The original documents are located in Box 25, folder "Military Aircraft - Use of (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

November 2, 1974

MEMORANDUM FOR: DONALD S. LOWITZ

FROM: DON RUMSFELD

Attached is a memo from Jerry Jones concerning the allocation of costs for political and official trips. I would appreciate it if you would promptly undertake a review of this entire subject in close consultation with the Counsel's office.

I would appreciate a report from you and an indication of the issues to be decided with drafts of the appropriate instructions depending on the options selected as promptly as possible.

Thank you.

cc: Buchen

NOV 1 1974
3

THE WHITE HOUSE

WASHINGTON

November 1, 1974

EYES ONLY - ~~CONFIDENTIAL~~

MEMORANDUM FOR: DON RUMSFELD

FROM: JERRY JONES

SUBJECT: Allocation of Costs for Political and Official Trips

As you are well aware, we have been getting numerous inquiries from the press as to the allocation and payment of Presidential travel costs for political trips. Our present policy is as follows.

ALLOCATION OF TRIP EXPENSES

I. Air Force One Official Trips

When the President travels as Commander in Chief on an official trip, all who travel with him on his aircraft -- family, staff, or guests - are paid for out of appropriated funds. Food and refreshments for his official travel are as follows:

a. The President pays for himself, his family, and guests.

b. Staff members are charged individually.

c. The press pool are also charged individually.

II. Air Force One Political Trips

The RNC pays for the President's political trips - charged an hourly rate for the type of aircraft utilized as agreed to by the Secretary of Defense. The total bill for refreshments and food for all staff members, guests, and the President, of course, are also paid for by the RNC.

III. Air Force One - A Combination of Official and Political Visits

When there is a combination of political and official visits during a single trip, the RNC pays up to and including the last stop which is classified as

political, even when an official stop is made in between political stops. The rest of the trip then is paid out of appropriated funds as described above. (For your information, this policy - while set during the Johnson Administration - was not changed during the Nixon Administration nor to date during the Ford Administration.)

IV. Air Force Support Missions for All Trips

All Air Force support missions for all trips both political and official are paid for by appropriated funds. Frequently, several aircraft have to accompany the President on a trip -- a car plane, a communications equipment plane, a back-up plane to carry additional staff members such as a change in Secret Service shift, WHCA personnel, etc. Also, Air Force One frequently flies to all stops before a Presidential trip so that the pilot is familiar with the landing procedures, etc. This, also, is paid out of appropriated funds even when it is for a political trip. The rationale for this allocation, again, was developed during the Johnson Administration and goes as follows:

a. The President does not want or need the extensive back-up and practice missions laid on by the Defense Department in support of the Commander in Chief during a political trip.

b. Since this is so, these charges are made because of his position as Commander in Chief and should not be charged to the RNC as a political expense, for the President, were he to have his way, would not have this kind of support.

V. Other Travel Expenses

a. The Advance Team

1. For official trips all Advancemen travel charges are paid out of appropriated funds.

2. For political trips Advance Team expenses are paid by the RNC.

3. Since each Advance Team handles a single city, the allocation between political and official is not difficult. When in a single city the President has both official duties and political duties, the entire stop is considered political and expenses are charged as such.

b. Identifiable support expenses incurred in connection with political activities are paid by the RNC, such as telegraph expenses, telephone charges, etc.

c. Normal salaries and expenses for personnel accompanying the President on all trips both official and political have been paid for from appropriated funds. The rationale for this allocation is that those people travelling with the President do so in order to support him as President just as they are required to support him at the White House, and, thus, they are performing official duties and are not, themselves, engaged in political activities.

PROBLEMS WITH ALLOCATION

The rationale behind the above policy may well have stood up during the Johnson Administration, but we could now have problems in the new era:

a. Payment out of appropriated funds for support missions which back up political trips.

b. Payment out of appropriated funds of salaries and expenses of personnel accompanying the President during political trips.

The above two items, if truly accounted for, would be enormous. If the press, who is now beginning to ask about back-up missions, gets the full picture, I am sure there will be many embarrassing questions asked, and we should be prepared to handle them. Also, since the last memo to the staff concerning political expenses was sent in December 1971 (see Tab A), our allocation system may well have broken down by people routinely charging political items against appropriated funds. Our policy after evaluation and reconfirmation should be restated to the staff.

I recommend that you have Counsel's office examine these policies in detail in light of the new political circumstances, as well as the Campaign Reform Act to see if they are still appropriate. If they are still appropriate, we then need to develop appropriate press answers for Ron Nessen for questions he will surely get concerning these allocations.

