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Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

JAN 23 1984

MEMORANDUM FOR MICHAEL E. SHAHEEN, JR.
Counsel
Office of Professional Responsibility

Re: Use of Department of Justice Vehicles
by Attorney General's Spouse

This responds to your written request of August 22, 1983 regarding the authority of the Department of Justice to make available to the spouse of the Attorney General a chauffeur-driven automobile leased by the Department. 1/ Specifically, you asked:

1. Under what circumstances may such a vehicle be provided to the Attorney General's spouse;
2. Whether the Attorney General's spouse functions in an official or quasi-official capacity;
3. Whether the Attorney General's spouse may be provided transportation by the White House Office or a political organization.

Additionally, you have provided us with some examples of the kinds of trips that might be taken in a Justice Department vehicle by the Attorney General's spouse. See note 1, supra. In this memorandum, we first provide a background discussion of the limits on the general use of Department of Justice

1/ Your written request has been supplemented by discussions between our offices on October 26 and November 15, 1983, and by a November 22 written list that sets forth eight categories of possible uses of the car by the Attorney General's spouse. This list of examples is addressed in the "Application" section of this memorandum, infra.

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Professional Responsibility

vehicles. We then discuss those limits as they would apply to the examples you have provided. 2/

Legal Background

Any discussion of the appropriate use of government vehicles must proceed from an analysis of 31 U.S.C. § 1344, which provides that passenger motor vehicles of the United States Government may be used for official purposes only. See 31 U.S.C. § 1344 3/; Comptroller General Opinion B-210555,

2/ We emphasize here that we address these examples only as hypothetical situations. We of course leave to you all fact-finding and judgments with respect to whether past use has comported with applicable limitations. See 28 C.F.R. § 0.39a.

3/ Section 1344 provides as follows:

(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.

re "Use of Government Vehicles for Transportation Between Home and Work" (June 3, 1983); see also DOJ Order 2540.4A (Aug. 17, 1982) (Use of Department of Justice Motor Pool Vehicles). Thus, as a preliminary matter, a government vehicle may be used by the Attorney General's spouse -- or by any other individual -- only for the purpose of carrying out official government business. More specifically, a Department of Justice vehicle may be used only for official Department of Justice purposes. See 31 U.S.C. § 1301 ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").

Section 1344 does not define the term "official purposes," other than to provide, with certain stated exceptions, that the term does not include transportation of government employees between their homes and places of employment ("portal-to-portal transportation"). 4/ The Comptroller General has, in the past, explained that the "primary purpose" of prohibiting portal-to-portal transportation "is to prevent the use of Government vehicles for the personal convenience of employees." See 57 Comp. Gen. 226, 227 (1978). While this is an important guide in construing Section 1344, it is also important to note that even transportation that is not for the personal convenience of employees -- transportation that could be viewed by a reasonable person as being in the interests of the government -- may nonetheless be prohibited under Section 1344. In a recent opinion addressing the meaning of "official business" with respect to portal-to-portal transportation for those not specifically entitled to such transportation by Section 1344, the Comptroller General clearly rejected the notion that what constitutes "official business" is a decision lying solely within the discretion of an agency head, or that an agency head may authorize portal-to-portal transportation whenever it is in the "interests of the government." See B-210555 (June 3, 1983). Because that opinion specifically addressed the explicit statutory prohibition against portal-to-portal transportation, it is not directly applicable to the question of spousal transportation. Nonetheless, the opinion

CG cancelled this new law!

4/ Because the Attorney General is the head of an executive department, motor vehicles for his official use are not subject to this limitation of § 1344. See 31 U.S.C. § 1344(b), note 3, supra.

emphasizes the importance of the principle that the use of government vehicles must be for an authorized official purpose. 5/

5/ In this respect, we would note that the continuing validity of the October 18, 1976 memorandum from Assistant Attorney General for Administration Pommerening to Attorney General Levi, re "Travel by Government Vehicles," which you supplied to us, is subject to doubt. The Pommerening memorandum sets forth nine categories of permissible use of government vehicles by the Attorney General. The first six categories relate solely to the Attorney General's use; the last three categories address use by the spouse of the Attorney General. The memorandum relies on earlier Comptroller General decisions that "a Government vehicle may be used whenever it is in the interests of the Government to do so," noting that "these decisions conclude that control over such use of a Government vehicle is primarily a matter of administrative discretion to be exercised by the agency or department concerned." Opinion *yes, but* B-210555 clearly has narrowed the scope of administrative *it was explicitly prospective only* discretion in this area.

In any event, while the Pommerening memorandum is not absolutely clear, we believe it authorizes separate transportation for the Attorney General's spouse only "when she participates in an official function as his representative" (category 8). Category 7, which would permit transportation of the Attorney General's spouse in five categories authorized for the Attorney General, appears to authorize such transportation only because she would be accompanying the Attorney General when he is himself on official business. Category 9 states that use of government vehicles would be justified "to transport the spouse of the Attorney General in any circumstances where security so dictates," but presents as the only example of this the circumstance in which "the Attorney General has been assigned a security detail and his spouse will accompany him." Department of Justice appropriations provide for FBI protection of the Attorney General, see Pub. L. No. 96-132, 93 Stat. 1040, § 9(B), and Pub. L. No. 98-166, 97 Stat. 1071, § 205 (continuing authority in 93 Stat. 1040), but we are aware of no authority to make independent expenditures of appropriated funds to provide security for the Attorney General's spouse, even if such security could be provided in the form of a DOJ chauffeur-driven automobile. We have in the past indicated that a federal function may be involved in the protection of a private citizen, so as to justify protection by United States Marshals, but we have also indicated that such *example doesn't define category exclusively*

(continued)

A central principle in determining what is an authorized, official purpose, is that appropriated funds cannot generally be used to pay the expenses of persons who are not federal employees. See Comp. Gen. Op. B-204877 (Nov. 27, 1981) ("[w]ith a few statutorily established exceptions, we are not aware of any authority to pay the travel and per diem expenses of individuals who are not Federal officers or employees"). This principle is given force, for example, in 31 U.S.C. § 1345, which prohibits the payment of travel, transportation, and subsistence expenses of private parties at meetings, except as specifically provided by law. 6/ One "limited exception" to Section 1345 is found at 5 U.S.C. § 5703, which permits the payment of travel expenses of persons serving the government intermittently or without pay. See General Accounting Office, Principles of Federal

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addressed
to unique
status
of
spouse*

5/ (continued)

protection would be justified only in light of special law enforcement purposes, such as protecting government witnesses or in response "to some particular, serious threat of violation of federal law." See Memorandum for Associate Attorney General Giuliani, from Deputy Assistant Attorney General Tarr, Office of Legal Counsel, re "Special Deputations," at 11, n.16 (March 18, 1983). Thus, separate transportation of the Attorney General's spouse for security reasons could be authorized only under unusual circumstances justified by special law enforcement purposes.

6/ 31 U.S.C. § 1345 provides as follows:

Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit --

(1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; and

(2) the Secretary of Agriculture from paying necessary expenses for a meeting called by the Secretary for 4-H Boys and Girls Clubs as part of the cooperative extension work of the Department of Agriculture.

