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

B-202278

April 18, 1983

The Honorable William Proxmire
United States Senate

Dear Senator Proxmire:

This is in response to your request of February 19, 1981, for our opinion on the legality of certain support which the Department of Defense (DOD) provided for activities associated with the inauguration of President Ronald Reagan. More particularly, you asked whether there was any specific statutory authority for the military to provide 1,120 service personnel as chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities. You noted that some members of the Presidential Inaugural Committee were provided with military drivers from mid-November 1980 until the end of January 1981. In addition, you requested any proposals we might have for a statutory remedy, in the event we concluded that there is no specific statutory authority for DOD to provide these kinds of support for Presidential inaugural activities.

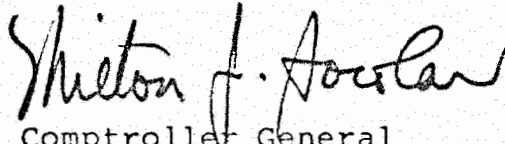
There is no specific statutory authority for DOD to provide chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities, nor are many of DOD's inaugural activities covered by more general authorities such as the Economy Act or those which support expenditures for local community relations activities. The Presidential Inaugural Ceremonies Act does authorize DOD to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but DOD itself recognizes that its extensive participation in Presidential inauguration activities is fundamentally a matter of custom rather than being rooted in legal authority.

Accordingly, we must conclude that much of the support provided by DOD for 1981 inaugural activities was without proper legal authority. At the same time, it must be recognized that Presidential inaugurations are highly symbolic national functions for which DOD support has been provided with the knowledge and approval of members of Congress over the years. Lack of a statutory base for this support has resulted in practices questionable on policy as well as legal grounds.

PUBLISHED DECISION
62 Comp. Gen. 100 (1983)

In these circumstances, we recommend that Congress undertake a review of the Presidential Inaugural Ceremonies Act to establish a clear basis in policy and law for continuing participation by Federal agencies in Presidential inaugural activities. We will be glad to work with you in this endeavor. A detailed analysis is enclosed. DOD's report to us on Presidential inaugural activities is also enclosed.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosures - 2

DEPARTMENT OF DEFENSE ASSISTANCE FOR
THE 1981 PRESIDENTIAL INAUGURATION

The Comptroller General has been requested to provide his opinion on the legality of certain support the Department of Defense (DOD) provided for activities associated with the inauguration of President Ronald Reagan. More particularly, we have been asked whether there was any specific statutory authority for the military to provide 1,120 service personnel as chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities. It was also noted that some members of the Presidential Inaugural Committee were provided with military drivers from mid-November 1980 until the end of January 1981. In addition, we were asked to provide any proposals we might have for a statutory remedy, in the event we concluded that there is no specific statutory authority for DOD to provide these kinds of support for Presidential inaugural activities.

FACTS

We requested DOD to provide to us a complete report on its 1981 Presidential inaugural activities, including a full description of the types of inaugural assistance it furnished, as well as the legal basis for that assistance. In its report, DOD states that a total of 11,430 armed forces personnel provided support for activities associated with the 1981 Presidential Inauguration. The report indicates that 1,533 of its personnel were used as military aides (both personal aides and social aides), drivers, and ushers--the types of assistance about which you express the greatest concern. The other DOD personnel involved in the inaugural activities performed a variety of functions, including participating in the inaugural parade, acting as honor and parade route cordons, removing snow, and providing security. In addition, a variety of equipment, supplies and other services were provided by DOD, including logistical and administrative support. DOD inaugural support was coordinated through the Armed Forces Inaugural Committee (AFIC).

PRESIDENTIAL INAUGURAL CEREMONIES ACT

The only statutory provision that specifically authorizes DOD to provide support for inaugural activities is 10 U.S.C. § 2543, the codification of section 6 of the Presidential Inaugural Ceremonies Act, act of August 6, 1956, ch. 974,

84th Congress, 2d Sess., 70 Stat. 1049, 1050. That section provides:

"(a) The Secretary of Defense, under such conditions as he may prescribe, may lend, to an Inaugural Committee established under section 721 of title 36, hospital tents, smaller tents, camp appliances, hospital furniture, flags other than battle flags, flagpoles, litters, and ambulances and the services of their drivers, that can be spared without detriment to the public service.

"(b) The Inaugural Committee must give a good and sufficient bond for the return in good order and condition of property lent under subsection (a).

"(c) Property lent under subsection (a) shall be returned within nine days after the date of the ceremony inaugurating the President. The Inaugural Committee shall--

"(1) indemnify the United States for any loss of, or damage to, property lent under subsection (a); and

"(2) defray any expense incurred for the delivery, return, rehabilitation, replacement, or operation of that property."

The type of inaugural assistance covered by this provision is rather limited and primarily of a medical or safety nature. This provision does not authorize DOD to provide the number of personnel and the wide-ranging inaugural support referred to in DOD's report to us.

