

The Use of Government-Owned Vehicles for the Comfort or Health and Welfare of Personnel in Deployed or Remote Locations

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I. Introduction: The Beginning of the Story

My interest in the topic of government-owned vehicles (GOVs)¹ began at Gwangju Air Base, Republic of Korea.² It was around 2300 hours of my first night in country, when my commander woke me up from a jet-lagged stupor. He wanted to know if it was “legal” to transport a bus full of Airmen in the morning to the base exchange at Kunsan Air Base to replenish toiletry and clothing items destroyed during some flooding in our “tent city.” He also thought the Airmen needed to recharge their batteries at Kunsan’s new gym and its other morale, welfare and recreational (MWR) facilities. I said, “Yes,” and spent the rest of my deployment justifying the commander’s decision to much of the Peninsula.

This article familiarizes judge advocates (JAs) with the proper use of GOVs for “life support” activities in a deployed or remote location. Life support activities, in the context of this discussion, consist of GOV transportation to those places that are “required for the comfort or health and welfare of the member.”³ Life support activities include things such as the chaplain’s program, inter-installation athletic competitions, the base exchange/commissary, and MWR programs under certain circumstances.⁴ The concepts discussed will help commanders improve mission performance by ensuring that their personnel obtain lawful transportation to morale enhancing life support activities. Of course, the basic rules and principles governing the use of GOVs are the same whether you are located at a large continental United States (CONUS) installation or at a small outpost in Iraq. The application of those rules to a particular set of facts and circumstances at a deployed or remote location, however, can often lead to more permissive results. A “no” at Fort Hood might be a “yes” at Camp Victory.⁵ Moreover, several provisions within the rules specifically provide for uses of GOVs in a deployed or remote location that are not available at an adequately serviced CONUS installation.

This article begins by providing a brief overview of the statutory rule that GOVs may only be utilized for “official use.”⁶ The discussion explains the key role played by commanders when exercising their discretion in determining what qualifies as official use. The ensuing sections of the article then analyze the regulations that authorize GOVs to be used for life support activities. To facilitate the discussion, the article breaks down life support activities into two general categories of non-recreational and recreational. The bulk of the discussion analyzes when GOVs may be used for non-recreational and recreational life support activities. Next, the article explains how the Department of Defense (DOD) guidelines for the spending of appropriated funds (APF) on MWR impose certain constraints on the ways that GOVs can be used for life support activities. Practical steps will be discussed on how to provide GOV transportation for MWR activities without running afoul of these rules. Finally, the conclusion summarizes the main learning points through a brief discussion of the Gwangju Air Base scenario from the opening paragraph.

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¹ A GOV, also known as a nontactical vehicle (NTV), includes a vehicle designed and operated principally for highway transportation of property or passengers, but does not include a vehicle designed or used for military field training, combat, or tactical purposes. See U.S. DEP’T OF DEFENSE, REG. 4500.36-R, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para. AP4.37 (16 Mar. 2007) [hereinafter DOD REG. 4500.36-R].

² Gwangju Air Base is a facility of the Republic of Korea Air Force and is located in the bottom southwest corner of the South Korean Peninsula.

³ DOD REG. 4500.36-R, *supra* note 1, para. C2.5.4.2.

⁴ See *id.* para. C5.7.1.

⁵ Camp Victory, Baghdad, Iraq.

⁶ See 31 U.S.C.S. § 1344(a)(1) (2007) (“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”).

II. The Rule: Official Use

The rule governing the use of GOVs is simple: the use of GOVs is restricted to “official purposes” only.⁷ The correct application of the rule requires an understanding of the crucial role played by the commander in determining what is an official use.