Appropriations Law at. 3-37 (1982). 7/ Generally, such persons are viewed as temporary employees or "quasi-employees" during the period of their service to the government. Under this theory, the Comptroller General has construed Section 5703 to authorize the payment of expenses of a private person to come to Washington to confer with government officials without formally inducting him into government service on the theory that the person was serving without compensation. 33 Comp. Gen. 39 (1953); 27 Comp. Gen. 183 (1947). On the same theory, the Comptroller General also ruled that the government may pay the expenses of a witness to attend an administrative hearing. 48 Comp. Gen. 110 (1968). Additionally, the Comptroller General has ruled that the government may pay the expenses of a person who was not a government employee to travel with a military officer who was unable to travel alone to undergo a mandatory physical examination in connection with disability status. 52 Comp. Gen. 97 (1972). That opinion cited an earlier unpublished opinion, B-169917 (1970), which concluded that the government could pay the expenses of a wife to accompany her employee-husband back to his duty station when he became incapacitated while on official travel. These persons could be regarded as "serving without compensation" even though they were not

7/ 5 U.S.C. § 5703 provides as follows:

An employee serving intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis, or serving without pay or at \$1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service.

As another example of a statutory exception to the rule against paying expenses of non-employees, fees and expenses of witnesses are authorized to be paid by Department of Justice Appropriation Acts. See Department of Justice Appropriation Act, Fiscal Year 1980, Pub. L. No. 96-132, 93 Stat. 1040, 1041; see also Pub. L. No. 98-166, 97 Stat. § 205(a) (continuing authority in 93 Stat. 1040).

actually appointed as employees. 8/ The Department of Justice travel regulations, § 1.1(b)(2), similarly permit the payment of travel expenses of "individuals serving without pay." See also Memorandum to Deputy Associate Attorney General Green, from Deputy Assistant Attorney General Ulman, OLC, re "Travel and Subsistence Expenses for FBI, Director-Designate Judge Johnson" (Oct. 19, 1977) (DOJ can pay travel expenses for trip to Washington related to confirmation hearing if designee meets with Department official on official business during trip and Attorney General or his delegate determines that meeting is of "substantial benefit" to the Department); 53 Comp. Gen. 424, 425 (1973) (setting forth standard relied on in Ulman memorandum). 9/

can't categorize spouses as if they were advisors committee part-time members

One limiting principle applied to Section 5703 is that "the individual is legitimately performing a direct service for the Government such as making a presentation or advising

8/ Opinion B-169917 reflects a narrow exception. The Comptroller General has required that administrative approval for an attendant be based on a certificate by the employee's physician stating that the employee requires an attendant in order to return to his permanent duty station. See B-169917.

9/ We would note, however, that in any event not everyone entitled to "government transportation" is entitled to the use of chauffeur-driven government vehicles, which are generally made available to a limited class of employees. With respect to use of Department of Justice vehicles, for example, the only officials authorized to use Department of Justice Motor Pool Vehicles are those listed in Appendix I to DOJ Order 2540.4A re "Use of Department of Justice Motor Pool Vehicles." While the Appendix would permit transportation to "[s]uch other officials as may from time to time, based upon need, be designated by . . . JMD" (Appendix I, item z) (emphasis added), the Attorney General's spouse does not appear on this list. Cf. Memorandum for General Counsel Knapp, Department of Housing and Urban Development, from Assistant Attorney General Olson, Office of Legal Counsel, re "Use of Government Automobiles to Transport Federal Employees Between Home and Work" (June 10, 1983) (use of government automobile prohibited between home and office on day when employee returns from or departs on official business, even though GSA regulations would permit reimbursement of taxi or private automobile costs for same travel).

list is of no legal significance

in an area of expertise." See Principles of Federal Appropriations Law, supra, at 3-39 (emphasis added). As explained by the Comptroller General, Section 5703 "is not a device for circumventing 31 U.S.C. § 551." The "direct service" test cannot be met merely because payment of the expenses may in some way enhance the agency's program objectives. Principles of Federal Appropriations Law, supra, at 3-39.

There are several special considerations that affect the application of these general principles to the spouses of government officials. A government official's spouse may of course have an independent appointment to a government position. Additionally, under some circumstances a spouse may be viewed as serving the government without compensation, as discussed above. These possibilities, however, and the provision of government transportation, are subject to several important limits.

*false
limitation -
spouse has
quasi-official
status*

One significant obstacle to viewing the Attorney General's spouse as serving the Department as an uncompensated employee is found at 5 U.S.C. § 3110, which imposes restrictions on the employment of relatives of certain public officials. Subsection (b) of that statute provides that:

A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.

*absurdly
would analyze -
He doesn't
have a right
his spouse!*

This Office has previously construed Section 3110 to apply to uncompensated, as well as to compensated services. See Memorandum for the Attorney General from Acting Assistant Attorney General Harmon, Office of Legal Counsel, re "Employment of Relatives Who Will Serve Without Compensation"

(Mar. 23, 1977). In 1977, we concluded, pursuant to Section 3110, that Mrs. Carter could not be appointed as Chairman of a Commission on Mental Health, although she might serve in an honorary capacity. See Memorandum for Associate Counsel to the President Huron, from Acting Assistant Attorney General Harmon, Office of Legal Counsel, re "Possible Appointment of Mrs. Carter as Chairman of the Commission on Mental Health" (Feb. 18, 1977). Moreover, the First Lady could not undertake, for example, "the day-to-day work of the White House Office, such as answering correspondence or telephone calls, which is . . . a governmental function of the kind ordinarily performed by regular members of the White House staff." March 23, 1977 Memo, at 8. However, we have not construed Section 3110 to prohibit the First Lady from carrying on the "traditional duties of First Lady in directing operation of the Executive Residence, making arrangements for entertainment, etc." Moreover, Section 3110 would not prohibit the First Lady from representing the President at certain official functions, because on such occasions "members of the President's family appear essentially on the President's behalf not in an official capacity or position." See id. (emphasis added).

why not similar exception for traditional duties of Cabinet spouse

In our view, Section 3110 would prohibit the Attorney General from appointing his spouse to, or recommending her for, even an uncompensated official position within the Department of Justice, even on a temporary or intermittent basis. Like the First Lady, she might on occasion appear as the Attorney General's representative in his absence, but we expect such occasions would arise infrequently. 10/

why only in his absence?

In addition to the problem raised by Section 3110, spousal transportation must be viewed in light of precedents that specifically address travel by government officials' spouses. See, e.g., Clark v. United States, 162 Ct. Cl. 477, 484 (1963) (wife's use of government car to do some marketing or take child to doctors not permissible, although under circumstances

10/ As we see it, the exception to § 3110 permitting the First Lady to appear in the President's stead might also apply to the Attorney General's spouse on rare occasions when the Attorney General is expected to attend a function purely for reasons of official protocol and is unable to be there himself. In such cases, where there are no official duties to be performed, the Attorney General's spouse may appear in his behalf without violating § 3110.

of case, offense not so major as to warrant employee's discharge). There have been several occasions on which the Comptroller General or this Office has considered the question of government travel for an employee's spouse. In Opinion B-204877, the Comptroller General reiterated that under Chapter 57 of Title 5 of the United States Code, which sets forth travel and subsistence provisions, "it is clear that an officer or employee of the United States who is traveling on official business is not entitled to be accompanied at Government expense by his or her spouse." B-204877, at 1 (Nov. 27, 1981). The Comptroller General applied this principle to travel by members of Congress not actually governed by Chapter 57, when he considered whether "for purposes of protocol, spouses of committee members and staff members of the House of Representatives may legally accompany them in authorized foreign travel and, if it is legal, how the travel expenses would be handled." Id. The Comptroller General concluded that even when spouses were made a part of an official delegation by designation of a committee chairman, federal funds could not be used to pay their travel expenses. See id. at 2. Noting that federal funds may be used for the purposes for which they are appropriated, and none other, see 31 U.S.C. § 1301, the Comptroller General explained that "[w]ith a few statutorily established exceptions, we are not aware of any authority to pay the travel and per diem expenses of individuals who are not Federal officers or employees. This is true even though the presence of spouses might in some way enhance the achieving of the purposes of the trip." B-204877, at 1. The Comptroller General did agree, however, consistent with applicable Department of Defense regulations, that spouses included in an official delegation by a pertinent committee chairman could travel in military aircraft on a "space available" basis. Expenses, however, such as in-flight meals or differential hotel costs, could not be paid with federal funds. B-204877, at 2-3.

