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From Angie Nash

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Message: This is the B-decision that you requested. The copy quality is very poor. I have called GAO and requested a readable copy.

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

B-204877

Nov. 27, 1981

The Honorable Carl D. Perkins
Chairman, Committee on Education
and Labor
House of Representatives

Dear Mr. Chairman:

This is in response to your letter of September 16, 1981, inquiring 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.

The statutory provisions relating to travel and subsistence expenses of Federal employees generally may be found in Chapter 57 of Title 5, United States Code. Under that authority, 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. Travel by Members of Congress or congressional committee staff is not governed by the provisions of Chapter 57, since an "agency" as referred to in 5 U.S.C. § 5701(1) (1976) excludes "a Member of Congress" and "an office or committee of either House of Congress or of the two Houses." Nevertheless, as discussed hereafter, it appears to us that while a Member or staff member may be accompanied by his or her spouse while on committee travel, no authority exists for expenses incurred by or on behalf of a spouse to be paid from Federal funds.

The Rules of the House of Representatives and of the individual committees govern travel by Members and staff members in the discharge of official congressional committee business. Travel outside the United States requires prior authorization from the chairmen of the respective committees. If prior authorization is given, appropriations made to the individual committees from the contingent fund of the House of Representatives, sanctioned and approved by the Committee on House Administration, are then used to fund such travel.

The Chairman may apparently also determine that, for protocol purposes, Members and staff may be accompanied by their spouses. This determination makes the spouses a part of the official committee delegation. However, expenses incurred by the spouses may not be paid or reimbursed from appropriated funds. Federal funds may only be used for the purposes for which they were appropriated and none other, 31 U.S.C. § 628 (1976). With 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 trips.

Therefore, Federal funds may not be used to pay the travel expenses of the spouses of Members of Congress or committee staff. Personal funds must be used to pay, for example, the spouses' transportation costs, meals, and the differential between the cost of a single and double hotel room. Similarly, should a Government agency furnish services to the spouses, personal funds must be used to reimburse the agency involved.

You specifically inquire about the group's receiving transportation from the Department of the Air Force. This travel is governed by Department of Defense Regulation 4515.13-R, January 1, 1980. Insofar as relevant here, paragraph 14-3 provides that the Secretary of Defense or his designee may approve travel of:

> "c. members and employees of the Congress when the request for travel is submitted in writing to the SECDEF over the signature of the chairman of the Congressional committee on which the member or employee serves and states that the purpose of travel is of primary interest to the DOD and that the expenditure of funds by the DOD is authorized by Section 1314 of the Supplemental Appropriations Act of 1954 or, if not so authorized, such other provisions of law as authorizes the expenditure by the DOD;
>
> "d. dependents stipulated in paragraph 14-4b [set out below] when the travel is other than within the 50 United States but is for the purpose stipulated in that paragraph, to include travel of medical personnel to accompany a member when the provisions of paragraph 14-4b are met;
>
> "e. members and employees of the Congress when travel is of official concern to the Congress and the request shows the appropriation fund chargeable, or other clear indication of the method by which reimbursement is to be made, provided US commercial carriers cannot meet the official requirements. (The Secretary of a military department may also receive and approve such a request.)"

Dependent travel described in paragraph 14-3d is set forth in paragraph 14-4b as follows:

> "b. dependents of members of the Congress and employees of the Congress, to permit them to accompany their principal within the 50 United States when essential to the proper accomplishment of the mission, desirable because of diplomatic or public relations, or necessary for the health or welfare of the principal. . . ."

> is appropriate, it shall be at the same rate as applicable to the principal. Medical personnel may be authorized to accompany a member of the Congress where necessary for the health of the member; * * **

In other words, if the chairman of a congressional committee includes spouses in the delegation on the basis that it is essential to the proper accomplishment of the mission or desirable because of diplomatic or public relations, the Defense Department will consider the spouses as part of the delegation in determining if it can provide transportation. DOD Reg. 4515.13-R.

The Department of Defense has informally advised us that the Air Force will provide transportation to a congressional delegation, properly authorized by the committee chairman pursuant to House Rules, only on a "space available" basis. Since the aircraft would be going anyway, the Department reasons that it does not incur any additional costs by reason of providing this transportation and thus does not charge the delegation for the flight. However, if there are in-flight expenses, such as the serving of meals, a charge will be made. While the cost of meals served to the Members of Congress and committee staff may be paid from funds appropriated to the Congress for this purpose, costs incurred on behalf of the spouses must be paid from private funds. It is primarily the responsibility of the congressional delegation to assure that a proper allocation of costs is made.

Therefore, it is up to the chairman to determine whether inclusion of spouses in the official delegation is primarily for protocol or other official purposes or whether it is primarily for the benefit of the Members, the staff, and the spouses. Once the chairman concludes that the spouses should be included as a part of the official delegation, the Department of Defense will provide transportation to them along with the rest of the delegation without charge on a "space available" basis. If there is no "space available" the Department will decline the request.

For more information on Defense Department policies and procedures, you may with to contact Ms. Mary Mann, Congressional Travel Office in the Office of the Assistant to the Secretary of Defense for Legislative Affairs. ~~Her phone number is 697-9166.~~

We trust we have been responsive to your inquiry.

Sincerely yours,

MILTON J. SOCOLAR

Comptroller General

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DOCUMENT 1

[redacted]

Entertainment - Appropriation Availability - [redacted]"

[redacted]

Funds appropriated to the Dept. of the Interior for salaries and "
expenses may not be used to pay for any portion of the expenses of a "
breakfast given by the wife of the Secretary of the Interior for the "
wives of high-level Government officials, or for a Christmas party given "
by the Secretary of the Interior for high-level Government officials and "
their guests. Entertainment expenses, unless specifically authorized by "
statute, are not properly chargeable to appropriated funds. 43 Comp.Gen."
305 and 47 id. 657. Donations - Private Funds - Usage - Conferences, "
Entertainment, etc. - Official Agency Purpose Requirement"

Funds donated to the Cooperating Association Fund of the National Park"
Service may be used to fund a breakfast given by the wife of the "
Secretary of the Interior for the wives of high-level Government "
officials and a Christmas party given by the Secretary of the Interior "
for high-level Government officials and their guests only if the "
Secretary sustains the burden of showing that the receptions were given ",
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in connection with or to further official Park Service purposes. In this"
instance, from the information provided, the parties appear to be "
primarily social in nature. Appropriations - Interior Department - "
Availability - Official Reception and Representation Expense Fund - "
Agency Discretion - Christmas Party"

To the extent funds are available in the Dept. of Interior's official "
reception and representation fund, they may be applied to the costs "
incurred for a Christmas party given by the Secretary of the Interior and"
to reimburse any amounts already spent from salary and expense accounts "
and from donated funds for that purpose. "

(ORIGINAL DOCUMENT PAGE 261)

"