DOD itself recognized the limited coverage of the provision. In the Executive Summary of the 1977 Armed Forces Inaugural Committee, DOD stated:

"10 U.S.C. 2543 is the only statutory authority within the United States Code specifically authorizing DOD support of a Presidential Inauguration. It identifies only medical and

safety equipment support. Additional inaugural support has traditionally been provided by DOD, though not specifically defined in the statute. Using the limiting language of this statute as a basis, * * * the Special Assistant, Secretary of Defense, understandably had reason to question the legality of all support traditionally provided by DOD. This caused lengthy reviews, frequent discussion and many false starts and stops. Major disruptions resulted. In the end, * * * the discussion was elevated to the U.S. Senate level * * *. To preclude recurrence of this situation, it is strongly recommended that DOD immediately initiate action to propose appropriate legislation to clarify the language and intent of 10 U.S.C. 2543.* * *

In response to DOD's concerns, the Chairman of the Joint Congressional Committee on Inaugural Ceremonies for the 1977 Presidential Inauguration had introduced S. 2839, 96th Congress, to amend the Presidential Inaugural Ceremonies Act, supra, to clarify DOD's participation. "Because of the legal questions always accompanying Inaugural support * * *, the Department of Defense supported Senate Bill 2839 * * *." Nevertheless, that bill was not enacted, and DOD now states that "the bill is still needed to avoid the quadrennial questions that prompted this inquiry." Thus there seems to be a consensus of uncertainty about DOD's authority.

DOD has not been alone in struggling with the lack of legal clarity with respect to participation in inaugural activities. The General Services Administration (GSA) in the past experienced inaugural problems similar to those of DOD. Without any explicit authority GSA provided the following assistance in connection with inaugurals:

- "1. Provide office space, office furniture, and telephones for the inaugural committee.
- "2. Provide additional guards for the protection and security of Government property and buildings.

"3. Make available public toilet facilities in Government buildings along the parade route.

"4. Make cafeterias and snack bars in Government buildings available to military organizations participating in the parade.

"5. Establish first-aid stations in Government buildings along or near the parade route.

"6. Maintain standby work force to deal with building maintenance emergencies (elevator trouble, electrical failures, plumbing leaks, snow removal, etc.).

"7. Arrange for special window and grounds cleaning at Government buildings along the parade route.

"8. Construct stands and platforms at Government buildings along the parade route.

"9. Provide parking space and dispatch services for official parade vehicles.

"10. Clean up Government buildings and grounds along parade route following inaugural."

H.R. Rep. No. 1796, 90th Cong., 2d Sess. 2 (1968).

Congress has since explicitly legitimized GSA's participation in inaugural activities by amending the Federal Property and Administrative Services Act. In 1968 Congress added subsection 210(a)(15) to the Federal Property and Administrative Services Act, as amended, 40 U.S.C. § 490(a)(15), which authorized GSA:

"to render direct assistance to and perform special services for the Inaugural Committee (as defined in section 721 of Title 36) during an inaugural period in connection with Presidential inaugural operations and functions,

including employment of personal services without regard to the civil service and classification laws; provide Government-owned and leased space for personnel and parking; pay overtime to guard and custodial forces; erect and remove stands and platforms; provide and operate first-aid stations; provide furniture and equipment; and provide other incidental services in the discretion of the Administrator."

It is with this background that we analyze whether DOD's participation in the 1981 Presidential inaugural events was legally supportable on some basis other than 10 U.S.C. § 2543. Our starting point is the Presidential Inaugural Ceremonies Act, supra, now largely codified at 36 U.S.C. §§ 721-730, because it is the primary legislation dealing with Presidential inaugurations. Legally it could well be construed as the exclusive authority for establishing responsibilities related to Presidential inaugurals, since it is the permanent legislation in which Congress attempted to address the whole inaugural process. The statute itself, however, does not explicitly preempt other authorities, and the example of the special legislation for GSA indicates that Congress has not legislated on inaugural matters exclusively through amendments to the Presidential Inaugural Ceremonies Act. Accordingly, we shall not treat the Presidential Inaugural Ceremonies Act, supra, as preempting other possible authorities for DOD assistance for Presidential inaugurals, as long as the other more general authorities do not contradict the provisions and policies of the Presidential Inaugural Ceremonies Act. The more general authorities relied on by DOD are the Economy Act and DOD's community relations regulations, each of which is discussed below.

Before addressing the other authorities relied on by DOD, however, at least the major features of the Presidential Inaugural Ceremonies Act should be noted, so that DOD's assistance may be properly evaluated in the context of the provisions of that primary statute.

First, subsection 1(b)(2) of the act, 36 U.S.C. § 721(b)(2), acknowledges that there will be a Presidential Inaugural Committee (PIC) for each Presidential inauguration, and defines it as "the committee in charge of the Presidential inaugural ceremony and functions and activities connected

therewith, to be appointed by the President-elect." The statute assumes that the PIC will be a private, non-governmental entity, and gives it substantive and substantial rights. However, it contains no provisions authorizing Governmental financial assistance to the PIC. At the same time, in at least three sections, the Presidential Inaugural Ceremonies Act requires that the PIC indemnify the Government for any loss or damage.^{1/} As such, the Presidential Inaugural Ceremonies Act implies that the PIC was not expected to receive Federal funds or any assistance from Federal agencies other than as specified.