*this is
not local
transportation
but
foreign
trips!*

This Office applied these principles to travel by the Attorney General and Mrs. Smith in an October 1982 opinion addressing the Attorney General's planned trip to Europe and Asia. During that trip, Mrs. Smith was scheduled to attend diplomatic functions with the Attorney General, as well as to attend independently several meetings on behalf of the government. This Office stated:

We are reluctant to conclude on the basis of the itinerary alone that these appointments and protocol functions are so necessary

to the trip from the perspective of this Department that they would justify a determination Mrs. Smith will be on official travel. On the other hand, we agree with the view set forth by the Comptroller General, that spouses of government officials who serve the government's interests by traveling with the official delegation should be given, when feasible, transportation without charge on a "space available" basis. Mrs. Smith clearly falls within this category, and we accordingly advise you that she may travel in the military airplane, without charge, so long as there is space available for her. Her other expenses should be paid from private funds in accordance with the principles set forth by the Comptroller General.

Memorandum for the Attorney General, re Travel by Mrs. Smith on Trip to Europe and Asia, at 4 (October 18, 1982).

Both the Comptroller General's opinion and this Office's October 1982 opinion illustrate that the fact that the presence of a spouse might be in the interests of the government and might enhance the accomplishment of a government objective does not itself create authority to expend appropriated funds for spousal travel. In short, circumstances that permit a spouse to be transported on an otherwise authorized trip in the interests of the government, on a "space available" basis, may nonetheless fail to justify the independent expenditure of appropriated funds for such travel. See also 57 Comp. Gen. 226, 228 (1978) ("where the transportation of a dependent in a Government vehicle is such that the dependent merely accompanies an employee on an otherwise authorized trip scheduled for the transaction of official business, and the agency involved makes a determination that it is in the Government's interest for the dependent to accompany the employee (for instance, for morale purposes), we do not believe that the provisions of section [1344] would be violated").

*opinion
and decisions
should be
made on a
case-by-case
basis*

Moreover, the fact that someone may be invited to an event as the spouse of a government official does not necessarily confer even "quasi-official" status. For example, the Comptroller General has rejected use of Department of Interior funds for a December 1981 breakfast given by the wife of the Secretary

of Interior for the wives of Cabinet members and White House officials, because the breakfast was attended "entirely by private persons." See Comp. Gen. Op. B-206173, re "Department of Interior -Funding of Receptions at Arlington House" (Feb. 23, 1982); see also B-204877, supra, at 1; United States Department of Housing and Urban Development, Inspector General Report (Sept. 21, 1982) (finding unauthorized the use of a government vehicle for nine trips involving the Under Secretary's wife, when she was not accompanied by the Under Secretary, including trips to bring her downtown so she could attend evening functions with the Under Secretary); cf. "Examination of President Nixon's Tax Returns for 1969-1972, H. Rep. No. 966, 93d Cong., 2d Session 161 (1974) (President realized taxable income when members of his family accompanied him on official trips but themselves had no official functions).

Application to Hypotheticals

Against this background, we consider the three general questions you have raised. First, as discussed above, a Department of Justice vehicle may be provided to the Attorney General's spouse only for the conduct of an official Department of Justice purpose for which there is authority to provide such transportation. 11/ Second, the Attorney General's spouse

11/ We address here only those occasions on which the Attorney General's spouse is provided a vehicle independently of the Attorney General. When she travels with the Attorney General in a government car, on an official trip, she presumably does so on a "space available" basis. See discussion infra.

We have considered whether the appropriations for official reception and representation expenses, which can be used "to fund official activities that further the interests of the Department of Justice," see DOJ Order 2110.31, "Expenditure of Representation Funds," are available to supply the Attorney General's spouse with transportation to official government functions. Use of the fund for "[h]ire, purchase, operation, or repair of any motor-propelled, passenger-carrying vehicle," however, is specifically prohibited by DOJ order. See id. at 6(d)(1).

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Basis for
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could function in an official government capacity if appointed to some government position or to perform a particular government function, but her role as spouse alone does not confer on her such an official position, and in fact limits the positions to which she might be appointed. See 31 U.S.C. § 3110. Moreover, even if the presence of the Attorney General's spouse enhances achievement of official objectives, or the Attorney General's spouse functions in some "quasi-official" capacity, the expenditure of appropriated Department of Justice funds on her behalf is not ordinarily authorized. Third, whether some other government organization, such as the White House, may pay for such transportation depends on whether that organization has authority to expend its appropriated funds in such a fashion. ^{12/} On the other hand, transportation provided or reimbursed by private organizations is not subject to the limits placed on the expenditure of appropriated funds, but may be prohibited by the conflict of interest laws, depending on the source and

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^{12/} The White House may be able to provide transportation under circumstances in which this Department could not. Unlike the Attorney General, the President has several possible sources of appropriated funds from which a nonemployee traveling for official purposes of the Presidency might be paid expenses. See, e.g., 3 U.S.C. § 102 (expense account, which is "to assist in defraying expenses relating to or resulting from the discharge of [the President's] official duties" and which specifically mandates that there shall be no accounting by the President, except for income tax purposes); the "Unanticipated Needs" fund, 3 U.S.C. § 108 (expressly made "without regard to any provision of law regulating the employment or compensation of persons in the Government service or regulating expenditures of Government funds"). See, e.g., Memorandum to Assistant Attorney General Harmon from Attorney-Adviser Taylor, Office of Legal Counsel, re "Payment of Travel Expenses by a Person Traveling on Behalf of the President" (Feb. 24, 1977). This is not to suggest, however, that White House funds should be used to reimburse the Department for any unauthorized use of its vehicles that may already have occurred.

the reasons for providing such transportation. See, e.g., 18 U.S.C. § 209; 28 C.F.R. Part 45. We would be happy to provide more guidance on this point if a specific situation arises. 13/

In addition to these general questions, your office submitted to us a list of examples of various possible uses of transportation by the Attorney General's spouse. Your list sets forth the following possible uses:

1. to attend to purely personal matters, such as shopping for groceries, going to the hairdresser's, visiting a physician, or traveling to and from airports; *as was case w/ Hordley's spouse.*
2. to attend social functions at private homes or clubs, restaurants and hotels to which she alone has been invited as the guest of a private organization, such as the League of Republican Women, the Junior League, or the Heart Association, or of a private citizen;
3. to attend meetings of organizations of which she is a member, such as the Opera Ball Committee or the National Symphony, at the Kennedy Center or at restaurants.
4. to attend social functions at private homes or clubs, restaurants and hotels to which she alone had been invited as the guest of the spouse of a Senator, Congressman or Cabinet Officer, where the function is in honor of a foreign diplomat's spouse, or the spouse of a Senator, Congressman or Cabinet Officer;
5. to attend luncheons or meetings at the White House which were part of, or related to, volunteer efforts involving spouses of elected and appointed U.S. Government officials;
6. to attend official social functions to which both she and the Attorney General had been invited by virtue of his position and to which she proceeds separately, meeting the Attorney General there;

13/ As a prospective matter, of course, the Department of Justice may not permit its motor vehicles to be used for nonauthorized purposes, even if reimbursement is anticipated.

