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United States Government Accountability Office
Washington, DC 20548

B-303964

February 3, 2005

The Honorable Jack Kingston.
Chairman
Subcommittee on Legislative Branch
Committee on Appropriations
House of Representatives

Subject: *Capitol Police—Use of Emergency Response Fund for Overtime Pay*

Dear Mr. Chairman:

This responds to your request for our legal opinion regarding the United States Capitol Police's authority to use the Emergency Response Fund¹ (hereinafter "ERF") and the Legislative Branch Emergency Response Fund² (hereinafter "Legislative Branch ERF") to fund overtime expenses attributable to the Security Traffic Checkpoint Program.³ Specifically, you asked four questions: (1) does the Chief of the U.S. Capitol Police have the authority to declare an emergency that permits obligating ERF monies; (2) does the Chief of the U.S. Capitol Police have the authority to use ERF monies for purposes other than those specifically approved in the appropriations process; (3) is the ERF available to the Capitol Police to pay the overtime pay of officers who man the security checkpoints erected in August in response to the elevation of the security threat to Code Orange; and (4) if the ERF is not available to pay overtime of officers who man the security checkpoints erected in August, has the Capitol Police violated the Antideficiency Act?⁴

To respond to your request, we wrote to the Capitol Police requesting factual information and its legal justification for its authority to use the ERF and the

¹ Pub. L. No. 107-38, 115 Stat. 220 (Sept. 18, 2001).

² Pub. L. No. 107-117, ch. 9, 115 Stat. 2230, 2315 (Jan. 10, 2002).

³ Although you asked about the Capitol Police's use of the Legislative Branch ERF, the Capitol Police explained that it paid all overtime costs for the Security Traffic Checkpoint Program from the ERF, not the Legislative Branch ERF. This opinion addresses the Capitol Police's use of the ERF.

⁴ 31 U.S.C. § 1341(a).

Legislative Branch ERF to fund the Security Traffic Checkpoint Program overtime. Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to John T. Caulfield, General Counsel, Capitol Police, Nov. 23, 2004. We received a reply signed by the members of the United States Capitol Police Board. Letter from Chairman Wilson Livingood, William H. Pickle, Alan M. Hantman, and Chief Terrance W. Gainer, Capitol Police Board, to Susan A. Poling, Managing Associate General Counsel, GAO, Dec. 10, 2004 (December Board Letter). On January 3, 2005, we sent a second letter to the Capitol Police Board requesting additional factual information. Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to Wilson Livingood, Chairman, Capitol Police Board, Jan. 3, 2005. We received a reply to this letter from the Capitol Police Board on January 11, 2005. Letter from Chairman William H. Pickle, Wilson Livingood, Alan M. Hantman, and Chief Terrance W. Gainer, Capitol Police Board, to Susan A. Poling, Managing Associate General Counsel, GAO, Jan. 11, 2005 (January Board Letter). We met with various Capitol Police officials on January 12, 2005 (January Meeting) to clarify the answers provided in both responses and to further develop the factual record. At the meeting, the Capitol Police provided us a detailed record of its use of the ERF (Board Supplement).

As we explain below, the ERF appropriation was available to cover overtime of the Capitol Police incurred from operating the Security Traffic Checkpoint Program. The availability of the ERF is not dependant on the declaration of an emergency. The Act outlines five specific purposes, including providing counterterrorism measures and supporting national security. The Security Traffic Checkpoint Program was a counterterrorism measure and was undertaken in support of national security. Because the Capitol Police covered these overtime costs by transferring funds from the ERF, the Police did not violate the Antideficiency Act.

BACKGROUND

The Security Traffic Checkpoint Program (STCP)

In August 2004, the Chief of the Capitol Police, with Capitol Police Board approval, established security traffic checkpoints around the Capitol Complex, a counterterrorism security measure titled Security Traffic Checkpoint Program (hereinafter “STCP”). December Board Letter at 4. The Capitol Police implemented this security measure after the Secretary of Homeland Security raised the national threat level from “Yellow—Elevated” to “Orange—High” specifically with respect to financial sectors in New York City, northern New Jersey, and Washington, D.C. *Id.* According to the Capitol Police Board, the Police instituted the STCP for multiple reasons, including intelligence information regarding the Capitol Complex, overall threat assessment, and the extensive law enforcement and security experience of the Capitol Police Board. *Id.* at 3. The Police erected traffic checkpoints, in part, as a result of intelligence information suggesting the possibility of terrorist attacks using vehicle-borne improvised explosive devices. *Id.* at 4–5.