Unlike the Christmas party, which was attended by Government officials "
and their guests, the use of the fund for a breakfast given by the wife "
of the Secretary of the Interior for the wives of high-level Government "
officials would be inappropriate because the breakfast was hosted and "
attended entirely by private persons. The amount of any shortfall for "
expenses attributable to the Christmas party, as well as the expenses of "
the breakfast, must be paid by the officials who authorized the "
expenditures. ",
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Matter of: Department of the Interior - Fundins of Receptions at "
Arlington House, February 23, 1982: "

and investigations of the Committee on Interior and Insular Affairs and the House Environment, Energy, and Natural Resources Subcommittee of the " Committee on Government Operations concerning the fundings of two " receptions held at Arlington House (also known as the Custis-Lee " Mansion). The receptions were hosted by the Secretary of the Interior, " James G. Watt, and his wife in December 1981. We conclude that the use " of appropriated funds, other than the Secretary of the Interior's " discretionary fund for official reception and representation expenses " (discretionary fund), is unauthorized. We conclude further that use of " the Cooperating Association Fund of the National Park Service, a fund " consisting entirely of monies donated to further official agency " purposes, was also improper. Accordingly, the relevant appropriation " accounts and the Cooperating Association Fund should be reimbursed for " any expenditure directly attributable to these receptions. "

On December 14, 1981, a breakfast was held at Arlington House hosted " by the wife of the Secretary of the Interior. Attending this breakfast ", WORKING

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were the wives of the other Cabinet members and the wives of several " assistants to the President. The exact purpose of this breakfast has not" been specified by the Department. Information developed by our audit " staff shows that the total estimated cost of the breakfast was $1,921. " Of this total amount, $1,148.10 constituted catering expenses, $325 was " for table name cards, escort cards, and menu cards, $48 was for six " placards advising the public that Arlington House was temporarily closed " for Mrs. Watt's breakfast, and $400 constituted the labor costs of eight " National Park Service employees who worked a total of 31 hours. The " services of the eight employees during these 31 hours were apparently " devoted exclusively to tasks associated with the breakfast. "

The other reception, hosted by the Secretary and his wife, was held on" the evening of December 17, 1981. The heading on the guest list obtained" from the Department of the Interior reads "Arlington House Christmas " Party." Approximately 220 persons attended the Christmas party, 62 of " whom were high-ranking Interior officials. The other guests were Cabinet" members and their spouses, members of the White House staff and their " spouses or guests, other senior officials of the executive branch with " spouses of guests and spouses or guests of the Interior officials. ", WORKING

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(ORIGINAL DOCUMENT PAGE 262) "

Our audit staff determined that the total estimated cost of the " Christmas party was $6,921.20. Of this total amount, $2,732.86 " constituted catering expenses, $2,325 was for the renting of a tent which" was erected in front of Arlington House and which was where the reception" was primarily held, $55.96 was for the purchase of refuse receptacles, " $7.38 was for the purchase of coat check tickets, and $1,800 constituted " the labor costs of 20 employees of the National Park Service working a " total of 135 hours, all of which was overtime associated with the party. "

Our audit staff has determined that the labor cost of both these " events have been charged initially to appropriated funds of the National " Park Service, although it is apparently the intent of the Department to " reimburse these costs from the Secretary's discretionary fund or from the" Cooperating Association Fund. Additionally, the other major items such " as the catering expenses, the cost of the tent, and the costs of the " invitations and cards, have been, or are intended to be, charged to the "

the imprest fund of the National Park Service. The Park Service
apparently intends to reimburse the imprest fund for the expenditures ",
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from the Cooperating Association Fund. "
By letter dated February 8, 1982, we requested the views of the "
Department of Interior as to the propriety of the use of appropriated "
funds to pay the salaries of the employees who provided services at the "
two events under discussion here, the propriety of using Cooperating "
Association funds in support of these vents, and the possible use of the "
Secretary's discretionary fund for official reception and representation "
expenses for these purposes. Although the Department did not respond "
directly to our request, we have been provided a copy of the Department's"
February 16 letter to Congressman Markey addressing these issues. "
That letter states: "
The expenses for the events will be funded by the Secretary's Official"
Reception and Representation Expenses Fund which is authorized in the "
Department's Appropriation Act and the National Park Services' Director's"
Discretionary Fund. "
(The latter fund is described by the Department as consisting solely "
of donations from Cooperating Associations.)"
The letter also states: "
The NPS Director's Discretionary Fund was earmarked (for these events)",
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at the planning stage because the Department's Appropriation Act had not "
been approved at the time and, therefore, resources were not readily "
available. Now that the Act has been approved, it is the intent of the "
Secretary to use a portion of his Official Reception and Representation "
Expenses Fund to fund the two events. "
The letter does not specifically address the question of the "
relationship, if any, between the use of donated Cooperating Association "
Fund amounts in these circumstances and the mission of the National Park "
Service. "
(ORIGINAL DOCUMENT PAGE 263) "
It does, however, state that: "
* * * The guests' visits to the house were designed to acquaint them "
with the historic significance of the house and to enhance their further "
understanding and appreciation of the Secretary's objectives concerning "
the NPS's role in historic preservation. "
* * * *"
The Arlington House provided a setting more conducive to social "
gatherings than would have the Interior building. "
Finally, concerning restrictions on the use of the Cooperating ",
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Association Fund, the letter states: "
There are no specified uses in the Director's Discretionary Fund by "
the Office of the Secretary. * * *"
The use of appropriated funds to pay for the wages of employees earned"

Christmas party, or for any other expenses directly [illegible]
two functions, constituted an unauthorized expenditure of these funds. "
We have consistently held that entertainment expenses, unless "
specifically authorized by statute, are not properly chargeable to "
appropriated funds. See 43 Comp.Gen. 305, 306(1963). Entertainment "
expenses are not specifically authorized in Interior's current "
appropriation. See Department of the Interior and Related Agencies "
Appropriation Act, 1982, Pub. L. No. 97-100, 95 Stat. 1391 (1981). "
Items such as the furnishing of meals or refreshments as well as the "
purchase of equipment to be used in the preparation of refreshments are "
considered entertainment expenses. 47 Comp.Gen. 657, 658(1968). "
Likewise, all labor costs directly attributable to the furnishing of "
meals or refreshments or any other similar activity should be considered "
entertainment expenses. We perceive no distinction between the expenses ",
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incurred by Interior for the breakfast and the Christmas party, including"
the labor costs of the Interior employees who provided support services, "
and other types of expenses which we have previously determined to be "
entertainment expenses. For example, we have considered the serving of "
coffee or other refreshments at meetings or the providing of dinner at "
annual recognition ceremonies as prohibited entertainment expenses. 47 "
Comp.Gen., supra; 43 Comp.Gen. 305, supra. We conclude, therefore, that"
the expenditure of appropriated funds for expenses directly attributable "
to these two affairs was not authorized and that appropriate "
reimbursement to these appropriations should be made. "
Unlike appropriated funds not specifically made available for "
entertainment purposes, there is no absolute prohibition against the use "
of donated funds for entertainment purposes. Rather, we have held that "
donated funds may be spent on entertainment where such expenses are in "
furtherance of official agency purposes. B-142538, February 8, 1961. "
This decision to the National Science Foundation concluded that expenses "
for food and entertainment for luncheons and dinners incident to a "
conference for the interchange of scientific information among foreign "
and United States scientists appeared to be proper charges to a trust ",
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fund similar to the Cooperating Association Fund. "
(ORIGINAL DOCUMENT PAGE 264) "
The decision also stated that in deciding whether a particular expense is"
in furtherance of official agency purposes, great weight will be given to"
an administrative determination to that effect. The administrative "
determination was characterized as one which, based on the facts, 'must "
reasonably justify the conclusion not only that the entertainment will "
further a purpose of the Foundation but that the Foundation's functions "
could not be accomplished as satisfactorily or as effectively from the "
Government's standpoint without such expenditures.' Finally, the decision"
cautioned that the use of donated funds for entertainment, the purpose of"
which is 'to cultivate cordial relations, manifest good will, or to "
reciprocate in kind hospitality extended by others' would be "
questionable. "
In a similar case, we permitted the Foundation to use its donated "
funds to pay for refreshments of persons participating in panel "
discussions sponsored by the Foundation. 46 Comp.Gen. 379(1966). We "
also permitted the National Credit Union Administration to use donated "