7. to attend official social functions honoring the spouse of a national leader (e.g., Mrs. Ronald Reagan, Mrs. Anwar Sadat) held at Government buildings to which she had been invited; and
8. to attend ceremonies held in Government buildings involving U.S. Government officials, such as the swearing in of new diplomats.

In our view, the first three examples reflect purely personal purposes for which there would be no apparent authority to expend funds appropriated for Department of Justice business. Shopping or visiting a physician, attending private social functions, or attending meetings of organizations of which the Attorney General's spouse is a member do not constitute official business of the Department. Additionally, those private social functions to which the Attorney General's spouse is invited, even if she is invited because she is the spouse of a Cabinet member (Example #4), have no authorized Department of Justice purpose justifying the expenditure of Department of Justice appropriations. See, e.g., Comp. Gen. Op. B-206173 (breakfast party for Cabinet spouses).

In the same sense, we would consider participation in volunteer efforts by spouses of government officials to have no authorized Department of Justice purpose, even if the volunteer activities are conducted under the auspices of the White House. Of course, if the White House has authority to transport private citizens for such purposes, it may provide such transportation to the Attorney General's spouse. See note 12, supra. We are aware of no authority, however, to expend Department of Justice appropriations for such purposes.

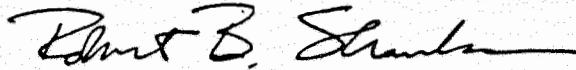
Examples #6, #7 and #8 arguably have a clearer nexus to some official Department of Justice purpose, but we nonetheless conclude that that nexus alone does not authorize the expenditure of Department of Justice appropriations to provide the Attorney General's spouse with independent transportation to the events. While the presence of the Attorney General's spouse at these events might be said to be in the interests of the government, and could be viewed as enhancing the Attorney General's role as a Cabinet officer, we are not aware of any special circumstances that would provide authority to expend Department of Justice appropriations to transport her to these events. Thus,

*no more
than
ipse limit*

while attendance at such functions may be viewed as being in the interests of the Department, and thus would be appropriate occasions for the Attorney General's spouse to accompany the Attorney General on a "space available" basis, we do not believe she can be provided her own Department of Justice vehicle on such occasions.

Conclusion

We have no doubt that the presence of the Attorney General's spouse often enhances the conduct of Department of Justice affairs. In addition, she may frequently be invited to events solely on the basis of her status as the spouse of the Attorney General. Nonetheless, the Attorney General's spouse is a private person for whom there is generally no authority to make independent expenditures of Department of Justice appropriations to transport her to such events.



Robert B. Shanks
Deputy Assistant Attorney General
Office of Legal Counsel

BY THE COMPTROLLER GENERAL

Report To The Congress OF THE UNITED STATES

Use Of Government Vehicles For Home-To-Work Transportation

GAO studied various federal departments and agencies' use of chauffeur-driven government vehicles for home-to-work transportation of federal employees in the Washington, D.C., metropolitan area. The results are presented in this study.

On June 3, 1983, GAO issued a decision on home-to-work transportation. In that decision, GAO concluded that government passenger motor vehicles are only available for transportation on official business. By statute, the Congress has declared that, except for the heads of cabinet-level departments and certain other specified individuals, transportation between an officer's or an employee's home or work station may not be considered to be official business. There is little room for the exercise of discretion by agency heads in permitting such transportation except in the kind of emergency situations set forth in GAO decisions. However, the law may be unduly restrictive. The decision recommended that consideration be given to amendatory legislation to broaden the scope of the exceptions to the prohibition in appropriate cases.



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COMPTROLLER GENERAL OF THE UNITED STATES
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B-210555

To the President of the Senate and the
Speaker of the House of Representatives

The House Conference Report that accompanied House Joint Resolution 631 ^{1/} making further continuing appropriations for the fiscal year ending September 30, 1983, directed the General Accounting Office to study the various federal departments' and agencies' use of government automobiles and chauffeurs for transportation of federal employees between their homes and places of employment. ^{2/}

OBJECTIVES, SCOPE, AND METHODOLOGY

Our objectives were to obtain information on how often and to whom home-to-work transportation is being provided and the circumstances under which services were provided as well as to identify the legal decisions and/or rationale for providing home-to-work transportation. We selected our sample of agencies to obtain a mix in terms of the amount of home-to-work transportation provided, agency size, and whether the agency had cabinet- or noncabinet-level status. We limited the scope of our study by studying only the use of government vehicles and chauffeurs for home-to-work transportation provided to headquarters officials at 13 selected executive branch departments and agencies in the greater Washington, D.C., metropolitan area. The departments and agencies reviewed were

- Office of Management and Budget, Executive Office of the President;
- Department of Defense, including the Departments of the Army, Navy, and Air Force;

^{1/}House Joint Resolution 631 became the Further Continuing Appropriations Act, 1983, Public Law 97-377, 96 Stat. 1830 (1982).

^{2/}H. Rept. No. 980, 97th Cong., 2d sess. 197 (1982).

- Department of Health and Human Services;
- Department of Housing and Urban Development;
- Department of Justice;
- Department of Transportation;
- Central Intelligence Agency;
- Civil Aeronautics Board;
- Environmental Protection Agency;
- Federal Communications Commission;
- Federal Home Loan Bank Board;
- Federal Trade Commission; and
- National Science Foundation.

In January 1983, we sent letters to the 13 selected departments and agencies requesting that they provide information on the home-to-work transportation services provided for the period October through December 1982. We verified the information at the National Science Foundation, one of three agencies that reported no use of government vehicles or chauffeurs for home-to-work transportation. We also verified the information provided by the Department of Defense's Office of the Secretary of Defense executive motor pool and the Pentagon (Army) and Navy motor pools because the Department reported a relatively high amount of such usage. This verification involved examining dispatch logs and vehicle records to determine the usage of motor pool vehicles and chauffeurs as well as reviewing applicable regulations and procedures. We found no discrepancies between what was reported to us and these agencies' records.

We did not obtain agency comments on this study because we received the data on the use of home-to-work transportation from the departments and agencies and reported it directly as received.

AUTHORITY FOR PROVIDING HOME- TO-WORK TRANSPORTATION

The basic authority governing the use of government-owned vehicles to transport federal employees between their homes and places of employment is 31 U.S.C. 1344, formerly 31 U.S.C. 638a(c)(2). This authority generally prohibits providing such transportation except for the heads of the cabinet-level departments and certain other specified individuals. (See p. 10 of

app. I.) In addition to this basic authority, departments and agencies, as part of their respective appropriations acts, are subject to specific statutory provisions regarding the use of home-to-work transportation.

In a June 3, 1983, decision, B-210555 (see app. I), we recognized that many agencies were uncertain about who was authorized home-to-work transportation or they believed, erroneously, that provision of such transportation was a matter for the discretion of the agency head. We made it clear that the Congress has stated, unequivocally, that except as specifically provided in the statute, home-to-work transportation may not be considered "official business" and may not be authorized by any official, including the agency head. The decision described certain limited emergency situations in which we have ruled that an exception could be made.

We recognized that the rigidity of the present law may lead to many hardships and inequities. We, therefore, recommended in the decision that the Congress consider amendatory legislation to relax the restrictions on providing home-to-work transportation in the case of special situations. We also suggested that the Congress may wish to reconsider the rationale for exempting only the heads of executive departments from the general prohibitions in 31 U.S.C. 1344(b) and expand the present exemption to include the heads of all agencies and perhaps their principal deputies.