A. The Commander’s “Official Use Determination”

“The determination as to whether a particular use is for official purposes is a matter of administrative discretion to be exercised within applicable law and regulations.”⁸ In the military, commanders (installation level commanders or higher, depending on the use of the GOVs) determine what constitutes official use of motor vehicles.⁹ “In making such a determination, consideration shall be given to all pertinent factors, including whether the transportation is: (1) essential to the successful completion of a DOD function, activity or operation, and (2) consistent with the purpose for which the motor vehicle was acquired.”¹⁰ GOVs may not be “provided by the Department of Defense for the purpose of conducting personal business or engaging in other activities of a personal nature by military or civilian personnel, members of their families, or others.”¹¹

Each military Service has enacted its own regulatory guidance for the use of GOVs.¹² In a few instances, this guidance is more restrictive¹³ than the parameters prescribed by the *DOD Regulation 4500.36-R, Management, Acquisition, and Use of Motor Vehicles (DOD Reg. 4500.36-R)*.¹⁴ In general, however, each Service’s regulation more or less adopts the DOD guidance without stricter limitations, though often with greater detail.¹⁵ For example, the applicable Air Force Instruction provides a helpful four-part test to assist commanders in making an official use determination in those situations when the proposed use is not already expressly authorized by the regulation.¹⁶ *Army Regulation 58-1*, on the other hand, generally

⁷ See *id.*; DOD REG. 4500.36-R, *supra* note 1, para. C2.5 (directing use of GOVs “shall be restricted to official purposes only”); Pub. Contracts and Prop. Mgmt., 41 C.F.R. § 102-34.220 (2005) (“using a motor vehicle to perform your agency’s mission(s), as authorized by your agency”).

⁸ See DOD REG. 4500.36-R, *supra* note 1, para. C2.5.1.

⁹ See U.S. DEP’T OF ARMY, REG. 58-1, MOTOR TRANSPORTATION-GENERAL: MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES paras. 5-4(b) and 5-5(b) (10 Aug. 2004) [hereinafter AR 58-1]; U.S. DEP’T OF THE AIR FORCE, INSTR. 24-301, TRANSPORTATION: VEHICLE OPERATIONS para. 2.5 (1 Nov. 2001) [hereinafter AFI 24-301]; U.S. MARINE CORPS, ORDER P11240.106B, GARRISON MOBILE EQUIPMENT para. 2003.2.b. (5 Jan. 2000) [hereinafter MCO P11240.106B].

¹⁰ DOD REG. 4500.36-R, *supra* note 1, para. C2.5.1. “When questions arise about the official use of a motor vehicle, they shall be resolved in favor of strict compliance with statutory provisions . . .” *Id.* para. C2.5.

¹¹ *Id.* para. C2.5.3. See, e.g., *Aiu v. Dep’t of Justice*, No. 96-3289, 1996 U.S. App. LEXIS 27124 (Fed. Cir. Oct. 16, 1996) (holding unlawful to commute between work and law school in a GOV); *Devine v. Nutt*, 718 F.2d 1048 (Fed. Cir. 1983) (holding unlawful to use GOV while on patrol duty to drive by a residence to pick up beer and deliver to the command center); *Miles v. Dep’t of the Army*, 55 M.S.P.R. 633, 1992 MSPB LEXIS 1652 (Nov. 27, 1992) (holding unlawful to drive a GOV into a restricted area for the purpose of killing a deer).

¹² See AR 58-1, *supra* note 9; AFI 24-301, *supra* note 9; U.S. DEP’T OF THE NAVY, SEC’Y OF THE NAVY, INSTR. 11240.8G, MANAGEMENT OF CIVIL ENGINEERING SUPPORT EQUIPMENT (CESE) IN NAVY (14 Sept. 1995) [hereinafter SECNAVINSTR 11240.8G]; MCO P11240.106B, *supra* note 9.

¹³ “The Army reserves the right to make certain provisions of [GOV] use more restrictive than the current DOD policy. Unless specifically stated within that policy, or within this regulation, the current DOD policy will apply.” AR 58-1, *supra* note 9, para. 2-3. See the discussion at page 7 for an example where the Air Force made its instruction more restrictive than *DOD Reg. 4500.36-R* by not authorizing a no-fare shuttle bus exception for “isolated sites.”

¹⁴ DOD REG. 4500.36-R, *supra* note 1.

¹⁵ The Navy’s *SECNAV Instr. 11240.8G*, in fact, simply adopted *DOD Reg. 4500.36-R* verbatim via incorporation. *SECNAVINSTR 11240.8G*, *supra* note 12.

¹⁶ *Air Force Instruction 24-301*, paragraph 2.5 states:

When guidance does not specifically fit a request for transportation support, commanders will use the following factors when making official use determinations:

2.5.1 Is the purpose of the trip official?

2.5.2 Does the request have the potential to create a perception that will reflect unfavorably on the Air Force or cause public criticism?

