are in proper form, certified, approved, and computed correctly on the facts certified. 31 U.S.C. §§ 3322(a), 3325(a). In the judicial branch, disbursing officers are authorized to disburse funds in accordance with certified payment requests and examine payment requests to ensure that they are in proper form, certified, and approved. 28 U.S.C. § 613(a). Likewise, the disbursing officer for the Library of Congress is authorized to disburse funds in accordance with certified vouchers and examine the vouchers to ensure that they are in proper form, certified, and approved. 2 U.S.C. § 142d.

In his history of financial management in the federal government, Professor Harvey C. Mansfield states that disbursing is "a clerical task whose virtues are accuracy, fidelity, and dispatch." He notes that disbursing officers should not be asked to settle questions of law, as the position of disbursing officer was not intended to involve discretion. Harvey C. Mansfield, The Comptroller General 123 (1939).

Since waiver of a claim amounts to relinquishing a claim of the government for recovery of funds, it requires specific statutory authority. B-253582, Dec. 13, 1993. Absent a clear statutory basis, no official is authorized to waive a claim on behalf of the United States. *Id.* The statutes we identified that establish the duties of disbursing officers do not also contain the authority to waive the collection of erroneous payments. *See* 2 U.S.C. § 80 (Chief Administrative Officer of the House); 10 Stat. 267 (Secretary of the Senate); 31 U.S.C. §§ 3322(a), 3325(a) (executive branch); 28 U.S.C. § 613(a) (judicial branch); and 2 U.S.C. § 142d (Library of Congress). We do note that as part of the Secretary of the Senate's broader authorities as an official of the Senate, the Secretary does have the authority to waive erroneous payments, but the authority is separate and distinct from her authority as a disbursing officer. 2 U.S.C. § 130c.

For most of the government, waiver authority does not rest with its disbursing officers, but with the head of the agency.<sup>2</sup> 5 U.S.C. § 5584(a)(2). In the uniformed services, claims for erroneous payments similarly may be waived by the Secretary of the relevant service or by the Department of Defense.<sup>3</sup> 10 U.S.C. § 2774(a). Thus, waiver authority is not a function of being a disbursing officer.

Therefore, the waiver of erroneous payments is not a function held by a disbursing officer, and we find no indication that Congress intended to transfer the waiver authority to the Chief of Police when it transferred the disbursing functions, duties, and authorities of the Secretary and the Chief Administrative Officer to the Chief of Police.

(2) If not, then does the waiver authority remain with the Secretary of the Senate and the Speaker of the House?

While the Chief of Police does not have the authority to waive the collection of erroneous payments for USCP employees, the question remains as to whether this authority rests with the Speaker and the Secretary. In transferring the disbursing authority to the Chief of Police, Congress included a provision that stated that:

“Any reference in any law or resolution before February 20, 2003, to funds paid or disbursed by the Chief Administrative Officer of the House of Representatives and the Secretary of the Senate relating to the pay and allowances of Capitol Police employees shall be deemed to refer to the Chief of the Capitol Police.”

2 U.S.C. § 1907(a)(1). If we apply section 1907(a)(1) to the House waiver provision, section 130d, we would insert “Chief of the Capitol Police” into that part of the provision relating to funds paid or disbursed by the Chief Administrative Officer of the House. So modified, section 130d would read as follows:

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<sup>2</sup> In the executive branch, heads of agencies are statutorily authorized to waive the collection of erroneous payments under \$1,500. 5 U.S.C. § 5584(a)(2). Authority to waive erroneous payments in excess of \$1,500 rests with the Director of the Office of Management and Budget (OMB), who has delegated this authority to agency heads. 5 U.S.C. 5584(a)(1), (h)(2); OMB Directive, *Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316* (Dec. 17, 1996). Prior to the 1996 transfer, the authority to waive erroneous payments in excess of \$1,500 rested with the Comptroller General. See Pub. L. No. 104-316, § 103(d), 110 Stat. 3826, 3828-30 (Oct. 19, 1996).

<sup>3</sup> OMB similarly delegated its authority to waive erroneous payments in excess of \$1,500 to members of the uniformed services to the Department of Defense. OMB Directive, *Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316* (Dec. 17, 1996).

