DECISION

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

DEC 18 1975

FILE: B-149372 DATE: 099416

MATTER OF: Secret Service Protection of the Secretary of the Treasury

DIGEST:

1. Holding in 54 Comp. Gen. 624 (1975) that funds appropriated to Secret Service are not available for protection of Secretary of Treasury because authorizing legislation, 18 U.S.C. § 3056(a) (1970), does not include Secretary among those entitled to protection, is reaffirmed. Administrative transfer to Secret Service of function of protecting Secretary does not, without more, make Secret Service appropriations available for that purpose.

2. Because intended use of Secret Service appropriation for protection of Secretary of Treasury was disclosed to and apparently acquiesced in by Congress in connection with fiscal year 1976 appropriation request that appropriation is available for such protection.

3. Since purpose of 54 Comp. Gen. 624, to stop then unauthorized use of Secret Service funds for protection of Secretary of Treasury, has been achieved, Department apparently acted in good faith, and Congress has acquiesced in use of fiscal year 1976 Secret Service appropriation for protection of Secretary, no useful purpose would be served by requiring reimbursement of Secret Service appropriation from appropriation for Office of Secretary of Treasury for period from decision in 54 Comp. Gen. 624 until fiscal year 1976.

PUBLISHED DECISION
55 Comp. Gen. .....

The General Counsel of the Department of the Treasury has asked, in effect, that we reconsider our decision at 54 Comp. Gen. 624, dated January 28, 1975, in which we held that funds appropriated for the operations of the Secret Service were not available for Secret Service protection of the Secretary of the Treasury, and that protection of the Secretary provided thereafter by the Secret Service should be on a reimbursable basis pursuant to 31 U.S.C. § 686(a) (1970), with reimbursement to be made from funds appropriated for salaries and expenses for the Office of the Secretary of the Treasury. In connection with the request for reconsideration, the General Counsel proposed, and we agreed, that the protection of the Secretary continue to be funded

from the Secret Service appropriation, with the understanding that, should our decision in 54 Comp. Gen. 624 not be modified, the Department would then take action to charge the cost of protection of the Secretary after the date of that decision to the appropriation for the Office of the Secretary.

Upon reconsideration, for the reasons set forth below, we find no justification for modifying our conclusion that funds appropriated to the Secret Service, prior to the enactment of the appropriation for fiscal year 1976, were not available for the purpose of providing protection to the Secretary of the Treasury. We have also concluded that funds appropriated to the Secret Service for fiscal year 1976 are available for protection of the Secretary, and we have modified our decision in 54 Comp. Gen. 624, to the extent that we now believe that no useful purpose would be served by requiring the cost of protection provided by the Secret Service to the Secretary after January 28, 1975, the date of that decision, to be reimbursed from the appropriation for the Office of the Secretary.

The General Counsel, in arguing that the appropriation for the Secret Service is available for protection of the Secretary, relies on the provisions of Reorganization Plan No. 26 of 1950, 31 U.S.C. § 1001 nt. (1970). Reorganization Plan No. 26 transfers all functions of all other officers of the Department and of all agencies and employees of the Department to the Secretary, with exceptions not here relevant. It goes on to provide that the Secretary may:

> "* * * from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Treasury of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan." Section 2, Reorganization Plan No. 26.

In addition, the Secretary may from time to time:

> "* * * effect such transfers within the Department of the Treasury of any of the records, property, personnel, and

> unexpended balances (available or to be made available) of appropriations, allocations, and other funds of such Department as he may deem necessary in order to carry out the provisions of this reorganization plan." Section 4, Reorganization Plan No. 26.

The General Counsel notes that in 54 Comp. Gen. 624 we found that authority exists for protection of the Secretary, notwithstanding that there is no express statutory authority for it. The General Counsel argues that protecting the Secretary is therefore a "function" of the Department in the sense of that word in Reorganization Plan No. 26; that this function is vested in the Secretary by the Reorganization Plan; that the function may, also by virtue of the Plan, be transferred to the Secret Service, as an agency of the Department; and that the Plan allows the concomitant transfer to the Secret Service by the Secretary of balances of funds deemed necessary to carry out the provisions of the Plan. He states that, once such a transfer has been made, the function of protecting the Secretary becomes a continuing function of the Secret Service and, accordingly, appropriations thereafter made to the Secret Service for necessary expenses become available automatically for protection of the Secretary.

