DECISION

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

25371

FILE: B-210555

DATE: June 3, 1983

MATTER OF: Use of Government vehicles for transportation between home and work.

DIGEST:

1. GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. § 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to be heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. § 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so.

2. GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. § 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. § 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments.

3. GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. § 1344(b)(3), to

include those high ranking officials whose duties require frequent official contact on a diplomatic level with high ranking officials of foreign governments. GAO construes 31 U.S.C. § 1344, (b)(3) to only include those persons who have been properly appointed, or have properly succeeded, to head a foreign diplomatic, consular, or other Foreign Service post, as an ambassador, minister, charge d'affaires, or other similar principal diplomatic or consular official.

4. The State Department's reliance on the GAO decision in 54 Comp. Gen. 855 (1975) to support the proposition that the use of Government vehicles for home-to-work transportation of Government officials and employees lies solely within the administrative discretion of the head of the agency was based on some overly broad dicta in that and several previous decisions. Read in context, GAO decisions, including the one cited by the State Department's Legal Advisor, only authorize the exercise of administrative discretion to provide home-to-work transportation for Government officials and employees on a temporary basis when (1) there is a clear and present danger to Government employees or an emergency threatens the performance of vital Government functions, or (2) such transportation is incident to otherwise authorized use of the vehicles involved.

5. Because so many agencies have relied on apparent acquiescence by the Congress during the appropriations process when funds for passenger vehicles were appropriated without imposing any limits on an agency's discretion to determine the scope of "official business," and because dicta in GAO's own decisions may have contributed to the impression that use of cars for home-to-work transportation was a matter of agency discretion, GAO does not think it appropriate to seek recovery for past misuse of vehicles, (except for those few agencies whose use of vehicles was restricted by specific Congressional enactments). This decision is intended to apply prospectively only. Moreover, GAO will not question such continued use of vehicles to transport heads of non-cabinet agencies and the respective seconds-in-command of both cabinet and non-cabinet agencies until the close of this Congress.

We have been asked by the Chairman of the House Committee on Government Operations to review a Department of State, July 12, 1982 legal memorandum and an earlier Department of Defense legal opinion which interpret the exemptions in 31 U.S.C. § 1344(b) (formerly 31 U.S.C. § 638a(c)(2)), from the prohibition in 31 U.S.C. § 1344(a) against using appropriated funds to transport Government officials between their homes and places of employment. Relying on these interpretations, the Department of State has expanded its internal list of officials for whom such transportation is authorized. The Chairman seeks our opinion on whether that action is in accordance with the meaning and intent of the law. As explained below, it is our opinion that the determination of the State Department (and that of the General Counsel of the Department of Defense, Legal Opinion No. 2, October 12, 1953, upon which the State Department action is based) is not in accordance with the law.

Notwithstanding these conclusions, we recognize that the use of Government-owned or leased automobiles by high ranking officials for travel between home and work has been a common practice for many years in a large number of agencies. (See, for example, our report to the Senate Committee on Appropriations on "How Passenger Sedans in the Federal Government are Used and Managed," B-158712, September 6, 1974.) The justification advanced for this practice is the apparent acquiescence by the Congress which regularly appropriate funds for limousines and other passenger automobiles knowing, in many instances, the uses to which they will be put but not imposing limits on the discretion of the agencies in determining what uses constitute "official business."

In addition, the General Accounting Office may, itself, have contributed to some of the confusion. As we studied our past decisions in order to respond to the Chairman's request, we recognized that in some instances, we may have used overly broad language which implied exceptions to the statutory prohibition we did not intend. (This will be discussed in more detail later.) For these reasons, we do not think that it is appropriate to seek recovery from any officials who have benefited from home-to-work transportation to date. Our interpretation of the law is intended to apply prospectively only.

Finally, we note that the General Accounting Office has made several legislative recommendations to the Congress over a period of years to clarify its intent about the scope of the prohibition. Among other things, we suggested that the Congress consider expanding the present exemption to include the heads of all agencies and perhaps their principal deputies. This decision, therefore, need not be considered effective with respect to agency heads and their principal deputies until the end of the present Congress in order to allow the Congress sufficient time to consider our suggestions. (This does not, of course, include any agency whose use of motor vehicles has been the subject of a specific Congressional restriction.)

