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THE WHITE HOUSE

WASHINGTON

January 24, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Portal to Portal Transportation

You asked that I prepare a memorandum to Baker, Meese, Deaver, and Darman -- copy to Oglesby -- on the portal to portal issue, recommending that it be discussed in a legislative strategy meeting. A draft is attached.

Attachment

THE WHITE HOUSE

WASHINGTON

January 24, 1984

MEMORANDUM FOR EDWIN MEESE III
COUNSELLOR TO THE PRESIDENT

JAMES A. BAKER, III
ASSISTANT TO THE PRESIDENT
CHIEF OF STAFF

MICHAEL K. DEEVER
ASSISTANT TO THE PRESIDENT
DEPUTY CHIEF OF STAFF

RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT
DEPUTY TO THE CHIEF OF STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Portal to Portal Transportation

Last summer the General Accounting Office issued an opinion adopting an interpretation of the statute governing use of Government vehicles for transportation between home and work far more stringent than that prevailing in most Federal agencies. The so-called Portal to Portal statute, 31 U.S.C. § 1344, specifies that Government vehicles may be used only for official purposes and that an official purpose "does not include transporting officers or employees of the Government between their domiciles and places of employment." The statute does not apply to vehicles for the official use of the President, the heads of Executive departments listed in 5 U.S.C. § 101 (the twelve Cabinet departments), or principal diplomatic and consular officials. The GAO analysis rejected arguments advanced over time by various Federal agencies permitting portal to portal service for officials other than the President and the twelve Cabinet department heads. For example, under the GAO interpretation, no one in the Executive Office of the President would be permitted portal to portal service.

GAO recognized that its interpretation of the statute was a departure not only from earlier GAO opinions but also from the established practice apparently acquiesced in by Congress. Accordingly, GAO announced that it would not seek reimbursement based on its new reading of the statute for past misuse of Government vehicles for portal to portal

service, and would apply its new interpretation only after the close of the current session of Congress. GAO noted that existing law, as interpreted by it, may be too restrictive, and urged Congress to consider meliorative legislation during the "grace period." That period ends when Congress adjourns, probably by early October.

We need to consider whether to seek legislation overriding the GAO view, which GAO itself has indicated may be desirable. If no legislation is passed and we continue current portal to portal practices, there is the danger that GAO may seek reimbursement from prominent Administration officials on the eve of the election. Seeking legislation also raises concerns, since it will likely be perceived and attacked as an effort by the Administration to expand the availability of portal to portal service. If no legislation is passed, we will either have to alter existing portal to portal practices by the time Congress adjourns, or commit to a challenge to GAO's reading of the law at a very sensitive time.

I recommend that this matter be discussed in a legislative strategy meeting at the earliest opportunity.

cc: M.B. Oglesby, Jr.
Assistant to the President
for Legislative Affairs

FFF:JGR:aea 1/24/84
bcc: FFFielding/JGRoberts/Subj/Chron

JV

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

WH009-02

- O - OUTGOING
- H - INTERNAL
- I - INCOMING
Date Correspondence Received (YY/MM/DD) 1/1

COPY
from ORM

Name of Correspondent: Mike Horowitz

MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: Proposed Portal - to - Portal Transportation Bill / Draft

ROUTE TO:	ACTION	DISPOSITION
Office/Agency (Staff Name)	Action Code Tracking Date YY/MM/DD	Type of Response Code Completion Date YY/MM/DD
<u>CUHOLL</u>	ORIGINATOR <u>84102107</u>	<u>C 84102114</u> JV
<u>CUAT18</u>	Referral Note: <u>D 84102107</u>	<u>C 84102114</u> JV
<u>CUFIEL</u>	Referral Note: <u># 84102114</u>	<u>C 84102114</u> JV
	Referral Note: <u>John P. Holt memo to H</u>	
		<u>1 1</u>
	Referral Note:	
		<u>1 1</u>
	Referral Note:	

- ACTION CODES:**
- A - Appropriate Action
 - C - Comment/Recommendation
 - D - Draft Response
 - F - Furnish Fact Sheet to be used as Enclosure
 - I - Info Copy Only/No Action Necessary
 - R - Direct Reply w/Copy
 - S - For Signature
 - X - Interim Reply
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- A - Answered
 - B - Non-Special Referral
 - C - Completed
 - S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: copy of Jan 24 84 memo attached JV
See ID 183641cu

