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

July 15, 1981

B-203209

The Honorable William F. Hildenbrand
Secretary of the Senate

Dear Mr. Hildenbrand:

Pursuant to section 2 of the act of July 25, 1974, Pub. L. 93-359, 88 Stat. 394 (2 U.S.C. 130c), and the May 4, 1981 request from the Financial Clerk of the Senate, we are submitting this report relative to Mr. Peter D. H. Stockton's application for waiver of the Government's \$2,934.40 claim against him. That amount represents pay disbursed to him by the Senate allegedly in error and in contravention of the dual compensation laws while he was concurrently employed with both the Senate and the House of Representatives between January 29 and May 10, 1975.

Facts and Circumstances

The documents and letters we have reviewed, and our personal interview with Mr. Stockton, have produced the following pertinent information concerning this matter.

Since 1969 Mr. Stockton has held many different positions with the United States Congress on a full-time, part-time, and intermittent basis in both the Senate and the House of Representatives. A transcript of service furnished by the Clerk of the House of Representatives shows this history of his employment there between January 1 and June 1, 1975:

<u>Date</u>	<u>Position</u>	<u>Per annum Salary</u>	<u>Office</u>
01/01/75	Investigator	\$20,000.00	Comm. on Merchant Marine & Fisheries
02/01/75	Staff Assistant	5,000.00	Cong. M. Heckler
03/01/75		15,000.00	
04/01/75	Multiple Roles	28,000.00	Int. & Foreign Commerce
05/01/75		26,000.00	
06/01/75		33,575.00	Also with Cong. Dingell

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[Application for Waiver of Indebtedness]

Additional written information furnished by Representative John D. Dingell establishes that Mr. Stockton did not actually work in the House in January 1975, but he was placed on the House payroll that month to compensate him for certain investigative services performed for the House Committee on Merchant Marine and Fisheries in 1974.

Records maintained by the Financial Clerk of the Senate show that Mr. Stockton was also employed with the Senate on an intermittent basis between January 29 and May 10, 1975, as a consultant to the Joint Economic Committee. Mr. Stockton's Senate salary was \$88.9222 per day "when actually employed" (equivalent to a \$32,012 per annum rate). He was compensated by the Senate for 33 days of employment between January 29 and May 10, 1975, in the total gross amount of \$2,934.40. In 1975 no questions were raised regarding the propriety of his simultaneous employment with both the Senate and the House of Representatives.

Some 5 years later in April 1980, Mr. Stockton was employed as an investigator with the House Committee on Energy and Commerce when an offer of intermittent employment was extended to him by the Senate Judiciary Committee. He tentatively accepted that offer, but the Financial Clerk of the Senate then informed him that such proposed concurrent employment with both the Senate and the House of Representatives was prohibited by the dual compensation laws. Upon hearing this, Mr. Stockton told the Financial Clerk that he had been simultaneously employed with both the Senate and the House of Representatives 5 years earlier in 1975. Following that conversation, the Financial Clerk advised Mr. Stockton in a letter dated April 22, 1980, that he therefore had an obligation to refund the \$2,934.40 in compensation he had received from the Senate in 1975.

Mr. Stockton did not immediately respond in writing to the Financial Clerk's letter, but he did leave his position with the House of Representatives between June 18 and July 11, 1980, in order to accept temporary full-time employment with the Senate Judiciary Committee. The Financial Clerk then withheld payment of his compensation for that temporary employment, \$2,231, as a means of partially liquidating the \$2,934.40 claim against him.

B-203209

Subsequently, by letter dated March 13, 1981, Mr. Stockton applied for a waiver of the claim against him under the provisions of 2 U.S.C. 130c. The Financial Clerk of the Senate made a preliminary evaluation of the waiver application and then reported the matter to our Office for further investigation and consideration by letter dated May 4, 1981.