The Law

Section 1344 of title 31 of the United States Code states:

"(a) Except as specifically provided by law, an appropriation may be expended to maintain, operate, and repair passenger motor vehicles or aircraft of the United States Government that are used only for an official purpose. An official purpose does not include transporting officers or employees of the Government between their domiciles and places of employment except--

(1) medical officers on out-patient medical service; and

(2) officers or employees performing field work requiring transportation between their domiciles and places of employment when the transportation is approved by the head of the agency.

(b) This section does not apply to a motor vehicle or aircraft for the official use of--

(1) the President;

(2) the heads of executive departments listed in section 101 of title 5; or

(3) principal diplomatic and consular officials."

Since vehicles may not be operated with appropriated funds except for an "official purpose" and the term, "official purpose" does not include transportation between home and work, (except as otherwise specifically provided), we regard subsection (a), above, as constituting a clear prohibition which cannot be waived or modified by agency heads through regulations or otherwise.

While the law does not specifically include the employment of chauffeurs as part of the prohibition in subsection (a), GAO has interpreted this section, in conjunction with other provisions of law, as authorizing such employment only when the officials being driven are exempted by subsection (b) from the prohibition. B-150989, April 17, 1963.

The State Department Determination

After researching and considering the provisions of section 1344, the State Department's Legal Advisor informed the State Department's Under Secretary for Management (in a memorandum dated July 12, 1982) that there is "no legal impediment" to authorizing the State Department's Under Secretaries and Counselor to use Government vehicles and drivers for transportation between their homes and places of employment. (Previous to that opinion, the State Department had restricted such transportation to the Secretary and Deputy Secretary.) The Legal Advisor founded his determination upon several bases.

For his first basis, the Legal Advisor relied upon an October 12, 1953, opinion by the General Counsel of the Defense Department which concluded that the phrase "heads of executive departments" contained in 31 U.S.C. § 1344(b)(2) (then referred to as section 16(a)(c)(2) of the Act of August 2, 1946, 60 Stat. 810) "is not limited to Cabinet Officers or Secretaries of executive departments, but includes also the principal officials of executive departments appointed by the President with the advice and consent of the Senate." Applying the DOD General Counsel's conclusion, the State Department's Legal Advisor found that the Secretary, Deputy Secretary, Under Secretaries, and Counselor (whom he refers to as the "Seventh Floor Principals") may be regarded as "heads of departments" for the purposes of section 1344(b)(2), and are therefore eligible to use Government vehicles and drivers for home-to-work transportation.

Secondly, the Legal Advisor determined that home-to-work transportation for the Seventh Floor Principals is also authorized based upon his construction of the exemption in section 1344(b)(3) for "principal diplomatic and consular officials." The Legal Advisor stated in his memorandum that the Seventh Floor Principals "all share in discharge of the Secretary's diplomatic responsibilities in much the same way as ambassadors abroad; and the [State] Department * * * is uniquely qualified to determine what diplomatic functions are and who performs them." In his interpretation, the restriction on home-to-work transportation in section 1344(a) would not apply to the Seventh Floor Principals because they are all "principal diplomatic * * * officials."

For his final basis, the Legal Advisor cited our decision in 54 Comp. Gen. 855 (1975). That decision, according to the Legal Advisor, "holds that where there is a clear and

present danger, use of Government vehicles to transport employees to and from home is not proscribed." The Legal Advisor also quoted the following passage from that decision:

> "In this regard we have long held that use of a Government vehicle does not violate the intent of the cited statute where such use is deemed to be in the interest of the Government. We have further held that the control over the use of Government vehicles is primarily a matter of administrative discretion, to be exercised by the agency concerned within the framework of applicable laws. 25 Comp. Gen. 844 (1946)." 54 Comp. Gen. at 857.

Based upon that passage, the Legal Advisor concluded that GAO's decisions support the proposition that home-to-work transportation is permissible whenever there is an administrative determination by the head of the agency that this would be in the interest of the Government, and not merely for the personal convenience of the employee or official concerned.