the National Credit Union Board where protocol required that the "
administration incur those expenses. B-170938, October 30, 1972. "

Our position on this issue was clarified in a 1980 letter to Senator "
Proxmire specifically concerning the use of the Cooperating Association "
Fund of the National Park Service. B-195492, March 18, 1980. We stated "
that while an agency's determination of whether a particular expense was "
justified would be accorded great weight, agencies do not "have blanket "
authority to use (donated) funds for personal purposes; each agency must"
justify its use of (donated) funds as being incident to the terms * * * "
of the statutory authority permitting acceptance of said donations. We "
went on to state that "(t)he burden is on the (agency) to show that its *"
* * expenditures were to carry out (authorized statutory) purposes." The "
letter concluded by pointing out that a number of past expenditures from "
the fund for entertainment had been justified by the Department on the "
basis of an overbroad interpretation of the 1961 National Science "
Foundation case. "

In this case, the use of the Cooperating Association Fund to pay for "
certain costs attributable to the breakfast and to the Christmas party is"
contemplated by the Department's February 16 letter. That use of these ",
WORKING

"'"

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funds will be necessary is demonstrated by the fact that the Secretary's "
discretionary fund has only $4500 remaining in it for the current fiscal "
year, substantially less than the cost of the two events. "

(ORIGINAL DOCUMENT PAGE 265) "

To determine whether these expenditures are authorized, it is "
necessary to refer to the purpose of this Fund. As required by 16 U.S.C."
6, the Fund must be used "for the purpose of the national park and "
monument system." The fundamental purpose of the national park and "
monument system as described in 16 U.S.C. 1 is to: "

(C)onserve the scenery and the natural and historic objects and the "
wild life therein and to provide for the enjoyment of the same in such "
manner and by such means as will leave them unimpaired for the enjoyment "
of future generations. "

A document entitled "National Park Service Donations Policy" submitted"
with one of the congressional requests in this case provides guidance on "
the kind of expenditures from the Cooperating Association Fund which may "
reasonably be considered as being in furtherance of Park Service "
purposes. The Policy states: "

* * * Disbursements from this Fund must be for projects directly ",
WORKING

"'"

"

related to National Park Service administration; support will not be "
provided for projects that are initiated outside of the Service and "
unrelated to the mission of the National Park Service. * * *"

The Policy provides as follows concerning expenditures for "
entertainment: "

* * * In accordance with the Comptroller General's decision of "

those occasions when the entertainment will further the purposes of ...
and that such purposes could not be served as satisfactorily or as "
effectively without such expenditures. (One use of the Fund which is "
inconsistent with the Comptroller General Decision is the expenditure for"
coffee or other refreshments for meetings attended solely or mostly by "
Service or other Government employees.)"
Applying the rules enunciated by our decisions and adopted by the "
National Park Service Donations Policy to the facts of the two questioned"
events compels the conclusion that the events were clearly unrelated to "
the furtherance of the Park Service's mission. Neither the breakfast nor"
the party was associated with any related Government conference or other "
meeting, as has usually been the case in prior cases in which we ",
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sanctioned the use of donated funds for entertainment purposes. In fact,"
no Park Service officials attended the breakfast and only a small "
percentage of the guests at the Christmas party were from the Park "
Service. "
The only justification advanced by the Department to link the two "
events to official Park Service purposes is the statement in its February"
16 letter that during the course of the two receptions, guests were free "
to tour the house, and thus could become acquainted with its historic "
significance and the Secretary's objective concerning historic "
preservation. In our view, this link with official purposes is too "
tenuous to justify the use of donated funds. The availability of tours "
of the buildins or general discussions of historic preservation "
objectives does not change the basically social nature of both "
gatherings, as characterized by the Department itself in its February 16 "
letter. In that letter, the Department offers as justification for the "
use of Arlington House rather than the Interior headquarters building "
that the former is "more conducive to social gatherings."
(ORIGINAL DOCUMENT PAGE 266) "
Moreover, so far as we are aware, no findins was made detailins "why the ",
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purposes of the NPS could not be served as satisfactorily or as "
effectively without such expenditure," as required by the Donations "
Policy. "
As stated in the Department's February 16 letter, the 1981 Department "
of Interior Appropriation Act provides the Office of the Secretary with "
not to exceed $5,000 for official reception and representation expenses. "
While questions could be raised about the use of this fund as well, "
agency heads have traditionally been accorded a great deal of discretion "
by the Congress in the expenditure of this type of fund. We will not "
object to the use of this fund for expenses related to the Christmas "
party. Unlike the Christmas party, which was attended by Government "
officials and their guests, the use of the discretionary fund for the "
breakfast, which was hosted and attended entirely by private persons, "
would be inappropriate. "
Accordingly, to the extent funds are available in the official "
reception and representation fund, they may be applied to the costs "
incurred for the Christmas party, including the labor costs for Interior "
employees who worked at that event. The amount of any shortfall for "
expenses attributable to the Christmas party, as well as the expenses of ",
WORKING

the breakfast, must be paid by the Interior officials who authorized the "
expenditures.

1. relevance aspect ignored (1983 GAO report; 1976 Pomerance; prior practice)

2. security analysis ignored, other than dismissed as private person

3. weaker analysis where no official clear quasi-official status, as in space available. None of the prior Cases Can you are on point.