Section 9 of the act, 36 U.S.C. § 729, reserves to the Joint Congressional Committee on Inaugural Ceremonies (JCCIC) responsibility for inaugural activities at the United States Capitol Buildings or Grounds or other property under the jurisdiction of the Congress. In addition, this section permits the JCCIC to receive, upon its request, any of the services or facilities otherwise authorized by the Presidential Inaugural Ceremonies Act.

Section 6 of the Presidential Inaugural Ceremonies Act, supra, which authorizes the limited DOD support to the PIC, is but one isolated provision of this statute, and DOD is but one of the agencies assigned responsibilities. Among other things, the Presidential Inaugural Ceremonies Act does, in addition, explicitly:

"Authorize an appropriation for District [of Columbia] expenses in connection with a Presidential inauguration;

"[A]uthorize the Commissioners [now Council of the District of Columbia] to make regulations for the protection of life, health, and property during the 'Inaugural period,' * * *;

"[A]uthorize the granting of special licenses [, with the approval of the Inaugural Committee,] to persons selling goods, wares, and merchandise on the streets of the District [of Columbia] during such period;

Please find footnotes at end of statement.

"[C]entralize in the Secretary of the Interior (or his designated agent, who might be the Superintendent of National Capital Parks) the authority to grant permits to the Inaugural Committee for the temporary use of public space under the control of the Federal Government outside of the Capitol Grounds;

"[A]uthorize the Commissioners [now Mayor of the District of Columbia] to grant permits to the Inaugural Committee for the temporary use of public space under their control; [and]

"[A]uthorize the temporary installation [by the Inaugural Committee] of lighting or communication facilities on and over public space; * * * ." (Organization modified from original into paragraph structure.)

S. Rep. No. 2645, 84th Congress, 2d Sess. 1 and 2 (1956). See also, H.R. Rep. No. 2611, 84th Congress, 2d Sess. 2 and 3 (1956). Moreover, section 3 of the act, as amended, 36 U.S.C. § 723, specifically authorized funds to be appropriated to the District of Columbia to enable it to:

"* * * provide additional municipal services * * * during the inaugural period, including employment of personal services without regard to the civil-service and classification laws; travel expenses of enforcement personnel, including sanitarians, from other jurisdictions; hire of means of transportation; meals for policemen, firemen, and other municipal employees, cost of removing and relocating streetcar loading platforms, construction, rent, maintenance, and expenses incident to the operation of temporary public comfort stations, first-aid stations, and information booths; and other incidental expenses in the discretion of the Commissioners [now Mayor of the District of Columbia] * * * ."

Finally, subsection 1(b)(1) of the Presidential Inaugural Ceremonies Act defines the term "inaugural period" as:

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"* * * the period which includes the day on which the ceremony of inaugurating the President is held, the five calendar days immediately preceding such day, and the four calendar days immediately subsequent to such day."
36 U.S.C. § 721(b)(1).

ECONOMY ACT

Aside from the Presidential Inaugural Ceremonies Act, DOD relies in part on the so-called Economy Act as authority to provide additional support for inaugural events in response to requests of the Presidential Inaugural Committee and the Joint Congressional Committee on Inaugural Ceremonies.^{2/} Section 601 of the Economy Act, as amended,^{3/} 31 U.S.C. § 1535,^{4/} permits one agency or bureau of the Government to furnish materials, supplies or services for another on a reimbursable basis. The PIC is not a Government agency and even if it were, DOD used its own appropriations without reimbursement from either the PIC or JCCIC. Therefore, the authority of the Economy Act is not applicable.

COMMUNITY RELATIONS REGULATIONS

Aside from statutes, DOD relies upon its internal regulations and its traditional ceremonial role of participation in national celebrations and somber state occasions.

DOD's community relations regulations are codified at 32 C.F.R. Parts 237 and 238. The statutory authority listed for them is 5 U.S.C. § 301 (previously codified at 5 U.S.C. § 22) which provides that:

"The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

DOD defines "community relations" as "the relationship between the military and civilian communities." 32 C.F.R. § 237.3(a). DOD's policy justifications for the community relations program include recognition that:

"The morale of all personnel of the Department of Defense is affected by the favorable or unfavorable attitudes of the civilian community toward their mission and their presence in the area * * *." (32 C.F.R. § 237.4(a)(2).),

and that:

"Active participation of military units and military personnel and their dependents as individuals in civilian activities, organizations, and programs is an important factor in establishing and maintaining a state of mutual acceptance, respect, cooperation, and appreciation between the Armed Forces and civilian communities affected by their operations." (32 C.F.R. § 237.4(a)(3).)

These regulations encompass a broad range of activities, with emphasis on DOD participation in local community events. They were not designed to cover events which are national in scope such as a Presidential inauguration and which have little if anything to do with the means by which favorable local community relations are fostered. Nevertheless, an examination of certain aspects of the regulations may be useful for the purpose of developing Presidential inauguration participation policy.