Attachment

A

Campfield
Distribution Dec. 22, 1971

THE WHITE HOUSE

WASHINGTON

December 22, 1971

MEMORANDUM FOR

THE WHITE HOUSE STAFF

The months ahead will see a considerable increase in political activity, and it will thus be especially important for staff members to keep in mind that expenses incurred for projects essentially political rather than official in nature are not properly chargeable to public funds.

Typical political expenses may include transportation, telegraph, long-distance telephone or postage costs. While some of these are readily identifiable, individual members of the President's Staff must take responsibility for notifying the telephone operators and Telegraph Office and Mail Room personnel when placing political calls or dispatching political mail and telegrams. With your co-operation, we will be able to insure that the appropriate expenses are billed to the Republican National Committee.

H. R. Haldeman
Assistant to the President

eng. file
Instructions re
1971

THE WHITE HOUSE

WASHINGTON

December 22, 1971

MEMORANDUM FOR

THE WHITE HOUSE STAFF

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H. R. Haldeman
Assistant to the President

198
11/6

THE WHITE HOUSE

WASHINGTON

November 6, 1974

MEMORANDUM FOR: PHILIP BUCHEN

FROM: JACK MARSH

The attached is a matter which I believe requires close coordination between your office and mine.

THE WHITE HOUSE

WASHINGTON

Jom

November 4, 1974

MEMORANDUM FOR: JACK MARSH

FROM: JERRY JONES

Attached is a letter from the GAO to Rumsfeld concerning the courier to former President Nixon. I have asked the Aide's office to prepare a letter answering these questions. In turn Don has requested that you be sent this letter and that you be the point man in dealing with GAO in this matter.

Thank you.

Attachment

OCT 31 1974

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-155950
B-149372

October 25, 1974

The Honorable Donald Rumsfeld
Assistant to the President
The White House

Dear Mr. Rumsfeld:

We have received inquiries from several Members of Congress concerning reports that U.S. Air Force planes have been used to take materials to former President Nixon in California and that Mr. Nixon's daughter, Julie Eisenhower, has been permitted to fly to California at Government expense on at least one such flight, to visit her father. In order that we may respond to the questions raised, we request that you answer the following questions.

1. What is the authority for the periodic courier flights to Mr. Nixon?

2. How long is it anticipated that these flights will continue?

3. What is the authority relied upon for allowing a private citizen to travel as a passenger on a Government aircraft?

4. Will the Government be reimbursed for the value of Mrs. Eisenhower's flight?

5. Will such flights by Mrs. Eisenhower or others be allowed on subsequent occasions?

Your attention to this matter will be appreciated.

Sincerely yours,

John J. Higgins

John J. Higgins
Associate General Counsel

For filing
in new
subject file

THE WHITE HOUSE

WASHINGTON

November 7, 1974

Dear Mr. Speaker:

Based upon the recommendation of the United States Secret Service regarding the security of the Speaker of the House of Representatives, the President has directed that you will be authorized to use military aircraft for transportation in the same manner as such aircraft are authorized for use by a Vice President. This direction shall continue until Mr. Rockefeller is confirmed as Vice President by the Congress. Of course, any travel by you for political purposes will be provided on a reimbursable basis.

Respectfully yours,

/s/ P.W.B.

Philip W. Buchen
Counsel to the President

The Honorable Carl B. Albert
Speaker of the House
House of Representatives
Washington, D.C.

THE WHITE HOUSE

WASHINGTON

November 7, 1974

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Respectfully yours,

Philip W. Buchen
Counsel to the President

The Honorable Carl B. Albert
Speaker of the House
House of Representatives
Washington, D.C.

DEPARTMENT OF THE TREASURY

UNITED STATES SECRET SERVICE

OFFICE OF THE DIRECTOR

WASHINGTON, D.C. 20223

November 8, 1974

MEMORANDUM

To : Mr. Philip Buchen
Counsel to the President
The White House

From : Clinton J. Hill
Assistant Director
Protective Forces

The U. S. Secret Service requests the use of Air Force aircraft for Speaker Albert, for the reasons stated in the attached copy of memorandum to Thomas K. Latimer, Special Assistant to the Secretary and Deputy Secretary of Defense, Department of Defense, dated October 4, 1974.