The Legal Advisor then referred to the Foreign Affairs Manual (FAM) to demonstrate that the Secretary, Deputy Secretary, Under Secretaries and Counselor "share in discharging the substantive responsibilities of the Secretary," and have been placed by law in the order of succession to be Acting Secretary of State. According to the Legal Advisor, those officials "constitute a management group--the Seventh Floor Principals." The Legal Advisor noted that those officials have "heavy after hours official representation responsibilities and a heavy load of other official responsibilities which requires virtually around the clock accessability * * *." The Legal Advisor concluded that these considerations "would support an administrative determination that it is in the interest of the United States, not personal convenience," to provide home-to-work transportation for the Seventh Floor Principals. In his opinion, such a determination would satisfy the requirements of GAO's decisions.

Discussion

We disagree with the analysis and conclusions of the Legal Advisor. With regard to the Legal Advisor's first basis, we have reviewed the October 12, 1953 Legal Opinion No. 2 of the General Counsel of the DOD, upon which the

Legal Advisor relied. (We have been informally advised that DOD has never overturned or modified that opinion although, as a matter of internal policy it has, over a period of years, curtailed the use of Government vehicles for such transportation.) We do not agree with the DOD General Counsel's conclusion that the exemption in subsection 1344(b)(2) for "the heads of executive departments listed in section 101 of title 5" includes the "principal officers of executive departments appointed by the President with the advice and consent of the Senate." The term "heads" of executive departments is not synonymous with the term "principal officers," particularly when the "head" of each of the 13 "executive departments" listed in section 101 of title 5 is explicitly designated in other statutory provisions. For example, 10 U.S.C. § 133 provides that "[t]here is a Secretary of Defense, who is the head of the Department of Defense * * *."1/ In 22 U.S.C. § 2651, it is provided that "[t]here shall be at the seat of government an executive department to be known as the Department of State, and a Secretary of State, who shall be the head thereof." (The State Department's own regulations provide that the Secretary of State "is the head of the Department of State." 1 FAM 110 (June 18, 1976).) Similar designations of the "head" of each of the other "executive Departments" may also

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1/ There is one statutory exception for the Department of Defense. When the Department of Defense was created by the National Security Act Amendments of 1949, Pub. L. No. 81-216, 81st Cong., 1st Sess., 63 Stat. 578, 591-92 (1949), Congress expressly provided in subsection 12(g) that, despite the consolidation of the three military departments into the DOD, the Secretaries of the Army, Navy, and Air Force continue to be vested with the statutory authority which was vested in them when they enjoyed the status of Secretaries of executive departments, See e.g., S. Rep. No. 366, 81st Cong. 25 (1949). That authority is to be exercised subject to the discretion and control of the Secretary of Defense. Id. For this reason, the Secretaries of the Army, Navy, and Air Force may also be regarded as heads of the executive departments, even though their respective agencies are not listed in 5 U.S.C. § 101.

be found in the United States Code. 49 U.S.C. § 1652 (Transportation); 42 U.S.C. § 3532 (Housing and Urban Development); 29 U.S.C. § 551 (Labor); 15 U.S.C. § 1501 (Commerce); 43 U.S.C. § 1451 (Interior); 31 U.S.C. § 301 (Treasury); 42 U.S.C. § 7131 (Energy); 42 U.S.C. § 3501n., as amended by 20 U.S.C. § 3508 (Health and Human Services); 28 U.S.C. § 503 (Justice); 7 U.S.C. § 2202 (Agriculture); 20 U.S.C. § 3411 (Education). Therefore, we construe subsection (b)(2) of section 1344 to refer strictly to those officers who are appointed (or who duly succeed) to the positions designated by law to be "the heads of executive departments" as listed in 5 U.S.C. § 101.

Moreover, the legislative history upon which the General Counsel relied does not support his conclusions. For example, the General Counsel cited the Act of March 3, 1873, 17 Stat. 485, 486, and the debate on that Act in the Congressional Globe, 42d Cong., 3rd Sess. 2104 (1873), for the proposition that "when Congress wanted to limit the expression [heads of executive departments] specifically to Cabinet Officers, it did so in precise terms and added after 'heads of executive departments' the qualification 'who are members of the President's Cabinet.'" However, our examination of the cited Act and debates failed to reveal the use of either phrase in the Act or the legislative debates. On the contrary, from our examination, it appears that the Act and the debates on it explicitly and repeatedly distinguish between the heads of the executive departments, and the "persons next in rank to the heads of Departments." See Cong. Globe, 42d Cong., 3rd Sess. 2100-2105 (1873); Act of March 3, 1873, 17 Stat. 485, 486.