As a general principle, DOD's regulations distinguish between the kind of participation in public events and programs which primarily fosters DOD's own interests and purposes, and participation as one of several interested parties in which the benefits may be said to be mutual. (By necessary implication,

if there is only negligible benefit to DOD to be derived from its participation, it should decline the invitation to be part of the event.) DOD may pick up most or all of the costs of its participation in the first category as necessary. For events in the second category, DOD should pay only the proportionate share of the costs directly attributable to the participation of its own personnel.

We will now examine DOD assistance with the 1981 Presidential inaugural activities in the light of these principles.

INAUGURAL CEREMONY

The installation of the President as Commander-in-Chief of the Armed Services is obviously of major interest to the DOD. It is also of major interest to every other Federal entity, as well as to the public at large. In recognition of this shared interest, the Congress established the Joint Congressional Committee on Inaugural Ceremonies (JCCIC) and charged it with the responsibility of making arrangements for the inaugurations of the President-elect and the Vice President-elect. In addition, section 9 of the Presidential Inaugural Ceremonies Act, 36 U.S.C. § 729, reserves to the JCCIC responsibility for inaugural activities at the United States Capitol Buildings or Grounds or other property under the jurisdiction of the Congress. Consequently, primary responsibility for the arrangements for the Presidential inaugural ceremony, including funding, rests with the JCCIC rather than DOD.

Since DOD also has a clear interest in the event, it may pay for the expenses necessarily incurred by its personnel in participating in the ceremony. This might well include the costs of transporting DOD participants to the ceremony, per diem and other travel expenses of participating, the costs of ceremonial uniforms, flags, etc. It would also include the costs of any services provided to the Presidential Inaugural Committee (PIC) under section 6 of the Presidential Inaugural Ceremonies Act, discussed before. As explained earlier, that type of assistance is rather limited and is primarily of a medical or safety nature.

On the other hand, there appears to be no authority for the provision of what DOD described as "logistical and administrative" support to the JCCIC, nor for the provision of equipment and supplies (unrelated to DOD's own participation needs), all on a non-reimbursable basis. We also question the use of DOD personnel as ushers for those holding reserved seats for the inaugural ceremony. (Ushers are explicitly listed as inappropriate capacities for service by military personnel in DOD's community relations regulations, 32 C.F.R. § 238.6(b)(4)(iv).) However, it is not our intention now to single out all specific costs which may definitely be allowed and to identify all others which are clearly improper. We are merely discussing the applicable principles under DOD's own community relations regulations, in order to point up the need for more definitive guidance from the Congress.

INAUGURAL PARADE

Participation in this significant national celebration is clearly of great importance and significance to DOD. As was true of the inaugural ceremony, other Federal entities could also regard such participation as being of direct benefit or interest to them. For example, it is conceivable that at some future inaugural, the Departments of Agriculture or Interior might be invited by the PIC to provide a "float" symbolizing their contributions to the nation. Thus, once again we have a "mutual benefit" event, and each agency may incur and pay costs directly attributable to its own participation. As for other costs not so allocable, we note that subsection 1(b)(2) of the Presidential Inaugural Ceremonies Act, 36 U.S.C. § 721(b)(2), charges the PIC with responsibility for Presidential inaugural functions and activities that do not take place at the United States Capitol Buildings or Grounds or on other property under the jurisdiction of the Congress. In addition, that statute does not provide for assistance to the PIC through Federal expenditures, although use of appropriated funds was anticipated by the District of Columbia government for related functions. Therefore, we conclude that primary responsibility for the presidential inaugural parade rested with the PIC and not DOD.

Applying this principle, we agree with a January 6, 1977, memorandum (referred to in the materials included in the Congressional submission) from the Assistant Secretary of Defense (Installation and Logistics) to the Assistant

Secretaries of the military departments. This memorandum questioned the practice of using military jeeps to pull non-military floats, or to supply military drivers for (non-DOD) VIPS taking part in the parade. Aside from the risks of tort liability, these expenses are not properly attributable to DOD's own needs but are, instead, expenses incurred for the benefit of some other participant.

INAUGURAL BALLS

In defining "official civil ceremonies", DOD's community relations regulations provide:

"* * * Community or civic celebrations such as banquets, dinners, receptions, carnivals, festivals, opening of sports seasons, and anniversaries are not considered official civil ceremonies even though sponsored or attended by civic or governmental dignitaries." (Emphasis added.) 32 C.F.R. § 237.7(h).

In addition, these DOD regulations define "official Federal Government functions" as:

"* * * Those activities in which officials of the Federal Government are involved in the performance of their official duties." 32 C.F.R. § 238.3(a)(3).

An inaugural ball, being akin to a banquet, dinner or reception, would not be regarded as an official civil ceremony. In addition, even though an inaugural ball may be attended by officials of the Federal Government, they are not in attendance in the performance of their official duties, but rather as guests who happen to be officials. Moreover, unlike the inaugural parade, an inaugural ball is not generally available to the community. See 32 C.F.R. § 238.6(a)(1)(iii). The inaugural balls have been limited to invitees, in significant part selected by the PIC; admission is by ticket only (usually for a substantial fee); and are basically private gatherings or parties whose proceeds go to the PIC. Therefore, we doubt that any of DOD's costs of participating at inaugural balls, whether incurred for DOD officials or others, constitute official expenses which may be paid from DOD appropriations.