4. procedure:
   - Space Pres ruled out: specific intent
   - Tell them different view

The Shanks memorandum suffers from a the basic logical fallacy of insufficient options. The Shanks analysis hinges upon whether a Cabinet spouse is a government official or a private citizen. Correctly concluding that the spouse is not (and, under the anti-nepotism statute, legally could not) be a government official, Shanks memo concludes that she must therefore be considered no different than any private citizen. As such, she is not entitled to government-furnished transportation. This conclusion ~~is~~ ignores widely-accepted past practice, is inconsistent with other recent Justice Department pronouncements, and is not compelled by the authority cited by Shanks.

reasoning

ordinary

The notion that Cabinet spouses must be treated ~~as~~ like ordinary private citizens - the core of the Shanks analysis - ~~[illegible]~~ not only ignores their unique status as a practical matter but also overlooks several legal opinions based on that unique status. For example, Shanks dismisses the 1982 Office of Legal Counsel opinion sanctioning Mrs. Smith's foreign travel with the attorney hewing to the so-called "space available" theory. This theory recognizes that Cabinet spouses are not unlike ordinary private citizens, for such citizens are not entitled to travel in government vehicles on a "space available" basis. Cabinet spouses are because of

their unique status and because their presence contributes to the [redacted] achievement of government purposes. Shank does not explain why this reasoning could not similarly justify some use of government vehicles by women.

Furthermore, until the last summer's consolidated Comptroller General opinion on postal-to-postal travel, the accepted view was that the definition of government vehicles may be used for "official business" and that the definition of what constituted official business rested with the discretion of the agency head, acting in this understanding, established Justice Department guidance (the Pomerening memorandum) expressly recognized several instances in which personal travel was authorized.

- Hoyle was refused, no criminal prosecution as no criminal intent (Public Integrity). 18 USC 641
Lowell: if more than certainty were here, ruling out Special Prosecutor.

- Ted has different view. After AG out, set him to unlock time.

- Prosecutor letter ?

- Robinson report ?

- Waiting to hear from us.

RAH - might clarify w/ Cong Gen, IG's, to see if this is right. No guidance from here to DOT; wire which Cong Gen will be our answer.

Gene

[illegible] Malmborg 632-2350

1980 Basic [illegible] 22 U.S.C [illegible] 2007 Principle offices

↓ changed

Sect State authorize [illegible] U.S. gov

employees + families,

unavailable or unsafe

health security problem

or otherwise advantageous to gov

- Applicable guidance at the time – Pommerening opinion.
- Comp Gen – administrative discretion re: official purpose

Shanks: violation of

31 U.S.C. 1344 (portal-to-portal)

31 U.S.C. 1301 (only for agency purposes)

31 U.S.C. 1345 (not for meetings)

31 U.S.C. § 1349 (b) – viol 1344 → 1 month min suspension.

18 U.S.C. § 641 – embezzlement / theft – specific intent

- background
- Harde: how calculated?
- alerting others
- CG dealings (perhaps)
- Proxmire
- Free Press – specific intent → allen
- FFF check for weight

[Harde referral, other to DOT → Lowell]

OLC

- safety
- reliance

State – Admin: any guidance to spouses – security of personnel.

Tax: letter to Proxmire on Tax – ES, Carlson, see security aspect. → TEX

Lowell review? → can't ad/no active dispute

* ⟹ Ted views differently – reliance, retroactive, no nepotism

AG: Bell's wife used

Sept 82 – Handle. HUD IG referred to DOJ
use of vehicle, parked-to-parked by
spouse + H. Pub Integrity thought
could but no 18 USC 641. No
criminal intent [Lowell – no Special
Prosecutor] Criminal declined, referred
back to HUD. Assessed $6K, settled
$3K w acting Sec't, not carving
on calculation.

Problems
Lowell set low on previous use.
Allen specific intent

Waiting to hear from us

W/AG out, ask for new OLC look – security,
reliance

not authorized to drive Government vehicles. Since such dependents are not "employees" within the meaning of the Federal Tort Claims Act, the Government would apparently not be liable for damages suffered by a third party occasioned by the negligence of the dependent. Moreover, it appears that should damage result from the negligence of the dependent such person might be held liable not only to the third party, but also to the Government for any damage to the Government vehicle.

Other factors for consideration would be the availability of space in the Government vehicle and the possible disruption in routine which might be caused by a large number of dependents accompanying an employee. Also, since GSA vehicles are involved, the contract agreement should be approved by GSA. The specific conditions of each particular situation will, no doubt, suggest additional factors for consideration. Since determinations should be made on a case-by-case basis, as opposed to a blanket policy, we suggest that the agency retain authority to make the required determination on a case-by-case basis.

Accordingly, 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 638a(c)(2) would be violated. Thus, we are of the view that the provisions of 31 U.S.C. § 638a(c)(2) do not, by themselves, serve to make the AFGE proposal nonnegotiable.

[B-191019]

Bids—Acceptance Time Limitation—Extension—After Expiration—Acceptance of Renewed Bid—Effect on Competitive System

A bid, once expired, may be accepted when revived by bidder provided such acceptance does not compromise integrity of competitive bidding system.

Bids—Acceptance Time Limitation—Extension—After Expiration—Initial Refusal and Delay in Reviving Low Bid—Award to Second Low Bidder *v.* Solicitation Cancellation

Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promptly revived at request of agency.

In the matter of the Veterans Administration—request for advance decision, January 23, 1978:

The Veterans Administration (VA) has requested an advance decision on the award of a contract for the addition to Building Num-

We are therefore recommending that NASA exclude CSC's proposal from consideration for award under the RFP. This recommendation is made under the authority of the Legislative Reorganization Act of 1970, 31 U.S.C. 1176.

Protest sustained.

[B-190440]

Vehicles—Government—Transportation of Dependents of Employees on Temporary Duty—Criteria—Length of Assignment and Government Interest

Union proposal would allow Federal employees on temporary duty for more than a specified period of time to transport their dependents in Government vehicles. Agency states that proposal violates 31 U.S.C. 638a(c)(2), which prohibits use of Government vehicles for other than "official purposes." However, where agency determines that transportation of dependents in Government vehicle is in interest of Government and vehicle's use is restricted to official purposes, the statute would not be violated. Accordingly, section 638a(c)(2) does not, by itself, render the union proposal nonnegotiable.

In the matter of the American Federation of Government Employees, Local 2814 and Federal Railroad Administration, January 20, 1978:

This action is in response to a letter dated October 3, 1977, from Mr. Henry B. Frazier, III, Executive Director, Federal Labor Relations Council, requesting our ruling on a negotiability matter concerning the American Federation of Government Employees (AFGE), Local 2814 and the Department of Transportation, Federal Railroad Administration, FLRC No. 77A-65. The matter involves a proposal by AFGE which would permit Federal employees to transport their legal dependents in Government vehicles while performing official business, subject to certain conditions.

The proposal in question is set forth below:

Section E. Employees assigned GSA vehicles will have the right to transport their legal dependents while traveling in GSA vehicles, subject to the following conditions:

1. The immediate supervisor must be notified in writing of such travel by dependents by the submission of a planned itinerary in advance, which identifies the dependents and relationship of the dependents.
2. The employee is on a planned itinerary requiring an absence of more than sixty (60) hours from his duty station.

