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OA/ID Number: 29185
Folder ID Number: 29185-003

Folder Title:
Cabinet Spouses/Travel (1991) [1]

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From C. Boyden Gray to John Sununu Re: Spousal Travel (1 pp.)	6/14/90	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Cabinet Spouses/Travel (1991) [1]

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Date Closed:	12/21/2004	OA/ID Number:	29185-003
FOIA/SYS Case #:	1998-0004-F[2]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
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P-1 National Security Classified Information [(a)(1) of the PRA]
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 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE
WASHINGTON

June 14, 1990

THE CHIEF of STAFF
has seen / approved
JUN 25 1990

MEMORANDUM FOR GOVERNOR JOHN H. SUNUNU
CHIEF OF STAFF

FROM: C. BOYDEN GRAY *CBM*
COUNSEL TO THE PRESIDENT

SUBJECT: Spousal Travel

Attached for your review is draft guidance on spousal travel (Attachment A). Justice has determined that it is legally supportable (Attachment B), and Treasury has cleared the section on tax issues. Before issuing the guidance, I recommend that we undertake three steps:

1. Give an informal heads-up to Hill leadership. It would be helpful to alert the leadership to the imminent issuance of the guidance. I have attached talking points you could use for this purpose (Attachment C). Among other things, we can make the point that what we are trying to do for the Cabinet is scarcely different than what is permissible for the leadership. The leadership may also have useful insights on how we can approach the General Accounting Office (GAO). (See point 2.)
2. Notifying the General Accounting Office. Because numerous GAO precedents adamantly oppose Federal support for travel by spouses of Federal employees, GAO is apt to dispute Justice's conclusion that the guidance is legally sound (especially because Justice had earlier taken a more restrictive approach itself).

We should talk about the options for consulting GAO after hearing any suggestions the leadership may have on this point. Advance consultation would be preferable if it could be done quickly and was likely to gain GAO support; otherwise, it may be preferable simply to send a copy of the guidance when it is issued.

3. Obtaining the President's official approval of the guidance. Because the guidance is premised on certain factual findings by the President, he needs to act before I can issue the guidance. I have a decision memorandum ready that can be sent forward once the first two steps are taken care of.

Please let me know if you have any questions.

Attachments

draft: June 14, 1990

MEMORANDUM FOR THE CABINET
GENERAL COUNSELS AND DESIGNATED AGENCY ETHICS
OFFICIALS IN CABINET AGENCIES

FROM: C. BOYDEN GRAY
COUNSEL TO THE PRESIDENT

SUBJECT: Transportation for Spouses of Cabinet Members

A number of questions have been raised about the extent to which spouses of members of the Cabinet may travel at U.S. Government expense. This memorandum, developed in conjunction with the Office of Legal Counsel of the U.S. Department of Justice, is intended to provide general guidance. Because it is only a summary, the referenced underlying authorities should also be consulted.

Overview

President Bush believes that Cabinet spouses perform direct and important services for the U.S. Government when they provide bona fide assistance in representational activities that are a part of the job of the Cabinet members to whom they are married. Thus, although spouses of Cabinet members are not employees of the Federal Government by virtue of their husband or wife's position in the Cabinet, certain activities on their part have an official Government purpose and may appropriately be supported by the Government, including --

- o attending receptions and similar functions in a representative role on behalf of the U.S. Government, whether or not accompanied by the Cabinet member;
- o speaking or other appearances as an official representative of the U.S. Government;
- o attendance, with other Cabinet spouses and/or the First Lady, at meetings or events directly concerned with U.S. Government functions; and
- o other activities approved by and directly supporting the mission of the Cabinet member's agency.

For convenience, the remainder of this memorandum will refer to these activities as "official spousal activities." As to any activities in the absence of the Cabinet member, official spousal activities are limited to those that would have been proper official activities if carried out by the Cabinet member.

Official spousal activities do not include any activities that a spouse undertakes independently of his/her wife's or husband's position (e.g., a spouse's own separate employment by a different Federal agency). Official spousal activities also do not include political activities.

Because of the unique status of the Cabinet, the President believes it possible to distinguish between the role of spouses of Cabinet members and spouses of other Government officials. This guidance has no bearing one way or the other on official spousal activities by anyone other than Cabinet spouses.

As described more specifically below, transportation expenses for official spousal activities, whether involving local transport or domestic or foreign travel, may be supported at government expense. As with all Federal travel, proper approval procedures are essential to ensure accountability for, and judicious use of, Federal funds. A high-level official at each Cabinet agency (such as the Deputy Secretary or the General Counsel) should be designated as the approval official for such travel.

Principles for Government Support of Transport by Cabinet Spouses

- o In general, a Cabinet spouse may be transported by a Government car when the transport is necessitated by official spousal activities. This may include:
 - (1) accompanying the Cabinet member in his/her car;
 - (2) transportation without the Cabinet member between locations at which official spousal activities occur;
 - (3) transportation from home or another non-work location to meet the Cabinet member at a site where official spousal activities occur; and
 - (4) if permitted by agency rules issued pursuant to section 503 of the Ethics Reform Act of 1989,¹ transportation from a home/non-work location to a site where official spousal activities occur (or vice versa), regardless whether the Cabinet member is at the official site.
- o To the extent that funds are available, a Cabinet spouse may travel domestically or abroad at Government expense (including travel on a Government plane with an official delegation), if required for official spousal activities.

¹Special statutory provisions on home-to-work transportation in government cars may limit what may be determined to be "official" transportation. Thus, this guidance treats this category of home-to-work transport for Cabinet spouses as incidental "unofficial" travel that may be authorized under section 503 of the Ethics Reform Act of 1989.

- o Under the Ethics Reform Act of 1989, regulations should shortly be issued by the General Services Administration that will give all agencies the authority to accept gift funds to pay for travel of a spouse accompanying a Federal employee (including a Cabinet member), subject to conflict-of-interest standards.
- o To the extent that both Office of Personnel Management and agency regulations permit, a Cabinet member may accept travel for himself or herself and his or her spouse from a non-profit organization recognized under section 501(c)(3) of the Internal Revenue Code in connection with attendance at meetings and conferences, provided there is no conflict of interest.
- o Under the Foreign Gifts and Decorations Act, a Cabinet member may accept from a foreign Government expenses for travel wholly inside a foreign country for himself or herself and a spouse, if refusal to accept would embarrass the foreign country and if consistent with U.S. interests.
- o If, during an official trip, an individual also undertakes personal or political activities, a reasonable allocation of costs must be made between official activities and others.

Nothing in this memorandum is intended to limit otherwise permissible use of a Government vehicle or travel at Government expense. Similarly, the memorandum is not intended to supersede any additional restrictions on the availability of Government-funded travel that may be unique to particular agencies. You should also be aware that financial disclosure may be required when travel is paid for by a non-federal entity.

Tax Liability Issues

The limitations set forth in this memorandum are intended to permit transportation of spouses only when there is a bona fide business purpose for the spouse's presence (not merely the performance of an incidental service). Consequently, if the transportation is provided only when a bona fide business purpose exists, Departments need not, except in the case of transportation between home and work, include the value of spousal transportation as taxable income in the W-2s issued to Cabinet members. The value of transportation between home and work provided to a spouse should be included in the Cabinet member's W-2, just as the value of the Cabinet member's transportation between home and work is now included.

Procedures

1. A high-level official in each agency (such as the Deputy Secretary or General Counsel) should be designated as the approving official for travel by the Cabinet member's spouse.

2. Each proposed trip at Federal expense by a Cabinet spouse outside the Washington D.C. area to perform official spousal activities should be reviewed in advance by the approving official.

3. The approving official should ensure that appropriate guidelines are issued governing local travel by Cabinet spouses within the Washington D.C. area in Government cars. Use of Government cars need not be approved on a trip-by-trip basis, unless agency procedures dictate otherwise.

Please feel free to contact my Office or the Office of Legal Counsel of the Department of Justice if you have any questions.



Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 4, 1990

MEMORANDUM FOR C. BOYDEN GRAY
Counsel to the President

Re: Transportation for Spouses of Cabinet Members

The President believes that Cabinet spouses provide direct and important services to the federal government when they participate in representational activities with their Cabinet member spouses and, you have informed us, he believes spousal travel to and from such activities should be paid for by the Government.¹ The President is prepared to authorize issuance of a directive describing the circumstances in which he believes spousal participation (and therefore their travel) would further the missions of the respective Executive departments. We understand that the President is considering issuing a memorandum that would include the following determination:

[A]lthough spouses of Cabinet members are not considered employees of the Federal Government by virtue of their husband or wife's position in the Cabinet, certain activities on their part have an official Government purpose and may appropriately be supported by the Government, including --

- ° attending receptions and similar functions in a representative role on behalf of the United States Government, whether or not accompanied by the Cabinet member;
- ° speaking or other appearances as an official representative of the U.S. Government;
- ° attendance, with other Cabinet spouses and/or the First Lady, at meetings or events concerned with U.S. Government functions; and

¹ Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel from C. Boyden Gray, Counsel to the President, January 8, 1990. This memorandum includes a Draft Guidance Memorandum (Draft Guidance Memorandum) for proposed use by agency heads.

• other activities approved by and directly supporting the mission of the Cabinet member's agency.

Draft Guidance Memorandum, at 1. If the President authorizes issuance of this directive, the concerned agencies are prepared to promulgate any needed implementing regulations.

You have asked for our advice on whether spousal travel, either by air or ground transportation, in the circumstances recited by the proposed directive may be paid for by the Government. We conclude for the reasons set forth below that Cabinet spouses who participate in these activities may travel at government expense.

I. Automobile Travel by Spouses

There are two statutes applicable to spousal travel by automobile.² See Pub. L. No. 101-194, § 503, 103 Stat. 1716, 1755 (1989) (Ethics Reform Act); 31 U.S.C. § 1344. Section 1344 authorizes the use of agency automobiles for official purposes.³

² There is no specific statute addressing travel by Cabinet spouses, as there is for Presidential and Vice-Presidential spouses. See 3 U.S.C. §§ 105(e), 106(c).

³ Section 1344 provides:

(a)(1) Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes. Notwithstanding any other provision of law, transporting any individual other than the individuals listed in subsections (b) and (c) of this section between such individual's residence and such individual's place of employment is not transportation for an official purpose.

* * *

(b) A passenger carrier may be used to transport between residence and place of employment the following officers and employees of Federal agencies.

* * *

(2)(A) officers compensated at Level I of the Executive Schedule pursuant to section 5312 of title 5
(continued...)

Section 503 of the Ethics Reform Act authorizes agencies to issue rules governing "incidental use" of automobiles for unofficial purposes.⁴

As discussed below, we believe that the spousal travel by automobile that would be authorized by the directive may properly be characterized as "official" within the meaning of 31 U.S.C. § 1344. To the extent any portion of such travel is determined to be "unofficial," or should the White House instead choose to characterize the travel as "unofficial," we believe such travel at government expense would nevertheless be authorized under section 503 as "incidental" unofficial travel. Consequently, we recommend that any implementing regulations provide that the authorized categories of spousal travel may be paid for as "official" travel or, alternatively, as "incidental" unofficial travel.

A. "Official" Travel Under Section 1344

Section 1344 authorizes use of government automobiles for spousal transportation if such use is for "official purposes." Id. at § 1344(a)(1).⁵ Whether spousal travel in any particular

³(...continued)
[Cabinet officers].

(Emphasis added.) See also 31 U.S.C. § 1345 (no appropriation may be used to pay for transportation expenses of anyone except a federal officer or employee carrying out official business); 31 U.S.C. § 1349 (mandatory one month suspension without pay for willful misuse of cars).

⁴ Section 503 of the Ethics Reform Act provides, in pertinent part:

Notwithstanding any other provision of law, the head of each department, agency, or other entity of each branch of the Government shall prescribe by rule appropriate conditions for the incidental use, for other than official business, of vehicles owned or leased by the Government.

See generally Report of the Bipartisan Task Force on Ethics on H.R. 3660, 101st Cong., 1st Sess. (Comm. Print 1989), at 35-37.