The STCP consisted of 14 security traffic checkpoints, which secured all streets to the two main avenues leading to the Capitol building. *Id.* at 5. The checkpoints were

located at every access adjacent to a congressional building, and every vehicle large enough to potentially carry large quantities of explosives was stopped and checked. *Id.* The STCP required officers to staff the 14 checkpoints on a 24-hour, 7-days-a-week basis, with each officer working 12-hour shifts. *Id.* During the STCP operation from August 2, 2004, until November 23, 2004, the Capitol Police incurred approximately \$1.3 to \$1.5 million in overtime expenses every pay period. *Id.* at 1. The Capitol Police stated that its annual Salaries appropriation would not have been adequate to cover all of the overtime expenses related to the STCP. *Id.* at 3. Instead, the Capitol Police financed overtime expenses relating to the STCP with money transferred to it from the ERF.⁵ *Id.* at 2.

The Emergency Response Fund (ERF)

Congress enacted the ERF appropriation “to respond to the terrorist attacks on the United States that occurred on September 11, 2001, to provide assistance to the victims of the attacks, and to deal with other consequences of the attacks.” Pub. L. No. 107-38, 115 Stat. 220 (Sept. 18, 2001). Congress provided \$40 billion in the ERF, without fiscal year limitation, for, *inter alia*, “providing support to counter, investigate, or prosecute domestic or international terrorism” and “supporting national security.” *Id.* Congress imposed conditions precedent on the use of the money in the ERF, effectively segregating the \$40 billion into three separate amounts: \$10 billion available to the President, after consultation with the House and Senate appropriations committees, to transfer to “any authorized Federal Government activity to meet the purposes” of the Act; \$10 billion available for transfer to any department or agency 15 days after the Director, Office of Management and Budget (OMB) submitted to the appropriations committees an allocation and plan for use of the funds; and \$20 billion available only after enactment of a subsequent emergency appropriations bill. *Id.*

Congress enacted the Legislative Branch ERF as a subsequent emergency appropriation from the \$20 billion in the ERF to provide legislative branch agencies funds for “emergency expenses to respond to the terrorist attacks on the United States.” Pub. L. No. 107-117, ch. 9, 115 Stat. 2230, 2315 (Jan. 10, 2002). Of the \$256,081,000 appropriated to legislative branch agencies, Congress appropriated \$31 million to the “Capitol Police Board,” “Capitol Police,” and “General Expenses.” *Id.* The Capitol Police informed us that they did not use any of this \$31 million to pay for emergency overtime expenses relating to the STCP.⁶ December Board Letter at 7; January Board Letter at 1.

⁵ See enclosure for a detailed discussion of the transfer of ERF money to the Capitol Police.

⁶ The Capitol Police used the money from the Legislative Branch ERF to pay for security enhancement projects and other operational programs directly after September 11, 2001, to protect the Capitol Complex from the continuing threat of domestic or international terrorism and anthrax attacks. December Board Letter at 7.

According to the Capitol Police, the money to fund STCP overtime expenses came from the ERF. December Board Letter at 2, 10; January Board Letter at 1. The Capitol Police received a total of \$34.5 million from the ERF; \$14 million came from the first \$10 billion available immediately for transfer by the President and \$20.5 million came from the second \$10 billion available for transfer upon an approved OMB allocation plan.⁷ January Board Letter at 2.

The Capitol Police covered the emergency overtime costs associated with the STCP from this \$34.5 million, using \$4.2 million and \$5.4 million on September 14 and November 17, 2004, respectively. December Board Letter at 2, 10. The Capitol Police stated that it did not use any of the \$9.6 million from the ERF appropriation to pay for other expenses related to the STCP itself. *Id.* at 11. To date, the Capitol Police have used approximately \$29.335 million of its \$34.5 million from the ERF.⁸ *Id.* at 3, 11.

DISCUSSION

You asked for our opinion on four specific questions:

- Does the Chief of the U.S. Capitol Police have the authority to declare an emergency that permits obligating ERF monies?
- Does the Chief of the U.S. Capitol Police have the authority to use ERF monies for purposes other than those for which they are specifically approved in the appropriations process?
- Is the Fund available to the Capitol Police to pay the overtime pay of officers who man the security checkpoints erected in August in response to the elevation of the security threat to Code Orange?
- If the Fund is not available to pay overtime of officers who man the security checkpoints erected in August, has the Capitol Police violated the Antideficiency Act?