The AFGE states that a similar provision was included in a Federal Railroad Administration order effective January 20, 1972, following negotiations on that point between the agency and the AFGE. The union believes that the proposal is not in conflict with law.

The Department of Transportation's position is set forth in a July 26, 1977, letter to the Federal Labor Relations Council. The Department states that it is of the opinion that the above-quoted proposal is nonnegotiable because it contravenes 31 U.S.C. § 638a(c) (1970). It further states that the inclusion of a similar provision in

prior Federal Railroad Administration regulations does not overcome the prohibition contained in the cited statute. Section 638a(c) states, in pertinent part:

> Unless otherwise specifically provided, no appropriation available for any department shall be expended—
>
> * * * * * * *
>
> (2) 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. * * *

Section 638a(c)(2) does not define the term "official purposes." It provides only that the term does not include the transportation of employees between their homes and places of employment, except in certain specified cases not relevant here. In construing section 638a (c)(2), this Office has recognized that its primary purpose is to prevent the use of Government vehicles for the personal convenience of employees.

The AFGE proposal would allow an employee's dependents to accompany him in a Government vehicle from the employee's residence or headquarters to his temporary duty station incident to an assignment which would require an absence of more than a specified time period. The proposal does not purport to authorize the transportation of dependents for any purpose when the employee himself would be prohibited from performing travel. Of course, if the employee used the Government vehicle to transport a dependent for other than "official purposes," he would be subject to the sanctions set forth in section 638a(c)(2). See *Clark* v. *United States*, 162 Ct. Cl. 477 (1963), in which the Court of Claims held that a 90-day suspension of an employee was sufficient punishment when he permitted his wife to drive a Government vehicle on personal business, on a few occasions. Thus, under the AFGE proposal the Government vehicle could be used only for "official purposes" and the transportation of any dependents could only be made incident to such use.

Determinations concerning Government interest with regard to section 638a(c)(2) are primarily to be made by the administrative agency concerned within the framework of applicable laws. 54 Comp. Gen. 855 (1975) and B–164184, June 21, 1968. However, in making determinations with regard to Government interest, an agency should consider the possible increased liability of the Government under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, for damages suffered by such dependents through any negligence of the employee. Furthermore, employees should be advised that their dependents are

Department of Justice

ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

AMERICAN LAW INSTITUTE

1:30 P.M.
FRIDAY, MAY 20, 1983
MAYFLOWER HOTEL
WASHINGTON, D.C.

Thank you, Mr. Perkins. I have looked forward to this occasion for some time. This is the first of a series of speeches on the Constitution I will be giving over the balance of this year. With the Bicentennial of the framing of the Constitution just four years away, it is appropriate that we as a nation reflect on the origins of the nation's fundamental law, which includes the Constitution and its 26 amendments. I will begin the series today by focusing on the original Constitution, as it was drafted in 1787.

Today we readily acknowledge that the Constitution of 1787 succeeded where the Articles of Confederation failed -- that is, it established efficient national government. We seem less aware, however, of the Constitution's other great success -- indeed its greater success -- of securing liberty for all.

One reason for this, perhaps, is that in recent decades many Americans have grown accustomed to looking to the Bill of Rights and the Fourteenth Amendment for the security of their liberties. As former Senator Birch Bayh wrote: "the guarantees of individual rights found in our Constitution's Bill of Rights are the very foundation of America's free and democratic society."

Senator Bayh's statement is not so much wrong as it is inadequate. The amendments guaranteeing rights are important, but the real foundation of America's free and democratic society is something else -- the unamended Constitution of 1787. As Alexander Hamilton, writing in Federalist 84, observed, "The Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."

Hamilton, together with other Federalists and champions of the new Constitution, deeply believed that the purpose of the Constitution was to protect the rights of the American people. This is a truth that must not be lost with the passage of time.

To grasp what the Framers of the Constitution accomplished, it is necessary to understand their vision of the purpose of government. The second sentence of the Declaration of Independence begins with these familiar words:

> "We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness -- that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . ."

The meaning of the first self-evident truth -- that all men are created equal -- has been misunderstood. As the late Professor Martin Diamond often explained, the Declaration did not assert an abstract equality but an equality defined by the second self-evident truth -- that all men are endowed with certain unalienable rights, including Life, Liberty and the Pursuit of Happiness. The Declaration thus declared the value of equal political liberty or, as Professor Diamond said, "the equal entitlement of all to the rights which comprise political liberty."

The Declaration goes on to claim that the purpose of government is to secure liberty. The language of the third

self-evident truth of the Declaration bears repeating: "To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

The problem facing the Framers was precisely that of instituting a government that could secure the rights with which men are naturally endowed. They eventually solved this by establishing an altogether new form of democratic government, but not until they had wrestled with the full dimensions of the problem.

The Framers sought to secure liberty, but they also wanted popular government -- a government in which, as the Declaration specified, all power would derive from the people. Nothing less than a popular or democratic government, in their view, could comport with the principles of the American Revolution.

Yet it was here that the problem of securing liberty became most difficult. All power had to derive from the people, but the people themselves could be their own worst enemy. In the Convention, Elbridge Gerry warned against "the evils" that flow from democracy. Edmund Randolph similarly complained of the "follies and excesses of democracy."

In perhaps the most famous essay in our political history, James Madison explained the threat to liberty posed by democracy. The threat would arise from what he called "faction." He defined a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of community." Madison was worried less about minority

factions than majority factions, and specifically majority factions that tyrannized other citizens.

Here lay not only the danger to private rights, but also the threat to the common good, and indeed to the government itself. As Madison pointed out, tyrannical majority factions could cause instability and, worse, injustice. And from these "mortal diseases," said Madison, "popular governments have everywhere perished."

Madison stated the full nature of the problem in this way: "To secure the public good and private rights against the dangers of a faction, and at the same time to preserve the spirit and form of popular government, is the great object to which our inquiries are directed."

Plainly, the Framers did not want to do away with democracy; they wanted to eliminate or lessen what Madison called the "inconveniences of democracy," but only in a manner "consistent with the democratic form of government."

How did they finally do this?

In the Framers' view, the urgency was to find a way to prevent the rule, if not the formation, of an oppressive majority. They rejected what Madison called "a pure democracy" -- one in which, as he put it, "citizens . . . assemble and administer the government in person." They embraced instead what Madison called a "republic" -- what we today might term, and what indeed Hamilton did term, a "representative democracy."

Accordingly, citizens through their representatives would assemble and administer the government. Representation thus would retain its democratic footing, but it would also have the advantage

of refining and enlarging the public views, thus tempering popular prejudice and partiality. In this way the representative principle would work to prevent the formation of an oppressive majority and thus protect liberty.

The Framers were not so naive, however, as to believe that the representative principle by itself would prevent the rise of tyrannical majorities. They decided, therefore, that it was necessary to design the national government itself in such a way as to prevent oppressive majorities, whenever they might form, from working their will. Accordingly, they divided sovereignty within the government by allocating power among three branches.