CHAUFFEURED GOVERNMENT VEHICLE USE BY DEPARTMENTS AND AGENCIES

Among the 13 departments and agencies (see app. II) responding, three agencies reported that they did not provide any home-to-work transportation service. These agencies were the Environmental Protection Agency, the Federal Home Loan Bank Board, and the National Science Foundation. The remaining 10 departments and agencies reported that they provided daily or occasional home-to-work transportation to senior-level officials. Specifically,

- 25 officials were provided daily home-to-work chauffeured transportation. Five of these officials were heads of cabinet-level departments.
- 42 senior-level officials occasionally received home-to-work transportation.

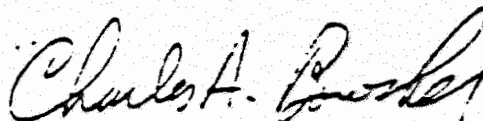
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--4 officials of the Department of Justice were provided government vehicles that they drove between home and work on a regular basis without using a chauffeur.

Appendix II provides a listing by department and agency of the specific officials receiving home-to-work transportation.

The justifications and the circumstances cited by the departments and agencies for providing home-to-work transportation are shown in appendixes III and IV, respectively.

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We are sending copies of this report to the Director, Office of Management and Budget, and to the heads of the federal departments and agencies covered in the report.



Comptroller General
of the United States



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)?

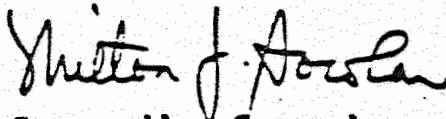
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The legislative history is silent or, at best inconclusive. This fact, coupled with the continued approval of limousines and other passenger vehicles during the appropriations process without restrictions on their use continues to confuse a number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

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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.

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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 appropriates 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.)

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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

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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

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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 * * *." 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.

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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. § 7134 (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

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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

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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. §5 041(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

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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).

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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). Id. 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.

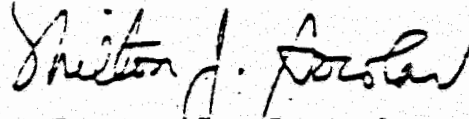
Unless one of the these exceptions outlined above applies, agencies may not properly exercise administrative discretion to provide home-to-work transportation for their officers and employees, unless otherwise provided by statute. (See e.g., 10 U.S.C. § 2633 for an example of a statutory exemption for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

B-210555

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

INDIVIDUALS RECEIVINGHOME-TO-WORK TRANSPORTATION

Of the 13 departments and agencies reviewed, 10 provided home-to-work transportation during the period of our study. The three that did not provide such transportation were the Environmental Protection Agency, the Federal Home Loan Bank Board, and the National Science Foundation.

In a February 15, 1983, letter to GAO responding to our request for information, the Assistant Attorney General for Administration, Department of Justice, stated that the Acting Administrator, Drug Enforcement Administration; the Witness Security Duty Officer and the headquarters driver, United States Marshals Service; and the Director, Bureau of Prisons were provided government vehicles that they drove between home and work without using a chauffeur. Also, the Assistant Secretary for Administration, Department of Transportation, in an April 21, 1983, letter, informed us that the Vice-Commandant of the United States Coast Guard rides to and from work with the Commandant in his chauffeured vehicle.

The following table shows the use of chauffeured transportation as reported by each of the selected departments or agencies. For example, the Department of Defense defines occasional use as whenever officials "determine this [home-to-work] transportation to be essential to the successful accomplishment of their duties for that day, but not on a daily or routine basis."

<u>Departments/agencies</u>	<u>Frequency</u>	
	<u>Daily</u>	<u>Occasionally</u>
Office of Management and Budget	Director	Deputy Director
Department of Defense:	Secretary	Assistant Secretary of Defense
Office of the Secretary of Defense	Deputy Secretary	(International Security Affairs)
	Under Secretary of Defense for Policy	Assistant Secretary of Defense (International Security Policy)
	Under Secretary of Defense for Research and Engineering	Assistant Secretary of Defense (Comptroller)
	Chairman, Joint Chiefs of Staff	Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics)
		Assistant Secretary of Defense (Public Affairs)
		Assistant Secretary of Defense (Health Affairs)
		Assistant Secretary of Defense (Legislative Affairs)
		Department of Defense General Counsel

<u>Departments/agencies</u>	<u>Frequency</u>	
	<u>Daily</u>	<u>Occasionally</u>
Department of the Army	Secretary of the Army Chief of Staff, Army	Under Secretary of the Army Vice Chief of Staff, Army Assistant Secretary of the Army (Civil Works) Assistant Secretary of the Army (Installations, Logistics and Financial Management) Assistant Secretary of the Army (Manpower and Reserve Affairs) Assistant Secretary of the Army (Research, Development and Acquisition) Commander, Army Materiel Development and Readiness Command
Department of the Navy	Secretary of the Navy Chief of Naval Operations Commandant of the Marine Corps	Under Secretary of the Navy Vice Chief of Naval Operations Assistant Commandant of the Marine Corps Assistant Secretary of the Navy (Manpower and Reserve Affairs) Assistant Secretary of the Navy (Shipbuilding and Logistics) Assistant Secretary of the Navy (Research, Engineering and Systems) Chief, Navy Material

<u>Departments/agencies</u>	<u>Frequency</u>	
	<u>Daily</u>	<u>Occasionally</u>
Department of the Air Force	Secretary of the Air Force Chief of Staff, Air Force	Under Secretary of the Air Force Vice Chief of Staff, Air Force Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) Assistant Secretary of the Air Force (Financial Management) Assistant Secretary of the Air Force (Research, Development and Logistics) Commander, Air Force Systems Command
Department of Health and Human Services	Secretary	Commissioner of the Social Security Administration Administrator, Health Care Financing Administration
Department of Housing and Urban Development	Secretary	Under Secretary (note a)
Department of Justice	Attorney General Deputy Attorney General Director, Federal Bureau of Investigation	Solicitor General

a/The Under Secretary is provided home-to-work transportation when he serves as the Acting Secretary.

<u>Departments/agencies</u>	<u>Frequency</u>	
	<u>Daily</u>	<u>Occasionally</u>
Department of Transportation	Secretary Commandant of the United States Coast Guard Vice-Commandant of the United States Coast Guard	
Central Intelligence Agency	Director Deputy Director Director, Intelligence Community Staff	
Civil Aeronautics Board		Chairman Four board members
Environmental Protection Agency (note b)		
Federal Communications Commission	Chairman	
Federal Home Loan Bank Board (note b)		
Federal Trade Commission		Chairman Three commissioners
National Science Foundation (note b)		
Total	<u>25</u>	<u>42</u>

b/These agencies reported that they did not provide any home-to-work transportation service to officials in the Washington, D.C., metropolitan area.

JUSTIFICATIONS CITED FOR PROVIDINGHOME-TO-WORK TRANSPORTATION

Five departments and one agency cited their interpretations of 31 U.S.C. 1344 as the justification for providing daily home-to-work transportation to a total of 21 officials. The justifications given by the departments and agencies for providing home-to-work transportation were as follows:

Departments/agenciesJustification

Office of Management
and Budget

Interpretation of decisions
of the Comptroller
General and the Attorney
General

Department of Defense
Department of Housing
and Urban Development
Federal Communications
Commission

Department or agency general
counsel's interpretation
of 31 U.S.C. 1344
(formerly 31 U.S.C.
638a(c)(2)) (note a)

Department of Health
and Human Services
Department of Justice

Interpretation of 31 U.S.C.
1344

Department of Transportation

Interpretation of 31 U.S.C.
1344, 5 U.S.C. 101, and
Comptroller General
decisions 25 Comp. Gen.
844 (1946) and 54 Comp.
Gen. 855 (1975)

a/31 U.S.C. 638a(c)(2) was codified into 31 U.S.C. 1344(b) and 1349(b) by Public Law 97-258, 96 Stat. 877, 924 (1982).