The General Counsel concedes that the transfer of function which he contends has taken place was accomplished without the formality of a written Treasury order. His view, however, is that:

> "* * * there is no requirement for such formality, particularly where for the safety of the protectee there may be a desire to withhold the very fact of the existence of such protection from those who might wish to harm the protectee. A long continued administrative practice, if not a de jure transfer of functions, is, at least, evidence of such a transfer. In the instant situation, almost every Secretary of the Treasury since 1950 (if not even earlier) has received Secret Service protection, when and as required. Therefore, we believe, as a matter of law, the function of protecting the Secretary has

> been vested in the Secret Service for many years and pursuant to § 4 of Reorganization Plan No. 26 of 1950 the appropriations of Secret Service are today available for such protection * * *."

It follows, the General Counsel contends, that appropriations for the Office of the Secretary need not be used to reimburse the Secret Service for protective services provided to the Secretary.

With respect to the argument that the function of protecting the Secretary may be transferred to the Secret Service, we have stated, as the General Counsel points out, that protection of the Secretary may be provided by the Department. The Secretary is, by law, the head of the Department (31 U.S.C. §1001 (1970)), and is empowered by law to:

> "* * * prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business * * *."
> 5 U.S.C. § 301 (1970).

Accordingly, as the General Counsel suggests, the Secretary can presumably order any office or component of the Department, including the Secret Service, to provide protection for him, pursuant to his general administrative authority, even without reliance on Reorganization Plan No. 26. The question remains, however, whether funds appropriated to the Secret Service are available for the purpose of carrying out the function assigned to it of protecting the Secretary.

The General Counsel argues that appropriations to the Secret Service are available to protect the Secretary pursuant to section 4 of Reorganization Plan No. 26 of 1950. Even assuming that a transfer of function pursuant to section 2 of Reorganization Plan No. 26 was indeed made, we nevertheless cannot accept the General Counsel's contention that funds of the Secret Service became available, and remain so, by virtue of section 4 alone, for the purpose of protecting the Secretary.

Section 4 of Reorganization Plan No. 26 provides for the transfer, in order to carry out the provisions of the Plan, of "unexpended balances (available or to be made available) of appropriations, allocations and other funds * * *." The General Counsel contends that the effect of the parenthetical phrase "available or to be made available" in section 4 is "to transfer all future appropriations even before they are made." We cannot agree.

First, the literal language of section 4 does not support this view. What is authorized thereby to be transferred is not "appropriations" but rather "unexpended balances" of appropriations; the parenthetical phrase "available or to be made available" modifies "unexpended balances." See, in this connection, the Reorganization Act of 1949, June 20, 1949, ch. 226, 63 Stat. 203, which is the legislative authority for the formulation of Reorganization Plan No. 26, and which states that any reorganization plan shall:

> "* * * make provision for the transfer of such unexpended balances of appropriations, and of other funds, available for use in connection with any function or agency affected by a reorganization, as he [the President] deems necessary * * * but such unexpended balances so transferred shall be used only for the purposes for which such appropriation was originally made * * *." § 4(4), 63 Stat. 203, 204.

It seems evident that the "unexpended balances" which are authorized to be transferred must be the balances of appropriations which are, at the time of the transfer of funds, available for obligation for purposes of protection of officials, rather than, as the General Counsel contends, the balances of appropriations not yet enacted. Indeed we fail to see, nor does the General Counsel explain, how an appropriation not yet made can be transferred.