Clinton J. Hill

Attachment: a/s

610.71

October 4, 1974

MEMORANDUM

To : Thomas K. Latimer
The Executive Assistant to the Secretary
and Deputy Secretary of Defense
Department of Defense

From : Clinton J. Hill
Assistant Director
Protective Forces

The U. S. Secret Service has the responsibility for the protection of Speaker Carl Albert until such time as a Vice President is confirmed. Speaker Alber has not traveled out of the Washington, D. C. area but on one occasion since his protection was instituted on August 8, 1974. We understand however, that he probably will begin a series of trips in the near future.

The Secret Service has long held that commercial aircraft travel by our protectees poses much mose of a threat than travel by military aircraft. It is virtually impossible to provide adequate protection in busy commercial terminals and on commercial aircraft. We request favorable consideration be given based on these security points should any request be forthcoming for military aircraft for the use of Speaker Albert while he is a protectee of the Secret Service:

The United States has experienced 160 hi-jackings, which have taken place in over 50 different cities. We recognize the fact that there has not been a successful hi-jacking in the United States in the last year, however, U.S. Air Carriers have been the target of terrorists in other parts of the world, with the more recent being the bombing of a Pan American Airline in Rome. Worldwide there have been more than 400 attempts to hi-jack aircraft, of which over 250 have been successful. Over 60 different countries have been victims of these hi-jackings. In addition to the hi-jacking threat it is readily apparent that commercial airports have become a target for worldwide terrorism. Although these acts of terrorism have not occurred at airports within the United States to date, it is possible for them to occur in the future, due to wide spread publicity that high officials of the U. S. Government will be traveling via commercial aircraft.

Travel by protectees in Special Air Mission (SAM) aircraft provides numerous safeguards not available on commercial aircraft. Several of these are listed below:

- SAM aircraft operate from non-crowded military airports, or private areas at commercial airports.
- SAM aircraft have a better overall safety record than the Commercial Air Industry.
- SAM aircraft can establish higher minimum requirements for take-offs and landings.
- SAM aircraft have passenger manifest and passenger control.
- Secret Service is able to inspect all "hold" baggage aboard SAM aircraft.
- SAM aircraft have a purity of fuel and water sources.
- Secret Service is able to provide food and beverage control for SAM aircraft.
- SAM aircraft are under 24-hour guard by specially trained guards.
- SAM aircraft have additional maintenance requirements with shorter replacement periods for vital parts.
- SAM aircraft are equipped with the most modern communications devices. These provide instantaneous communications for Secret Service Agents and instantaneous communications for Protectees.
- Federal Aviation Authority gives constant monitoring and priority clearance to SAM aircraft.
- U. S. Military installations along the route of travel can be alerted and maintain constant contact in the event of an emergency.
- SAM aircraft provides a flexibility of scheduling. Due to the world situation, a Protectee may be required to be any place in the country at a moment's notice.
- Staff and Secret Service Agents must accompany Protectees. Commercial reservations are not available on short notice.

- Emergency evacuation procedures on commercial aircraft are different for each airline and each aircraft.

- In the event of an emergency caused by weather, turbulence, or a security factor, SAM aircraft can alter the course when necessary and not stick to a pre-determined flight pattern. Commercial aircraft experiencing the same emergency would require long delays in exposed and unanticipated locations.

It is the professional opinion of the U. S. Secret Service that if the Government of the United States feels that a person is important enough from the national security viewpoint to receive protection by the U. S. Secret Service, then the Government of the United States should provide the most secure transportation possible for the Protectee.

Clinton J. Hill

October 7, 1974

MEMORANDUM FOR: AMBASSADOR RUMSFELD

FROM: GENERAL LAWSON

SUBJECT: Aircraft Support for the Speaker of the House of Representatives

Pursuant to instructions received from your office, I have verbally directed the Department of Defense to schedule aircraft in support of the Speaker of the House.

The attached letter will be forwarded to the Special Assistant to the Secretary of Defense following your approval.

Approved _____

Disapproved _____

October 7, 1974

MEMORANDUM FOR: Mr. Thomas K. Latimer
The Special Assistant to the
Secretary and Deputy Secretary
of Defense

SUBJECT: Aircraft Support for the Speaker of the House of Representatives

Based upon the recommendation of the United States Secret Service regarding the security of the Speaker of the House of Representatives, the President has directed that the Speaker of the House will be authorized to use military aircraft for transportation in the same manner as such aircraft are authorized for use by a Vice President. This direction shall continue until Mr. Rockefeller is confirmed as Vice President by the Congress.