Departments/agenciesJustification

Central Intelligence
Agency

Interpretation of section 8
of the Central Intelligence
Agency Act of 1949, as
amended (50 U.S.C. 403j)

Civil Aeronautics Board

No authority cited
(occasional home-to-work
transportation provided the
chairman or other board
members for reasons of per-
sonal safety and the infre-
quency of public transporta-
tion at night)

Federal Trade Commission

No authority cited
(infrequent home-to-work
transportation was provided
to the chairman and the three
commissioners when atten-
dence was required at offi-
cial meetings or functions
outside of regular business
hours)

CIRCUMSTANCES FOR
PROVIDING HOME-TO-WORK
TRANSPORTATION

Some of the circumstances surrounding the duties and responsibilities of those persons provided home-to-work transportation cited by the departments and agencies were as follows:

<u>Departments/agencies</u>	<u>Circumstances</u>
Department of Defense Department of Justice Central Intelligence Agency Civil Aeronautics Board	Personal safety/security
Department of Defense Department of Justice Central Intelligence Agency	Security for classified documents
Office of Management and Budget Department of Defense Department of Justice Department of Transportation Central Intelligence Agency Federal Communications Commission:	Capability of maintaining constant communication with official
Department of Defense Civil Aeronautics Board Federal Trade Commission	Infrequency of public transportation or parking for privately-owned vehicles unavailable or inaccessible within a reasonable distance

We did not evaluate the circumstances cited and are presenting them solely as a matter of information.

(943562)

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THIRD CLASS

Records Show Weinberger's Wife Used Government Cars for Personal Use

By TOM PHILPOTT

JANE WEINBERGER, wife of Defense Secretary Caspar Weinberger, has used the Pentagon's executive motorpool and its drivers for personal transportation around Washington, including trips to and from a private library, medical facilities, airports and various social functions, motorpool dispatch records indicate.

DoD officials have confirmed that allowing such trips could violate federal law and DoD regulations.

Federal law states that "Any officer or employee of the government who willfully uses or authorizes the use of any government-owned passenger motor vehicle . . . for other than official purposes . . . shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant."

While DoD administrators may have known this, Pentagon officials suggested that Defense Secretary Weinberger and his wife did not.

Following an internal DoD audit and requests by Army Times — a privately-owned newspaper not as-

sociated with the government — to review the motorpool dispatch records, officials announced that Secretary Weinberger repaid the government for the cost of providing the private transportation for his wife. DoD officials, however, could not provide figures on the size of the reimbursement, nor would they say when it was made.

A review by the Army Times of six months of motorpool dispatch records covering June through November last year showed that:

- DoD provided a car and driver to Mrs. Weinberger on at least 27 occasions during the period. The dispatch records indicated that a few of the trips may have been for official social functions. In other instances, however, the records either showed that the trips were of a personal nature or the records failed to provide any explanation of why the Pentagon provided Mrs. Weinberger with a car and driver.

- DoD on one occasion last August dispatched a car and driver to a residence in McLean, Va., to pick up Caspar W. Weinberger Jr., son of the Defense Secretary, and drive him to a commercial airport.

- Richard N. Perle, Assistant Secretary of Defense for International Security Affairs, routinely bad-



Weinberger
Repaid government

a car pick him up in the morning at his home in Chevy Chase, Md., drive him to the Pentagon and back home again after work. This may have violated DoD regulations that prohibit persons below the grade of under secretary from routinely using executive motorpool vehicles and chauffeurs to commute to work.

Only the dispatch records for the six-month period had been made

available at press time.

The same records were studied by investigators with the DoD Inspector General's office last December. In a December 10 "quick reaction" report, the IG concluded that tighter controls are needed on use of the executive motorpool to assure that cars and drivers are used in accordance with applicable laws and regulations.

Without describing specific trips or destinations, the IG found that, of 6000 motorpool trips conducted during the six-month review period, more than 1000 were to nongovernment activities.

"These trips may or may not have been for official purposes, but this could not be clearly determined in most cases from information recorded in the vehicle dispatch records," the IG report said.

One official said the IG investigators were not allowed to interview the motorpool drivers because union rules required that the drivers have legal counsel or a union representative present during such interviews.

The IG report said the dispatch records reviewed showed 217 trips that made for nonofficial purposes. In 49 instances, family members of DoD executives used the motorpool, the report said. The report did not mention Mrs. Weinberger or any other

person by name.

The IG also found that in 120 instances the executive vehicles were used to drive persons between their homes and commercial airports. It would have been cheaper if the executives had taken taxis, the report said. "Many of these trips were made during off-duty hours which involved overtime pay for the drivers," the report said.

In 1979 the average pay for the chauffeurs, including overtime and holiday pay was \$29,789. Updated figures were not available from DoD at press time.

The report recommended that David O. Cooke, Deputy Assistant Secretary of Defense for Administration, review the dispatch records and recover the cost for vehicles and drivers from persons who were not authorized to use the executive motorpool.

In early May a DoD official said, "Mr. Weinberger has reimbursed the government for those trips determined to be of a nonofficial nature."

DoD officials could not say how large a reimbursement Weinberger provided or when it was paid. Also, they said they had no information on whether other officials had reimbursed the government for unauthorized use of the vehicles.

DoD's executive motorpool includes 17 vehicles, 13 drivers, two dispatchers and a supervisor. Charles Warren, motorpool supervisor, declined to be interviewed and a DoD official complained about Army Times attempts to interview the drivers.

Several of Mrs. Weinberger's trips were to commercial airports and in one case the passenger list included her maid. In several instances, Pentagon officials ordered a car and driver to take Mrs. Weinberger from her home to the Folger Shakespeare Library, a rare book research library in Washington, where she is chairman of the trustee committee. On other occasions she was driven to a, orthopedic clinic and a hospital, the records indicate. On six separate days last November, a car and driver were dispatched for Mrs. Weinberger with general instruction to take her to locations "as directed."

The IG indicated that the executive motor pool may have been misused because Reagan administration officials were not provided written guidance on use of the motorpool and its civilian chauffeurs.

Tom Philpott is a reporter for Army Times News Service.

Newskey

LATE FILE

- Heavy fighting between rival religious groups broke out in the mountains surrounding Beirut, engulfing the eastern part of the city in a barrage of artillery and rocket fire. Police said more than 24 people have died thus far in the fighting, and scores more have been wounded.

- Syria told Secretary of State George Shultz it could not withdraw its troops from Lebanon under the terms of a tentative accord with Israel, but U.S. off-

en over by communists "it's only logical, it's only reasonable to believe that it will spread northward to Mexico."

- Novelist John Masters, author of numerous books set in his native India, died at the age of 68. Masters works included "Nightrunners of Bengal" and "Bhowani Junction."

- Japanese Prime Minister Yasuhiro Nakasone told Philippine President Ferdinand Marcos the Soviet Union's threat to Japan was "serious" and Japan

- Artist Christo's giant "lilies" of shocking pink plastic reached full bloom in Biscayne Bay. The "Surrounded Islands" project — wrapping 11 islands in pink plastic — was completed after three days of work.