As his second basis for concluding that the "Seventh Floor Principals" may be authorized to receive home-to-work transportation, the State Department Legal Advisor construed subsection (b)(3) of section 1344 (which exempts "principal diplomatic and consular officials" from the restrictions on home-to-work transportation) to include the "principal officers of this [State] Department." (Emphasis added.) According to the Legal Advisor, the "principal officers" of the State Department are the Seventh Floor Principals. We do not concur in that construction of subsection 1344(b)(3). For similar reasons we also disagree with the DOD General Counsel who concluded in his 1953 opinion (as cited and relied upon by the State Department Legal Advisor) that the phrase "principal diplomatic and consular officials" includes "those principal officers of the Government

whose duties require frequent official contact upon a diplomatic level with ranking officers and representatives of foreign governments." (Emphasis added.)

Although the Congress has not defined the term "principal diplomatic and consular officials" as used in section 1344, it has defined "principal officer" as that term is used in the context of performing diplomatic or consular duties. In 22 U.S.C. § 3902, it is provided that the term "principal officer" means "the officer in charge of a diplomatic mission, consular mission * * *, or other Foreign Service post." Consistent with that statute, the State Department's Foreign Affairs Manual also defines a "principal officer" to mean the person who "is in charge of an embassy, a legation, or other diplomatic mission, a consulate general or consulate of the United States, or a U.S. Interests Section." 2 F.A.M. § 041(i) (October 11, 1977). See also 3 F.A.M. 030 (Nov. 27, 1967) (similar definition of "principal officer"). Our reading of these statutory and regulatory definitions, in conjunction with the plain meaning of subsection (b)(3) of section 1344 leads us to conclude that neither the Legal Advisor's definition, nor that of the DOD General Counsel, is correct. In our view the term "principal diplomatic and consular officials" only encompasses those individuals who are properly designated (or succeed) to head a foreign diplomatic, consular or other similar Foreign Service Post.

Furthermore, examination of the original enactment which was later codified as section 1344 by Pub. L. No. 97-258, 96 Stat. 877 (1982) also supports the conclusion that the Congress intended to limit the meaning of the phrase "principal diplomatic and consular officials" to the officers in charge of foreign posts. Section 16(a)(c)(2) of the Act of August 2, 1946, Chapt. 744, 60 Stat. 810-811 provided, in pertinent part:

> "The limitations of this paragraph [now contained in section 1344(a)] shall not apply to any motor vehicles or aircraft for official use of the President, the heads of the executive departments enumerated in 5 U.S.C. 1, ambassadors, ministers, charges d'affaires, and other principal diplomatic and consular officials." (Emphasis added.)

As the underlined language makes clear, Congress intended the term "principal diplomatic and consular officials" to

include ambassadors, ministers, charges d'affaires and other similar officials. The codification of title 31 was not intended to make any substantive changes in the law. See H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 69 (1982). Compare also, 2 F.A.M. §§ 041(i), 043 (October 11, 1977) (principal officers are ambassadors, ministers, charges d'affaires, and other similar officers who are in charge of Foreign Service Posts; each such person is the "principal diplomatic representative of the United States * * * to the government to which he is accredited"). Therefore, we conclude that the Seventh Floor Principals are not "principal diplomatic and consular officials" who may legally receive home-to-work transportation.

In arguing the third basis for his determination, the Legal Advisor relied specifically on our decision in 54 Comp. Gen. 855 (1975). That case concerned the provision of home-to-work transportation for DOD employees who were stationed in a foreign country where, according to the DOD submission, there was serious danger to the employees because of terrorist activities. As the Legal Advisor initially acknowledged, our decision in that case holds that where there is a "clear and present danger" to Government employees and the furnishing of home-to-work transportation in Government vehicles will afford protection not otherwise available, then the provision of such transportation is within the exercise of sound administrative discretion. 54 Comp. Gen. at 858.