⁵ The term "official purposes" is defined to include certain home-to-work transportation. By the terms of the statute, home-to-work transportation by government vehicle is available only to Cabinet members themselves. General Services Administration (GSA) regulations implementing 31 U.S.C. § 1344, however, define
(continued...)

circumstance is for an "official purpose" has proven to be a nettlesome question over the years.⁶ GAO has taken a restrictive

⁵(...continued)
limited conditions under which family members may be beneficiaries of this privilege:

If an employee is authorized transportation between his/her residence and an official duty site, this privilege does not extend to his/her spouse, other relatives, or friends unless --

- (1) It is consistent with the agency's policy,
- (2) They are with the employee when he/she is picked up, and
- (3) They are transported to the same place or event.

53 Fed. Reg. 26773, 26777 (July 15, 1988), to be codified at 41 C.F.R. § 101-6.402(f) (emphasis added). Thus, spouses may use government automobiles that are provided to Cabinet members for home-to-work transportation, but only when they are accompanying their Cabinet spouse to or from the same function. Id. This limited exception is obviously not broad enough to encompass the full range of spousal transportation contemplated by the President. It can and should be relied upon, however, as additional authority for that portion of the agencies' regulations to which it will pertain.

GSA recently advised that its authority over home-to-work transportation did not include authority over spousal transportation because spouses are not federal employees entitled to such transportation. Letter to Mr. Abraham D. Sofaer, Legal Advisor, Department of State from Richard G. Austin, Acting Administrator, GSA, September 5, 1989. It took the position that the agency must determine whether spousal transportation is for an "official purpose" within the meaning of 31 U.S.C. § 1344(a)(1): "A determination that [transportation of the Secretary of State's wife] is for an 'official purpose' can only be made by the Department of State, based upon whether or not the transportation furthers the mission of the agency." Id.

⁶ The question has also attracted considerable press attention. See, e.g., Wash. Post, September 20, 1985, at A10, col. 1 (review of GAO report covering misuse of automobiles by spouses); Wash. Post, March 28, 1984, at A21, col. 1 (wife of the Secretary of the Treasury, wife of the Attorney General); id. at A22, col. 1 (wife of the Secretary of Defense); Wash. Post, (continued...)

view of agency authority in this area, concluding that only spouses who are performing a "direct service" to the government may have their travel expenses paid by the government. The GAO justifies the payment of travel expenses in these circumstances under 5 U.S.C. § 5703 which provides that "An employee serving intermittently in the Government Service as an expert or consultant and paid . . . or serving without pay or at \$1 a year, may be allowed travel or transportation expenses . . . while away from his home or regular place of business and at the place of employment or service." The "direct services" test -- which is not based on any statutory language -- is not met, according to GAO, merely because the individual's activities may in some way enhance the agency's objectives. Principles of Federal Appropriation Law (GAO 1982), at 3-39. While GAO has occasionally approved limited spousal travel, it has rejected attempts to have the government pay more generally for spousal travel expenses.⁷

In the past OLC has taken a similarly restrictive view of "official purposes" spousal travel. The Office concluded in 1984, for example, that the Department of Justice could not pay for transportation of the Attorney General's spouse to events very similar to those listed in the Draft Guidance Memorandum.⁸

⁶(...continued)

March 27, 1984, at A21, col. 3 (wife of an Undersecretary at HUD); Wash. Post, May 20, 1983, at A15, col. 1 (wife of an Undersecretary at HUD).

⁷ Compare GAO Op. B-111642 (1957) (unpublished) (government could pay travel expenses of surviving spouse to attend ceremony where departmental award would be given to deceased employee); GAO Op. B-169917 (1970) (unpublished) (government can pay wife's expenses to accompany employee-husband who became incapacitated while on official travel) with GAO Op. B-210555.9, Letter to Sen. Jake Garn from Milton J. Socolar, Comptroller General, June 28, 1984, at 3 ("the fact that a spouse of a government official may be performing services which would benefit the Government would not, in itself, satisfy the statutory requirement" of an official purpose); GAO Op. B-204877 (Nov. 27, 1981) (unpublished) ("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 employees. This is true even though the presence of spouses might in some way enhance the achieving of the purposes of the trips.").

⁸ Memorandum for Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, January 23, 1984, at 14-15.

In 1986 GAO adopted a modest exception to its strict position on spousal transportation. It concluded that spouses of government employees entitled to routine home-to-work transportation may be transported in government vehicles when the spouse is being transported to or from an official or quasi-official function, the spouse's presence at the function is in the government's interest, and circumstances make it awkward or impossible for the official to accompany the spouse enroute.⁹ GAO thus concluded that the presence of a Cabinet spouse at certain activities could be "in the government's interest," thereby authorizing as an "official purpose" spousal transportation to and from those activities. OLC subsequently adopted this view in a 1986 opinion that relied on the GAO Report.¹⁰ Neither GAO nor OLC, however, has generally permitted spousal travel under the authority of section 1344.

The President proposes to determine categorically that certain spousal activities serve the "official purposes" of the Executive branch. As head of the Executive branch, the President ultimately has this authority to determine what falls within the Executive branch's official activities. Thus, he clearly would be in a position to make a categorical determination that certain spousal transportation furthers the mission of the Executive branch as a whole, and therefore the individual Executive departments. The President cannot define the statutory term "official purposes" to include anything he wishes. Presumably, there must be a meaningful nexus between the spouses' participation in the proposed activities and the advancement of agency objectives before the statute would be satisfied. However, the President has significant discretion as the Chief Executive to decide what activities advance the official business of the executive agencies he supervises, and there obviously is a sufficient nexus in this case to satisfy the statute. The activities listed in the Draft Guidance Memorandum will be undertaken either on behalf of or to advance the interests of the United States government or to advance a specific agency's mission. Accordingly, were the President to conclude that the activities listed in the Draft Guidance Memorandum were "official purposes" within the meaning of 31 U.S.C. § 1344(a)(1), we

⁹ GAO, Use of Government Motor Vehicles for the Transportation of Government Officials and the Relatives of Government Officials, Report to the Chairman, Subcommittee on Legislation and National Security, Committee on Government Operations, House of Representatives, at 50 note a (GAO Report GGD-85-76) (1985).

¹⁰ Memorandum for Harry H. Flickinger, Acting Assistant Attorney General for Administration from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, October 23, 1986.

believe that agencies could utilize their cars to transport spouses to and from the activities identified by the President.

B. "Incidental" Unofficial Travel Under Section 503

Even if section 1344 did not provide authority for the kind of automobile travel proposed by the President, section 503 of the Ethics Reform Act, see note 4 supra, exists as an alternative source of authority. This section accords agency heads broad discretion to authorize incidental, nonofficial use of government vehicles. If section 503 were relied upon, the White House directive would be that agencies and departments shall deem the specified travel to be "incidental" and "unofficial" within the meaning of section 503. We believe that if each Cabinet agency issued regulations pursuant to such a White House directive stating that spousal transportation to and from these activities constitutes "incidental use" of government vehicles "for other than official business," the Cabinet spouses could permissibly travel to and from the activities by government vehicle. Given the breadth of the agency heads' discretion under section 503, this statute provides clear authority for the transportation of Cabinet spouses within metropolitan Washington for the purposes listed in the Draft Guidance Memorandum: transportation from home to receptions and similar functions, speaking appearances on behalf of the federal government, and meetings with the First Lady and other Cabinet spouses. Accordingly, we believe that a presidential directive and the ensuing agency regulations could also be based on section 503, should the President choose to characterize the designated travel as "incidental" and "unofficial."

II. Aircraft Travel by Spouses

The proposed directive would contemplate spousal travel by aircraft, in addition to travel by government car. The directive would provide that:

To the extent that travel funds are available, a Cabinet spouse may travel domestically or abroad at Government expense (including travel on a Government plane with an official delegation) if the travel is required for official spousal activities.

The directive would go on to explain that under certain circumstances such spousal aircraft travel may be paid for either by nonprofit organizations¹¹ or by foreign govern-

¹¹ The directive would provide in this regard that "to the extent that both Office of Personnel Management and agency regulations permit, a Cabinet member may accept travel [expenses] for (continued...)"

ments.¹² Finally, the directive would emphasize that under soon-to-be-issued GSA regulations, all agencies will be permitted to accept gift funds to pay for spousal travel.¹³ We believe that the broad authorization of spousal aircraft travel is supportable under existing law, and that the draft directive otherwise reflects the current authorities that could be relied upon for such travel.

1. The government may pay for air travel that is required for official spousal activities. An agency may pay for spousal travel on government, 31 U.S.C. § 1344,¹⁴ and commercial, 5 U.S.C. § 5703,¹⁵ aircraft as long as the spouse is serving an

11(...continued)
himself or herself and his or her spouse from a non-profit organization recognized under section 501(c)(3) of the Internal Revenue Code in connection with attendance at meetings and conferences, provided there is no conflict of interest."

12 The directive would provide that "under the Foreign Gifts and Decorations Act, a Cabinet member may accept from a foreign Government expenses for travel wholly inside a foreign country for himself or herself and a spouse, if refusal to accept would embarrass the foreign country and if consistent with U.S. interests."

13 Under the authority of section 302 of the Ethics Reform Act of 1989, regulations are to be issued by GSA that will give all agencies the authority to accept gift funds to pay for travel of a spouse accompanying a Federal employee (including a Cabinet member), subject to conflict-of-interest standards.

14 Section 1344 imposes limitations on the use of federal funds for a "passenger carrier." Section 1344(g)(1) defines "passenger carrier" to include aircraft owned or leased by the government.

15 See page 5 supra. Although we cite 5 U.S.C. § 5703 as general authority, most agencies have broad authority to use their appropriation to pay for all necessary expenses. This includes official travel expenses, such as air fare and hotel accommodations. See, e.g., Pub. L. No. 101-162, 103 Stat. 988, 995 (1979) (Department of Justice appropriation for necessary expenses for Department's administration). Once the President has made his determination that such travel should be deemed official, and the agency has made the case-by-case determination that the proposed travel falls into one of the approved categories of official spousal activity, the agency can use its appropriation to pay for the travel, just as it now uses the appropriation to pay for its employees' official travel expenses.

official purpose.¹⁶ The President's determination that the specified spousal activities are official activities of the federal government would clearly establish the necessary predicate for reliance upon these statutes.

There are many instances, especially in the context of foreign travel, where it may not even be necessary for the agency to pay for spousal travel. For example, a department often pays the Department of Defense a lump sum for use of a military aircraft. In those instances, spouses have traditionally, and permissibly, traveled on a space-available basis.¹⁷ If this method of travel is otherwise available, agencies may wish simply to continue that method of accounting for spousal travel.¹⁸

2. An employee's spouse may accept travel expenses from a charitable organization. Employees may, consistent with any other applicable conflicts rules, accept reimbursement for travel expenses for official travel from any organization that is tax-

¹⁶ See, e.g., Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, March 12, 1988, at 2-3 ("Spousal expenses on foreign trips may also in certain circumstances be borne by the U.S. Government, if a spouse's presence on a foreign trip can be said to serve an official purpose."); Memorandum for the Attorney General from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, October 16, 1982, at 2 (where spouse's travel "serves the diplomatic interests of the United States"); Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, December 19, 1980, at 1-2; Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, September 21, 1979, at 3 (where "the Government would be benefited"); 2 Op. Off. Legal Counsel 327 (1978) (government can pay travel expenses of a relative of the President who is traveling on official business on behalf of the President).

¹⁷ GAO Op. B-204877 (Nov. 27, 1981) (unpublished) (transportation of congressional spouses); Memorandum for the Attorney General from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, Oct. 18, 1982 (Attorney General's wife may travel on foreign visit on space-available basis).

¹⁸ The disadvantage of this method is that the Cabinet member must reimburse the agency for any additional expenses, such as in-flight meals, that may be personal to the spouse. Nevertheless, there may be Cabinet spouses who would prefer that they not be treated as an official member of the party. For example, a spouse who worked at a law firm that did business with the agency might prefer to pay his or her personal costs in order to avoid even the appearance of impropriety.

exempt under section 501(c)(3) of the Internal Revenue Code. 5 U.S.C. § 4111(a).¹⁹ The Department of Justice has long taken the position that an employee's acceptance of reimbursement for a spouse's travel expenses is also permissible.²⁰ In the interim until GSA promulgates its regulations, see discussion infra, and even after the regulations issue, this will remain as authority for acceptance of spousal travel expenses.