PRE-INAUGURAL ACTIVITIES

The submission states that certain kinds of DOD assistance were provided to some members of the PIC from mid-November 1980 until the end of January 1981. We recognize the complexities associated with effective coordination and implementation of the various inaugural activities. Therefore, a reasonable amount of planning and preparation by participants is essential. As was true for all the other inaugural activities discussed before, DOD should only have assumed the costs of planning and preparation for its own participants.

SPECIFIC ASSISTANCE

Much of the assistance reported to us by DOD appears directly related to its own preinaugural needs. There are, however, a number of questionable activities. For example, DOD reports the billeting of high school and university parade participants from outside the National Capital Region in local military installations. In addition, DOD reports:

"e. The Military Aides Subcommittee of the AFIC organized, assigned, briefed, supervised, and assisted aides provided to VIPs during the Inaugural period. Two categories of aides were provided. Personal aides were assigned to assist specific VIPs. Social aides were assigned to assist at official Inaugural events. A total of 175 personal aides and 329 social aides were utilized.

* * * * *

"i. The Transportation Subcommittee of the AFIC coordinated the travel and transportation of all Armed Forces elements in connection with the Inaugural and operated the Inaugural motor pool. This motor pool provided drivers to operate vehicles donated to the PIC for the purpose of providing transportation for AFIC and PIC staff personnel on official business prior to the Inaugural and other VIPs during Inaugural week. During the peak period immediately preceding Inaugural Day, 671 drivers were utilized."

The use of military personnel as chauffeurs, personal escorts and social aides for non-military personnel cannot be regarded as a cost related to the participation of DOD's own personnel in the inaugural events. Moreover, this type of support does not comply with 32 C.F.R. § 238.6(b)(4)(iii) of DOD's community relations regulations, which provide:

"(b) The Department of Defense does not authorize support of community relations programs when * * *

"(4) * * * DOD support:

* * * * *

"(iii) Consists wholly or in part of resources, facilities, or services which are otherwise reasonably available from commercial sources." (Emphasis in original.)

We have seen no evidence that adequate, non-military-chauffeured transportation was not reasonably available from commercial sources, such as taxis, buses, subway, and other forms of public transportation, for the use of PIC personnel during the pre-inaugural period. Similarly, with respect to drivers for the private motor vehicles loaned to the PIC, there appear to be many sources of help in the private sector, if PIC personnel were unable to drive themselves in the pre-inaugural period, or even in the inaugural period itself.

Similarly, we believe that the services of personal escorts or aides, social aides, and ushers were "reasonably available from commercial sources," and thus were not authorized to be provided by DOD under DOD's community relations regulations.

We find nothing in the materials before us that indicates that military personnel or military skills were peculiarly essential in the performance of the duties assigned to personal aides, social aides, or ushers for the inaugural activities. Thus, we think that personnel for these tasks should have been obtained from commercial sources. See also

32 C.F.R. § 238.6(b)(4)(iv) and 32 C.F.R § 238.11(f)(ii) of DOD's community relations regulations which list these functions as being inappropriate for DOD personnel.

Even if DOD's community relations regulations did not contain the limitations discussed, we would have reservations about these expenditures. It is fundamental that Federal agencies cannot make use of appropriated funds to supply services (or manufacture products or materials) for private parties in the absence of specific authority therefor, usually specific statutory authority. 34 Comp. Gen. 599 (1955); 31 Comp. Gen. 624 (1952); 28 Comp. Gen. 38 (1948); B-69238, July 13, 1948. See also, 31 U.S.C. § 628; National Forest Preservation Group v. Volpe, 352 F. Supp. 123 (D.C. Mont. 1972), aff'd. on reconsideration 359 F. Supp. 136 (D.C. Mont. 1973). In fact, it has been held that the performance of services by Government personnel for non-Federal or private agencies involves an improper use of appropriated funds even where the Government is compensated therefor or reimbursed in kind. 34 Comp. Gen. 599 (1955); 31 Comp. Gen. 624 (1952); B-69238, July 13, 1948. See also, 33 Comp. Gen. 115 (1953). Moreover, "the general rule [is] that it is the sole right of the Government to supervise and control the work and time of performance of its officers and employees engaged in governmental activities," and an agency does not have authority to delegate this responsibility to a non-Federal or private entity. 31 Comp. Gen. 624 (1952).

In any other context besides the Presidential inaugural events, there would be little doubt about the impropriety of using taxpayer funds to provide personal aides, social aides, and drivers for private individuals. While we agree that the application of usual laws and regulations may not seem appropriate for inaugural activities, the current law does not make any special exceptions for agency assistance to the inaugural events, other than as provided in the Presidential Inaugural Ceremonies Act. If assistance would be unlawful and improper generally, it likewise would be unlawful and improper for the inaugural events. Consequently, we conclude that a significant amount of the support provided by DOD for 1981 inaugural activities was without proper legal authority.