Flights performed in conjunction with the official duties of the Speaker of the House will be provided on a non-reimbursable basis. Any travel by the Speaker of the House for political or other non-official purposes will be provided on a reimbursable basis in accordance with the current procedures.

RICHARD L. LAWSON
Major General, United States Air Force
Military Assistant to the President

THE WHITE HOUSE

WASHINGTON

November 7, 1974

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Respectfully yours,

Philip W. Buchen
Counsel to the President

The Honorable Carl B. Albert
Speaker of the House
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DEPARTMENT OF THE TREASURY

UNITED STATES SECRET SERVICE

OFFICE OF THE DIRECTOR

WASHINGTON, D.C. 20223

November 8, 1974

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Counsel to the President
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Attachment: a/s

610.21

October 4, 1974

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Department of Defense

From : Clinton J. Hill
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-
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RICHARD L. LAWSON
Major General, United States Air Force
Military Assistant to the President

Monday 11/18/74

10:05 Barry Roth had asked for a copy of the memorandum prepared by your law firm while you were at the Privacy Committee on the tax aspects of travel by the Vice President on Air Force Two.

You indicated it was prepared by James Christenson -- so I assume you had requested this.

Shall I send a copy to Barry?

(Mr Roth indicated Casselman had had a copy and gave it to Jack Marsh, who now can't find it.)

NIEL A. WEATHERS
ROBERT W. RICHARDSON
~~PHILIP W. BUCHEN~~
DAVID E. DUTCHER
ROGER LAW
JOHN R. NICHOLS
W. FRED HUNTING, JR.
WILLIAM R. HINELINE
PATRICK M. MULDOON
GARY P. SCHENK
ALAN C. BENNETT
JAMES E. CHRISTENSON
FREDERICK J. BONCHER
JAMES L. WERNSTROM

TELEPHONE (616) 459-1171

LAW, ~~BUCHEN~~, WEATHERS, RICHARDSON & DUTCHER

ATTORNEYS AND COUNSELORS 740 OLD KENT BUILDING

GRAND RAPIDS, MICHIGAN 49502

November 14, 1974

Philip W. Buchen, Esq.
Counsel to the President
White House
Washington, D. C.

Dear Mr. Buchen:

Enclosed is a copy of the memorandum which you requested. I have retained a copy for my files.

As defacto social secretary for the firm, I would also like to invite your wife and a guest to the firm Christmas party. It is scheduled for the evening of December 6, 1974, at Kent Country Club.

It was good to see you at the President's speech last month. I enjoyed seeing him, and I hope he was not too disappointed with the results of the election.

If I can be of any further help, don't hesitate to contact me.

Most sincerely,

James E. Christenson

JEC:nlr
Enclosure

TO: PWB
FROM: JEC
RE: Gerald R. Ford -- Tax Aspects of Travel by the Vice-President on Air Force Two

The United States Government provides the Vice-President Ford with free official transportation while he is in office. This free transportation includes the use of a series of aircraft commonly known as Air Force Two. Air Force Two is used by the Vice-President on all of his travels and the costs of maintaining and operating it are paid by the government whether the purpose of the Vice-President's trip is one primarily of business or of pleasure.

Vice-President Ford has been accompanied by family or friends on some flights in Air Force Two. In certain instances these individuals were performing official functions, in others, however, they were traveling with the Vice-President in an unofficial capacity. Regardless of whether the person was traveling with the Vice-President in an official or unofficial capacity, the government did not render a charge to either the Vice-President or to the individuals for transportation on Air Force Two.

The practice of the government of allowing the Vice-President to use Air Force Two free of cost when the purpose of his trip is primarily pleasure, has come under questioning in recent months. Likewise, the practice of allowing his friends to accompany him on such trips at no charge, where they are not traveling in an official capacity, is a subject of controversy.

Many of the recent questions concern the tax implications of the government's provision of cost free transportation to the Vice-President and to those who accompany him. One question is whether the Vice-President realizes taxable income from the cost free use of Air Force Two when the purpose of his trip is primarily pleasure as contrasted with business. A second question is whether the Vice-President receives taxable income as a result of the free transportation provided those individuals accompanying him on Air Force Two in an unofficial capacity.

This memorandum will address itself to these two questions regarding the tax implications of the Vice-President's free use of Air Force Two. The conclusion I have reached is that the Vice-President do not realize taxable income either on account of the free use of Air Force Two when the purpose of his trip is primarily pleasure or on account of free transportation provided his family or friends who are accompanying him in and unofficial capacity.