We address each of these questions below.

⁷ See enclosure for a more thorough discussion of the transfer of the ERF money to the Capitol Police.

⁸ GAO did not audit any of the figures provided by Capitol Police officials regarding its use of the ERF.

Does the Chief of the U.S. Capitol Police have the authority to declare an emergency that permits obligating ERF monies?

Availability of the ERF appropriation is not triggered by the declaration of an emergency.⁹ The ERF appropriation makes funds available for use for five specified purposes, none of which are preconditioned on a declared emergency: “(1) providing Federal, State, and local preparedness for mitigating and responding to the attacks; (2) providing support to counter, investigate, or prosecute domestic or international terrorism; (3) providing increased transportation security; (4) repairing public facilities and transportation systems damaged by the attacks; and (5) supporting national security.” Pub. L. No. 107-38, 115 Stat. 220 (Sept. 18, 2001).

An appropriation is only available for those obligations and expenditures that are consistent with the objects of the appropriation. 31 U.S.C. § 1301(a). To test compliance with this requirement, we look to see whether there is a reasonable nexus between the object of the obligation or expenditure and the appropriation charged. Here, the Capitol Police maintains, and we agree, that the STCP serves two purposes of the appropriation: “providing support to counter, investigate, or prosecute domestic or international terrorism” and “supporting national security.” Pub. L. No. 107-38. Accordingly, the ERF appropriation was available for STCP overtime costs, a direct cost of a counterterrorism measure.

The September 11 terrorist attacks heightened the nation’s awareness of terrorist activity in the United States, the vulnerability of our national monuments, and the need for ongoing vigilance to guard against future attacks. Law enforcement agencies are entitled to discretion in deciding how best to protect our national institutions, such as the United States Congress, its Members, staff, and facilities. Here, the Capitol Police implemented the STCP in reaction to the heightened terror alert in August 2004 due to intelligence information suggesting the strong possibility of a terrorist attack at the Capitol Complex using vehicle-borne improvised explosive devices. December Board Letter at 4-5. The Capitol Police specifically designed the checkpoints in the STCP so that all vehicles with the capability of carrying explosives would be stopped and searched. *Id.* The STCP checkpoints, clearly, were a counterterrorism measure, and certainly fall within the very broad scope of “supporting national security.” Availability of the ERF appropriation, by its very terms, is not contingent on the declaration of an emergency. So long as the agency’s use of the appropriation serves one of the five purposes for which the appropriation was enacted, the agency cannot be said to have used the appropriation improperly.

The Capitol Police’s use of the appropriation for overtime also appears consistent with congressional leaders’ expectations for the use of the Fund. On October 2, 2001, the majority and minority leaders of both the House and the Senate asked the President to provide for certain projects in the President’s submission of the OMB

⁹ We further discuss the issue of “emergency” in answering the second question (page 7).

allocation plan of the second \$10 billion available in the ERF.¹⁰ They were concerned with the current security systems at the Capitol Complex and requested \$20.5 million for Capitol Police to enhance security. Board Supplement, Hastert Letter. Specifically, the leaders said: “[W]e have an obligation to protect the millions of people who visit the Capitol Complex every year as well as Members of Congress and our staffs. These security measures include . . . providing overtime pay to hundreds of Capitol Police Officers who have worked tirelessly since the tragic events of September 11.” *Id.*

Does the Chief of the U.S. Capitol Police have the authority to use ERF monies for purposes other than those for which they are specifically approved in the appropriations process?

As explained above, because the STCP was a counterterrorism measure and was undertaken in support of national security, the ERF appropriation was available to cover the Capitol Police’s overtime costs.

Apart from the question of legal availability, there is nothing in the ERF appropriation or its legislative history restricting use of the Fund by requiring agencies to seek approval from, or notify, the appropriations committees before use.¹¹ However, Capitol Police officials told us that, in January 2003, staff of the Senate Committee on Appropriations orally requested that the Capitol Police provide obligation plans, outlining its use of its ERF money. January Meeting. Although this oral request is not legally binding on the Capitol Police, as a practical matter, the Police should attempt to honor wishes expressed by the appropriations committees. *See* 55 Comp. Gen. 307 (1975).