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Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

THE WHITE HOUSE

WASHINGTON

February 14, 1984

I+II

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Portal-to-Portal

By memorandum dated January 24, 1984 you requested a meeting of the legislative strategy group to consider the portal-to-portal "crisis" precipitated by last summer's Comptroller General opinion. You will recall that the opinion strictly interpreted the Portal-to-Portal statute, 31 U.S.C. § 1344, in a manner that makes much currently provided portal-to-portal service illegal. In order to give Congress time to enact corrective legislation, the Comptroller General announced that he would not enforce the new, strict interpretation of the statute until the current Congress ended its session -- around late October. Mike Horowitz, who has been involved with this issue, considers it imperative to obtain corrective legislation at the earliest opportunity. In my memorandum to you of January 9, 1984, I noted the political costs attendant upon seeking expanded limousine service for Administration officials in an election year, and suggested that the issue could be held in abeyance until after the election (with more limited use of portal-to-portal by officials after October).

Horowitz has now submitted a draft bill he would like to have approved as a "going-in position." It would expand the authorization for portal-to-portal service beyond the heads of Cabinet Departments to include deputy heads, the heads of AID, NASA, VA, CEA, OSTP, USIA, EPA, CIA, FAA, NSF, OPM, the Federal Highway Administration, the Chiefs of Staff, the Undersecretaries of Defense and State and the State Department Counsellor, and no more than four Assistants to the President (53 people in all). The draft bill also contains an expanded physical safety exception to the general portal-to-portal prohibition.

I have no objection to the draft bill as a starting position, but I do not think the decision has yet been made to seek legislation of this sort. As noted in your January 24 memorandum, that question should be considered by the legislative strategy group. Mr. Hauser advises me that he is setting up a meeting between you and Joe Wright to discuss this issue.

Attachment

THE WHITE HOUSE

WASHINGTON

January 24, 1984

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COUNSELLOR TO THE PRESIDENT

JAMES A. BAKER, III
ASSISTANT TO THE PRESIDENT
CHIEF OF STAFF

MICHAEL K. DEAVER
ASSISTANT TO THE PRESIDENT
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RICHARD G. DARMAN
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FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

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cc: M.B. Oglesby, Jr.
Assistant to the President
for Legislative Affairs

FFF:JGR:aea 1/24/84

bcc: FFFielding/JGRoberts/Subj/Chron



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MEMORANDUM

February 3, 1984

To: Dick Hauser
From: Mike Horowitz *MH*
Subject: Portal to Portal

202708 CW

1. Per our conversation, here's the draft. For your information, the agencies covered by Section 3(c) are AID, NASA, VA, CEA, OSTP, USIA, EPA, CIA, FAA, NSF, OPM and the Federal Highway Administration.

2. As indicated, Socolar acknowledges the enormous and unintended problems created by an end-of-session deadline, but does not want to commit to a later date until we send over (however unofficially) some draft bill. If matters are to move, therefore, you will need to review the attached draft to see if it is an acceptable going-in position.

3. Let me know of your thoughts.

cc: Joe Wright

1984 FEB 03 11 53

DRAFT

Proposed Portal-to-Portal Transportation Bill

5 U.S.C. 1344(b) is hereby amended by deleting subsection (2) thereof, renumbering subsection (3) as subsection (2), and inserting the following subsections:

✓P

"(3) (a) No more than 4 persons with the rank of Assistant to the President, to be designated by the President;

(b) the heads and deputy heads of the Executive Departments listed in section 101 of title 5 and the Office of Management and Budget;

(c) the heads of all other establishments in the Executive Branch, except those specified in section 3502(10) of title 44, whose positions are classified at level II of the Executive Schedule in section 5313 of title 5;

(d) the Chairman of the Joint Chiefs of Staff, the Chiefs of Staff of the Army and the Air Force, the Chief of Naval Operations, the Commandant of the Marine Corps, the Under Secretaries of Defense, and the Under Secretaries and Counsellor of the Department of State; and

(4) Employees whose physical and personal safety is subject to significant threat, where the provision of such transportation will afford protection not otherwise

DRAFT

Section-by-Section Analysis

This bill would authorize the provision of portal-to-portal transportation for certain of the most senior officials of the Executive Branch. The persons holding these offices discharge a heavy burden of official responsibilities and also bear substantial official representation responsibilities outside normal business hours. Provision of such transportation is in the interest of the effective performance of the government's obligations.