There is little or no case law precisely addressing itself to the issues involved. It is possible however to treat the questions as similar to those that arise out of the field of taxation of employees for the receipt of nonmonetary compensation. The conclusions I have reached are based principally on analogies drawn from that field of tax law. For reasons set out more fully later, I have treated the area of taxation of shareholders for the receipt of constructive non-monetary dividends as inapposite.

The Internal Revenue Code of 1954 defines the word "income" in Section 61. "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including but not limited to the following items . . . . ."

Section 61 is substantially a reenactment of its predecessor, Section 22(a) of the Internal Revenue Code of 1939[1]. H. R. Rept A 18; S. Rpt 168. Both sections were intended to extend the taxing power of the Congress to the fullest extent permitted by the Constitution. James v. United States, 366 U.S. 213, 6 L.ed 2d 246 (1961); Helvering v. Clifford, 309 U.S. 331, 84 L.ed 788 (1940). Thus, although the position of the Revenue Service on many issues has changed since the adoption of Section 22(a), the limitations on the power of Congress to tax were not extended by the adoption of Section 61.

---

1 "Gross income includes profits and income derived from slaaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent dividends, securities, or the transaction of any business carried on for gain or profit or gains or profits and income from any source derived."

Meals and lodging provided the employee for the convenience of the employer have traditionally been excluded from the income of the employee. This tradition was codified in the 1954 Internal Reven Code by Section 119. Under the 1939 Act such food and lodging were a excluded from the employee's income. The basis for this exclusion wa that they were not income within the meaning of the Constitution and therefore not taxable under the provisions of the 1939 Code. Diamond Sturr, 221 F. 2d 264 (2nd Cir. 1955); Benaglia v. Commissioner, 36 BTA (CCH ¶9802); appeal withdrawn 97 F. 2d 996 (9th Cir 1940).[2]

The rationale behind these decisions is that the advantages to the employee from the provision of this free food or lodging is merely incidental to the performance of his duties, that they are provided so the employee may perform the services for which he was hired. Benaglia v. Commissioner, supra. The meals and lodging thus comport a part of the services to be rendered and are not additional compensation for such services. The Benaglia and Diamond cases stand for the principal that an employee's receipt of incidental benefits is not income taxable within the meaning of the Constitution when the benefits arise from the employee's performance of the services required by the terms of his employment.

The adoption of Section 61 in the Internal Revenue Code of 1954 did not bring such extra "incidental benefits" within the definition of income. United States v. Gotcher, 401 F. 2d 118 (5th Cir 1968). As noted earlier, both Sections 61 and its predecessor 22(a) were intended to have the same all inclusive scope. The taxability of such incidental benefits therefore remain unchanged by the Revenue Code of 1954.

The 1954 Code contains an explicit provision codifying the exclusion of meals and lodging provided at the convenience of the employer from the employee's income.

---

[2] It should also be noted that the Revenue Service had adopted a Regulation under Section 22(a) which stated that such food and lodging would not be considered income where it was provided at the convenience of the employer. Neither case, however, based its decision on the Regulation (See Bitter, Federal Income, Estate a Gift Taxation, 3rd Ed. p. 49 (1964).

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if -

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation." (Section 119.)

This provision does not purport to and could not be the sole exclusion from employee income of incidental benefits where they result from services performed for the benefit of the employer (see United States v. Disney, 413 F. 2d 783 (9th Cir. 1969); John L. Ashby v. Commissioner 50 TC 38 (1968)). The question of the tax liability of the Vice-President on account of the free transportation provided in Air Force Two continues to be controlled by the Constitutional definition of income and not by any statutory provision.

It should also be kept in mind that Code provisions adopted to control the deductibility of certain travel and entertainment expenses by a corporation have no bearing on the inclusion of these benefits in the employee's income. Wolf, P.J. Fringe Benefits; "The Use of Corporation Facilities (Non-Financial) by Officers and Shareholder", 26th Annual N.Y.U. Tax Institute, p. 1159 (1968). The question of deductibility and of taxability are separate questions which may command separate answers.

With this perspective of the Constitutional limitations on Congressional power to tax as income certain benefits provided employees, it is possible to apply the food and lodging cases to the questions addressed by this memorandum. But while it is possible to treat the issues raised by these cases as analogous to the questions being treated here, care should be taken in using this analogy because most of the cases involve arguments over the interpretation of Section 119. The cases do not directly address the question whether that Sectio

comports with the constitutional limits of Congressional taxing powe This collateral issue renders the actual holding in most of the case dicta for the purposes of this memorandum.