In his letter of May 4, the Financial Clerk noted that when Mr. Stockton was appointed to a position with the Senate on January 29, 1975, he executed an Oath of Office and a Personnel Affidavit, copies enclosed, in which he failed to disclose that he was then also employed with the House of Representatives. The Financial Clerk suggested, in effect, that this might preclude favorable consideration of his application under the waiver statute. In addition, the Financial Clerk requested our opinion generally concerning the propriety of the actions that had already been taken in Mr. Stockton's case, and the procedures to be followed in the future to recover the balance of the amount claimed against him, \$703.40.

We interviewed Mr. Stockton on May 29, 1981, to hear what he had to say about the matter. In substance, he explained that he has always kept his working arrangements in the Congress as flexible as possible so that his services could be available and put to best use when desired by different individual members and committees. For the most part he has worked in the House of Representatives, and ordinarily he has been employed there simultaneously with an individual member and with a committee, serving both on a part-time basis. From time to time he has also held temporary appointments with Senate committees.

Mr. Stockton further explained that even though he has been employed in that manner for a number of years, he is not an expert in the personnel field, and he was unfamiliar with the exact provisions of the statutes and rules governing personnel administration within the Congress. He noted that his simultaneous part-time employment with different members and committees in the House of Representatives was perfectly acceptable, and he had been under the impression that the same concept applied throughout the Congress as a whole. He had thought that the only distinction between the House and Senate was that the House rules made no provision for intermittent, "when-actually-employed" positions. He knew it was

improper to hold two full-time positions in the Congress at the same time, but he thought that an individual could properly work part-time in the House and concurrently also hold a part-time or an intermittent position in the Senate. No one told him otherwise until 1980.

Mr. Stockton said that in 1975 when he was employed concurrently on a part-time basis in the House of Representatives and on an intermittent basis in the Senate, it was with the full knowledge and approval of the concerned members of Congress and committee staff personnel. He furnished a list of currently available witnesses to verify this.*

With respect to the enclosed Oath of Office and Personnel Affidavit dated January 29, 1975, Mr. Stockton said that he did not remember anymore the exact circumstances in which he filled out those particular forms; however, he said that he has always been honest when preparing personnel forms, and he has never deliberately or intentionally misrepresented any information on a form. Upon reflection, he said it appeared that he had filled out the two forms in question in a hurried fashion, but he pointed out that he had not actually misrepresented any facts. In that connection, he noted that the forms contained an inquiry concerning his previous employment with the Government but did not call for any information about his current employment. He also noted that in January 1975 he was not working for the House but had merely been placed on the payroll so that he could be compensated for past services. He repeated that in any event, it had been widely known he was on the House payroll and it upset him that anyone would now suggest he had been trying to cover up or lie about that fact.

*Representative John D. Dingell; Representative Margaret M. Heckler; Mr. John R. Stark, then staff director of the Joint Economic Committee; and Mr. Frank M. Potter, Jr., then of the House Commerce Committee. On June 10, 1981, we talked with Mr. Stark, who is now retired; he confirmed that he and everyone else on the Joint Economic Committee knew Mr. Stockton was on the House payroll when they asked him to do some investigative work for them on an intermittent basis in 1975, and that no one thought there was anything wrong with the arrangement.

In addition, Mr. Stockton said he and the concerned staff employees of the Senate Judiciary Committee had been surprised 5 years later in 1980 to hear that it was improper for an individual to concurrently work part-time for the House of Representatives and on an intermittent basis for the Senate. It was only he who then raised the question of the propriety of his concurrent employment with the Senate and the House in 1975, and no claim would have been brought against him if he himself had not called attention to the matter. He suggested this alone, if nothing else, should demonstrate that he had acted honorably and in good faith in the matter.

Mr. Stockton further indicated that he has begun to wonder why the dual compensation laws should be applied in his case, since he was only working part-time in the House between February and June 1975, and his appointment with the Joint Economic Committee provided him with neither an increase in his income over past periods nor with unearned compensation. If those laws do apply, he wonders why the claim against him should not be for a refund of the part-time earnings he received from the House of Representatives instead of the pay he earned while working for the Joint Economic Committee. He also wonders how the various statutes of limitation should be applied in his case.