3. A Cabinet member may permit a foreign government to pay for a spouse's travel expenses. The Foreign Gift Act permits the acceptance of travel expenses from a foreign government for a

¹⁹ This section provides:

(a) To the extent authorized by regulation of the President, contributions and awards incident to training in non-Government facilities, and payment of travel, subsistence, and other expenses incident to attendance at meetings, may be made to and accepted by an employee, without regard to section 209 of title 18, if the contributions, awards, and payments are made by [a § 501(c)(3)] organization[.]

See, e.g., 28 C.F.R. § 45.735.14a(a). Thus, section 4111 permits acceptance of these payments without regard to 18 U.S.C. § 209, and there is no statutory bar to an employee's spouse accepting them as well.

²⁰ See generally Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, March 2, 1988, at 2; Letter to David Martin, Esquire, Director, Office of Government Ethics from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, April 11, 1984; Letter to David Scott, Esquire, Office of Government Ethics from Ms. Beth Nolan and Ms. Janis Sposato, Attorney-Advisers, Office of Legal Counsel, July 8, 1983; Memorandum for Carolyn B. Kuhl, Special Assistant to the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, September 16, 1982, at 2-3; Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, December 19, 1980, at 3 n.5; Memorandum for Terrence B. Adamson, Special Assistant to the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, June 19, 1978, at 3 n.2. See also 28 C.F.R. § 45.735-14a(d) (spousal travel expenses may, with the permission of the Deputy Designated Agency Ethics Official, be accepted from most non-profit organizations).

federal employee and a spouse. 5 U.S.C. § 7342(c)(1)(B)(ii).²¹ As the proposed Memorandum notes, the statute only covers travel that is "entirely outside" the United States. The flight to and from the foreign country is not covered.²²

4. Agencies may accept the cost of spousal travel expenses from sources outside the government. Section 302 of the Ethics Reform Act of 1989, to be codified at 31 U.S.C. § 1352, directs the Administrator of GSA in consultation with the Office of Government Ethics (OGE), to issue regulations prescribing

the conditions under which an agency or employee in the executive branch may accept payment from non-Federal sources for travel, subsistence, and related expenses with respect to attendance of the employee (or the spouse of such employee) at any meeting or similar function relating to the official duties of the employee.

Id. (emphasis added). Once these regulations are issued, agencies and employees will be able to accept travel expenses for all spouses, including Cabinet spouses, under the conditions set forth in the regulations. Even agencies, such as the Department of Justice, that do not have gift acceptance authority, will be able to accept funds for spousal travel. Under these regulations, agencies and employees should have much greater flexibility in permitting non-government sources to pay for spouses accompanying government officials.²³

²¹ The Foreign Gift Act defines employee to include spouse. 5 U.S.C. § 7342(a)(1)(G). Employees may accept gifts of more than minimal value where refusal would cause offense or embarrassment. 5 U.S.C. § 7342(c)(1)(B). Employees are specifically authorized to

accept gifts of travel or expenses for travel taking place entirely outside the United States . . . if such acceptance is appropriate, consistent with the interests of the United States, and permitted by the employing agency and [its regulations].

5 U.S.C. § 7342(c)(1)(B)(ii).

²² See, e.g., Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, March 2, 1988.

²³ The Draft Guidance Memorandum includes a statement that if a trip has multiple purposes, a reasonable alloca-

(continued...)

CONCLUSION

We believe, based upon the foregoing authorities, that the President can ensure that Cabinet spouses may use government vehicles, or otherwise travel at government expense, to and from the activities that he would identify, through issuance of the contemplated directive and promulgation of conforming regulations by the respective agencies and departments.

We would be glad to assist in implementing this proposal. Please let me know if we can be of further assistance.²⁴



William P. Barr
Assistant Attorney General
Office of Legal Counsel

²³(...continued)

tion of costs should be made between official activities and others, just as costs of travel by Presidential appointees are now allocated between official, personal, and political travel.

We would recommend that this language be redrafted to eliminate any suggestion that Cabinet members may use government transportation for personal activities. The following language might be used instead:

if, during an official trip, an agency official also undertakes personal or political activities, a reasonable allocation

²⁴ To the extent travel is for official purposes, we do not believe that the value of transportation would be treated as taxable income. However, this should be confirmed with the Department of the Treasury which is responsible for administering the tax laws.

The Memorandum should also note that certain items, such as reimbursement of a spouse's travel by a private organization, may have to be reported on the Cabinet member's financial disclosure report. 5 U.S.C. app. § 202(e)(1)(C), (D).

Talking Points for Leadership on Spousal Travel

- o We are preparing to issue a guidance memorandum that would facilitate efforts by spouses of Cabinet members to assist Cabinet members with official activities.
- o The memorandum would cover local travel by government car, as well as domestic and foreign travel on commercial flights and government planes.
- o The basic principle is that when spouses are performing activities directly in support of the Cabinet member's agency -- whether or not accompanied by the Cabinet member -- they are entitled to use government-provided transportation for that purpose.
- o We are not looking for boondoggles here: we do not intend for government cars to be used for family grocery shopping trips or for government trips to be used as excuses for shopping expeditions abroad.
- o But the basic principle is that the President considers the spouses of the Cabinet members to be virtually as much a part of the Administration as the Cabinet, and it has been a continuing source of frustration to him and to all of us in trying to ensure that the government can support proper official activities.
- o We've had the attorneys here and at the Department of Justice take a look at this, and we've come up with some sound legal guidance that will clear up some recurring questions -- for example making it possible for a Cabinet wife to travel by government car from home to an official event.
- o As I understand it, this would not be all that different than the situation for your own wives.
- o Nevertheless, there may be some objections to our guidance from the press or from the General Accounting Office. GAO doesn't seem to understand that spouses, although private citizens, can provide the government with real and direct service.
- o I wanted you to know that we are not looking for abuses, just reasonable livable guidance.
- o And of course, we'd welcome any ideas you may have on how to avoid a flap about what really should be a very straightforward matter.

DRAFT; January 8, 1990

TRANSPORTATION OF SPOUSES OF CABINET MEMBERS

This memorandum considering the extent to which spouses of Cabinet members may travel at the expense of the U.S. Government. Part I of this memorandum assesses the authorities and precedents generally relevant to domestic and foreign travel by spouses, including authorities relating to the acceptance of donated funds for travel by a spouse. Part II features a similar summary and analysis focusing specifically on use of local transportation, such as Government cars. Part III applies existing precedents to travel by Cabinet spouses in the Bush Administration, in view of the President's determination that such travel can be of direct service to the Government.

I. General Principles Affecting Travel

A. Overview

Any payment of the expenses of travel for Cabinet spouses with U.S. Government funds requires statutory authorization.¹ While there is unquestioned legal authority to pay for the travel of a Federal employee on official business away from his or her post of duty or home see 5 U.S.C. 5702 and 5703, the scope of the Federal Government's authority for payment of expenses by private citizens is less well defined.

In general, Cabinet spouses are not Federal employees. Rather, they are generally private citizens whose activities, for the most part, are neither regulated by nor supported by the Federal Government.² A few statutes specifically address travel by

¹"No money shall be drawn from the treasury, but in consequence of appropriations made by law," U.S. Const., art. I, sec. 9, cl. 7, and "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. 1301(a).

²It is possible that in a particular case the spouse of a Cabinet member might be appointed to a Federal position, either related to or independent of the individual's relationship to the Cabinet member. A President might, for example, decide to appoint a Council of Cabinet Spouses, on which each spouse who wished to accept the appointment would serve part-time as a special Government employee. Any such service would be subject to existing laws and regulations governing the conduct of special

spouses of certain federal officials,³ although there is no general statute addressing travel by spouses of Cabinet members. Authority to pay for travel by spouses must therefore be considered in light of the more general Government authorities for supporting travel by non-Government employees.

B. Authority for Payment by the U.S. Government

Section 5703 of Title 5, U.S. Code, which authorizes payment of travel expenses by intermittently employed experts and consultants,⁴ has generally been interpreted to permit the payment of travel expenses by private citizens. The U.S. General Accounting Office "Red Book" acknowledges as a general principle that "'when requested by a proper officer to travel for the purpose of conferring upon official Government matters,'" private

Government employees.

A spouse might also hold any number of other government positions wholly independent of his or her relationship to a member of the Cabinet. Because of the nepotism statute, however, the Cabinet member "may not appoint, employ, promote, advance, or advocate [his or her spouse] for appointment, employment, promotion, or advancement in or to a civilian position in" the agency he or she heads. 5 U.S.C. 3110.

³A statute expressly authorizes support for activities by the spouse of the President "in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities," 3 U.S.C. 105(e). A similar statute addresses the spouse of the Vice President. 3 U.S.C. 106(c) (spouse of the Vice President).

Another law specifically authorizes payment of the travel and related expenses of members of the Foreign Service "and their families" in enumerated circumstances. See 22 U.S.C. 4081.

⁴The statute provides:

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

citizens may "be regarded as persons serving without pay and therefore entitled to travel expenses under 5 U.S.C. 5703. . . . In order to qualify . . . the individual must be performing a direct service for the Government." U.S. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law 3-38 (June 1982) (emphasis added) [hereinafter cited as GAO Redbook]. GAO circumscribed its approval further, explaining that it is not enough that the person is merely attending a conference on a subject also of interest to the agency or sponsored by the agency.⁵ The individual must be "legitimately performing a direct service for the Government such as making a presentation or advising in an area of expertise." Id. at 3-39 (emphasis added).

The Office of Legal Counsel (OLC) has acknowledged and accepted GAO's interpretation of 5 U.S.C. 5703 as authorizing payment of travel expenses for private persons, including, in some instances, a Cabinet spouse. See Acceptance and Reporting of Travel Reimbursement, Op. Off. Legal Counsel, at 2-3 (March 2, 1988) [hereinafter cited as 1988 OLC Opinion]; Use of Department of Justice Vehicles by Attorney General's Spouse, Op. Off. Legal Counsel at 5-7 (January 23, 1984) [hereinafter cited as 1984 OLC Opinion]; Travel by Mrs. Smith on Trip to Europe and Asia, Op. Off. Legal Counsel, at 2-3 (October 18, 1982) [hereinafter cited as 1982 OLC Opinion]. In summarizing the legal framework for payment of travel expenses, the 1988 OLC Opinion stated that:

Spousal expenses on foreign trips may also in certain circumstances be borne by the U.S. government, if a

⁵The prohibition on paying the expenses of mere attendance at meetings stems from 31 U.S.C. 1345, which prohibits appropriations from being used for travel, transport, and subsistence expenses for a meeting, except as specifically provided by law. See GAO Redbook at 3-34 to 3-37. Thus, for example, the National Highway Traffic Safety Administration was held by the General Accounting Office to be precluded from paying the travel expenses of state and local officials to a proposed odometer fraud workshop. See 62 Comp. Gen. 531 (1983).

It may be worth noting that for Federal employees, a separate general authorization exists for such expenses. See 5 U.S.C. 4110 ("Appropriations available to an agency for travel expenses are available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.")

spouse's presence on a foreign trip can be said to serve an official purpose.

Although the general legal framework plainly permits Government payment of spousal travel expenses when the spouse is performing a direct service to the Government, existing precedents have not identified such instances. For example, a 1981 General Accounting Office letter ruling concluded that although Congressional spouses may travel with an official delegation for purposes of protocol, their expenses could not be paid from Federal funds, "though the presence of spouses might in some way enhance the achieving of the purposes of the trip." Comp. Gen. Op. B-204877, at 1 (November 27, 1981). The General Accounting Office also finds it is more difficult to identify an official purpose to be served by domestic (as opposed to foreign) transportation (or other activities)⁶ by spouses of Federal employees:

'[W]e find it hard to conceive of any instance--at least in the United States--when transportation of unaccompanied private persons . . . at Government expense would constitute official business.'