Care should also be taken to avoid comparisons with the constructive dividend cases arising out of corporation-shareholder-employee transactions. The issue in the dividend cases is not simply whether the taxpayer is being provided wages in the form of nonfinanc compensation, it goes beyond this to whether the corporation is being used to disguise the ownership of property which is actually used for the benefit of the shareholder. Tax liability is present in the employee cases because of the transfer of compensation to the employee Liability is present in the shareholder cases because the corporation has provided benefits to the shareholder with its own funds, which ben fits should be considered as inuring to the personal benefit of the shareholder and not the corporation.

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The Vice-President's use of Air Force Two is not income within the meaning of Section 61. Air Force Two is provided the Vice-President so that he may perform his Constitutionally mandated duties. These duties include being constantly ready to react to an emergency and require that he be in contact with Washington. Whether the Vice-President is on a trip which is designed primarily for busine or one designed primarily for pleasure, his duties require that he hav immediate access to transportation that can take him wherever required Air Force Two does not lose its status as equipment essential to the performance of the Vice-President's duties even though it is used to transport the Vice-President to a location where his object is pleasur rather than business. The Vice-President's trips are in this sense never "pleasure" trips within the meaning of Section 61. The use of Air Force Two to transport the Vice-President is never a gratuitous benefit of employment not required by the office.[4]

The second area of inquiry relates to whether the Vice-President realizes taxable income from his friends and family being permitted to accompany him free on flights in Air Force Two. In answering this question care must be taken in analyzing cases which are used as precedent. Litigation in the nonmonetary compensation area often involve two separate issues which at first glance appear to be the same. One issue is whether an object is being used primarily for t benefit of the employer or whether it is being used to provide addition compensation to an employee. In many cases the object is not being used exclusively for either type of work, and there must be an allocation between taxable and nontaxable uses. The other issue is whether once it is determined that the object is being used for the benefit of the employer, the employee should be taxed because the use creates some incidental benefits to relatives or friends of the employee. It is only this second issue which is relevant here.

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4 See J.T. Sneed, Configurations of Gross Income, Ohio State University Press, (1965) and Jones v. United States, 60 Ct. Cl. 552; 1 U.S.T.C. 129 (1925)

The question of the taxability of the Vice-President's friends and relatives is of the latter type. The use of Air Force Two by the Vice-President is a nontaxable requirement of his job. He never uses Air Force Two in such a way that he would be required to allocate between his taxable and nontaxable use of the plane. The question is whether the Vice-President should be taxed for allowing his friends to ride along with him.

There are very few cases which address themselves clearly to the second issue. The courts and the Revenue Service have for the most part assumed sub silentio that such incidental benefits are not taxable to the employee. (See Caratan v. Commissioner, 442 F. 2d 606 (9th Cir. 1971.) Once it is determined that the use of the object is for the benefit of the employer, the inquiry generally doesn't go farther to see if anyone else also received a benefit. Thus, in the case of United States Junior Chamber of Commerce v. United States, 334 F. 2d 660 (Ct. Cl. 1964), it was held that where the president of the Jaycees was required to live in the Jaycee's White House as a condition of his job, that he received no taxable income even though his family also lived there. The Court so held despite the fact that the president was able to entertain friends in the home at will.

Likewise, in United Airline Co. v. Commissioner, 21 T.C. 327 (1962), the Tax Court ruled that the half of the expenses of maintaining a yacht were properly deductible as a corporate expense and not taxable to corporation's officers and shareholders. The tax court so ruled even though it noted that on many of the cruises which were alleged to have been business trips customers brought along their wives and families. (See also Wilhelm v. United States, 257 F. Supp. 16 (D.Wyo. 1966) Charles Anderson v. Commissioner, 42 T.C. No. 25, revs'd on other grounds 371 F. 2d 59 (6th Cir 1966); Swartz v. Commissioner, 22 TCM 835 (1963); John Nolen v. Commissioner, 23 TCM 595 (1964).

The basis for these decisions is that the employee is being taxed for compensation provided him by his employer. Once it is determined that the employer's expense in providing the house or in a yacht trip is not compensation for the job, the employee should not be taxed if others receive incidental benefits which do not place an added economic burden on the employer. (See Motel Company v. Commissioner, 340 F. 2d 445 (2nd Cir. 1965).