CONGRESS

The Executive Summary of the 1977 Armed Forces Inaugural Committee discloses certain DOD inaugural activities in 1977 of questionable legality under the standards discussed above, and akin to those of concern in the 1981 inaugural. However, many of these DOD actions were apparently undertaken with the knowledge, active involvement and approval of key members of Congress. DOD stated in its response to our letter of inquiry that Congress had "full knowledge of past practices because Congressional members themselves have participated in the events." However, the mere fact that an activity has been disclosed to the Congress and has not been objected to does not necessarily require the conclusion that it was thereby legally authorized. B-69238, July 13, 1948.

We note that the House Committee on Government Operations, when acting upon GSA's request for inaugural legislation which was discussed above, stated:

"The inauguration of a President of the United States is a principal event in our democratic society. It symbolizes the major attribute of a governmental system based on laws rather than on men: the orderly transfer of the powers of the highest office in the land.

"Millions of Americans are present on this ceremonious occasion, either in person or through the medium of television, and their presence gives further affirmation and legitimacy to the democratic process.

"The spectacle of an inauguration requires a great deal of planning as well as financing to accommodate the public and to insure that the event is as memorable in execution as it is in significance.* * *

H.R. Rep. No. 1796, 90th Cong., 2d Sess. 2 (1968).

We agree with these statements. However, we are not confident that existing law, agency practices and Congressional oversight are adequate to provide necessary guidance to agencies on permissible and impermissible inaugural activities and their funding.

RECOMMENDATION

We recommend that Congress undertake a review of the provisions of the Presidential Inaugural Ceremonies Act for the purpose of conforming its provisions to recent practices with respect to Government support of inaugural activities or, in the alternative, prohibiting the practices that do not conform with the law. In this review, we suggest that special attention be given the issues of:

- (1) which inaugural functions should properly be funded by the American taxpayers and which by the President-elect and Vice President-elect's supporters from private funds;
- (2) whether formal governmental representation on the Presidential Inaugural Committee might be appropriate, if the Government is to bear any substantial costs for inaugural activities;
- (3) whether Government funding should vary depending on the inaugural activity, i.e., pre-inaugural planning and preparation, formal inaugural ceremony, inaugural parade, and inaugural balls; and
- (4) DOD's appropriate role in inaugural activities in light of the current trend of increasing DOD's responsibilities for such activities as contrasted with the Presidential Inaugural Committee, the Joint Congressional Committee on Inaugural Ceremonies, the Government of the District of Columbia, and the Department of the Interior.

Until these basic policy issues are resolved, we are reluctant to propose any specific statutory language. However, we shall be glad to work with Congress in a review of the provisions of the Presidential Inaugural Ceremonies Act and in offering any other assistance that may be requested in devising a legislative solution to the problems identified above.

FOOTNOTES

1/ Section 4 of the act, 36 U.S.C. § 724, provides, in part:

"* * * The Inaugural Committee shall indemnify and save harmless the District of Columbia and the appropriate agency or agencies of the Federal Government against any loss or damage to * * * ["any sidewalk, street, park, reservation, or other public grounds in the District of Columbia" occupied with the approval of the Inaugural Committee by any stand or structure "for the sale of goods, wares, merchandise, food or drink"] and against any liability arising from the use of such property, either by the Inaugural Committee or a licensee of the Inaugural Committee." (Emphasis added.)

Section 5 of the act, 36 U.S.C. § 725, provides, in part:

"* * * No expense or damage from the installation, operation, or removal [by the Inaugural Committee] of * * * temporary overhead conductors or * * * illumination or other electrical facilities shall be incurred by the United States or the District of Columbia, and the Inaugural Committee shall indemnify and save harmless the District of Columbia and the appropriate agency or agencies of the Federal Government against any loss or damage and against any liability whatsoever arising from any act of the Inaugural Committee or any agent, licensee, servant, or employee of the Inaugural Committee." (Emphasis added.)

Section 6 of the act, 10 U.S.C. § 2543, provides, in part:

"* * * [T]he Inaugural Committee shall indemnify the Government for any loss or

damage to any * * * ["hospital tents, smaller tents, camp appliances, hospital furniture, ensigns, flags, ambulances, drivers, stretchers, and Red Cross flags and poles" lent to them by the DOD], and no expense shall be incurred by the United States Government for the delivery, return, rehabilitation, replacement, or operation of such equipment. The Inaugural Committee shall give a good and sufficient bond for the safe return of such property in good order and condition, and the whole without expense to the United States." (Emphasis added.)

- 2/ DOD stated its justification for reliance on the Economy Act as follows:

"Another legal theory which authorized Department of Defense support to the Inaugural is that much of it was pursuant to the Economy Act (31 U.S.C. 686). Throughout the pre-Inaugural period, the AFIC received requests from the PIC, which is recognized by 36 U.S.C. 721. As an operational principle, the AFIC responded to the PIC as if the PIC were an agency entitled to receive Economy Act assistance. Although this was inconsistent with a 1977 interpretation by the Staff Judge Advocate, Military District of Washington, it was reasonable for the AFIC to provide assistance to the PIC in view of the interrelationship among the JCCIC, PIC, and AFIC. Of course, in 1977 the Special Assistant to the Secretary of Defense expressly approved Economy Act support for the JCCIC, which is recognized by 36 U.S.C. 729."