Moreover, with respect to the transfer of balances of funds already appropriated, it may be, as the General Counsel argues, that a transfer of functions under section 2 of Reorganization Plan No. 26 could be accomplished

without formality, but a transfer to the Secret Service appropriation account of a portion of the unexpended balance of funds from the Office of the Secretary appropriation account, under section 4 of Reorganization Plan No. 26, would presumably be accomplished by some written evidence of the transfer, The General Counsel does not contend that any such transfer of funds actually took place.

The General Counsel argues in the alternative that, even absent section 4 of Reorganization Plan No. 26 of 1950, once the Secretary has exercised the authority to transfer the function of protecting himself, it becomes a continuing function of the Secret Service, and appropriations for necessary expenses for the operation of the Secret Service become available thereafter for the transferred function. However, to say that, as a result of the transfer, the expense of protecting the Secretary becomes a "necessary expense" for the operation of the Secret Service is to beg the question which, fundamentally, is whether the Secretary may, by administrative action, and without disclosure to the Congress, make the Secret Service appropriation available for purposes for which, by virtue of 18 U.S.C. § 3056(a), it would otherwise not be available.

The answer to this question, in our view, must be that he may not, at least where there has been no mention, either in the Secret Service appropriation itself or in the material submitted to the Congress to support it, that it is intended to be used for protection of the Secretary. In that respect, we said in 54 Comp. Gen. 624, at 629, that:

> "* * * the Secret Service, although subject to the direction of the Secretary of the Treasury, derives its operating authority with respect to providing protection generally from 18 U.S.C. § 3056(a), and its funds are therefore not available, without specific authorization, to perform protective duties not authorized by that statute."

We find no new or compelling reason to depart from that statement. To hold that Secret Service funds have been available for protection of the Secretary, where neither the appropriation acts, the reports, the budget justifications, nor the testimony gave any indication that such a use was intended, would be inconsistent with the express terms of 18 U.S.C. §3056(a).

In speaking to this point, the General Counsel argues that the lack of express reference to protection of the Secretary does not negate the conclusion that the Secret Service appropriation is available for that purpose because:

> "* * * Both the Treasury Security Force and the Executive Protection Service are included under this appropriation as part of the Secret Service. There is, however, no specific breakout by Force and Service. The Treasury Security Force guards Government securities and Treasury buildings. This necessarily includes protecting those in the buildings, including the Secretary. Moreover, when the Secretary travels abroad, as he frequently does, he is an official representative of the United States performing special missions abroad. This entitles him to protection, at Presidential direction, pursuant to 18 U.S.C. 3056(a) itself. Lastly, the Executive Protection Service provides protection to the Executive residence and any building in which White House offices are located. The Secretary of the Treasury holds a number of positions which may well qualify his office as a 'White House office' in the same way that the Office of Management and Budget is such an office. It does not stretch the imagination, therefore, to find that protection of the Secretary is subsumed (although not expressly mentioned) in the functions for the performance of which the Secret Service appropriation is made. Consequently, the budget estimates support rather than detract from the conclusions reached above.

> "Lastly, having three discrete protective services--i.e., the Secret Service, the Executive Protection Service and the Treasury Security Force--under his jurisdiction, it makes eminent good sense that the Secretary would turn to these for such protection as may be required for his person. Conversely, it would not make sense to create another protective service on his immediate staff for this purpose. Having once turned to these existing services, all funded from the same appropriation and under the supervision of the Director of the Secret Service, and having a continuing need for such protection, it would follow that the funding for such protection should come from, and be the continuing responsibility of, the Secret Service. This is, in fact, what has historically transpired."

We acknowledged in 54 Comp. Gen. 624 that protection of the Secretary by the Treasury Security Force, to the extent its duties as set forth in the Secret Service budget justification involve such protection, is authorized. As we then pointed out, those duties include the responsibility for protecting life and property in Department buildings and for providing security for the Secretary's press conferences. It is likewise clear that, under the explicit authority of 18 U.S.C. § 3056(a), the President may direct protection of the Secretary when the Secretary travels abroad on special missions as an official representative of the United States. Assuming, arguendo, that the Secretary's duties make his office a "Presidential office" within the meaning of 3 U.S.C. § 202 (1970), setting forth the duties of the Executive Protective Service (referred to in the above quotation as the "Executive Protection Service"), then certainly Secret Service funds would be available to enable the Executive Protective Service to carry out its duty under that law to protect, not the person of the Secretary as such, but the building in which the Presidential office is located.