Once it is determined that the object is used for business purposes, the relevant criterion to determine the tax liability of the employee is the added economic detriment to the corporation, not the benefit to the recipient or the employee. Robert Walker, Inc. v. Commissioner, 362 F. 2d 140 (7th Cir 1966); Bauer v. Commissioner, 32 TCM 496 (1973). If a benefit results to a third party but there is no added economic cost to the corporation, the added benefit is not taxable compensation paid by the employer to the employee.

In the Bauer case the employer of Mr. Bauer purchased airplane tickets for his future wife and her two sons so that they could join him in Japan. The airline sold Mr. Bauer's future wife a ticket at full price, her older son one at half price, and her younger son one at 10 per cent. The Revenue Service attempted to tax Mr. Bauer for two half-price tickets for the children. The Tax Court rejected the claim stating that the taxpayer was only taxable for the actual cost borne by the corporation.

It is at this point that the distincition between employee compensation cases and shareholder dividend cases is most obvious. The constructive dividend cases indicate that the shareholder is considered to have received income in a much broader range of situations than exists in the employee compensation area. The reason for this is that a taxable dividend occurs whenever the taxpayer receives an economic benefit from the corporation. Sullivan v. United States, 363 F. 2d 724 (8th Cir 1966). The employee compensation area, however, is limited to payments made for an employee on account of his employment.

Even in the constructive dividend area, however, the amount of the dividend is limited to the actual additional economic cost incurred by the corporation on account of its transactions with the shareholder. Commissioner v. Riss, 374 F. 2d 161 (8th Cir 1967); Greenspon v. Commissioner, 229 F. 2d 947 (8th Cir 1956); Alabama-Georgia Syrup Co. v. Commissioner, 311 F. 2d 640 (5th Cir 1962). In the Riss case the corporation purchased a very expensive house which it rented to one of its shareholders. The rent it charged the shareholder was less than the actual expenses paid by the corporation in maintaining the house plus the depreciation. The Revenue Service tried to tax the shareholder as having received a constructive dividend on the difference between the rent paid and the actual expenses plus depreciation. The Court of Appeals disallowed such a charge, holding that the taxpayer had established that he was paying the actual rental value of the house. Thus, because the corporation was suffering no economic detriment on account of the rental, the taxpayer could not be treated as receiving a dividend on account of his gain. Commissioner v. Riss, supra.

In the case of the Vice-Presidential party there is no extra cost to the government for having these persons travel with the Vice-President. The cost of having the airplane travel to carry the Vice-President is an expense which is general and which is to be borne by the United States Government. As there is no extra expense involved in the matter to the Government, there is no taxable income to the Vice-President.

TO: PWB
FROM: JEC
RE: Gerald R. Ford -- Tax Aspects of Travel by the Vice-President on Air Force Two

The United States Government provides the Vice-President Ford with free official transportation while he is in office. This free transportation includes the use of a series of aircraft commonly known as Air Force Two. Air Force Two is used by the Vice-President on all of his travels and the costs of maintaining and operating it are paid by the government whether the purpose of the Vice-President's trip is one primarily of business or of pleasure.

Vice-President Ford has been accompanied by family or friends on some flights in Air Force Two. In certain instances these individuals were performing official functions, in others, however, they were traveling with the Vice-President in an unofficial capacity. Regardless of whether the person was traveling with the Vice-President in an official or unofficial capacity, the government did not render a charge to either the Vice-President or to the individuals for transportation on Air Force Two.

The practice of the government of allowing the Vice-President to use Air Force Two free of cost when the purpose of his trip is primarily pleasure, has come under questioning in recent months. Likewise, the practice of allowing his friends to accompany him on such trips at no charge, where they are not traveling in an official capacity, is a subject of controversy.

Many of the recent questions concern the tax implications of the government's provision of cost free transportation to the Vice-President and to those who accompany him. One question is whether the Vice-President realizes taxable income from the cost free use of Air Force Two when the purpose of his trip is primarily pleasure as contrasted with business. A second question is whether the Vice-President receives taxable income as a result of the free transportation provided those individuals accompanying him on Air Force Two in an unofficial capacity.

This memorandum will address itself to these two questions regarding the tax implications of the Vice-President's free use of Air Force Two. The conclusion I have reached is that the Vice-President do not realize taxable income either on account of the free use of Air Force Two when the purpose of his trip is primarily pleasure or on account of free transportation provided his family or friends who are accompanying him in and unofficial capacity.