- 3/ Section 601 of the Economy Act, as amended, states in part:

"(a) Any executive department or independent establishment of the Govern-

ment, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, upon its written request, either in advance or upon the furnishing or performance thereof, all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau, or office as may be requisitioned; but proper adjustments on the basis of the actual cost of the materials, supplies, or equipment furnished, or work or services performed, paid for in advance, shall be made as may be agreed upon by the departments, establishments, bureaus, or offices concerned * * *." (Emphasis added.)

- 4/ Pub. L. No. 97-258, approved September 13, 1982, 96 Stat. 877, enacted Title 31 of the United States Code into positive law and renumbered various of its provisions. The Economy Act, cited by DOD as 31 U.S.C. § 686, is now found at 31 U.S.C. § 1535.



COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON D.C. 20548

June 3, 1983

B-210555

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

This is in response to your letter of January 10, 1983, in which you asked us to review two legal memoranda which represent the positions of the Departments of State and Defense with respect to the use of Government vehicles and drivers for the provision of transportation for officials and employees of those Departments between their homes and places of employment. You requested our opinion on whether the policies of those two Departments, as discussed in the official memoranda which you supplied to us, are consistent with the meaning and intent of 31 U.S.C. § 1344.

Enclosed is a copy of our decision of today in which we explain how and why we conclude that the determinations of the Departments of State and Defense concerning the provision of home-to-work transportation are not consistent with the law.

However, we would like to take this opportunity to reiterate some recommendations we have made to the Congress over a period of years whenever new or amended language has been proposed to deal with this subject. (See, e.g., the "Limousine Limitation Act of 1975, S. 615, 94th Congress, and more recently, section 614 of H.R. 7158, the House version of the Treasury, Postal Service, and General Government Appropriation Act for FY 1983.) The fact that none of this legislation has passed (although restrictions on home-to-work transportation for a few specific agencies were enacted) has added to general agency uncertainty about Congressional intent. Did these proposals fail to pass because the Congress no longer wishes to apply the title 31 restrictions so strictly, or because a new Act was thought to be unnecessary in view of the continued viability of 31 U.S.C. 1344(b)(2)?

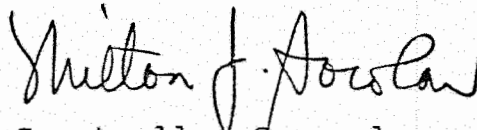
B-210555

The legislative history is silent or, at best inconclusive. This fact, coupled with the continued approval of limousines and other passenger vehicles during the appropriations process without restrictions on their use continues to confuse a number of agencies about the Congress' wishes on this subject.

Again, we recommend that clarifying legislation be enacted to resolve the troubling questions about the scope of an agency head's discretion to relax the restriction in the case of emergencies and similar situations.

Finally, the Congress may wish to reconsider the rationale for exempting only heads of executive departments from the restriction. It is not clear to us how a cabinet officer's needs differ from those of the heads of other major agencies, such as the General Services Administration, the National Aeronautics and Space Administration, and so forth. In addition, the law does not take into account any special requirements or needs of the principal officer of each agency. By "principal officer," we have in mind the individual who occupies the number two position in each agency, and who shares most of the same responsibilities as the agency head. Finally, we note that there are no provisions for handicapped personnel, or for transportation to and from evening meetings where alternative transportation is not available or, generally, where there is no other way to accomplish official business without the use of chauffeur-driven automobiles. The Congress may wish to have a Government-wide canvas of special needs prior to deciding whether to broaden the exceptions presently in the law. We will, of course, be glad to help in this endeavor.

Sincerely yours,



Acting Comptroller General
of the United States

Enclosure

DECISION



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

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 accessibility * * *." 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

^{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).

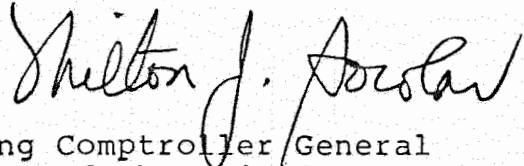
There is one other narrow exception to the prohibition which should be mentioned. When provision of home-to-work transportation to Government employees has been incident to otherwise authorized use of the vehicles involved, i.e., was provided on a "space available" basis, and did not result in additional 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.



Acting Comptroller General
of the United States

THE WHITE HOUSE

WASHINGTON

March 30, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: GAO Report Entitled "Justice Can Further
Improve Its Monitoring of Changes in
State/Local Voting Laws"

Assistant Attorney General Robert McConnell has sent you a copy of Justice's comments on the December 19, 1983 GAO report on Justice's monitoring of changes in state and local voting laws. The report was largely favorable to Justice's Civil Rights Division, concluding that the Division's decisions on preclearance of voting changes under section 5 of the Voting Rights Act:

have been made in accordance with existing legal standards and established procedures. We found no evidence that the division had applied arbitrary administrative standards in making decisions. Also on the basis of our review of correspondence files, we found no evidence that parties outside of the division influenced its decisions.