Furthermore, Mr. Stockton said, when the Senate's claim was initially brought against him in April 1980, he was unaware that he had a statutory right to apply for a waiver of that claim. When he did learn of the existence of the waiver statute in March 1981, he felt he deserved favorable consideration under its provisions and applied for relief. He said if he had actually violated the dual compensation laws in 1975, then he felt at most it was only a "technical" violation, since neither he nor anyone he worked with at the time was aware that there might be anything improper about his employment arrangements with the Senate and the House. Also, in 1975 when he worked part-time in the House and intermittently in the Senate, he was paid by each only for services actually rendered, and he did not believe that he had received dual payments for the same work or been overpaid for the work he had performed. Further, he said he is not rich and has five children at home, and he felt that the collection action against him had caused him and his family to suffer unreasonable financial hardship. He also said in March he received information from the Office

of the Clerk of the House of Representatives indicating that the House had granted waivers to its employees, and that our Office had granted waivers to agency employees and military personnel, in cases similar to his own. He therefore believed that the Senate's collection action against him was "against equity and good conscience" and that he deserved relief under the Senate's waiver statute.

Application of the Dual Compensation Laws

Provisions of law setting forth the circumstances in which a person may simultaneously hold more than one position with the United States Government are contained in sections 5531 through 5537 of title 5, United States Code. With respect to a person employed with the Senate or the House of Representatives, 5 U.S.C. 5533(c), as in effect in 1975, provides as follows:

"(c)(1) Unless otherwise authorized by law and except as otherwise provided by paragraph (2) or (4) of this subsection, appropriated funds are not available for payment to an individual of pay from more than one position if the pay of one of the positions is paid by the Secretary of the Senate or the Clerk of the House of Representatives, or one of the positions is under the Office of the Architect of the Capitol, and if the aggregate gross pay from the positions exceeds \$7,724 a year.

"(2) Notwithstanding paragraph (1) of this subsection, appropriated funds are not available for payment to an individual of pay from more than one position, for each of which the pay is disbursed by the Clerk of the House of Representatives, if the aggregate gross pay from those positions exceeds the maximum per annum gross rate of pay authorized to be paid to an employee out of the clerk hire allowance of a Member of the House.

"(3) For the purposes of this subsection, "gross pay" means the annual rate of pay (or

equivalent thereof in the case of an individual paid on other than an annual basis) received by an individual.

"(4) Paragraph (1) of this subsection does not apply to pay on a when-actually-employed basis received from more than one consultant or expert position if the pay is not received for the same day."

It is our view that under the above-quoted provisions of statute, Mr. Stockton's concurrent employment in 1975 with both the House of Representatives and the Senate was improper. In that regard, we note that his combined annual rate of pay for his House and Senate positions exceeded the \$7,724 statutory limit then imposed on such dual employment by 5 U.S.C. 5533(c)(1), even though he could have held more than one position solely within the House at a higher combined annual rate under the authority of 5 U.S.C. 5533(c)(2). Moreover, although he was compensated on a daily, "when-actually-employed" basis by the Senate, it appears that he was paid on a monthly basis for his part-time work in the House, so that his situation was not covered by the exception provided in 5 U.S.C. 5533(c)(4) for intermittent employment.

It is also our view that in this case Mr. Stockton is entitled to keep the compensation for part-time work he received from the House, but that the earnings he received from the Senate for his intermittent services constitute erroneous payments received in contravention of 5 U.S.C. 5533(c). The reason for this is that Mr. Stockton accepted intermittent employment with the Senate without abandoning continuous employment with the House, so that the earnings he received from the Senate are properly to be regarded as the erroneous payments here. Compare Comptroller General decision B-195783, October 2, 1980, copy enclosed.

Hence, it is our view that in 1975 Mr. Stockton became lawfully indebted to the United States in the amount of \$2,934.40 as the result of the erroneous payments received by him from the Senate.

Statutes of Limitation

Section 237a of title 31, United States Code, provides that:

"The United States hereby waives all claims against any person arising out of the receipt by such person of compensation from the United States including Government owned or controlled corporations or from the government of the District of Columbia in violation of any provision of law prohibiting or restricting the receipt of dual compensation, which has not been reported to the General Accounting Office for collection within six years from the last date of any period of dual compensation."