Madison, writing in the Federalist Papers, declared that "the accumulation of all powers legislative, executive, and judicial in the same hands, whether of one, a few, or many, and whether heriditary, self-appointed, or elective may justly be pronounced the very definition of tyranny." The preservation of liberty, he wrote, "requires that the three great departments of power should be separate and distinct."

As we all know, the Framers of the Constitution distributed power in this manner. They allocated legislative power to Congress, executive power to the president, and judicial power to the Supreme Court and any inferior courts Congress might create. And they also did something further -- again in the interest of liberty. They provided checks and balances on the respective functions of government. These are quite familiar to us today, and include, among others, the presidential veto, the president's legislative initiative, judges' discretion in the adjudication of individual cases, Congressional power over the creation of inferior

federal courts and their jurisdiction, senatorial confirmation of executive appointees and judicial nominees, and so on.

The Framers quest to secure liberty did not stop, however, with separation of powers and checks and balances. They believed still more was necessary if liberty was to be secured within the framework of democratic government. In particular they believed the republic should be an "extended" one.

The concept of an extended republic is not familiar to us today. And perhaps it is hard for us to understand how geography, or demography, can have political implications. But during the founding period it was a very live issue whether a republic should be small or large.

Traditionally republics had been small, both in territory and population. It had been generally believed that a small republic would be more homogeneous in terms of the people's interests and beliefs, and therefore could achieve political stability. Large nations had therefore been considered unworkable, and no one had ever founded a republic on the idea that it should be spread over a large territory having a sizeable population.

Yet the Framers did just this. They believed that in a small republic the representative principle by itself could not produce a sufficient diversity of representatives, and that without greater diversity a faction might gain control and oppressively exercise power. They believed, furthermore, that distributing power among the various branches would avail little in a small republic, for the branches themselves would be constituted by persons so alike they would become the mere agents of oppressive popular will. The Framers believed that "only when

there is a distance between the people and their government will there be that difference between the ultimate authority of the people and the immediate authority of their representatives which is the decisive condition for the advantages supplied by the principle of both representation and separation of powers." And only what Madison called "an extended republic" could achieve this condition. The novel idea of the Founding Fathers, which lay at the heart of what Hamilton called the "new science of politics," was that the republic should be a very large one indeed.

The implications of this idea were staggering at the time. For obviously it meant not fewer but more factions, indeed many more. "The latent causes of faction," Madison wrote, "are,... sown in the nature of man." The more people that populate a nation, therefore, the more factions will result, provided the people are free, as the Framers plainly intended them to be. They believed it would be a denial of liberty to try to deny the growth of factions. And they thought that in a nation full of factions, engaged in the give-and-take of politics, the chances would diminish that a tyrannical faction would gain majority status, thus imperiling private rights. "Extend the sphere," said Madison, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other."

Representation. Separation of powers and checks and balances. An extended republic. These great ideas influenced the Constitution of 1787. But the Framers did not stop there in the effort to secure liberty.

The people may elect representatives; the government may be separated into three branches; the people themselves may be many and spread over a vast territory. But the Framers believed that if despite all of this the nation was divided into two dramatically different economic classes -- the haves and the have-nots -- neither liberty nor democracy could survive. The Framers therefore designed a Constitution for a particular kind of large nation -- what Madison called a "civilized" nation. By this, Madison meant a nation in which there would be many economic interests. "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests," he wrote, "grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views."

A commercial society, including an agricultural component, was precisely the kind the Framers envisioned. In such a society, men would not be agitated by huge class differences. Instead, men would pursue their interests and organize themselves into as many groupings as they wished. And the claims of these groups would fall short of the absolute factional kind that could destroy liberty and democracy both.

At the end of Federalist 10 Madison wrote that "in the extent and proper structure of the Union . . . we behold a republican remedy for the disease most incident to republican

government." The remarkable genius of the Constitution becomes clear when we realize that the Framers were concerned with securing liberty through representation, separation of powers and checks and balances, and an extended, commercial republic. And as they wrote a constitution reflecting these ideas they defined the key issue of the Convention -- federalism -- in such a manner as to secure liberty in still another way. For by dividing power between the federal and state governments, the Framers sought to prevent the excessive concentration of power in any one government.

Today, as we reflect on the work of the Framers, we must recognize that in one area the Constitution did not measure up to the ideals of the Declaration of Independence. In those parts, implicitly concerned with blacks, the Constitution obviously failed to accord equal political liberty to all men. As we know, slavery agitated the nation until its resolution through civil war. And that war led to the ratification of the three amendments that did much to remedy the defect of the original Constitution. The amending procedure spelled out in Article V thus facilitated the document's self-correction by a people whose conscience must continually be informed by the Declaration of Independence; and with these three amendments we see the amending procedure working to serve the cause of liberty for all men. It would have been better had the Constitution been right to begin with, of course. It would have been better to have avoided the tragedy of our great war. But it is a testimony to the enduring worth of the Constitution of 1787 that its mistake with regard to slavery did not require its ultimate abandonment.

Over the course of two centuries the Constitution has in general achieved what the Framers intended: It has secured liberty. The distribution of power among the three branches has proved fortunate in many instances. Some stand out in American history -- such as Watergate. But almost daily there are interactions among the branches of no headline importance that nonetheless work to secure liberty. Furthermore, whenever we vote, the Framers' representative principle works to the same end. We may not like the politics of someone elected from another state or region, or even from our own state; but in the diversity of our representation lies the protection of our liberties. Finally, the extended, commercial republic, which has grown from 13 states to 50, spanning a continent and more, and including many new enterprises and industries, has ensured a diversity of electorates. So has the constant immigration that has culturally enriched our nation. Perhaps the most remarkable fact about our Constitution is that in ways we have long since come to take for granted, it works still today to secure the blessings of liberty.

As for the Framers' goal of preventing tyrannical majority rule, it has been achieved from generation to generation. Today we may complain about the paralysis on Capitol Hill that seems to result from the multiplicity of factions Madison applauded. But while our constitutional system may at times be cumbersome, it has by and large prevented the rule of oppressive majorities. It has produced rule most often by moderate majorities -- majorities made up of constantly changing coalitions. Majorities that have formed on certain issues have broken apart on others and then reformed, in new ways, on still others. The many, not the few, have

governed. Self-government is not a rhetorical slogan -- it has been our chief characteristic as a people.

Each age offers its own challenge for us to live according to our constitutional ideals. Although the Framers envisioned that the people would make policy primarily through the legislative branch, it can indeed become a "vortex," drawing all power unto itself. Similarly, the executive branch can overreach, and the judiciary, although Hamilton called it the "least dangerous branch," can threaten representative government and frustrate the policy choices of the people, as President Franklin D. Roosevelt recognized. Furthermore, the national government itself can draw too much power away from the states.