The report did recommend that the Division institute a general review of new state laws in covered jurisdictions to catch voting law changes that should have been but were not submitted for preclearance. In its letter Justice pats itself on the back for the favorable conclusion in the GAO report, and announces that it has accepted the rather minor GAO recommendations for further improving its performance.

No response is necessary.

Attachment

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

H/1015

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1

John any response needed?

Name of Correspondent: Robert A. McConnell☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: GAO report entitled "Justice Can Further Improve Its Monitoring of Charges in State / Local Voting Laws"

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>W Holland</u>	ORIGINATOR	<u>84103129</u>			<u>1 / 1</u>
<u>WAT 18</u>	Referral Note: <u>A</u>	<u>84103130</u>			<u>1 / 1</u>
	Referral Note:				<u>1 / 1</u>
	Referral Note:				<u>1 / 1</u>
	Referral Note:				<u>1 / 1</u>
	Referral Note:				<u>1 / 1</u>
	Referral Note:				<u>1 / 1</u>

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:

A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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U.S. Department of Justice
Office of Legislative Affairs

219846 *CU*

Office of the Assistant Attorney General

Washington, D.C. 20530

March 27, 1984

Honorable Fred Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Fred:

On December 19, 1983, GAO issued a report entitled "Justice Can Further Improve Its Monitoring of Changes in State/Local Voting Laws". Pursuant to the Legislative Reorganization Act of 1970, the Department has just commented on the GAO report.

I thought it might be of interest to you that the Department is most pleased that the GAO found the actions of the Civil Rights Division to be "fair, impartial and apolitical in nature." A copy of Assistant Attorney General Kevin Rooney's letter is attached for your information.

Very best personal regards.

Yours sincerely,

Robert A. McConnell
Assistant Attorney General

Attachment



March 23, 1984

Washington, D.C. 20530

Honorable William V. Roth
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to the provisions of Section 236 of the Legislative Reorganization Act of 1970, the Department of Justice (Department) is responding to the United States General Accounting Office's (GAO) report issued December 19, 1983, subject: "Justice Can Further Improve Its Monitoring of Changes in State/Local Voting Laws" (GAO/GGD-84-9).

The GAO final report is substantially the same as the draft report on which the Department provided comments in a letter dated August 25, 1983. The letter is incorporated in the final report as Appendix V. As pointed out in our letter, we find that the report accurately describes the actions of the Department's Civil Rights Division in its administration and enforcement of the requirements of Section 5 of the Voting Rights Act.

We are particularly pleased that GAO found the actions of the Civil Rights Division to be fair, impartial and apolitical in nature. GAO's recognition and approval of these actions provide encouragement for the Department to move forward positively and aggressively in its administration and enforcement of Section 5. In fact, the final report is even more succinct than was the draft in recognizing the responsible and impartial nature of the determinations made by the Department under Section 5:

Our review of redistricting and annexation cases showed that the Civil Rights Division consistently applied the discriminatory purpose or effect analysis in making preclearance, objection and withdrawal decisions under section 5 of the Voting Rights Act. Its decisions have been made in accordance with existing legal standards and established procedures. We found no evidence that the division had applied arbitrary administrative standards in making decisions. Also, on the basis of our review of correspondence files, we found no evidence that parties outside of the division influenced its decisions. ~

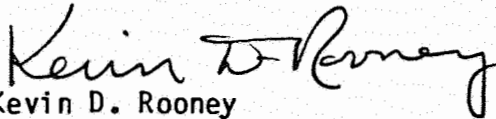
We are equally pleased to note that the report specifically recognizes the steps the Civil Rights Division has taken to improve the administration and enforcement of the Voting Rights Act. In fact, in Appendix IV of the report, GAO concludes that the corrective actions taken by the Department on an earlier report of June 7, 1978 accomplished the basic intent of the report's recommendations and no further action is required. The present report notes two additional matters needing further improvement, and the Civil Rights Division already has taken corrective action to remedy the problems in these areas.

As recommended by GAO, the Civil Rights Division now includes in its Section 5 files a statement that the list of information required to be submitted under its guidelines has been reviewed and that any information not in the file was not pertinent to an analysis of the particular voting changes under consideration.

Also, as GAO recommended, the Civil Rights Division has enhanced its ability to identify unsubmitted voting changes by instituting procedures for reviewing all new State laws each year, including State laws of local application, for each of the nine fully covered States (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia) and for North Carolina (where 40 of the State's 100 counties are specially covered). This action will affect States containing 885, or 96.5%, of the 917 political subdivisions specially covered by the Voting Rights Act. Other actions will be taken insofar as may be practicable with respect to the remaining 32 jurisdictions.

We appreciate the opportunity to comment on the report. Should you have need for any additional information, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script, reading "Kevin D. Rooney".

Kevin D. Rooney
Assistant Attorney General
for Administration