- President Reagan saluted American mothers this weekend and said his economic policies were bringing much-needed relief to families. He said many modern American mothers "are quiet, everyday heroes, struggling to stretch budgets and too often maintaining their families alone."

- Translated from Chinese by Yine Rong-heng Chu

- Brandon Hall, a 13-month-old battling for his life with lungs damaged during the first of two liver transplants, remains in very critical condition at a Memphis children's hospital.

fit print

... Is on vacation

Request for Opinion

AUG 22 1983

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Michael E. Shaheen Jr.
Counsel
Office of Professional
Responsibility

To assist us in our understanding of a waste, fraud and error matter currently under review in this Office, we request an opinion from the Office of Legal Counsel on the application of 31 U.S.C. §1344. We are specifically interested in determining under what circumstances government transportation in the form of a chauffeur-driven vehicle leased by the Justice Department may be provided to the spouse of the Attorney General. A related question which we are concerned with is whether the Attorney General's spouse functions in any official, or "quasi-official" capacity. A third question is whether the Attorney General's spouse may be provided transportation by a component of the Executive Office of the President, such as The White House Office, or by an organization affiliated with the political party headed by the Chief Executive as the leader of his party.

We are aware of only one prior memorandum on this subject. That memorandum was prepared by former Assistant Attorney General for Administration Pommerening for the use of Attorney General Levi. We have attached a copy of this memorandum for your review.

We appreciate your continuing cooperation.

Attachment

RBL:grw

WFE-151

Edward H. Levi
Attorney General

Glen E. Pommerening/⁵/ GER
Assistant Attorney General
for Administration

OCT 18 1976

Travel by Government Vehicle

Pursuant to prior discussions, I have prepared the following general guidance on your appropriate use of a Government vehicle.

The pertinent statutes, regulations and Comptroller General decisions clearly indicate that as the head of an executive department you may use a Government vehicle for any "official purpose".

As defined by 31 U.S.C. § 638a(c)(2), "official purpose" generally does not include transportation of officers and employees between their domicile and place of employment. However, that section excludes the heads of executive departments from that limitation. Accordingly, as it has been interpreted by the Comptroller General, 31 U.S.C. § 638a should be more broadly construed in its application to the Attorney General.

In two recent decisions, the Comptroller General has reaffirmed the principle that, pursuant to section 638a, a Government vehicle may be used whenever it is in the interest of the Government to do so. Furthermore, these decisions conclude that control over such use of a Government vehicle is primarily a matter of administrative discretion to be exercised by the agency or department concerned.

I consider the following to be examples of legal and appropriate exercise of administrative discretion in the use of Government vehicles by the Attorney General in support of the mission of the Department of Justice:

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G. E. P.
Professional Responsibility

1. To transport the Attorney General from his domicile to his office, from his office to his domicile, and intermediate points between such departures.
2. To transport the Attorney General in the conduct of official functions on behalf of the Department.
3. To transport the Attorney General in the conduct of official functions on behalf of other Federal agencies or departments, the Office of the President, the Congress or members thereof, the judiciary or members thereof (e.g., a reception of the State Department for a foreign dignitary or the State of the Union by the President before a joint session of the Congress).
4. To transport the Attorney General from his domicile, office, or any other point of departure to an airport or other common carrier terminal for purposes of official travel.
5. To transport the Attorney General during any period when a security detail is assigned to him by the FBI, Secret Service, or any other law enforcement agency designated to provide the Attorney General personal protection.
6. To transport the Attorney General for his convenience (e.g., to a restaurant, clothing store, barber shop, etc.) to maximize his availability to carry out his official duties, since he is in a duty status at all times.
7. To transport the spouse of the Attorney General in any of the circumstances enumerated in paragraphs 1-5 above.

- 3 -
8. To transport the spouse of the Attorney General when she participates in an official function as his representative (e.g., a diplomatic or White House reception).
 9. To transport the spouse of the Attorney General in any circumstance where security so dictates (e.g., as when the Attorney General has been assigned a security detail and his spouse will accompany him).

If you should desire additional, specific advice in situations not enumerated in paragraphs 1 through 9, please contact my Administrative Counsel, Harry L. Castley, on extension 5361.

cc: Subject
Reference
Daily Chron - Room 1111
Exec. Sec. (2)
Mr. Nolan, DAAG/A (OBD)

of *Royal-Pioneer Paper Box Manufacturing Co., Inc.*, ASBCA No. 13059, 69-1 BCA § 7631, is cited for the proposition that:

*** The Government, in using formal advertising for the repurchase, is bound to accept the lowest responsible bid. *** When it utilizes the formal advertising procedures, it has the obligation to maintain the integrity of the bidding system by applying the regulations relevant to that procedure. ***

We have no difficulty in accepting this principle, for in *Royal-Pioneer* the ASBCA was concerned with the Government's attempt to mitigate damages in soliciting and dealing only with third parties, and not with the defaulted contractor. Here the Government's effort to mitigate damages was necessarily governed by the fact that the defaulted contractor, Ohio Pipe, had submitted low bids and was found to be responsible for purposes of these procurements.

Although it is an established principle of procurement law that a repurchase contract may not be awarded to a defaulted contractor at a higher price than the price in the defaulted contract, 27 Comp. Gen. 343 (1947), there is no prohibition against the defaulted contractor being considered for award if it is otherwise responsible. B-165884, May 28, 1969. Such consideration is consistent with the Government's obligation to mitigate damages.

Therefore, and since Ohio Pipe was the lowest, responsive, responsible bidder under the repurchases the protest is denied.

[B-178342]

State Department—Employees—Home to Work Transportation—Government Vehicles

22 U.S. Code 1138a and 2678, which authorized designated State Department officials to permit use of Government vehicles for home to work transportation of Government employees, apply only to vehicles owned or leased by the State Department.

Vehicles—Government—Home to Work Transportation—Government Employees—Overseas

Although use of Government vehicles for home to work transportation of Government employees is generally prohibited by 31 U.S.C. 638a(c)(2), this prohibition does not apply where such use is necessary for protection of overseas employees from acts of terrorism. Such use may be regarded as in Government interest, although specific legislative authority to use Government vehicles for this purpose should be sought and interim provision of vehicles to this end should be limited to most essential cases.

In the matter of use of Government vehicles, April 15, 1975:

This decision to the Secretary of Defense responds to a request by the General Counsel of the Department of Defense (DOD) for our opinion on the use in foreign countries of Government-owned or leased motor vehicles for home to work transportation with specific reference

to the applicability of sections 1138a and 2678 of Title 22, U.S. Code, to military and civilian personnel of DOD.

The General Counsel explains that with the rise of political unrest and terrorist activities, there is concern about the safety of DOD military and civilian personnel stationed in certain foreign countries traveling from their domicile to place of work and return. Enclosed with his request are a number of materials which illustrate, in greatly varying degree of apparent seriousness, potential dangers to the security of personnel in specified countries.

In several of the countries covered by this material the Ambassador or Head of Mission has authorized State Department funded domicile to duty transportation for Defense Attache Office personnel. It is assumed that the DOD personnel here involved are not Defense Attache personnel.