The constant necessity is for us to rethink our current politics in light of the Framers' enduring Constitution. If we do this honestly and fairly at this juncture in our history, we may find that we are asking all branches and all levels of government to do too much, consistent with the principle of liberty.

And it is only for the sake of liberty, in the final analysis, that government by right can exist. As we approach the bicentennial of the framing of our Constitution, let us remember that the founding generation went to Philadelphia in the service of liberty. The document they wrote for themselves and their posterity was truly a Constitution of Liberty. By it they secured for us the principle of "Liberty to all." May we never forget, as Lincoln reminded us, that this principle of liberty is the primary cause of our great prosperity as a nation.

Department of Justice

ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

AT THE

THE UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER

GRADUATION CEREMONY

6:15 P.M. E.D.T.
THURSDAY, MAY 12, 1983
BOVARD AUDITORIUM
UNIVERSITY OF SOUTHERN CALIFORNIA
LOS ANGELES, CALIFORNIA

Thank you, Dean Bice. It is always a pleasure to be in Southern California, and it is a special pleasure to address a graduating class of this distinguished law school.

There is a story told about Oliver Wendell Holmes when he was in his eighties, nearing the end of his distinguished career on the Supreme Court. The great jurist found himself on a train and, confronted by the conductor, he couldn't find his ticket. Recognizing Holmes, the conductor told him not to worry, that he could just send in the ticket when he found it. Holmes looked at the conductor with some irritation and replied:

"The problem is not where my ticket is. The problem is, where am I going?"

Upon discovering your presence in law school, many of you may have wondered, Holmes-like, where you were going. Today you have at least one answer to that question -- you were heading toward the successful completion of three years of law school, toward, in fact, this very day.

This may be an obvious answer, but the three years you have just finished are extremely important. For they represent a ticket of sorts -- a very valuable ticket, one that can gain entry to many interesting and rewarding careers. It is an honor for me to join your families and friends and teachers in congratulating you on your accomplishment.

Law-school graduates typically travel many paths after graduation. Some of you will go into general practice, some into trial work. Some will find yourselves in specialties like patent and tax law. Some of you will practice corporate law in large firms. Some will be lobbyists, using your legal skills to represent a variety of organizations before government. And some of you will wind up in government, perhaps in Washington, in the Department of Justice. A few of you may become judges, a few politicians, and a few may decide to teach future generations of attorneys. Persons trained in the law obviously do a great many things. You rightly should be excited about your prospects, both immediate and long-range.

Today I would like to share with you my thoughts on the relationship of the legal profession to the changing nature of American society.

Governed by the rule of law and devoted to commercial enterprise and the pursuit of happiness, America has always been and will continue to be a litigious nation. That is an abiding characteristic. In the past three decades, however, the citizens of our society have been turning to the courts in unprecedented numbers and for a variety of new reasons. Time magazine says -- I believe correctly -- that in this area of our society "a virtual revolution" has been taking place.

The features of this revolution are plain enough. As never before, courts have been voiding federal and state statutes and discovering numerous new constitutional rights, protections and entitlements. Many Americans, emboldened by huge awards in personal injury suits, have been going to court seeking damages that in previous decades would not have been considered even remotely recoverable.

Meanwhile, federal and state legislatures have been writing laws at unprecedented rates. And administrative agencies have been churning out vast numbers of new regulations. Many of these laws and regulations have become the subjects of litigation.

Civil case filings in all courts, state and federal, trial and appellate, have grown dramatically in the past 30 years. As Erwin Griswold -- former Solicitor General of the United States and former dean of the Harvard Law School -- has pointed out, the belief is now widespread that "every controversy should be resolved in the courts, and every reform should be achieved in the courts."

Chief among the leaders of this revolution have been individuals who have been trained in the law. The growth in the number of individuals studying the law is staggering. Law school enrollments have tripled since 1950, growing at a rate six times faster than that of the general population.

Meanwhile, the work of many lawyers has been changing. If the judicial invalidation of statutes and assertions of policymaking authority have been a conspicuous characteristic of our time, so, too, has the vigor of lawyers in opposing democratic or majoritarian desires and in representing parties whose complaints in another time would have been considered most bizarre.

The question I would like to pose today is whether this revolution, which began before most of you were born, is one we should applaud. I will not try to offer a complete assessment -- that would try the patience of any listener, and indeed any speaker. Instead I will focus on areas that most concern me.

Much of the revolution of the past 30 years has been brought to us by judges and lawyers. On many occasions the courts, without constitutional warrant, have struck down actions by legislative bodies and midwifed new rights. The courts have given us what I call government by judicial decree.

Government by judicial decree is objectionable not on conservative or liberal political grounds, but rather on grounds that it offends the very nature of our constitutional government. To the degree that it invades the legislative function, it displaces representative government.

By wrongly voiding legislative acts and thus usurping power that properly belongs in federal or state or local legislatures, the courts close down, as former Attorney General and Supreme Court Justice Robert Jackson once pointed out, "an area of compromise in which conflicts have actually, if only temporarily, been composed." Furthermore, they impose their own policy choices upon the people affected, whether they are the people of the nation, a particular state, a city or county.

Very often, these choices represent imperfect policy-making. The fact-finding resources of courts are limited. And judges are necessarily dependent on the facts presented to them by the interested parties. Legislatures, on the other hand, have expansive fact-finding capabilities that can reach far beyond the narrow special interests being urged by parties in a lawsuit. Legislatures have these capabilities precisely because they are so closely related to the people. They have constituencies to which they are directly accountable.

The policy choices of legislatures thus are presumptively better than those of judges. But even if these choices are unwise or poorly considered, they still should be respected by the courts. The courts' review should extend, in the case of constitutional questions, only to the constitutionality of an action or statute, not to its wisdom. In general, the courts should void the policy choices of legislatures only when they contravene clear constitutional principles. U.S. Circuit Court Judge and former Solicitor General Robert Bork put it well when he wrote: "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution."

By inviting citizens to forgo elective politics and instead bring lawsuits, government by judicial decree has encouraged acceptance of the view that the only avenue to justice lies through the courts. But that is not accurate. The courts are not the only avenue to justice, or even always the best one. The legislature is quite capable of achieving justice, as witness the enactment of the Civil Rights Act of 1964. Furthermore, contrary to much that is popularly written and said today, the courts, like other branches of government, are quite capable of doing injustice.

It was, after all, the Supreme Court which in 1857 declared that Congress lacked the authority to prohibit slavery in the territories. And it was the Supreme Court which, during the first decades of this century, stopped a state legislative effort to ameliorate sweat-shop conditions in the baking industry; invalidated minimum wage and maximum work hour regulations; struck down statutes condemning "yellow dog" contracts; and refused to allow states to restrict entry into the ice business, or to regulate the price of theater tickets or gasoline.

We must always keep in mind, as Justice Holmes once observed, that "the legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."