Along similar lines, in assessing a planned trip abroad by the Attorney General and his wife, the Office of Legal Counsel acknowledged the possibility that a private citizen may be considered to be on official travel, but invoked the Comptroller General's ruling in recommending that private funds be used to cover the incremental expenses relating to the Attorney General's wife's participation on a planned trip to Europe and Asia. See 1982 OLC Opinion at 4. Rather than outright reject use of

⁶GAO concluded, for example, that the Interior Secretary's entertainment funds could not be spent to pay for a breakfast for Cabinet spouses and White House spouses where no Federal employees were in attendance. See 61 Comp. Gen. 260 (1982), aff'd on reconsideration, Op. Comp. Gen. B-206173 (August 3, 1982). Although the Comptroller General may not have been disposed to find an official purpose for the gathering, the opinion suggests that the Interior Department did not present a very strong justification for it. The only official purpose apparently suggested by the Interior Department was that the guests were free to tour the historic house in which the reception occurred.

⁷Op. Comp. Gen. B-210555.9 at 2 (June 28, 1984) (quoting Op. Comp. Gen. B-211586-O.M. (July 8, 1983)). The statement was made in the context of local use of Government vehicles.

government funds, however, OLC stated merely that:

We are reluctant to conclude on the basis of the itinerary alone that these appointments and protocol functions are so necessary to the trip from the perspective of this Department that they would justify a determination that Mrs. Smith will be on official travel.⁸

Id. at 4. What remains is the ability to assess in each case whether the spouse's activities warrant a determination that official travel status is justifiable.

As a separate issue in addressing authority to fund spousal travel, the 1984 OLC Opinion questioned whether the nepotism statute (which would prohibit the Attorney General from formally appointing his spouse to even an uncompensated official position in the Department of Justice) would also prevent the Department of Justice from invoking 5 U.S.C. 5703 in connection with her travel. The opinion suggested that the statute would not be violated by an appearance by the spouse as the Attorney General's personal representative, when the Attorney General's appearance was required simply "for reasons of official protocol" and not because there were official duties to perform.⁹ One could also

⁸The account of the functions that Mrs. Smith would have performed is as follows:

We note that as the ranking member of the government party you are scheduled to attend diplomatic functions at virtually every point of the trip, and that Mrs. Smith will attend these functions with you. In addition, we note that Mrs. Smith may have several independent appointments concerning the White House Fellows Program and an Italian drug rehabilitation program.

1982 OLC Opinion at 3-4.

⁹1984 OLC Opinion at 9 n.10. This notion of a wife serving as the personal representative of her government-official husband was derived from earlier opinions analyzing the role of the First Lady. As quoted in the 1984 OLC Opinion, the earlier analysis concluded that the nepotism statute did not prevent the First Lady or other family members from representing the President at certain official functions in that such appearances were "essentially on the President's behalf not in an official capacity or position." Id. at 9 (internal quotation marks

legitimately conclude that the nepotism statute is never implicated since all section 5703 requires is the theory of an employment relationship, not an actual employment relationship.¹⁰ Even if one considers the statute relevant, certain support activities by Cabinet spouses could be viewed as being performed at the President's direction rather than that of the Cabinet member.¹¹

C. Agency Acceptance of Funds for Employee Travel

Apart from agency use of appropriated funds to support the travel

omitted).

¹⁰When "invitational travel" under 5703 is invoked to pay the expenses of an individual assisting the Government, the individual is not necessarily appointed as a special Government employee or otherwise, and no one has suggested that each such individual is covered by the Hatch Act, conflict-of-interest laws, or other laws constraining Federal employees.

¹¹Although not raised in existing precedent on Government payment for spousal travel, it may be worth at least brief consideration of 31 U.S.C. 1342, the statute banning acceptance of voluntary service. The law states that:

An officer or employee of the United States or the District of Columbia may not accept voluntary service for either government or employ personal services exceeding that authorized by law

The statute could not have been intended to apply to the kinds of typical activities that might be undertaken by a spouse in support of the mission of a government official's agency -- such as accompanying (or standing in for) the official at a reception or similar official function or, in the case of a State Department spouse, holding a private luncheon for the spouse of a visiting dignitary, even if in the absence of such a private luncheon, the State Department would have been obligated by diplomatic considerations to arrange an equivalent official event. Moreover, precedent interpreting the invitational travel statute contemplates the possibility that private citizens may carry out activities that have both a private and an official function and that their travel may be supported at government expense. For example, a government agency holding a conference might fly in individuals to present individual papers without appointing them as special Government employees or considering them impermissible volunteers.

of an employee and spouse, the Ethics Reform Act of 1989 conferred on each agency throughout the Executive Branch the authority to accept private funds to support travel of employees and an accompanying spouse. Section 302 of the Act creates a new 31 U.S.C. 1352, governing "Acceptance of travel and related expenses from non-Federal sources." The law states that:

Notwithstanding any other provision of law, the Administrator of General Services, in consultation with the Director of the Office of Government Ethics, shall prescribe by regulation the conditions under which an agency or employee in the executive branch may accept payment from non-Federal sources for travel, subsistence, and related expenses with respect to attendance of the employee (or the spouse of such employee) at any meeting or similar function relating to the official duties of the employee.

(emphasis added). This new authority supersedes all other agency and employee authorities to accept travel,¹² with the exception of the Training Act, 5 U.S.C. 4111, discussed later. See 31 U.S.C. 1352(b). To enhance accountability, Congress included mandatory reporting requirements by agencies with respect to acceptance of payments of more than \$250. Once issued, these regulations will for the first time establish uniform gift acceptance authority for travel throughout the Executive Branch, including clear Executive-Branch-wide authority to accept funds to be used to pay for the travel of a spouse accompanying an employee on official business.

D. Employee Acceptance of Funds for a Spouse's Travel

Separate issues are posed by situations in which employees are authorized to accept as personal gifts the payment of expenses for travel by themselves and their spouses. It has been suggested that acceptance of such expenses may be considered an impermissible supplementation of an employee's salary for official duties in violation of the criminal law prohibition in

¹²Prior to the enactment of this new authority, not all agencies had authority to accept travel funds from outside sources. Rather, the availability of general gift acceptance authority varied on an agency-to-agency basis. Prior OGE precedent permitted an agency with gift acceptance authority to accept a gift of travel for an employee and a spouse if it determined that the spouse's presence will further the agency mission. See Office of Government Ethics, Informal Op. 83x3 (1983).

In certain circumstances, acceptance of spousal expenses has been held allowable. First, there are situations in which -- absent an appearance of impropriety -- personal gifts may be accepted to support the travel of a spouse. Federal employees are generally subject to limitations on the personal gifts they may accept from entities that do business with their agencies (among other prohibited sources). These restrictions were embodied in Exec. Order 11222 (now superseded by Exec. Order 12674), and implementing regulations issued by the Office of Personnel Management (see 5 C.F.R. Part 735) and standards of conduct regulations issued by each agency. Despite these limitations, employees could nevertheless -- absent an appearance of impropriety -- typically accept gifts under circumstances that made clear that the motivation for a given gift was purely personal. Following the November 30, 1989 enactment of the Ethics Reform Act of 1989, the general prohibition on acceptance of gifts has been made statutory. See section 303 of the Act (creating a new 5 U.S.C. 7353).

Under the Ethics Reform Act of 1989, however, acceptance of travel expenses for travel associated with official activities is no longer governed by the general gift standards. As noted earlier, the new law directs the GSA Administrator, in consultation with OGE, to issue regulations delimiting newly created authority for agencies to accept funds to be used to pay for the travel of employees and their spouses. In addition, the regulations are to prescribe the circumstances in which employees may personally accept the expenses of such travel.

A second authority for employees to accept payment of spousal travel expenses as a personal gift is found in the Training Act, 5 U.S.C. 4111. The Act authorizes employees to accept payment of expenses for attendance at meetings and conferences from organizations recognized under section 501(c)(3) of the Internal Revenue Code. Acceptance of such expenses is expressly excepted from 18 U.S.C. 209. Although the Training Act does not specifically reference spousal expenses, it has been interpreted

¹³ See Reimbursement for Spouses' Travel Expenses, Op. Off. Legal Counsel, at 5 (December 19, 1980) [hereinafter cited as 1980 OLC Opinion]. But see 1988 OLC Opinion at 2 n.2 (noting without explanation that the Department's regulations permit acceptance of travel expenses from a private source -- regardless whether it is recognized under section 501(c)(3) -- for the expenses of a spouse's travel accompanying a Department official on official business).

by the Office of Legal Counsel to encompass spousal expenses.¹⁴

Third, under the Foreign Gifts and Decorations Act, 5 U.S.C. 7342, an official has been permitted to accept from a foreign country payment of his or her own and a spouse's expenses for travel wholly within a foreign country.¹⁵ Acceptance is permitted, subject to certain reporting and approval requirements, if refusal to accept would embarrass the foreign Government and if consistent with U.S. interests. Unless incorporated in the GSA regulations to be issued under 31 U.S.C. 1352, this authority will be overridden by that statute.

Fourth, because 18 U.S.C. 209 does not prohibit employees from receiving salary supplements from state or local Governments, employees have been allowed to accept travel reimbursement for spousal expenses from such entities.¹⁶

II. Local Transport in Government Vehicles

Federal agencies are authorized to expend available funds on maintenance, operation and repair of passenger motor vehicles "only to the extent that such carrier is used to provide transportation for official purposes." 31 U.S.C. 1344(a)(1) (emphasis added).¹⁷ An officer or employee who wilfully uses or authorizes a car in violation of 1344 shall be suspended without pay or worse. See 31 U.S.C. 1349. The Federal Property and Administrative Services Act also reflects a legislative intention to limit the use of Government vehicles to "official governmental

¹⁴See, e.g., Letter from Assistant Attorney General Charles J. Cooper to Judge Frank Q. Nebeker (May 6, 1988) (concluding that the Attorney General lawfully accepted reimbursement for his wife's trip to China pursuant to Department of Justice regulations implementing 5 U.S.C. 4111); 1980 OLC Opinion at 3 n.5.

¹⁵See 5 U.S.C. 7342(c)(1)(B)(ii); 1988 OLC Opinion at 2.

¹⁶See 1988 OLC Opinion at 2.

¹⁷A separate statute provides that Federal funds may only be expended to buy or lease passenger motor vehicles for use by the President, the secretaries to the President; the heads of executive agencies enumerated in section 101 of Title 5, U.S. Code, or as specifically provided by law. See 31 U.S.C. 1343. A number of agencies also have separate statutory authorizations allowing them to purchase some number of vehicles.

purposes." 40 U.S.C. 491(a)(2). More recently, however, Congress created additional flexibility by enacting as section 503 of the Ethics Reform Act of 1989, a provision directing agency heads --

[n]otwithstanding any other provision of law . . . [to] prescribe by rule appropriate conditions for the incidental use, for other than official business, of vehicles owned or leased by the Government.

Although there is little clear guidance on what constitutes "official purposes" under 31 U.S.C. 1344, that law does include certain very specific statements about what are not official purposes:

Notwithstanding any other provision of law, transporting any individual other than the individuals listed in subsections (b) and (c) of this section between such individual's residence and such individual's place of employment is not transportation for an official purpose.

31 U.S.C. 1344(a)(1).¹⁸ This structure limiting home-to-work transportation was enacted in 1986 (with minor modifications in 1987).

To implement the 1986 and 1987 amendments on home-to-work transportation, GSA issued regulations in 1988 that address some aspects of transportation of spouses of federal officials in Government vehicles. These regulations state that:

An employee authorized home-to-work transportation may elect to share space in a Government passenger carrier with other individuals on a space available basis, provided that the passenger carrier does not travel additional distances as a result, and provided such sharing is consistent with his/her agency's policy.

¹⁸Subsection (b) lists certain employees who may nevertheless be transported portal-to-portal between home and work, including: the President, Vice-President; a limited number of employees designated by the President, any employee paid at Executive Level I; employees designated pursuant to certain temporary determinations by agency heads, and so forth. An agency-head determination may not last for more than 15 days, unless specially extended. Designations may not be made solely or principally for the comfort or convenience of an officer or employee. Notice to Congress of designations is required and agencies must keep logs of home to office transport.

. . . If an employee is authorized transportation between his/her residence and an official duty site, this privilege does not extend to his/her spouse, other relatives, or friends unless --

- (1) It is consistent with the agency's policy.
- (2) They are with the employee when he/she is picked up, and
- (3) They are transported to the same place or event.