There is little or no case law precisely addressing itself to the issues involved. It is possible however to treat the questions as similar to those that arise out of the field of taxation of employees for the receipt of nonmonetary compensation. The conclusions I have reached are based principally on analogies drawn from that field of tax law. For reasons set out more fully later, I have treated the area of taxation of shareholders for the receipt of constructive non-monetary dividends as inapposite.

The Internal Revenue Code of 1954 defines the word "income" in Section 61. "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including but not limited to the following items . . . . ."

Section 61 is substantially a reenactment of its predecessor, Section 22(a) of the Internal Revenue Code of 1939[1]. H. R. Rept A 18; S. Rpt 168. Both sections were intended to extend the taxing power of the Congress to the fullest extent permitted by the Constitution. James v. United States, 366 U.S. 213, 6 L.ed 2d 246 (1961); Helvering v. Clifford, 309 U.S. 331, 84 L.ed 788 (1940). Thus, although the position of the Revenue Service on many issues has changed since the adoption of Section 22(a), the limitations on the power of Congress to tax were not extended by the adoption of Section 61.

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1 "Gross income includes profits and income derived from slaaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent dividends, securities, or the transaction of any business carried on for gain or profit or gains or profits and income from any source derived."

Meals and lodging provided the employee for the convenience of the employer have traditionally been excluded from the income of the employee. This tradition was codified in the 1954 Internal Reven Code by Section 119. Under the 1939 Act such food and lodging were a excluded from the employee's income. The basis for this exclusion wa: that they were not income within the meaning of the Constitution and therefore not taxable under the provisions of the 1939 Code. Diamond Sturr, 221 F. 2d 264 (2nd Cir. 1955); Benaglia v. Commissioner, 36 BTA (CCH ¶9802); appeal withdrawn 97 F. 2d 996 (9th Cir 1940).[2]

The rationale behind these decisions is that the advantages to the employee from the provision of this free food or lodging is merely incidental to the performance of his duties, that they are provided so the employee may perform the services for which he was hired. Benaglia v. Commissioner, supra. The meals and lodging thus comport a part of the services to be rendered and are not additional compensation for such services. The Benaglia and Diamond cases stand for the principal that an employee's receipt of incidental benefits is not income taxable within the meaning of the Constitution when the benefits arise from the employee's performance of the services required by the terms of his employment.

The adoption of Section 61 in the Internal Revenue Code of 1954 did not bring such extra "incidental benefits" within the definition of income. United States v. Gotcher, 401 F. 2d 118 (5th Cir 1968) As noted earlier, both Sections 61 and its predecessor 22(a) were intended to have the same all inclusive scope. The taxability of such incidental benefits therefore remain unchanged by the Revenue Code of 1954.

The 1954 Code contains an explicit provision codifying the exclusion of meals and lodging provided at the convenience of the employer from the employee's income.

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2 It should also be noted that the Revenue Service had adopted a Regulation under Section 22(a) which stated that such food and lodging would not be considered income where it was provided at the convenience of the employer. Neither case, however, based its decision on the Regulation (See Bitter, Federal Income, Estate a Gift Taxation, 3rd Ed. p. 49 (1964).

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if -

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation." (Section 119.)

This provision does not purport to and could not be the sole exclusion from employee income of incidental benefits where they result from services performed for the benefit of the employer (see United States v. Disney, 413 F. 2d 783 (9th Cir. 1969); John L. Ashby v. Commissioner 50 TC 38 (1968)). The question of the tax liability of the Vice-President on account of the free transportation provided in Air Force Two continues to be controlled by the Constitutional definition of income and not by any statutory provision.

It should also be kept in mind that Code provisions adopted to control the deductibility of certain travel and entertainment expenses by a corporation have no bearing on the inclusion of these benefits in the employee's income. Wolf, P.J. Fringe Benefits; "The Use of Corporation Facilities (Non-Financial) by Officers and Shareholder", 26th Annual N.Y.U. Tax Institute, p. 1159 (1968). The question of deductibility and of taxability are separate questions which may command separate answers.

With this perspective of the Constitutional limitations on Congressional power to tax as income certain benefits provided employees, it is possible to apply the food and lodging cases to the questions addressed by this memorandum. But while it is possible to treat the issues raised by these cases as analogous to the questions being treated here, care should be taken in using this analogy because most of the cases involve arguments over the interpretation of Section 119. The cases do not directly address the question whether that Sectio

comports with the constitutional limits of Congressional taxing powe This collateral issue renders the actual holding in most of the case dicta for the purposes of this memorandum.

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