As a result of the Senate Committee interest, on February 5, 2003, the Capitol Police sent letters to the legislative branch appropriations subcommittees of both House and Senate Committees on Appropriations requesting approval to use any remaining funds from the \$34.5 million transferred from the ERF (at the time estimated at

¹⁰ Letter from Dennis Hastert, Speaker, House of Representatives, Tom Daschle, Majority Leader, Senate, Trent Lott, Republican Leader, Senate, and Richard Gephardt, Democratic Leader, House of Representatives, to The President, Oct. 2, 2001 (Board Supplement, Hastert Letter).

¹¹ The House and Senate appropriations committees did impose notification or “approval” requirements on legislative branch agencies’ use of the Legislative Branch ERF. A conference report accompanying the Legislative Branch ERF asked that legislative branch agencies receiving funds from the Legislative Branch ERF seek the approval of the appropriations committees before use. H.R. Conf. Rep. 107-350, at 438, 439 (2001). Specifically, the conferees stated: “[N]one of the funds provided to the Legislative Branch agencies [under Public Law No. 107-117] are to be obligated without prior approval of an obligation plan submitted to the Committees on Appropriations of the House and Senate.” *Id.*

\$14.765 million) to cover unfunded overtime needs in emergency situations. December Board Letter, Attachments 9 and 10 (“in the event of an emergency situation, your approval is requested to transfer to the annual Salaries account any portion of the remaining amount [of ERF] that may be required to cover unfunded overtime needs”). The Capitol Police asked for indefinite approval and promised to keep both Houses informed of its use of the ERF. *Id.* The Chairman and Ranking Member of the Subcommittee on Legislative Branch of the Senate appropriations committee as well as the Chairman of the Subcommittee on Legislative Branch Appropriations of the House appropriations committee signed each of these letters as “approved.” *Id.*

The Capitol Police notified both the House and the Senate appropriations committees on September 17, 2004, that it had used \$4.2 million from the remaining ERF money to pay overtime costs associated with the STCP. December Board Letter, Attachments 17 and 18. The Capitol Police sent letters to House and Senate appropriations committees on November 17, 2004, explaining that the Capitol Police had withdrawn \$5.4 million from the ERF appropriation to pay overtime expenses related to the STCP. December Board Letter, Attachments 19 and 20.

Although the availability of the ERF is not preconditioned on the declaration of an emergency, in the February 5, 2003, letter, the Capitol Police Board advised that it would limit its use of the ERF for overtime pay in “emergency situations.” December Board Letter, Attachments 9 and 10. However, the Board did not identify in the letter what it would consider to be an emergency situation. *Id.* At the January meeting, Capitol Police officials advised us that they intended the February 5 letter to allow the Capitol Police Board discretion to determine whether an emergency exists as the Board does with special statutory authority in other circumstances. January Meeting. *See* 2 U.S.C. § 1971 (the Capitol Police may accept contributions of meals and refreshments during a period of emergency “as determined by the Capitol Police Board”). *See also* 2 U.S.C. § 1932.

On August 3, 2004, the Capitol Police Board notified the Senate Committee on Rules and Administration and the House Committee on House Administration of its planned security projects, including the STCP, but, at that time, it did not notify the appropriations committees of its plans. January Board Letter, Attachment 7. Nevertheless, as stated above, nothing in the ERF appropriation or its legislative history conditions the Fund’s use on notice or approval.

Is the Fund available to the Capitol Police to pay the overtime pay of officers who man the security checkpoints erected in August in response to the elevation of the security threat to Code Orange?

As explained above, the ERF is available for this purpose. Two of the five purposes enumerated in the Act establishing the ERF are providing counterterrorism measures and supporting national security. Pub. L. No. 107-38. The Capitol Police implemented the STCP as a counterterrorism measure and for reasons of national security in response to an increase in the threat level to “Code Orange” and other

intelligence of threats from vehicle-borne improvised explosive devices. December Board Letter at 4–5.

If the Fund is not available to pay overtime of officers who man the security checkpoints erected in August, has the Capitol Police violated the Antideficiency Act?

A violation of the Antideficiency Act occurs when “an officer or employee of the United States Government . . . make[s] or authorize[s] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. § 1341(a)(1)(A). The Capitol Police stated that its fiscal year Salaries appropriation would not have been sufficient to pay the overtime costs of the STCP. December Board Letter at 3. If the Capitol Police had had to rely on its fiscal year 2004 Salaries appropriation, the Police would not have had enough funds to cover its overtime obligations and therefore would have violated the Antideficiency Act. By covering STCP overtime costs with funds transferred to it from the ERF, the Capitol Police avoided violating the Antideficiency Act.