41 C.F.R. 101-6.402(f).

Subsequently, in response to an inquiry from the State Department, the GSA Administrator stated that the cited regulations were intended to govern use of cars by Federal officers and employees, rather than to limit permissible use of cars by private citizens, such as spouses of Federal employees. Letter from Richard G. Austin, Acting Administrator, General Services Administration, to Judge Abraham D. Sofaer, Legal Advisor, Department of State (September 5, 1989). The State Department had inquired whether an official vehicle could be used to transport the Secretary's wife when "State Department interests clearly require the presence of the spouse of the Secretary and either he will not be attending the event or will not be arriving at the event from his residence" -- e.g., when attendance is required by "international diplomatic practice" at a reception given by the wife of an Ambassador for the wife of a visiting foreign minister. Letter from Judge Abraham D. Sofaer, Legal Advisor, Department of State, to Richard G. Austin, Acting Administrator, General Services Administration, at 2 (undated).

Although the distinction is not entirely clear from GSA's letter, GSA presumably considers the regulations to govern an employee's ability to have a spouse or other individual accompany him or her in the car, rather than the independent ability of the spouse to call upon the services of a car in his or her own right. The GSA response went on to explain that the answer to the State Department's inquiry "turns upon whether the contemplated use is transportation for an 'official purpose'" within the meaning of 31 U.S.C. 1344(a). GSA deferred to the State Department as to whether particular transportation of the spouse of the Secretary

of State would "further[] the mission of the agency."¹⁹

For completeness, one should also note the legislative history of the 1986 and 1987 amendments to 31 U.S.C. 1344. Prior to the amendments, the statutory standards for home-to-work transportation were less specific. Action on revisions was preceded by a General Accounting Office report that surveyed car usage agency by agency and identified unauthorized use of cars, including unauthorized use by wives of several Cabinet members.²⁰ Although the 1985 GAO Report did not include a detailed assessment of the kinds of activities for which these individuals used their spouse's cars, the report included a summary of GAO's views on the extent of existing legal authority for transport of spouses:

Spouses of government employees may be transported in government vehicles only when: (1) the spouse is accompanying an official whose transportation is itself authorized to or from his home and an official function and his or her transportation does not result in additional expense to the government, (2) the spouse of an official entitled to routine home-to-work transportation is being transported to or from an official or quasi-official function and the spouse's presence at the function is in the government's interest and circumstances make it awkward or impossible for the official to accompany the spouse enroute, or (3) government transportation is necessary for security reasons²¹

¹⁹The GSA letter also suggested that before making a determination, the State Department should consult with the General Accounting Office and with the House Government Operations Subcommittee on Government Affairs and Transportation.

²⁰ See generally General Accounting Office, Report To The Chairman, Subcommittee On Legislation And National Security, Committee On Government Operations, House Of Representatives: Use Of Government Motor Vehicles For The Transportation Of Government Officials And The Relatives Of Government Officials (1985) (GAO Report GGD-85-76) [hereinafter cited as 1985 GAO Report].

²¹The report went on to explain that home-to-work transportation for security reasons is permissible when --

(1) there is a clear and present danger of violent criminal activity directed at the employee in question,

Id. at 50 n.a. GAO went on to state its belief that "[s]pouses are not themselves considered representatives of the United States, except overseas, and cannot 'represent' the Government official at functions he or she does not attend." In an opinion the prior year, GAO had acknowledged that "[v]ehicles may be used to transport spouses . . . of Government employees in the United States only for an 'official purpose' [footnote omitted]"; it added the qualification, already quoted above, that it did not anticipate circumstances in which transportation of unaccompanied private persons in the United States at Government expense would constitute official business. Op. Comp. Gen. B-210555.9 at 1, 2 (June 28, 1984). The opinion adds that "the fact that a spouse of a Government official may be performing services which benefit the Government would not, in itself, . . . [constitute] an 'official purpose.'" Id. at 3.

During a House hearing on the amendments, OMB's General Counsel was asked why the Administration proposal was silent on the subject of transportation of spouses. He responded that --

The Comptroller General has already issued reasonable guidance with respect to when spouses of government officials may be transported at government expense. For example, when an official is going to an official function and the spouse is attending, the spouse may be permitted to ride in the government vehicle. We believe that this is a restrictive and reasonable approach to the problem.

Administration Proposal Regarding Home-to-Work Transportation for Government Officials, Hearing before the House Government Operations Subcommittee, 99th Cong. 1st Sess. 60 (1985). He also acknowledged that --

The Comptroller General offered [language that would expressly address spouses] but it was not included because it was felt that committee report language endorsing the Comptroller's opinions on the subject would take care of the problem.

(2) there is a showing that . . . [it] would provide protection not otherwise available, and (3) the decision to provide home-to-work transportation is made with circumspection and is not based on speculative or remote fears of criminal activity.

1985 GAO Report at 50 n.b.

Id. at 61. The Comptroller General also testified as to his agency's existing interpretation. Not surprisingly, the 1986 and 1987 amendments do not expressly address transport of spouses, nor, in turn, does 31 U.S.C. 1344.

Although not addressed in the hearings on the 1986 and 1987 amendments to 31 U.S.C. 1344, a 1984 Office of Legal Counsel interpretation was similar to that of GAO. Although the opinion stated that government funds generally could not be expended for transporting private persons, it acknowledged that there were instances in which such transportation might be justifiable. In assessing a range of potential activities by the spouse of the Attorney General, however, the opinion concluded that even those activities that "might be said to be in the interest of the government, and could be viewed as enhancing the Attorney General's role as a Cabinet Officer" were not official activities authorized to be supported with Department of Justice funds. Id. at 15. The opinion concluded that "the Attorney General's spouse is a private person for whom there is generally no authority to make independent expenditures of Department of Justice appropriations." Id. at 16.

III. Authority for Funding Certain Transport of Cabinet Spouses

The above precedents relating to travel and transportation by spouses of Government officials reflect the principles that Federal funding of a private citizen's travel is permissible when the individual is "performing a direct service for the Government" and that funding of transportation (i.e., local use of a Government vehicle) is permissible when an "official purpose" would be served. Thus, rulings rejecting funding of travel or transportation by spouses in particular instances rest on the conclusion that the spousal activities in question were not of sufficient benefit or official purpose. It may be understandable that the General Accounting Office has been reluctant to craft broad interpretations that would, e.g., allow an official to determine when his or her spouse's activities were sufficiently official to justify Federal funding.

In general, the determination whether any given activity is official or not involves an exercise of judgment by agencies.²²

²²Cf. Op. Comp. Gen. B-210555.9 at 1 ("[s]ection 1344 provides no guidance as to what circumstances would give rise to an 'official purpose.' Further, precedent in this area is sparse.")

For example, agency policy and approvals may determine whether the same reception in a given room is an official activity that may be supported with official entertainment funds, or a private activity justifiable under an agency policy about employee use of agency facilities. Similarly, agency judgments generally dictate whether a given trip or briefing by agency employees is a proper official activity. In making these decisions, agency judgments are necessarily affected by the agenda and procedures of each Administration. To date, no Administration has made a cross-cutting policy determination about what activities by a spouse may serve an "official purpose" or constitute a "direct service" to the U.S. Government.

As the chief of the Executive Branch, the President is uniquely positioned to offer a persuasive and relevant opinion on what activities serve an official Government purpose. The opinion of the President would not supersede any statutory limitation on permissible activities (e.g., the Hatch Act or limiting language in appropriations bills). Nevertheless, within the range of authorized Government purposes, the President's opinion helps define the activities that an agency may properly undertake as official.

As such, analysis of the permissibility of Federal financing of travel by Cabinet spouses during the Bush Administration should reflect the fact that President Bush firmly believes that a range of activities by Cabinet spouses amount to a direct and substantial service to the Government that benefits each agency's mission. Such activities include --

- o attending receptions and similar functions in a representative role on behalf of the United States Government, whether or not accompanied by the Cabinet member;
- o speaking or other appearances as an official representative of the U.S. Government;
- o attendance, with other Cabinet spouses and/or the First Lady, at meetings or events concerned with U.S. Government functions; and
- o other support activities approved by the Cabinet member's agency as advancing the agency's mission.

For convenience, these will be referred to as "official spousal activities." As to any activities in the absence of the Cabinet member, official spousal activities are limited to those that would have been proper official activities if carried out by the

Cabinet member.

Much as members of the President's family may represent him in particular situations, the President believes that spouses of members of his Cabinet may represent the Cabinet members -- and, de facto, the United States -- even in the absence of the Cabinet member, whether in the United States or abroad.²³ Because of the elevated symbolic position of the Cabinet, the President believes it possible to distinguish between the role of spouses of Cabinet members and spouses of other Government officials and to recognize official spousal activities only by Cabinet spouses.

Absent a specific legal limitation to the contrary, such a Presidential determination seems compelling in identifying the "direct service" to the Government required to justify payment of travel expenses (whether domestic or foreign) under 5 U.S.C. 5703. The same general considerations apply in determining when an "official purpose" is served under 31 U.S.C. 1344 -- whether the Cabinet spouse was accompanied by the Cabinet member or riding independently. The only notable difference between local vehicle use and Government funding of travel stems from the limitations on home-to-work transportation imposed by 31 U.S.C. 1344.

Since the General Services Administrator has interpreted the implementing GSA regulations under 31 U.S.C. 1344 as not having any bearing on travel by a spouse in his or her own right, the only limitation on what constitutes "official purposes" warranting use of government vehicles are those inherent in the statute itself. Considering solely the statute leads to the conclusion that home-to-work transport of Cabinet spouses is authorized under the circumstances described by GAO to Congress during debate on the 1986 and 1987 amendments to 31 U.S.C. 1344, i.e., when:

1. the spouse is accompanying the Cabinet member to or from his or her home and an official function and the transportation does not result in additional expense;
2. the Cabinet spouse is being transported to or from an official or quasi-official function that the Cabinet member is attending, the spouse's presence at the

²³This is not to say that he believes that husbands or wives may properly substitute for their Cabinet-member spouses in Government decision-making or operational activities. Rather, it is meant to address spousal participation in protocol functions and in presenting the agency's pre-determined position.

function is in the government's interest and circumstances make it awkward or impossible for the official to accompany the spouse enroute; or

3. government transportation is necessary for security reasons

GAO's testimony plainly contemplated that an official entitled to home-to-work travel could remain at work and send his or her car home to pick up a spouse to go to an evening event, rather than insisting that the official himself or herself ride home to pick up the spouse and travel to the event.²⁴

Apart from these circumstances, home-to-work transport of Cabinet spouses engaged in official spousal activities cannot be considered transportation for "official purposes" under 31 U.S.C. 1344. Such transportation may nevertheless be permitted, as an "incidental" use of vehicles for "other than official business," if so authorized under rules issued pursuant to section 503 of the Ethics Reform Act of 1989.

IV. Conclusion

Cabinet spouses may legally travel at Government expense when carrying out official spousal activities. Acceptance of private funds for spousal travel by either an agency or an employee is also permissible, pursuant to regulations to be issued by the General Services Administration.

Cabinet spouses may also legally use Government vehicles for transportation between any two locations at which they are conducting official spousal activities, whether or not they are accompanied by or will be met by the Cabinet member. As to transportation to or from a home (or other non-officially-related location) the Government vehicle may always be used if the Cabinet member attends the event with the spouse (regardless whether the Cabinet member accompanies the spouse to the event or whether the car is sent home for the spouse while the Cabinet member continues working). If allowed by agency rules issued pursuant to section 503 of the Ethics Reform Act of 1989

²⁴In contrast, the GSA regulations, if considered the exclusive authorization for travel by spouses in Government cars, would not permit the spouse to ride unaccompanied by the official. In view of GSA's interpretation of its regulations, however, this particular limitation would not apply if the spouse were conducting official spousal activities at the event.

governing "incidental" non-official use of government cars, it is also permissible for a government car to transport a Cabinet spouse to or from a non-work site to the site of official spousal activities even if the Cabinet member will not be there.



Administrator
General Services Administration
Washington, DC 20405



cc: L/m

September 5, 1989

Mr. Abraham D. Sofaer
Legal Advisor
Department of State
Washington, DC 20520

Tab C

Materials

C

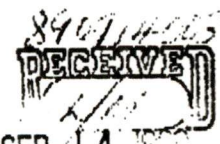
Dear Mr. Sofaer:

This letter is in response to your inquiry requesting clarification of 41 CFR 101-6.402(f) and Public Law 99-550 pertaining to the scope of official transportation for the spouse of the Secretary of State.