The bill would authorize provision of such transportation to 53 people. Many of these officials currently are provided such transportation but, according to an opinion issued recently by the Comptroller General, only the heads of the eleven (11) Cabinet agencies will be entitled to such transportation beginning in 1985. The bill would provide an explicit statutory basis for such transportation.

The bill also would codify longstanding interpretations of the existing law which permit such transportation to be provided senior government officials when their physical safety is threatened.

THE WHITE HOUSE

WASHINGTON

February 14, 1984

MEMORANDUM FOR FRED F. FIELDING

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Attachment

THE WHITE HOUSE
WASHINGTON

Date 2.16.84

Suspense Date _____

MEMORANDUM FOR: *John*

FROM: **DIANNA G. HOLLAND**

ACTION

- Approved
- Please handle/review
- For your information
- For your recommendation
- For the files
- Please see me
- Please prepare response for
_____ signature
- As we discussed
- Return to me for filing

COMMENT

LAW

BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

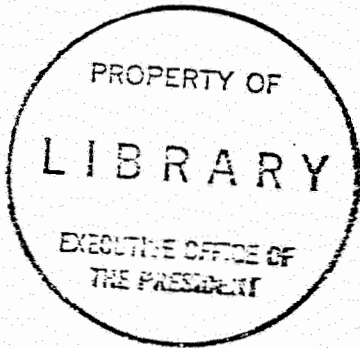
Use Of Government Vehicles For Home-To-Work Transportation

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.



GAO/NSIAD-83-3
SEPTEMBER 28, 1983



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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.

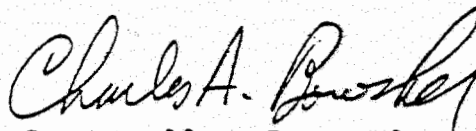
--4 officials of the Department of Justice were provided government vehicles that they drove between home and work on a regular basis without using a chauffeur.

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.

- - - -

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)?

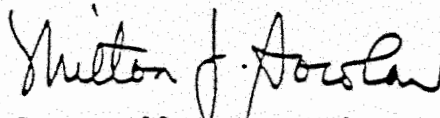
B-210555

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

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

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

Sincerely yours,



Acting Comptroller General
of the United States

Enclosure

DECISION



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

FILE: B-210555

DATE: June 3, 1983

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

DIGEST:

1. GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. § 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to be heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. § 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so.
2. GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. § 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. § 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments.
3. GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. § 1344(b)(3), to

B-210555

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.

B-210555

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

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

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

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

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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.

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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 * * *." ^{1/} In 22 U.S.C. § 2651, it is provided that "[t]here shall be at the seat of government an executive department to be known as the Department of State, and a Secretary of State, who shall be the head thereof." (The State Department's own regulations provide that the Secretary of State "is the head of the Department of State." 1 FAM 110 (June 18, 1976).) Similar designations of the "head" of each of the other "executive Departments" may also

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

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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. §§ 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). Cf. 60 Comp. Gen. 420 (1981).

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

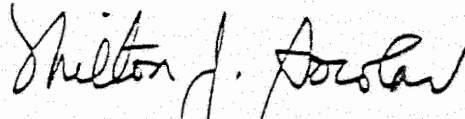
Unless one of the these exceptions outlined above applies, agencies may not properly exercise administrative discretion to provide home-to-work transportation for their officers and employees, unless otherwise provided by statute. (See e.g., 10 U.S.C. § 2633 for an example of a statutory exemption for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

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

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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 RECEIVING
HOME-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: Office of the Secretary of Defense	Secretary Deputy Secretary Under Secretary of Defense for Policy Under Secretary of Defense for Research and Engineering Chairman, Joint Chiefs of Staff	Assistant Secretary of Defense (International Security Affairs) Assistant Secretary of Defense (International Security Policy) Assistant Secretary of Defense (Comptroller) 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, Intel- ligence Com- munity 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.

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