May 10, 1975, was the last date for which Mr. Stockton received compensation under his January 29, 1975 appointment to the Joint Economic Committee. Our Office first received notice of the resulting claim against him from the Financial Clerk of the Senate on May 6, 1981, which was within 6 years of that date. It is therefore our view that no part of the claim against Mr. Stockton is barred from collection by the provisions of 31 U.S.C. 237a. See 43 Comp. Gen. 165 (1963).

In addition, 28 U.S.C. 2415 generally prescribes a 6-year limitation period for the initiation of judicial action to recover erroneous overpayments of compensation received by a Federal employee. While 6 years have now expired since Mr. Stockton received the erroneous payments, in a September 5, 1980 letter to the Senate Financial Clerk he appears to acknowledge the debt. That acknowledgement may have the effect of starting the running of the 6-year period from the date of the acknowledgement. See 28 U.S.C. 2415(d). However, our view is that even in a situation where the Government may be barred by that statute from direct judicial action to collect a debt, the Government nevertheless retains the right to recover the debt by administrative setoff against current payments to the debtor. See 58 Comp. Gen. 501, 506 (1979).

Accordingly, it is our view that the right of the Senate to collect Mr. Stockton's debt has not lapsed through the passage of time.

Collection Procedures

The compensation of a Senate employee may be withheld to satisfy his debts to the Senate under 2 U.S.C. 60c-2a(c), and

it is therefore our view that the action taken to withhold Mr. Stockton's Senate pay last summer was lawful. It is also our view that future collection of the remaining balance of Mr. Stockton's debt could be properly accomplished under that same statute, or otherwise under the Government's common-law right as a creditor to extinguish his debt by setoff against certain other amounts due to him. See 58 Comp. Gen. 501, 503, supra.

Waiver

Section 130c of title 2, United States Code, provides in pertinent part as follows:

"(a) 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 collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part by the Secretary of the Senate * * *. An application for waiver shall be investigated by the Financial Clerk of the Senate who shall submit a written report of his investigation to the Secretary of the Senate. An application for waiver of a claim in an amount aggregating more than \$500 shall also be investigated by the Comptroller General of the United States who shall submit a written report of his investigation to the Secretary of the Senate.

"(b) The Secretary of the Senate may not exercise his authority under this section to waive any claim--

"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of * * * the officer or employee * * *."

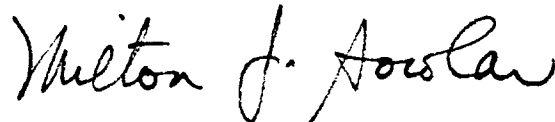
B-203209

Under the above-quoted provisions of statute, exclusive authority is vested in the Secretary of the Senate to determine whether waiver is appropriate in any case involving the erroneous payment of compensation to an officer or employee of the Senate. Hence, we offer no opinion of our own as to whether a grant of waiver should be made in Mr. Stockton's case.

However, it may be useful for you to know that our Office has published standards for waiver in 4 C.F.R. 91.1 et seq., copy enclosed, for similar cases arising under 5 U.S.C. 5584, 10 U.S.C. 2774, and 32 U.S.C. 716 involving agency employees and military personnel. Under those standards waiver is generally granted when it is found that the erroneous payment occurred through an administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the concerned agency employee or service member. In the case of an employee or service member receiving erroneous payments in contravention of the dual compensation laws, we have acted favorably on applications involving persons who made no secret of their dual employment and who had no reason to know in the circumstances that they were violating the dual compensation laws. See, e.g., 52 Comp. Gen. 700 (1973); 53 Comp. Gen. 377, 381-382 (1973); 57 Comp. Gen. 554, 563-564 (1978).

We trust this report will serve the purpose of fulfilling our responsibilities under 2 U.S.C. 130c in this case.

Sincerely yours,



Acting Comptroller General
of the United States

Enclosures