The Federal Property Management Regulations, 41 CFR 101-6.4, do not apply in this instance. The regulations are written to provide guidance for authorization of home-to-work transportation for officers and employees of the Federal Government. Since the spouse of the Secretary of State is neither an officer nor an employee of the Federal Government, the regulations do not apply to her. Furthermore, transportation provided to the spouse of the Secretary would not be between her residence and "place of employment" as she is not employed by the Department of State. Such transportation does not constitute home-to-work transportation within the context of the statute, and consequently, the exceptions listed in 31 U.S.C. 1344 have no bearing in this particular case. The real issue, then, turns upon whether the contemplated use is transportation for an "official purpose."

Under 31 U.S.C. 1344, funds available to a Federal agency may be expended "only to...provide transportation for official purposes." A determination that the contemplated transportation is for an "official purpose" can only be made by the Department of State, based upon whether or not the transportation furthers the mission of the agency. It is apparent that the Department of State has a unique mission involving foreign governments and their representatives. The role of the Secretary of State and his spouse would necessitate special consideration.

It should be cautioned that the General Services Administration's interpretation of 31 U.S.C. 1344 is strictly a legal analysis. Consideration must be given to the "official" nature of the transportation to be provided to the Secretary's spouse, the appearance of such transportation, as well as the overall intent of Congress in enacting P.L. 99-550.

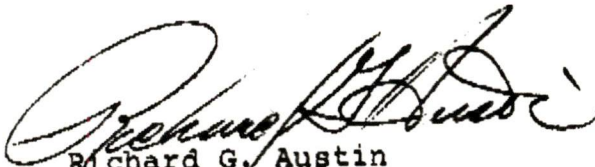


- 2 -

It is recommended that prior to making a determination that such use is for an official purpose, you advise the appropriate members of the House Government Operations Committee, Subcommittee on Government Activities and Transportation, to ensure against potential adverse impact which may otherwise result through Congressional oversight of this issue. In addition, the Department of State may want to request a ruling from the General Accounting Office with respect to such use of the vehicle and associated costs relating to the transportation of the spouse of the Secretary.

I trust this clarifies the issue for you. If I can be of additional assistance, please do not hesitate to contact me.

Sincerely,



Richard G. Austin
Acting Administrator



United States Department of State

The Legal Adviser

Washington, D.C. 20520

Richard G. Austin
Acting Administrator
General Services Administration
18th & F Streets NW
Washington, D.C. 20405

Dear Mr. Austin:

This letter is to request your guidance on the circumstances in which it may be permissible to transport the spouse of the Secretary of State in an official vehicle. Our reading of 31 U.S.C. 1344 in connection with a 1984 letter from the Comptroller General is that it may permit carefully defined uses of official vehicles in cases where official government purposes are furthered by a spouse's attendance at a function. However, given the broad language contained in 41 CFR Part 101-6.402 (f), which implements certain provisions of P.L. 99-550, we are seeking your views on the relationship of this regulation to the permissible scope of "official" transportation for the spouse of the Secretary of State.

Section 1344, as amended by P.L. 99-550 provides, in part

(a)(1) Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes.

Part 101-6.402(f) of 41 CFR in discussing the transportation of spouses stresses situations in which they are with the employee when he or she is picked up and both travel to the same place or event. In a June, 1984 letter to Senator Garn predating P.L. 99-550 but interpreting language similar to the present section 1344, the Comptroller General expressed the view that transportation of spouses of high Government officials in Government vehicles would be permissible in very limited circumstances, for example when the spouse's presence at the function is in the Government's interest and circumstances make it awkward or impossible for the government official to accompany the spouse.

-2-

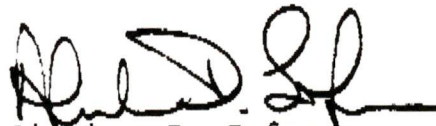
Since official transportation of spouses was not specifically addressed in the amendments contained in P.L. 99-550, the GAO's reasoning in the Garn letter appears to us to continue to be applicable to the provision of an official vehicle to the spouse of the Secretary of State in those instances where important Department interests require her presence and the Secretary is not able to attend the event, where the event might involve only high-level diplomatic spouses or where the Secretary may not be travelling from his residence but will meet his spouse at the event. Such events would include, for example, a luncheon given by a foreign Ambassador's wife for the wife of a visiting foreign minister. International diplomatic practice regarding such events would require the presence of the spouse of the United States Secretary of State (despite the fact that she is not a government employee and would not be compensated for her time attending such an event). Indeed, the Foreign Service Act of 1980 expressly recognizes the important role of spouses in diplomatic activities in section 905 which authorizes the Secretary to pay representational expenses, "including expenses of family members ... to enable the Department and the Service to provide for the proper representation of the United States and its interests." Although this Foreign Service Act authority applies to activities abroad, the rationale for the authority -- the importance of spouses to diplomatic activities -- applies with equal force to the presence of the spouse of the Secretary of State at high level diplomatic activities here in the United States.

Given the broad language contained in section 101-6.402(f) of your regulations on use of official vehicles, we believe we need to clarify whether transportation of the spouse of the Secretary of State would be permissible in cases falling outside those spelled out in the regulations. Such cases would be strictly limited to those in which State Department interests clearly require the presence of the spouse of the Secretary and either he will not be attending the event or will not be arriving at the event from his residence.

-3-

We would appreciate any guidance you can give us concerning this issue. Should you have any questions or need any further information please contact James Thessin or Jean Bailly of my staff at 647-4446.

Sincerely,


Abraham D. Sofaer

cc: Charles A. Bowsher
Comptroller General of the United States

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

MAY 6 1988

Honorable Frank Q. Nebeker
Director
Office of Government Ethics
1625 K Street, N.W.
Washington, D.C. 20044

Dear Judge Nebeker:

At our meeting yesterday, you asked that I describe the circumstances under which I approved the Attorney General's acceptance of reimbursement of Mrs. Meese's travel expenses when she accompanied him to a legal conference in China last summer. The legal conference, entitled "The U.S./China Joint Session on Trade, Investment and Economic Law," was planned and sponsored by People to People International, an international exchange organization that is tax exempt under 26 U.S.C. 501(c)(3). The Attorney General co-chaired the conference with the Chinese Minister of Justice. People to People reimbursed Mrs. Meese's expenses.

Under the Department's regulations, officials are permitted to accept travel expenses for an accompanying spouse in connection with travel to attend meetings of an organization, if the DAEO (or Deputy DAEO) finds in advance that acceptance will not create an appearance of impropriety. See 28 C.F.R. 45.735-14a(d). See also Memorandum for the Attorney General from John M. Harmon, December 19, 1980 (5 U.S.C. 4111 authorizes employees to accept spousal travel reimbursement from organizations that are tax exempt under 26 U.S.C. 501(c)(3)). In making this determination, the regulation directs the Deputy DAEO to consider "all relevant facts and circumstances." Among the factors that would "tend to support a favorable determination" are whether the expenses are to be paid by the sponsoring organization itself;

¹ People to People also reimbursed the expenses of Mrs. Joseph Morris. Mr. Morris, Director of the Department of Justice's Office of Liaison Services, attended the conference as a member of the United States delegation. This Office did not pass on the reimbursement of Mrs. Morris' travel expenses, since the Office of Liaison Services has its own Deputy DAEO. We note, however, that there would appear to be no relevant difference between Mrs. Meese's situation and Mrs. Morris' with respect to the permissibility of their husbands' acceptance of reimbursement for their travel expenses to the conference.

whether the sponsoring organization is a charitable or educational institution; whether the sponsoring organization has business with the Department that falls within the employee's official responsibility; whether the sponsoring organization would pay spousal expenses for similarly situated nongovernmental employees; whether the amount paid is reasonable and covers only actual expenses for transportation, lodging and food incident to the travel; and whether the spousal reimbursement was solicited by the employee or the spouse.

While the Department's spousal travel regulation appears to contemplate approval of reimbursement even in situations where not all of the factors listed in section 45.735-14a(d) are present,² in this case I did in fact find that all of those factors were present: People to People, a non-profit educational organization, was sponsoring the conference. People to People had no "business" with the Department as that term is used in the regulation,³ and its policy was to pay the travel expenses of similarly situated nongovernmental spouses.⁴ The reimbursement was not solicited by either the Attorney General or Mrs. Meese.⁵ Finally, it was our understanding that reimbursement would cover only actual expenses of travel, lodging, and expenses. Accordingly, since all of the factors that support approval of spousal travel reimbursement were present, I advised the Attorney General that it would be permissible for him to accept it.

Sincerely,


Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

² In addition, we do not believe the Department's spousal travel regulation should be construed to restrict any ability an employee may otherwise have under 5 U.S.C. 4111 to accept spousal travel reimbursement from an organization that is tax exempt under 26 U.S.C. 501(c)(3).

³ I do not believe the term "business" in the regulation can properly be understood to include the meeting or conference itself, since this would seem effectively to preclude ever being able to satisfy this factor.

⁴ Indeed, in this case, People to People reimbursed the expenses of all of the spouses accompanying members of the official U.S. delegation to the conference.

⁵ People to People extended its invitation to Mrs. Meese and Mrs. Morris in the attached letter of July 16, 1987.



PEOPLE TO PEOPLE *International*

• DWIGHT D EISENHOWER Founder

Headquarters:

601 East Armour Boulevard • Kansas City, MO 64109 • (816) 531-4701 • Cable Eldeop • Fax (816) 581-7502

July 16, 1987

Joseph Morris, Esquire
Director, Office of Liaison Services
Department of Justice
Room 4213
Constitution Avenue and 10th Street, N.W.
Washington, D.C.

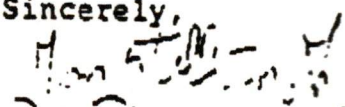
Dear Joe:

As we discussed, People to People International would be pleased if Mrs. Meese and Mrs. Morris could participate in the upcoming U.S./PRC Economic Law Conference in the Peoples Republic of China. Their participation would help emphasize the human side of this type of program showing that, while we are a nation of law, the essence of mutual understanding is truly relating to each other on a people to people level. The Chinese view this as a particularly important aspect of a project of this nature. A special program will be arranged for the Official Delegation's spouses highlighting various aspects of Chinese society and culture. People to People International will cover the cost of the participation in this program of Mrs. Meese and Mrs. Morris.

As you know, People to People International is a non-profit, non-political, tax-exempt [501-(c)(3)] international exchange organization founded by President Eisenhower in 1956. Each year we conduct a variety of international educational and cultural programs aimed at increasing mutual understanding and respect between the people of the United States and those of other nations, all without any government funding. Attached is some background information which highlights a few of our many programs.

I look forward to working closely with your office and the PRC Minister of Justice to ensure that this historic conference will lay the ground work for an environment between the U.S. and the PRC which is conducive to both international business and people to people cross-cultural communication.

Sincerely,


Tom Stillitano, Jr.



U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

MAR 2 1988

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Acceptance and Reporting of Travel Reimbursement

You have asked for the advice of this Office concerning the following specific questions relating to the rules applicable to your acceptance and reporting of travel reimbursement.

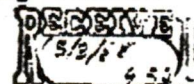
1. Under what circumstances may a person, organization, state, or foreign country provide lodging or any other thing of value to the Attorney General's family, and what, if any, reporting requirements apply?

There are no legal restrictions on acceptance by members of the Attorney General's family of gifts that are made to them without regard to their relationship to the Attorney General. (Considerations relating to appearances may, however, counsel caution if the donor is a "prohibited source" under the Department's standards of conduct.) Gifts or reimbursements to a spouse or dependent child made "totally independent" of their relationship to an official need not be reported by the official on his or her annual financial disclosure form. See 5 U.S.C. App. 202(e)(1)(B) and (C).