2.5.3 Will the request impact on mission requirements?

2.5.4 Is commercial or D[O]D scheduled transportation available? It is important to not that the Air Force does not provide transportation support that competes with commercial services.

takes a more hands-off approach and simply states that the use of GOVs “is restricted to official purposes only.”¹⁷ Additional important guidance for what constitutes official use of an Army GOV is found in the Secretary of the Army Travel Policy.¹⁸

1. Expressly Authorized Uses Are Non-Exclusive

Each Service regulation governing the use of GOVs includes a list of expressly authorized uses. When reading these Service regulations, it is important to remember that the lists of expressly authorized uses are not exclusive.¹⁹ These lists are for guidance purposes only. Just because a use is not expressly authorized does not necessarily mean that it cannot be done. While the well-beaten track may be the safest path, the needs of the mission may require adventuring beyond the list of common uses. Nobody needs a lawyer to help them read a list, and rest assured, straightforward uses are not the ones a JA will be called upon to arbitrate. When faced with a situation where the official purpose of the proposed GOV use is unclear, the most important element to analyze is commander’s intent.

2. Commander’s Intent

The commander’s intent for the use of the vehicle is critical to all GOV official use determinations. The law gives great deference to “administrative discretion” in determining what constitutes official use.²⁰ As a result, if a proposed use is not expressly authorized by service guidance, the practitioner must engage the commander with approval authority in order to obtain his command intent for the use of the vehicle. In turn, the commander must determine whether the proposed use is for the purpose of furthering the unit’s mission.²¹ This determination must be made on a case-by-case basis.²² Once the commander makes a positive official use determination, the use is permissible as long as it is not prohibited by applicable laws, regulations, or policies.

The importance of commander’s intent cannot be overemphasized. Inevitably in close-call situations, the difference between an authorized and an unlawful use of a GOV hinges on whether the government employee sought permission from the appropriate agency supervisor. Case law and Comptroller General opinions are full of examples where the government employee was sanctioned for failing to seek permission to use a GOV when the official nature of the use was unclear.²³ For that reason, it is imperative to seek the commander’s permission to use a GOV for activities that are not expressly authorized by service regulations.²⁴

AFI 24-301, *supra* note 9, para. 2.5.

¹⁷ AR 58-1, *supra* note 9, para. 2-3.

¹⁸ U.S. DEP’T OF ARMY, DIR. 2007-01, SEC’Y OF THE ARMY POLICY FOR TRAVEL BY DEPARTMENT OF THE ARMY OFFICIALS WITH SUPPLEMENTARY GUIDANCE FOR ARMY PERSONNEL IN THE NATIONAL CAPITAL REGION (25 Jan. 2007), *available at* http://www.apd.army.mil/pdf/files/ad2007_01.pdf. Unique among the Services, the Army Travel Policy expressly authorizes the use of GOVs to transport Army personnel who are not participating in the ceremony, to changes of command, promotions, retirements, and unit activations/deactivations. *Id.* para 14.e(2).

¹⁹ AFI 24-301, *supra* note 9, para. 2.5 (discussing guidance that the U.S. Air Force gives commanders for determining whether proposed uses are for an official purpose when they are not expressly authorized).

²⁰ See DOD REG. 4500.36-R, *supra* note 1, para. C2.5.1; Fed. Bureau of Investigation, B-195073, 1979 U.S. Comp. Gen. LEXIS 1777, at *2 (Nov. 21, 1979) (“The control over the use of government vehicles is primarily a matter of administrative discretion to be exercised by the agency concerned within the framework of applicable laws.”) (citation omitted); Fed. Energy Regulatory Comm’n, 71 Comp. Gen. 469, at *1 (1992) (Federal Energy Regulatory Commission’s limited use of vehicle resources “to transport students to and from the Commission’s headquarters to participate in educational programs [was] within the bounds of its administrative discretion to support civic, charitable, and similar community support activities.”).

²¹ See DOD REG. 4500.36-R, *supra* note 1, para. C2.5.