However, we cannot agree with the General Counsel that the conclusion to be drawn from the foregoing is that "protection of the Secretary is subsumed (although not expressly mentioned) in the functions for the performance of which the Secret Service appropriation is made." Rather, if any significance is to be given to the information concerning the Treasury Security Force and the Executive Protective

Service, it would seem to be that Secret Service funds are available for protection of the Secretary only in the limited circumstances described. That is, he can be protected by the Treasury Security Force, but only at the Treasury building or at press conferences, and by the Executive Protective Service, again only at his building (assuming that his is a "Presidential office), but he cannot be protected by the Secret Service, except when on a mission abroad at the direction of the President.

The General Counsel argues further as follows:

> "To the extent that any Secretary received Secret Service protection prior to January 28, 1975, the costs thereof were charged to the Secret Service appropriation for Salaries and Expenses. This approach has been consistently followed, at least, since the tenure of Secretary Morgenthau. In fact, the costs thereof have been consistently included in the budget request for the Secret Service Salaries and Expenses appropriation. Admittedly this fact is hard to demonstrate, since the budget estimates submitted each year by the President (see for example the Appendix to the Budget of the United States, 1976, at pp. 747-749) do not make any express mention of it. However, these same estimates make reference to protection of persons only in the narrative portion and, in that connection, essentially restate the substance of 18 U.S.C. 3056 and 3 U.S.C. 202 and 203a. Nowhere in the presentation is there a breakdown of the cost of individual protection. This is deliberate. It is part of the protection afforded such persons to guard closely the identity of the protectees and the number of Secret Service personnel assigned to protect each individual. In view of this, the estimates (i.e., tables) do not provide figures on the cost of protection of persons; such cost is subsumed under the other categories. The narrative does identify the persons protected; i.e., where classes of persons are mentioned there is no further identification of those who make up the class. Hence,

it is consistent that protection of the Secretary would not be specifically mentioned because, as the Comptroller General stated in his decision, the Secretary of the Treasury is not one of those persons for whom 18 U.S.C. 3056 expressly authorizes protection. Nevertheless, it is a fact that the Secret Service budget estimates, including specifically those for FY 1975, have included the cost of providing protection to the Secretary.

"The absence of specific mention of Secretarial protection has, perhaps, misled the Comptroller General. Consequently, we propose to present testimony in support of the Secret Service appropriation for the fiscal year 1976 which fully discloses that such appropriation includes funds for the protection of the Secretary. We also propose to include narrative language in support of any future Secret Service appropriation which will make that fact clear. These two steps should resolve the questions raised by the Comptroller General for the future."

We do not dispute that the Department's budget requests have in fact included amounts sufficient to allow the Secret Service to protect the Secretary. However, we reject the suggestion that the need for secrecy somehow justified the failure of the Department to reveal to the Congress the intended use of those funds. The fundamental issue is not whether the Comptroller General may have been misled, but whether the Congress was misled.

Nothing in this or our earlier decision requires the public disclosure of any information the release of which would, in the judgment of the Secretary, compromise the effectiveness of the protection. However, neither do we condone the practice of not disclosing to the Congress the intended use of an appropriation where, as in this instance, that use is for a purpose not authorized by the applicable legislation. The

Department was not justified in failing to reveal that its requests for funds for the Secret Service have included amounts intended to be used for protection of the Secretary.

Concerning the argument that nondisclosure of the identities of protectees is necessary as part of the protection, in logic it would appear at least as likely that public knowledge of protection would deter attacks. In any event, even assuming that ability to protect an individual is enhanced if the fact of protection is not publicly known, this argument cannot be used to justify nondisclosure to the Congress. Various mechanisms exist for offering confidential information to the Congress if that is thought necessary in a particular case.