CONCLUSION

The ERF appropriation was available to cover the Capitol Police’s STCP overtime costs. The availability of the ERF is not dependant on the declaration of an emergency. The ERF appropriation enumerated five purposes for which the money is available, including supporting counterterrorism measures and national security. The STCP was a counterterrorism measure and was undertaken in support of national security.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel

Enclosure

Transfer of ERF money to the Capitol Police

According to the Capitol Police, the money to fund the Security Traffic Checkpoint Program (hereinafter "STCP") overtime expenses came from the Emergency Response Fund (hereinafter "ERF"), Public Law No. 107-38, 115 Stat. 220 (Sept. 18, 2001). December Board Letter at 2, 10; January Board Letter at 1. Specifically, the Capitol Police received these funds, totaling \$34.5 million, from the first \$10 billion available immediately for transfer by the President and the second \$10 billion available for transfer upon an approved OMB allocation plan. January Board Letter at 2. The \$34.5 million was transferred into the Capitol Police Salaries appropriation on three separate occasions, September 21, 2001, September 28, 2001, and December 4, 2001. January Board Letter, Attachment 1¹ and 2.²

In 2001, when Congress enacted the ERF, the House and the Senate managed the Capitol Police Salaries appropriation, which was divided into two separate accounts with each House managing one. January Board Letter at 2. The House managed account number 0477. January Meeting. The Senate managed account number 0177. *Id.*

On September 21, 2001, \$2.5 million was transferred out of the first \$10 billion of the ERF appropriation from the Executive Office of the President to the Capitol Police. January Board Letter, Attachment 1. Of this amount, \$1,150,000 was transferred into the House-managed account and \$1,350,000 into the Senate-managed account. *Id.* Because the ERF appropriation is a no-year appropriation, and the Capitol Police appropriation is a fiscal-year appropriation, the transfers from the ERF were held separately in 00X0477, managed in the House, and 00X0177, managed in the Senate. January Meeting.

On September 28, 2001, the Capitol Police received a transfer of \$11.5 million from the Executive Office of the President out of the first \$10 billion portion; \$5,750,000 was deposited into 00X0477, and \$5,750,000 was deposited into 00X0177. January Board Letter, Attachment 1. Therefore, from the first \$10 billion available to the President for transfer, the Capitol Police received a total of \$14 million—\$6.9 million held in account number 00X0477 and \$7.1 million held in account number 00X0177.

The Capitol Police also received \$21 million from the second \$10 billion, which was available for transfer upon an approved OMB allocation plan. January Board Letter at 2. On December 4, 2001, \$10.5 million was transferred from the Executive Office of the President to 00X0477 and \$10.5 million to 00X0177. January Board Letter, Attachment 2.

¹ Attachment 1 of the January Board Letter is the Treasury Department "Nonexpenditure Transfer Authorizations" for September 21, 2001, and September 28, 2001.

² Attachment 2 to the January Board Letter is the Treasury Department "Nonexpenditure Transfer Authorization" for December 4, 2001.

OMB included these transfers in the allocation plan upon a request from Congress. Board Supplement.

On August 1 and September 18, 2002, the Capitol Police used \$9.9 million and \$1.07 million, respectively, from account number 00X0477, to pay for the overtime of officers. January Meeting; December Board Letter at 11. At the same time, the Capitol Police used \$8.1 million and \$665,000 from account number 00X0177. *Id.* The Capitol Police used these funds in responding to the anthrax attacks at the Capitol Complex. *Id.*

On February 20, 2003, Congress unified the separate salaries accounts. 2 U.S.C. § 1907. *See* January Board Letter at 3. The balances of amounts transferred from the ERF were combined into 00X0477. January Board Letter at 3.

To pay the overtime salaries of officers working the STCP checkpoints, the Capitol Police twice transferred amounts from account number 00X0477 to its fiscal year 2004 salaries account, account number 0040477. December Board Letter 2, 10. The Capitol Police transferred \$4.2 million and \$5.4 million on September 14 and November 17, 2004, respectively.³ December Board Letter at 2, 10.

³ GAO did not audit any of the figures provided by Capitol Police officials regarding its use of the ERF.