“A claim of the United States against a person arising out of an erroneous payment of any pay or allowances . . . to an officer or employee whose pay is disbursed by [the Chief Administrative Officer of the House of Representatives] *the Chief of the Capitol Police* . . . may be waived in whole or in part by the Speaker of the House.” (Substitute text italicized.)

Similarly, if we apply section 1907(a)(1) to the Senate provision, section 130c, it would read as follows:

“A claim of the United States against a person arising out of an erroneous payment of any pay or allowances . . . to an officer or employee whose pay is disbursed by [the Secretary of the Senate] *the Chief of the Capitol Police* . . . may be waived in whole or in part by the Secretary of the Senate.” (Substitute text italicized.)

Thus, under the plain meaning of the statute, both the Speaker of the House and the Secretary of the Senate have the authority to waive erroneous payments to USCP employees.<sup>4</sup> Since USCP employees are no longer designated as either House or Senate employees, they now have two venues in which to apply for waiver. While such an interpretation does present certain implementation problems, we must presume that Congress “says in a statute what it means and means in a statute what it says.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-4 (1992).

Congressional control over the compensation of USCP employees is not uncommon. For example, the Speaker of the House and the President Pro Tempore of the Senate have the authority to issue joint regulations for the entire legislative branch, including the USCP, regarding the garnishment of employees’ paychecks and the designation of beneficiaries for moneys due to deceased employees. 5 U.S.C. §§ 5520a(j)(1)(B), 5582(a)(2). Furthermore, separating waiver authority from disbursing authority provides a measure of control at the USCP. Therefore, we see no reason to reject a literal application of 2 U.S.C. § 1907 to sections 130c and 130d. Accordingly, USCP

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<sup>4</sup> This interpretation is supported by another provision that ensured continuity in the rules regarding pay of USCP employees following the transfer of the disbursing authority. Congress included a provision that stated that “any such individuals serving as employees of the Capitol Police as of February 20, 2003, shall be subject to the same rules governing rights, protections, pay, and benefits in effect immediately before such date until such rules are changed under applicable laws or regulations.” 2 U.S.C. § 1907(e)(2). In the broadest sense, the availability to apply for waiver is a rule governing “rights, protections, pay, and benefits,” and Congress sought to preserve such rules. Furthermore, Congress has extended the ability to apply for a waiver of erroneous payments to the vast majority of federal employees, and there is no indication that Congress intended to remove this right from USCP employees.

employees may apply to either the Secretary or the Speaker for waiver of erroneous payments.

(3) If the waiver authority remains with the Secretary of the Senate and the Speaker of the House, then what is the procedure by which they exercise this authority?

One of the vestiges of the divided USCP payroll is the divided waiver authority, which we have concluded continues today. USCP employees may apply to either the Secretary of the Senate or the Speaker of the House for the waiver of erroneous payments. As set out in the waiver statutes, applications for waiver are investigated by the Chief Administrative Officer of the House and by the Financial Clerk of the Senate in their respective chambers. 2 U.S.C. §§ 130c(a), 130d(b). The Comptroller General may also investigate waiver applications in the Senate, if the payment is in excess of \$1,500. 2 U.S.C. § 130c(a). Both the Speaker and the Secretary have the authority to promulgate rules and regulations under the waiver statutes, which would apply if a USCP employee applied for waiver of an erroneous payment. 2 U.S.C. §§ 130c(f), 130d(g).

We recommend that Congress consider addressing the concurrent waiver authority to reduce the duplication of effort and the potential for conflicting results or forum shopping. Congress could do so either legislatively or administratively, through an agreement between the Speaker and the Secretary as to how to handle waiver applications from USCP employees.

## CONCLUSION

The transfer of the disbursing authority for USCP employees from the Secretary of the Senate and the Chief Administrative Officer of the House to the Chief of Police did not also transfer the authority to waive collection of erroneous payments, because Public Law 108-7 only transferred the functions, duties, and authorities of the Secretary and the Chief Administrative Officer *as disbursing officers*, and waiver of erroneous payments is not a function of a disbursing officer. Authority to waive erroneous payments made to USCP employees remains with the Speaker of the House and the Secretary of the Senate. To avoid implementation problems, we recommend that Congress consider addressing this issue to ensure equitable and efficient consideration of USCP employees' applications for waiver.

Sincerely yours,



Anthony H. Gamboa  
General Counsel