Moreover, the identities of protectees whose protection is authorized by 18 U.S.C. § 3056(a) are in effect disclosed by that statute. The law authorizes the protection of the President and his immediate family, the Vice-President and (by virtue of Pub. L. No. 93-381, 88 Stat. 613 (August 21, 1974)) his immediate family, and of former Presidents and their wives, as well as their widows and children under certain conditions. In every case, the identity of the protectee is obvious. Visiting heads of State or Government and major Presidential or Vice-Presidential candidates are also entitled to protection; there would ordinarily be no doubt as to the identity of such individuals.

Only in the cases of protection of distinguished foreign visitors to the United States (who are not heads of State or Government) or of official representatives of the United States performing special missions abroad, both of which classes are entitled to protection if the President so directs, is the identity of those entitled to protection not readily apparent. Even in those cases, identification in the statute of the classes entitled to protection makes it possible to speculate with some expectation of accuracy that certain individuals would be likely to be receiving protection.

It thus becomes apparent that the principle that it is necessary "to guard closely the identity of the protectees," which the General Counsel offers as the

justification for failure to disclose the protection of the Secretary, finds its primary application in the kind of case now before us, where the law does not authorize such protection to be provided. We cannot agree that nondisclosure is justified in such circumstances. Accordingly, we reaffirm our conclusion in 54 Comp. Gen. 624 that the use of Secret Service funds for the protection of the Secretary of the Treasury was improper.

The Department has now made known to the Congress, in connection with the fiscal year 1976 appropriation request for the Secret Service, that it intends to use that appropriation for protection of the Secretary. The Congress has apparently acquiesced to that proposal. The Senate Report on the Treasury, Postal Service, and General Government Appropriation Act, 1976, states that one of the functions of the Secret Service is to provide for the protection of the Secretary of the Treasury, as required. S. Rep. No. 94-294, 19 (1975). Moreover, although it is not reflected in the budget justification or the House Report, representatives of the Department of the Treasury testified in House hearings on the appropriation request for fiscal year 1976 that Secretary Simon is receiving protection, funded from the Secret Service appropriation, and that the request for fiscal year 1976 funding for the Secret Service included amounts intended to be used for that purpose. Hearings on the Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1976 Before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess. 782-83 (1975).

In view of this history, we conclude that funds appropriated to the Secret Service for fiscal year 1976 by the Treasury, Postal Service, and General Government Appropriations Act, 1976, Pub. L. No. 94-91, approved August 9, 1975, are available for protection of the Secretary. This conclusion of course cannot be taken to make appropriations to the Secret Service for subsequent fiscal years available for protection of the Secretary. Unless the law is amended to authorize the Secret Service to protect the Secretary of the Treasury, the availability of each annual appropriation for that purpose must be determined by reference to the terms of the appropriation act and its history.

Since funds appropriated to the Secret Service by Pub. L. No. 94-91 are available for protection of the Secretary, the only period to which the requirement of 54 Comp. Gen. 624--to charge the protection of the Secretary to the appropriation for the Office of the Secretary--now applies is from the date of that decision, January 28, 1975, until the close of fiscal year 1975, June 30, 1975. With respect to that period, as recognized above, it is not disputed that funds were included in the budget request of the Secret Service, albeit without disclosure, for protection of the Secretary.

While we have not changed our view that that use was not authorized, the Department was apparently acting in the belief, in good faith, that its procedure was proper. Our purpose is not to penalize the Department, but simply to put a stop to the unauthorized practice. That purpose has been achieved, and the Congress has made the Secret Service appropriation for fiscal year 1976 available for the purpose of protecting the Secretary. Accordingly, the cost of protection of the Secretary of the Treasury during the period January 28 to June 30, 1975, will not be required to be reimbursed from the appropriation for the Office of the Secretary. Our decision in 54 Comp. Gen. 624 is modified accordingly.

SIGNED ELMER B. STAATS

Comptroller General
of the United States