The Legal Advisor then quotes the second passage from the decision (set forth earlier) which, as the reference indicates, was taken from 25 Comp. Gen. 844 (1946). That passage has been repeated a number of times as dicta in other Comptroller General decisions. (See, for example, B-181212, August 15, 1974, or B-178342, May 8, 1973.) Standing alone, it certainly implies that what constitutes official business is a determination that lies within the discretion of the agency head, and it is not surprising that many agencies chose to act on that assumption. However, all decisions must be read in context. The seminal decision, 25 Comp. Gen. 844 (1946), denied a claim for cab fare between an employee's home and the garage where a government car was stored, prior to beginning official travel, on the general principle that an employee must bear his own commuting expenses. The decision then said, in passing, that if an agency decided that it was more advantageous

to the Government for official travel to start from an employee's home rather than from his place of business or, presumably, from the garage, "[S]uch use of a Government automobile is within the meaning of 'official purposes' as used in the act."

Deputy Assistant Attorney General Leon Ulman, Department of Justice, wrote a memorandum opinion on this topic for the Counsel to the President on August 27, 1979. After quoting the above-mentioned generalization about administrative discretion to authorize home-to-work transportation, Ulman concluded:

> "But this sweeping language has been applied narrowly by both the Comptroller General and this Department * * *. We are aware of nothing that supports a broad application of the exception implied by the Comptroller General. That exception may be utilized only when there is no doubt that the transportation is necessary to further an official purpose of the Government. As we view it, only two truly exceptional situations exist: (1) where there is good cause to believe that the physical safety of the official requires his protection, and (2) where the Government temporarily would be deprived of essential services unless official transportation is provided to enable the officer to get to work. Both categories must be confined to unusual factual circumstances."

Moreover, even under the circumstances discussed in the terrorist activities case relied on by the State Department Legal Adviser, we pointed out that section 1344 does not expressly authorize either the exercise of such discretion or the provision of such transportation. We then stated:

> "the broad scope of the prohibition in [what is now section 1344], as well as the existence of specific statutory exceptions thereto, strongly suggests that specific legislative authority for such use of vehicles should be sought at the earliest possible time, and that the exercise of administrative discretion in the interim should be reserved for the most essential cases." 54 Comp. Gen. at 858 (footnote omitted).

Thus, it was the need to protect Government employees from a clear and present danger (not simply an administrative determination of the Government's interest) which led us to authorize the interim provision of home-to-work transportation until specific legislative authority for such transportation could be obtained.

Subsequent Comptroller General's decisions have not relied upon an administrative determination of the Government's interests as the sole basis for either approving or disapproving home-to-work transportation. 2/ We have, however, somewhat broadened the concept of an emergency situation to include temporary bus service for essential employees during a public transportation strike. 54 Comp. Gen. 1066 (1975). Cf. 60 Comp. Gen. 420 (1981).

There is one other narrow exception to the prohibition which should be mentioned. When provision of home-to-work transportation to Government employees has been incident to otherwise authorized use of the vehicles involved, i.e., was provided on a "space available" basis, and did not result in additional expense to the Government, we have raised no objection. See, e.g., B-195073, November 21, 1979, in which additional employees were authorized to go home with an employee who was on field duty and therefore was exempt from the prohibition.

Unless one of the these exceptions outlined above applies, agencies may not properly exercise administrative discretion to provide home-to-work transportation for their officers and employees, unless otherwise provided by statute. (See e.g., 10 U.S.C. § 2633 for an example of a statutory exemption for employees on military installations and war plants under specified circumstances.)

2/ An audit report which was primarily concerned with misuse of federal employees as personal aides to Federal officials, GAO/FPCD-82-52 (B-207462, July 14, 1982) may have created a contrary impression. It, too, quoted our 1975 decision, without fully describing the limited context in which the exercise of administrative discretion might be permissible. The error was inadvertent.

Conclusion

In light of the foregoing, we conclude that, unless one of the exceptions outlined above applies, the Deputy Secretary of State, the Under Secretaries, and the Counselor may not be authorized under 31 U.S.C. § 1344(b) to use Government vehicles or drivers for transportation between their homes and places of employment, nor may any other official or employee of the Departments of State and Defense (other than the Secretaries of those two Departments, and the Secretaries of the Army, Navy, and Air Force) be so authorized under that subsection, unless that person has been properly appointed (or has succeeded) to be the head of a foreign diplomatic, consular, or other Foreign Service post as an ambassador, minister, charge d'affaires, or another similar principal diplomatic or consular official.

Milton J. Socolar

Acting Comptroller General
of the United States