Government by judicial decree reflects in large part a failure by the courts to restrain themselves. Recent years have witnessed the erosion of restraint in considerations of justiciability -- in matters of standing, ripeness, mootness, and political questions. Meanwhile there has been an expansion of several doctrines by which state and federal statutes have been declared unconstitutional -- in particular, the analyses that have multiplied so-called "fundamental rights" and "suspect classes." Furthermore, there has been an extravagant use of mandatory injunctions and remedial decrees. Indeed, at times, it has become hard to distinguish courts from administrative agencies; for example, in some cases the courts have taken charge of local sewage systems - and prison systems.

The courts are to a certain degree responsible for the growing caseload that is overwhelming them. The caseload burden has sometimes forced curtailment of oral argument and led to assembly-line procedures for disposing of cases. It has not allowed enough time for reflection or mastery of records. In 1975 Circuit Judge Duniway lamented that he and many of his brothers and sisters on the court "are no longer able to give to the cases that ought to have careful attention the time and attention which they deserve."

The lack of judicial restraint has led to a substitution of judicial judgment for legislative and executive judgment. And missing in much of this government by judicial decree has been a proper understanding of the Constitution.

At the Department of Justice, we are urging judicial restraint upon the courts whenever the nature of the issues presented in both practical and constitutional terms require the more considerable resources of a legislature to resolve. We hope that more and more courts will exercise restraint in regard to questions of justiciability, analysis of fundamental rights and suspect classes, and use of mandatory injunctions and remedial decrees.

The principle of restraint needs the support not only of judges but also of lawyers. Lawyers, to be sure, must zealously represent their clients by using every weapon in their arsenal. And lawyers should not be daunted when they lose. Justice Rehnquist, in the Vermont Yankee Nuclear Power case in 1978, was right to excoriate an appellate court for swallowing an argument on a "peripheral issue"; but the lawyers who presented that argument to the court were right at least to try this long shot -- they were discharging their duty to their clients.

Lawyers, however, have obligations outside the courtroom. As citizens and as members of their bar associations, they have an obligation to preserve our form of government, which requires that policy-making authority reside in the elected branches of government, not in the unelected judiciary. As citizens and members of the bar, lawyers should urge self-restraint upon the courts.

Lawyers, by the way, have another obligation that deserves mention. The past 30 years have witnessed increasing acceptance of the view that it is better to go to court than to settle differences privately. To be sure, lawyers must serve their client to the best of their abilities, but lawyers should remember that often the best service they can provide a client is to keep him out of court. It was Lincoln who said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses and waste of time."

Furthermore, we should be more modest about what lawyers must do. It is hardly obvious that lawyers -- and, for that matter, judges -- need to be involved in every dispute. Such "non-judicial" routes to justice as arbitration, negotiation and administrative process deserve greater employment as alternatives that can complement the judicial systems.

Judges and lawyers are not the only ones deeply involved in the litigious revolution of our times. So, also, are the institutions responsible for their training -- the law schools.

The judicial policy-making of the past three decades has been aided and abetted by the view that the Constitution is simply the precedents to the case at hand. Unfortunately, this view is all too often taught in our law schools. Knowing precedent is of course important, but central to constitutional interpretation should be the text of the Constitution, the intent of the framers, and the historical context of the document.

How often are law students asked to read the Federalist papers or study the records of the Constitutional Convention? How often are they asked to understand separation of powers, as this concept has developed over 200 years? And if these intellectual underpinnings are frequently neglected in law schools, is it any wonder that ultimately they come to be neglected by our lawyers in argument, and our judges in their decisions, and indeed by our citizens in their understanding of the law that binds, or should bind, us together? There is perhaps no more compelling need in legal education today than instruction in the law and legal institutions of our founding period.

Law schools reflect the intellectual currents of the age, and the ones of our time happen to be positivism and instrumentalism. These philosophies are rarely made explicit. But in the phrase of former Assistant Attorney General Roger Cramton, now Dean of the Cornell Law School, they are "part of the intellectual woodwork of the law school classroom."

This silent woodwork is an amazingly effective professor. It teaches a student to believe that all things are relative (except of course relativism itself), and to view law merely as a tool to achieve whatever one wants. There are no right answers for many students; just winning arguments.

Law schools today would be well advised to examine the intellectual woodwork of their classrooms. Law is not merely instrumental, a device to enable you to get what you want, a technique that can be manipulated according to the end sought. Law is not a means of gratifying one's wants.

What must be understood today is that law has an inner morality that protects us all. Alexander Bickel called it the "morality of process." It is found in legal technicalities -- what Bickel called "the stuff of law." Government by judicial decree has denied the morality of process and thus the importance of legal technicalities. As Bickel noted of the Warren Court, it "took the greatest price in cutting through legal technicalities, in piercing through procedure to substance." If we are to preserve our form of government, it is the stuff of law that must be taught to and respected by the students who will soon enough become the nation's lawyers and judges.

I realize that today I have been a little rough on the legal profession. Let me assure you that I dissent from Shakespeare: I am not about to suggest that we kill all the lawyers, or the judges, or the law professors, and certainly not law school students. But I believe that the revolution of our times is something all of us trained in the law must be concerned about.

For not only have we become too concerned with courts and too inattentive to how we can govern ourselves through the elective branches. And not only have we failed to see how the very organization of our government works to preserve liberty and equal rights for all. Our preoccupation with litigation also has caused us to neglect something most fundamental.

Writing in Federalist 55, James Madison said that our form of government "presupposes," to a higher degree than other forms of government, the existence of certain qualities of human nature. These qualities include prudence, civility, honesty,

moderation, a concern for the common good -- in short, what Madison and his colleagues called virtue. "To suppose that any form of government will secure liberty or happiness without any virtue in the people," said Madison at the Virginia Convention in 1788, "is a chimerical idea."

The revolution I have described today has not only failed to nourish these values, it has also weakened them. We have become impatient with the voluntary morality of life in society and grown to prefer the compulsory morality of the courtroom. We have become accustomed to thinking about and demanding our rights in courts of law, and neglecting our responsibilities to our families and neighbors and institutions. We have put our faith in courts of law, and law itself, to make us good men and women, and indeed to set the world aright.

But the legal order cannot by its mere existence in code, law, and document nourish the values upon which it rests and depends. Civility cannot be litigated into being; and decency and responsibility cannot be the products of legislation or bureaucratic fiat. Knowledge of law and legal experience do not make men and women good.

Walter Lippman once wrote that "the acquired culture is not transmitted in our genes and so the issue is always in doubt." Let me emphasize that neither is the acquired culture transmitted, at least in its most important form, in courts of law. As Judge Learned Hand once said, "A society so riven that the spirit of moderation is gone, no court can save; . . . a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."

I wish you the best in your legal careers. But I leave with you the thought that your most important contribution to this society will be less what you do as a lawyer than what you do as a citizen in transmitting the acquired culture on which our society and form of government depend. And I offer you a challenge: that what you do as a mother or a father, a volunteer or a neighbor, may in the final analysis be your best and finest service to America.