¹ The "prohibited sources" from which gifts may not be accepted by Department officials are listed in the standards of conduct at 28 C.F.R. 45.735-14(a). They are any person or entity which

- (1) Has, or is seeking to obtain, contractual or other business or financial relationships with the Department;
- (2) Conducts operations or activities that are regulated by the Department;
- (3) Is engaged, either as principal or attorney, in proceedings before the Departmental [sic] or in court proceedings in which the United States is an adverse party; or
- (4) Has interests which may be substantially affected by the performance or nonperformance of the employee's official duty.

Categories 1, 2, and 4 are taken almost verbatim from the description in section 201(a) of Executive Order 11222 of the categories of persons and entities from which an executive branch employee may not accept "any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value."



Under the Department's regulations, the Attorney General may accept reimbursement from a private source for his wife's travel expenses when she accompanies him on official business, as long as the Deputy DABO determines in advance that "acceptance will not create an appearance of impropriety."² All such reimbursements must be reported as gifts on his annual financial reporting form. Like all other departmental officials, the Attorney General is prohibited from accepting reimbursement for the expenses of other members of his family when they accompany him on official trips. The restrictions on accepting reimbursement for the travel expenses of family members are predicated on the notion that an official's acceptance of such expenses while on official business raises an issue under 18 U.S.C. 209, the prohibition against supplementation of a federal official's salary.

An official may accept monies paid "out of the treasury of any State, county, or municipality" without violating section 209. See 209(a). Thus, that section would not prohibit an official from accepting reimbursement from state and local governments for any of his family members. However, OGE takes the position that such reimbursement, if excessive, may raise an issue under Executive Order 11222 (use of public office for private gain) and that it must in any event be reported.

Foreign travel is something of a special case. The Foreign Gifts Act permits officials to accept reimbursement from a foreign government for travel taking place entirely outside the United States (which does not include travel originating at a U.S. port). See 5 U.S.C. 7342(c)(1)(B)(ii). Spousal travel expenses on foreign trips may be reimbursed by the foreign government on the same terms. Spousal expenses on foreign trips may also in certain circumstances be borne by the U.S. government, if a spouse's presence on a foreign trip can be said to serve an

² See 28 C.F.R. 45.735-14a(d). This regulation sets forth several factors that would "tend to support a favorable determination" respecting acceptance of reimbursement for a spouse's travel expenses. They include whether the reimbursement is from the sponsoring organization itself, whether the reimbursing organization is nonprofit, whether it is a prohibited source, whether the reimbursement is reasonable and covers only actual expenses, whether it was solicited by the Attorney General, and whether the reimbursing entity reimburses similarly situated nongovernmental persons. Note that reimbursement for spousal travel under this section does not depend upon the reimbursing entity being tax exempt under section 501(c)(3).

³ Gifts of transportation and lodging received by an official's spouse or dependent children that are not "totally independent" of their relationship to him are attributable to him, and must be reported on his annual financial disclosure form. See 5 U.S.C. 202(e)(1)(C) and (D).

official purpose. There is no authority for the government to pay the expenses of other family members on foreign trips, unless there is some independent official reason for their taking the trip.

2. Under what circumstances may the Attorney General accept payment by a sponsoring person, organization, state or foreign country of costs for lodging, etc. incurred while on official business, and what reporting requirements apply?

The Attorney General's expenses while on official business must be paid from the Department's appropriation. Because the Department does not have general gift authority, it has no authority to accept reimbursement for such expenses from sources outside the Department, since this would result in an augmentation of its appropriation. See, e.g., 46 Comp. Gen. 689 (1967). There are only two exceptions to this rule against reimbursement for official travel, both of which depend upon the fiction that the Attorney General is accepting the reimbursement as a personal gift. One is for reimbursement from entities that are tax exempt under 26 U.S.C. 501(c)(3). See 5 U.S.C. 4111. The other is for payments from "the treasury of any State, county, or municipality," which are carved out of the rule against supplementation of federal salary in 18 U.S.C. 209.

When the Attorney General's expenses are paid from departmental funds, they are subject to the restrictions contained in GSA's travel regulations. Some of these restrictions can be waived if necessary to serve an official purpose.⁴ If the Attorney General's expenses are reimbursed by a 501(c)(3) entity or by a state or local government, he is not bound by the per diem and other limitations on expenditures in the GSA travel regulations.

Because the Department does not have gift acceptance authority, reimbursements from 501(c)(3) entities and state and local governments must be paid directly to the Attorney General, and must be reported as gifts from those entities. He may not accept reimbursement from a 501(c)(3) entity that falls within one of the categories of "prohibited sources" described in the Department's gift regulation, 28 C.F.R. 45.735-14(a).

⁴ See Comp. Gen. Dec. No. B-209375 (Dec. 7, 1982). For example, an official who must hold official meetings in his hotel room may exceed the limitations imposed by the GSA travel regulations if necessary to obtain appropriate accommodations.

⁵ While OGE's standards of conduct do not state whether reimbursement for official travel may be accepted from entities that fall within one or another category of "prohibited sources" under the standards of conduct, see 5 C.F.R. 735.202(f), OPM's regulations implementing 5 U.S.C. 4111 provide that expense reimbursement should not be accepted in circumstances that would

3. Why are such payments treated as supplementation of salary rather than as augmentation of the Department's budget, notwithstanding the fact that the purpose of the trip is official business?

Notwithstanding the general rule against an agency's augmenting its appropriation by gifts from nonfederal sources, the Comptroller General has allowed agency employees to accept reimbursement for official travel as long as it is not prohibited by 18 U.S.C. 209. The two sources from which an employee may accept reimbursement notwithstanding section 209 are 501(c)(3) organizations, see 18 U.S.C. 209(d) and 5 U.S.C. 4111, and state and local governments. See 209(a). The somewhat anomalous result is that an agency without gift authority may effectively augment the travel funds available to it from nonfederal sources, so long as the reimbursement can be characterized as a permissible contribution to its employee's salary. Building upon this rather shaky theoretical structure, OGC takes the position that all such reimbursements for official travel must be reported as a gift to the employee.

What steps have been taken to secure the necessary authority to augment the Department's budget, and why have they been unsuccessful?

5 (Cont.) "reflect unfavorably on the ability of the employee to carry out his official duties in a fair and objective manner," would "compromise the honesty and integrity of Government programs or of Government employees and their official actions or decisions, or would "otherwise [not] be proper and ethical for the employee concerned under the circumstances in his particular case." See 5 C.F.R. 410.702(b). We believe that especially in light of these provisions, the Department's own standards of conduct should be interpreted to preclude acceptance of travel reimbursement from an entity falling within one of the categories of "prohibited sources" in section 735.14(a).

6 The Comptroller General's rule against augmentation of appropriations has no specific statutory basis, but is derived from several separate statutory enactments. These include the provision restricting appropriations to the use intended, the rule requiring deposit of all miscellaneous receipts into the Treasury, and the law prohibiting an official's supplementation of salary. See GAO's Principles of Federal Appropriations Law at 5-62.

7 See 55 Comp. Gen. 1293 (1976) (IRS may not itself accept reimbursement from eligible tax exempt entities for expenses incurred by its employees in attending training meetings, since it has no authority to accept gifts; it may, however, allow its employees to accept such reimbursement directly from the tax exempt organization under authority of 5 U.S.C. 4111).

A number of agencies have authority to accept gifts from nonfederal sources to supplement their travel budgets. See Memorandum of October 10, 1986 ("Department of Justice Gift Authority")(attached). Until very recently, however, the Department had not made a serious attempt to secure its own gift authority. OLC developed a model gift authority provision several years ago, which has been included in our current proposed authorization legislation. We understand from JMD that in discussions last week Senate staffers were quite cool to the idea of giving DOJ gift authority.

4. Why are the President and his staff (and, perhaps some other Cabinet members) able to get full reimbursement from the Government for their actual travel expenses, while the Attorney General's right to reimbursement is limited?

The President has available to him by statute travel funds that can be spent without regard to any otherwise applicable legal restrictions, including the GSA travel regulations. See 3 U.S.C. 103. Persons accompanying him on official trips can in certain circumstances be reimbursed from these funds as well. See 3 U.S.C. 105(d). See also 3 U.S.C. 106(b)(travel expenses of the Vice President and his staff similarly exempt from restrictions). Other Cabinet Members are subject to the same restrictions as is the Attorney General, unless their agency has authority to accept gifts of money that can be used to pay travel expenses. As noted in response to Question 2, see note 3, supra, many of the restrictions in the GSA travel regulations may be waived if necessary to serve a governmental purpose.


Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

8 This gift authority may permit an agency generally to increase the travel funds available to its officials, and avoid restrictions that would be applicable to travel paid from appropriated funds (such as the GSA travel regulations), as well as accept reimbursement for specific trips from the sponsoring organization.

**ADMINISTRATION PROPOSAL REGARDING
HOME-TO-WORK TRANSPORTATION
FOR GOVERNMENT OFFICIALS**

HEARING
BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES
NINETY-NINTH CONGRESS

FIRST SESSION

ON

A BILL

TO AUTHORIZE THE TRANSPORTATION OF OFFICERS OR EMPLOYEES
OF THE FEDERAL GOVERNMENT FOR SECURITY REASONS, AND FOR
OTHER PURPOSES

SEPTEMBER 19, 1985

Printed for the use of the Committee on Government Operations



ADDITIONAL QUESTIONS OF MR. BORTON
FOR MR. HOROWITZ

1. When former Director Stockman transmitted this proposal to Chairman Brooks, he wrote that the Administration "does not concur in the Comptroller's 1983 interpretation of the law, it is inconsistent with known and accepted past practice and Congressional acquiescence in or approval of such practice."

A. What specific disagreements do you have with the Comptroller's 1983 interpretation of the law?

A: As indicated earlier, there has been substantial uncertainty concerning this matter for a number of years. Although we have disagreed with the Comptroller General's June 1983 opinion, the Administration did not seek a definitive ruling on the matter from the Department of Justice, preferring instead to seek a comprehensive legislative solution. At the same time, it would be fair to state that the Administration's present position -- and, conceivably, that of future Administrations -- is that the Comptroller General's earlier opinions more properly construe and define the scope of the law.

B. Was that 1983 interpretation the first time OMB was aware of a difference of opinion with GAO on this matter?

A: Yes.

A: The Administration's proposal contained a provision covering the Congress, the Comptroller General, and the Supreme Court in an attempt to be comprehensive. However, the Administration defers to the Congress and to the Chief Justice of the Supreme Court with regard to their respective interests.

4. Why does your proposal not include specific authority for spouses of government officials under certain circumstances, as defined in GAO opinions?

A. Are there any circumstances, in your judgment, which would warrant government transportation for spouses? If so, what are those circumstances?

A: The Comptroller General has already issued reasonable guidance with respect to when spouses of government officials may be transported at government expense. For example, when an official is going to an official function and the spouse is attending, the spouse may be permitted to ride in the government vehicle. We believe that this is a restrictive and reasonable approach to the question.

B. What efforts, if any, did GAO make to include language for spouses in this proposal?

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government vehicle. We believe
and reasonable approach to the

GAO make to include language
al?

A: The Comptroller General offered such language, but it was
not included because it was felt that committee report
language endorsing the Comptroller General's opinions on
the subject would take care of the problem.

5. What is your view of GAO's interpretation of the term "heads"
of Executive departments? Do you consider the term "heads"
to be synonymous with "principal officers" of Executive
departments, as maintained by legal advisors at both Defense
and State?

A: For purposes of the Administration's proposal, the "heads" of
Executive departments are the "principal officers" of those
departments, i.e., the Cabinet Secretary or agency head,
where appropriate, and the principal deputy.

6. What is your view of GAO's determination that government
transportation for security reasons is not authorized without
"specific evidence of 'clear and present danger' and a
showing that use of a government vehicle would increase
protection" of the government official riding in the vehicle?

A. Is GAO's formulation of a security justification too
restrictive?

A: The "clear and present danger" standard is too
restrictive because it implies that there must be
specific knowledge of imminent danger. In fact, an
official may be the subject of threats or other danger

QUESTIONS OF MR. BROOKS
FOR MR. SOCOLAR

1. What are the most appropriate criteria to use to determine which government officials should be provided home-to-work transportation?

The majority of the existing and proposed legislative exceptions to the statutory home-to-work prohibition are based on the nature of the responsibilities, including the demands on his time, which an official at the highest levels of government must deal with. This criterion was part of the original legislation, enacted in 1946. The OMB bill proposes an expansion of the numbers of positions covered, reflecting the increased complexity and size of the federal government in the last 40 years. We think this criterion is very reasonable.