The General Counsel points out that the problem stems from the prohibition in section 638a of Title 31, U.S. Code, against the use of Government-owned vehicles in the transportation of officers and employees between their domiciles and places of employment with limited exceptions, none of which includes personnel safety. 31 U.S.C. § 638a (c) (2) (1970) provides in part as follows:

Unless otherwise specifically provided, no appropriation available for any department shall be expended—

for the maintenance, operation, and repair of any Government-owned passenger motor vehicle or aircraft not used exclusively for official purposes; and "official purposes" shall not include the transportation of officers and employees between their domiciles and places of employment, except in cases of medical officers on out-patient medical service and except in cases of officers and employees engaged in field work the character of whose duties makes such transportation necessary and then only as to such latter cases when the same is approved by the head of the department concerned. * * *. The limitations of this paragraph shall not apply to any motor vehicles or aircraft for official use of the President, the heads of the executive departments enumerated in section 101 of Title 5, ambassadors, ministers, charges d'affaires, and other principal diplomatic and consular officials.

The General Counsel cites two statutes which are exceptions to 31 U.S.C. § 638a (c) (2) and asks whether they are applicable to military and civilian personnel of the Department of Defense. These two statutes read as follows:

22 U.S.C. § 1138a (1970):

Notwithstanding the provisions of section 78 of Title 5 [now 31 U.S.C. § 638a (c) (2)], the Secretary [of State] may authorize any principal officer to approve the use of Government owned or leased vehicles located at his post for transportation of United States Government employees and their dependents when public transportation is unsafe or not available.

22 U.S.C. 2678 (1970):

Notwithstanding the provisions of section 638 (c) [sic] of Title 31, the Secretary of State may authorize any chief of diplomatic mission to approve the use of Government-owned vehicles or taxicabs in any foreign country for transportation

of United States Government employees when public transportation is not available.

The term "United States Government" encompasses employees of the United States Government. However, the history of the provisions for transportation in Statute 770, 70 Stat. 705 (22 U.S.C. 2678) use of such vehicles for other than local employees and their dependents. Cong., 40. Thus, it is our opinion that such provisions must be considered limited to those intended to vest in the control over another agency's personnel. 22 provisions cannot be used to furnish Government transportation to its employees, as is apparent.

Notwithstanding the foregoing, the General Counsel presented by the General Counsel in relation to 31 U.S.C. § 638a (c) (2) constitutes a general prohibition on the use of Government-owned vehicles for home to work transportation with specified officials and employees. Apparently limit such use of Government-owned vehicles expressly stated in the part IV-A, paragraphs 1-2 of the statute. A specific restriction in this statute on the use of Government-owned vehicles for transportation to employment, our Office has recognized that the use of Government-owned vehicles by an employee. In this regard we have concluded that the use of a Government vehicle does not violate the statute if the use is deemed to be in the interest of the Government. We have held that the control over the use of Government-owned vehicles is a matter of administrative discretion and is concerned within the framework of the statute. 844 (1946).

In our view, the protection of United States Government employees overseas from terrorist activities is a Government interest which outweighs the inconvenience. This conclusion is

of United States Government employees from their residence to the office and return when public transportation facilities other than taxicabs are unsafe or are not available.

The term "United States Government employees" in the above-quoted provisions encompasses employees of any agency, including DOD. However, the history of this provision shows that it originated to afford transportation in State Department controlled vehicles of foreign service personnel who were U.S. citizens to recreation facilities, in section 12(d) of the Foreign Service Act Amendments of 1956, ch. 770, 70 Stat. 705 (22 U.S.C. 1139), and was later extended to authorize use of such vehicles for other transportation for both American and local employees and their dependents. See H. Report No. 646, 88th Cong., 40. Thus, it is our opinion that the application of these provisions must be considered limited to the use of vehicles controlled or leased by the State Department since it is difficult to believe the Congress intended to vest in the designated State Department officials any control over another agency's use of its vehicles. Accordingly, the Title 22 provisions cannot be used as a basis for expending DOD appropriations to furnish Government vehicles for home to work transportation of its employees, as is apparently contemplated by the General Counsel.

Notwithstanding the foregoing conclusion, we believe that the problem presented by the General Counsel merits further consideration in relation to 31 U.S.C. § 638a(c)(2). As noted previously, this statute constitutes a general prohibition against the use of Government vehicles for home to work transportation with certain exceptions dealing with specified officials and employees. Current DOD regulations apparently limit such use of vehicles to the excepted officials and employees expressly stated in the statute. See DOD Directive No. 4500.36, part IV-A, paragraphs 1-2 (July 30, 1974). In construing the specific restriction in this statute against employee use of Government-owned vehicles for transportation between domicile and place of employment, our Office has recognized that its primary purpose is to prevent the use of Government vehicles for the personal convenience of an employee. 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).

In our view, the protection of DOD officials and employees stationed overseas from terrorist activities may clearly be regarded as involving a Government interest which transcends considerations of personal convenience. This conclusion is implicitly recognized in the Title 22

provisions discussed hereinabove, although such provisions are not directly applicable here. Thus, it is our opinion that DOD may exercise some discretion to protect the safety of its overseas employees from terrorist activities without violating 31 U.S.C. § 638a(c)(2) where there is a clear and present danger of such activities and assuming that the furnishing of Government transportation will provide protection not otherwise available. At the same time, the broad scope of the prohibition in 31 U.S.C. § 638a(c)(2), 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.

Finally, it has already been indicated that the particular instances brought to our attention appear to vary considerably in terms of the circumstances said to justify the provision of home to work transportation. We recognize that assessment of the sufficiency of such justifications is essentially a matter of agency discretion. However, we believe that the provision of vehicles for officials stationed in countries where there is no clear and present danger of terrorist activities, and the asserted dangers to employees seem highly speculative and remote, would constitute an abuse of discretion.

[B-180215]

Decedents' Estates—Compensation—Children—Paternity Status

Claim by deceased Federal Employee's children, who were not formally acknowledged in accordance with New York (State of domicile) inheritance laws, may nevertheless be allowed. Record establishes fact of paternity and other New York laws conferring analogous Governmental benefits do not require formal judicial order of paternity.

Decedents' Estates—Compensation—Children—Illegitimate—Effect of Court Decisions

Recent Supreme Court and lower Federal Court decisions, particularly those applying the Federal life insurance statute, indicate that distinctions between "legitimate" and "illegitimate" children for purposes of receipt of benefits should be abrogated. Therefore, State standard of proof which encourages such distinctions will not be followed. Prior Comptroller General decisions contra will no longer be followed.

In the matter of survivors' claim for unpaid compensation due deceased Federal employee, April 15, 1975:

This matter concerns an appeal from settlement action by our Transportation and Claims Division on October 4, 1974, which denied the

*See, in addition to the Title 22 provisions, 38 U.S.C. § 233(b) (1970), which authorizes the Administrator of the Veterans Administration to utilize Government vehicles for home to work transportation of employees in emergency situations.

claim of children for unpaid compensation of father, deceased, who had been in the Army in Watervliet, New York.

The controlling statute, 5 U.S.C. § 5596, provides that money due an employee at the time of his death shall be paid to his surviving family in the following order of precedence:

First, to the beneficiary or beneficiaries designated in writing received in the employing agency.

Second, if there is no designated beneficiary, to the employee.

Third, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Fourth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Fifth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Sixth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Seventh, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Eighth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Ninth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Tenth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Eleventh, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twelfth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Thirteenth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Fourteenth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Fifteenth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Sixteenth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Seventeenth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Eighteenth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Nineteenth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twentieth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-first, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-second, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-third, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-fourth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-fifth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-sixth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-seventh, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-eighth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Twenty-ninth, if none of the above, to the surviving spouse or descendants of deceased children by representation.

Thirtieth, if none of the above, to the surviving spouse or descendants of deceased children by representation.