Another group of exceptions is based on the requirements of the job in question--e.g., field work or medical outpatient service. These job-related criteria are also part of the present law.

The remaining criteria for permitting home-to-work transportation for temporary periods are not related to the level of the position held or the nature of the incumbent's responsibilities. They relate instead to the existence of an emergency situation, such as security threats or other occurrences, which make it unsafe or impracticable for an employee to commute to or from work without the use of a government car. These criteria are discussed more fully in subsequent answers.

2. For which government officials do you consider home-to-work transportation absolutely essential?

There is no particular government official for whom we think that government-provided home-to-work transportation is "absolutely essential" at all times. However, there are certain emergency situations in which the provision of such transportation on a temporary basis may well be essential; for example, when a strike, act of God, or some other crisis makes an essential employee's normal means of transportation unavailable or when the employee is facing an actual security threat. In both cases, if the official cannot travel safely to or from work by any means other than a government car, home-to-work transportation may be characterized as essential for the duration of the emergency.

to my request for comments on that the heads of all agencies co-work transportation. How do this context?

of "agency" in 31 U.S.C. § 101, throughout title 31 of the Code is desirable for this purpose. Department, agency or instrument- Government." In view of the first paragraph of our answer that the non-cabinet agency heads should be limited to those generally recognized as meet- the Appendix to the President's submission to the Congress. Six ed, right after the list of and before a miscellaneous "other independent agencies."

r agency heads are already 2)(B) of the OMB-proposed bill, covers all persons in the der Level II of the Executive There are two other agency cy size and extent of respon- mparable and who were also dix as major agencies. Since tly listed at Level III, they erage. We therefore suggest ncies be included by name in trator of General Services, e Small Business Administra-

cluded to govern chauffeur

the use of government vehi- hibit the use of chauffeurs. use of all agency employees, een left to the discretion of ee. However, OPM regulations any employee to perform pure- rial--services for a govern- ork transportation is not he trip is non-official, and de the use of a chauffeur for is reason, we do not think

further legislation addressed specifically to the use of chauffeurs is required.

8. What method of recordkeeping should be implemented by the agency heads to prevent abuses in providing home-to-work transportation?

We suggest that in addition to the logs most agencies already maintain to record the usage of government cars in general, special records be kept of home-to-work travel, including the name of the passenger (or passengers), the stated purpose of the trip, the date and elapsed time of each trip, destination, and mileage travelled. These records could then be reviewed on a regular basis by the Inspector General's office or some other official or unit designated to perform internal review functions to assure compliance with the statutory criteria.

9. In view of the relatively rapid turnover of personnel at the highest levels of government, what can be done to assure that employees understand the restrictions on the use of government vehicles?

We, too, have observed that many violations of section 1344 and its predecessors have occurred because new appointees did not understand the restriction or did not even know that it existed. We suggest that the OMB prepare explicit guidance on compliance with this section of the law for all executive agencies, perhaps in the form of an executive order or OMB circular. Information about automobile entitlements--or lack thereof--should be added to the briefings provided to new appointees at the time they enter office.

10. Why has G.A.O. said that unaccompanied spouses of Government employees should be permitted to use Government vehicles?

G.A.O. has never sanctioned the use of government vehicles by unaccompanied spouses of government officials except in one very narrow circumstance. We have said only that in view of the fact that a government official who is himself or herself authorized to use a government car to travel between home and an official function could, if he or she chose, stop work early and use a government car to ride home to pick up his or her spouse to attend an official function with him or her, the

official need not actually make that extra trip if it is more useful, from the government's point of view, to have the car pick up the spouse at home and then the official at the office to take them both to the official function. See B-210555.9, June 28, 1984.

11. What criteria should be used by agency heads to determine when exceptions for out-patient medical service and field work are justified?

The exception for medical officers on out-patient service has been in the law since its original enactment. G.A.O. has never been asked to review the use of a car by medical officers and we therefore have never formulated criteria. We are not aware of any allegations of abuse of this privilege in all the years it has been in the law.

In general, if the propriety of a particular doctor's use of a government car for home-to-work transportation was raised, we would be inclined to rely on the agency's assignment sheet and the physician's job description. These documents could tell us whether, for the period in question, a substantial amount of the physician's time was spent on traveling directly from home to a patient's house or to several clinic sites for the purpose of rendering out-patient services.

We note that not one of the agencies listed in our September 16 report to the Subcommittee reported the use of a government car for home-to-work transportation by a doctor on out-patient service. It may be that the exemption in the law is now anachronistic; i.e., that government medical personnel no longer visit patients' homes or that medical personnel generally provide out-patient services in a clinic located at their primary duty station. If so, the exemption could be deleted from the law on the theory that the occasional exception could be covered under the field work exemption.

The "field work" exemption has also been in the law since its inception. Like the medical officer exemption, this Office has had very few requests to rule on its meaning. Based on some rather scant legislative history, we have concluded that an employee is engaged in "field work" when the nature of his or her job requires spending a large proportion of time "on the road," driving from place to place during the work day--e.g., mine safety inspectors and other investigators. The exact number of

QUESTIONS OF MR. HORTON
FOR MR. SOCOLAR

1. Mr. Stockman, in his letter accompanying this proposal, charged that your 1983 opinion on portal to portal transportation is "inconsistent with known and accepted past practice and congressional acquiescence in or approval of such practice." The Comptroller General, in fact, acknowledged as much in that 1983 opinion. Given that background of confusion and inconsistency, do you believe that current usage of home-to-office transportation in the executive branch is surprising? Is it greater, less, or about the same as it has been in previous years?

The purpose of our 1983 decision, as we said in testimony before your Subcommittee on September 19, was to dissipate "any legitimate doubts which may have existed about the application of Section 1344" because of past G.A.O. decisions that may have implied (although they did not state) that agency heads had wide discretion to authorize home-to-work transportation, and tacit acquiescence by certain congressional committees that knew but did not object to the exercise of that discretion. We were not "surprised" in 1983 that so many agency heads misunderstood the scope of their authority and violated the prohibition in the statute. We therefore declined to take exception to and recover the improper expenditures for any such transportation used prior to June 3, 1983, the date of our decision, 62 Comp. Gen. 438.

We do think it is surprising that so many unauthorized officials continued to use government cars for home-to-work transportation even after the date of what we consider our "definitive" decision on this topic, as well as several supplementary letters and decisions since that time further clarifying the statutory restriction. This may in part be attributable to the fact that, as Mr. Stockman said in transmitting his legislative proposal to your Subcommittee, "The Administration does not concur in the Comptroller General's 1983 interpretation of the law."

It is difficult for us to give you any statistically meaningful answer about the extent of improper use of government cars today, as compared to previous years. In 1983, the G.A.O. conducted a limited survey of home-to-work transportation involving only 13 departments or agencies. Ten of these departments and agencies did provide such transportation to a total of 21 individuals.

consistent positions on those issues not, how have your positions were the reasons for the changes?

on of the scope of the existing law little over the years. What did issuance of our 1983 opinion is that possible for an agency to conclude reports the proposition that the pro-work transportation is permissible of an agency thinks it would serve s of the government. Dicta in some cisions--e.g., 54 Comp. Gen. 855 ut of context, could be and were hat proposition. As we said in our Comp. Gen. 438, 445-7), unless one ceptions applies, "agencies may ise administrative discretion to ork transportation for their offi s, unless otherwise provided by

stature and your role in this mat- G-A-O ever consider offering a s?

ny, GAO over the years has taken ggest to the Congress that it con- Sec. 1344. We have suggested in e filed with both Houses on pro- s topic that the existing law was d that the list of exemptions be raged certain agencies--e.g., the nd State--to seek individual ertain key officials to use sportation on a regular basis. Chairman Brooks, we recommended he exercise of discretion in true inally, we urged the Chairman to government-wide survey of agency o determine whether a change in y. It was this survey that pro- Administration's proposed bill.

you not submitted a proposal to hy not?

aw would have to be supported by needs throughout the govern- et. Chairman Brooks quite

appropriately, in our view, invited the OMB, on behalf of the executive branch, to conduct a survey and make legislative recommendations, if warranted. The Comptroller General is the only legislative branch official not already covered (see our answer to question 7) who is at a comparable level to the officials proposed for coverage in the executive branch proposed legislation. We therefore requested and the OMB agreed to include the Comptroller General as well as the justices of the Supreme Court in the Administration bill to avoid the necessity of amending Sec. 1344 in a piecemeal fashion.

4. In a June, 1984, letter to Senator Garn, you suggested that a new sentence should be added to 31 USC 1344, which is the current legal authority for home-to-office transportation. That sentence is as follows: "An official purpose does not include transporting the spouse of a government officer or employee except:

"(1) Spouses of those officials listed in subsection (B) of this section traveling to or from an official function, whether or not accompanied on the trip by the government official, where their attendance is considered by such officials to be appropriate and in the public interest; and

"(2) Spouses of government officials whose life or physical safety is threatened as a consequence of the official's duties, when the furnishing of government transportation is determined by the head of the agency to be essential to provide protection not otherwise available."

Are you still supportive of that language? If so, what justification can you give for providing such service?

In view of the questions you and Chairman Brooks have raised about our position on the transportation of unaccompanied spouses, we think that the language of paragraph (1) which we recommended to Senator Garn needs modification, in order to express our true intent. We would rewrite that paragraph today to this effect:

"(1) Spouses of officials authorized home-to-work transportation pursuant to this or any other Act may travel with such official to or from official functions and their homes on a

space available basis, provided: That the official need not leave his or her office and ride home in the car to call for the spouse if it is more convenient or economical, from the government's standpoint, for the car to pick up the spouse first and then the official at his or her office before continuing on to the official function."

The above language may well need some refining. What we are trying to say is that in instances when an official is authorized home-to-work transportation anyway, and it will not cost any more to transport the spouse to and from an official function and their home, we have no basis to object to the expenditure of public moneys for this purpose.

5. In that same correspondence with Senator Garn, you wrote that, under current law, the transportation of spouses in government vehicles would be permissible if "it is in the public interest for the spouse of a cabinet-level official to attend an official function and circumstances make it awkward or impossible for the official to accompany the spouse enroute." Do you still hold that view and, if so, would you elaborate on that conclusion and how you reached it?

The "awkward or impossible" language is explained in the answer to question 4, above. We meant only that the official need not stop work early in order to make a special trip home to pick up his or her spouse who will be attending an official function with him or her.

- A. Does that mean that a government car could legally be sent for the spouse and that it would not be necessary for the official to be in the car?

It would not be required for the official, in the above described circumstances, to make an unnecessary trip from office to home and back to the office again. He or she would, however, have to accompany the spouse from the office to the official function.

- B. Could a car legally make two runs from the office to an official function, one for the spouse and one for the official? If so, how did you reach that conclusion?

No. There must be no additional cost to the government for the spouse's transportation.

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additional cost to the use's transportation.

C. Was your suggested amendment on spouses ever considered during your discussions with O-M-B on the current proposal? If not, why was it not? If so, why was it rejected?

No. OMB did not consider it necessary to cover transportation of spouses or other family members.

6. In various statements, G-A-O has indicated that home-to-office transportation of officials not named in 31 USC 1344 is permissible when there has been a finding of "specific evidence of 'clear and present danger' and a showing that use of a government vehicle would increase protection" of the government official riding in the vehicle.

A. Where in current law do you find justification for this conclusion?

There is presently no express statutory authorization based on security needs. We found nothing in the legislative history to indicate that the Congress had ever considered the necessity for permitting the waiving of the prohibition in emergency situations although we could not believe that it would have denied this permission had the need been brought to its attention. To make this authority explicit, however, we recommended in our 1983 decision that some provision for temporary exceptions to the prohibition be included in any subsequent amendments to section 1344. The Administration has proposed such language in subsection (a)(3) of its bill.

B. Do you believe that the law should make explicit a security justification for home-to-office transportation?

Please see answer to A, above.

7. What is your view of the language in the proposal dealing with the Congress, the Comptroller General, and the Supreme Court?

A. Should the legislative and judicial branches be considered in legislation separate from the executive? If so, why?