²² Individual Mobilization Augmentee (IMA) Transportation Entitlements, Op. JAG, Air Force, No. 1996/57 (12 Apr. 1996) [hereinafter Op. JAG, Air Force, No. 1996/57] (opining the “determination is a matter of administrative discretion and must be made on a case-by-case basis”).

²³ See, e.g., Cent. Intelligence Agency, B-275365, 1996 U.S. Comp. Gen. LEXIS 625 (Dec. 17, 1996).

[d]etermination that attendance at a funeral constitutes official business must be made by the agency head or a delegate authorized to make that determination. . . . “We would expect . . . that before an employee is authorized to travel to a funeral as the official agency representative, the matter would be reviewed and the authorization made at an appropriate level of the agency.”

Id. at *6 (citation omitted).

²⁴ This recommendation also applies to those uses which are expressly authorized only with the approval of the appropriate level commander.

In making his decision, the commander must affirmatively determine that the use of the GOV is for an official purpose. This process is especially critical where the proposed activity could rationally be seen as serving both mission and non-mission related purposes. The best practice is to document the commander's intent in a detailed memorandum that explains why the particular facts and circumstances of the mission support a determination of official use. Drafting the commander's memorandum, of course, is where lawyers earn their pay. At least one excellent reason to memorialize the commander's official use determination is that the penalties for unlawfully using a GOV are stiff.

B. Penalties For Misuse

The ramifications for misusing GOVs include administrative, criminal, and financial penalties. A civilian employee who willfully uses or authorizes the use of a GOV "for other than official purposes shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month and shall be suspended for a longer period or summarily removed from office if circumstances warrant."²⁵ Further, any person who knowingly misuses GOVs "may be subject to criminal prosecution and, upon conviction, to fines or imprisonment."²⁶ Military personnel who willfully use or authorize the use of a GOV for other than an official purpose can be disciplined under provisions of the Uniform Code of Military Justice.²⁷ If the misuse occurred during a temporary duty assignment, the misfeasor may also be held "responsible for any additional cost resulting from unauthorized use"²⁸ In short, it is well worth the effort to seek the commander's determination of official use and to thoroughly document his decision. This is especially true when the commander wants to use GOVs for transportation to life support activities. People tend to watch GOVs closely, and questions are sometimes raised when GOVs are used in a non-customary manner.

III. Life Support Activities

Government-owned vehicle transportation to life support activities consists of transportation to those places that are "required for the comfort or health and welfare of the member."²⁹ Many JAs have deployed overseas to an installation that is too small or new to have an adequate base/post exchange. Aspirin is about the extent of the available drug store goods. Military clothing sales is virtually nonexistent. The commissary consists of a candy and chips rack. Maybe the unit has a Protestant chaplain, but no priest to give Catholic mass. Because there is no barber shop, the troops either have long hair, or bad hair because they are cutting it themselves. Perhaps the unit's morale is sinking because everyone has been working seven-day weeks for the last month and there is nothing fun to do on base. A GOV bus could help your commander solve many of these problems by transporting his personnel to an established installation where these services are provided. Your commander also likes the idea for an MWR trip over the weekend, using a GOV bus. Of course, your commander wants all this transportation to be free to his troops, and he wants you, the JA, to make sure it's legal. A good place to start your legal review is the Code of Federal Regulations (C.F.R.).

A. Public Contracts and Property Management, 41 C.F.R. § 301-10.201 (1998): Definition of "Official Use"

The touchstone regulation that defines the meaning of official use of GOVs is 41 C.F.R. § 301-10.201.³⁰ This regulation provides commanders tremendous flexibility and discretion when deciding how to utilize their GOVs, especially while on temporary duty or in a remote location. Section 301-10.201, C.F.R., provides that GOVs may be used:

Only for official purposes which include transportation:

²⁵ Pub. Contracts and Prop. Mgmt., 41 C.F.R. § 109-6.450, para. (a) (1998); 31 U.S.C. § 1349 (1982); *see also* DOD REG. 4500.36-R, *supra* note 1, para. C1.3.1.1.

²⁶ 31 U.S.C. § 1349; *see also* *United States v. Rose*, 31 C.M.R. 726 (A.F.B.R. 1962) (convicting non-commissioned officer of wrongful appropriation for using government truck to transport his personal lumber).

²⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) [hereinafter MCM]. *Id.* pt. IV, ¶ 46c(2)(b) (citing as an example of wrongful appropriation under Article 121, "while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from government service by deviating from the assigned route without authority, to visit a friend in a nearby town and later restore the vehicle to its lawful use"). A charge for failure to obey an order or regulation under Article 92 is another option. *Id.* pt. IV, ¶ 16; *see also* DOD REG. 4500.36-R, *supra* note 1, para. C1.3.1.1.

²⁸ Pub. Contracts and Prop. Mgmt., 41 C.F.R. § 301-10.202 (2006).

²⁹ DOD REG. 4500.36-R, *supra* note 1, para. C2.5.4.2.

³⁰ 41 C.F.R. § 301-10.201 (formerly 41 C.F.R. § 301-2.6(a) (1993)).

- (a) Between places of official business;
- (b) Between such places and places of temporary lodging when public transportation is unavailable or its use is impractical;
- (c) Between either paragraphs (a) or (b) of this section and restaurants, drug stores, barber shops, places of worship, cleaning establishments, and similar places necessary for the *sustenance, comfort, or health* of the employee to foster the continued efficient performance of Government business; or
- (d) As otherwise authorized by your agency under 31 U.S.C. § 1344.³¹

Subparagraph (c), 41 C.F.R. § 301-10.201 provides federal agencies with a very practical tool to keep its forces on temporary duty fed, healthy, clean cut, spiritually nurtured, and laundered. It potentially authorizes uses of a GOV on temporary and remote duty that would normally be considered of a personal nature, and thus unlawful.³² The key trigger for the provisions of subparagraph (c) is that the proposed use, which is “necessary for the sustenance, comfort, or health” of the military member, should “foster the continued efficient performance of Government business.”³³ It is worth noting that section 301-10.201 does not limit these life support activities to any minimum number of people, or particular size or type of GOV. Thus, at least pursuant to section 301-10.201, either a single military member or a group may potentially utilize a GOV for life support activities. Even more noteworthy is the generous interpretation that the Government Accountability Office (GAO) has given the language of subparagraph (c) in its opinion, *Federal Aviation Administration*.³⁴

1. Federal Aviation Administration: Subparagraph (c)

In *Federal Aviation Administration*, the regional administrator in Alaska for the Federal Aviation Administration (FAA) asked for clarification on “whether it may permit employees on temporary duty [two weeks] at a remote duty location [Cold Bay, Alaska] where no other transportation is available to use government vehicles for transportation to and from recreational sites during their off-duty hours.”³⁵ The regional administrator reported that Cold Bay was “a small, remote community” and that recreational activities were “limited to satellite television, hiking, hunting, fishing, the Cold Bay Federal Community Services Facility, chapel, Ceramics Club and a Rod and Gun Club.”³⁶ In addition, no public transportation was available and private vehicles were not authorized.³⁷ The employees used FAA vehicles while performing official duties at Cold Bay, but these GOVs were generally not in use after duty hours.³⁸ The regional administrator concluded that using the FAA vehicles for travel to recreational sites after duty hours was necessary for the employees’ health and welfare, but referred the issue to the GAO for guidance on whether the language of subparagraph (c) of 41 C.F.R. § 301-10.201 extended to recreational activities.³⁹

The GAO responded in the affirmative. The Comptroller General opined that, “[w]ith reasonable limitations and safeguards, such use may be authorized under [subparagraph (c) of 41 C.F.R. § 301-10.201] of the Federal Travel Regulations that authorizes the use of government-furnished vehicles for transportation to ‘places necessary for the sustenance, comfort, or health of the employee to foster continued efficient performance of Government business.’”⁴⁰ In reaching its opinion, the Comptroller General reasoned that limited use of GOVs for recreational purposes at Cold Bay, in light of the conditions there, was unobjectionable, “provided the policy contained adequate controls to prevent abuse and ensure accountability.”⁴¹ The opinion noted that the application of this provision is a matter “left to a reasonable degree of

³¹ *Id.* (emphasis added).

³² See DOD REG. 4500.36-R, *supra* note 1, para. C2.5.4; *Mattos v. Dep’t of the Army*, No. 93-3203, 1993 U.S. App. LEXIS 26551 (Fed. Cir. Oct. 8, 1993) (upholding thirty day suspension for taking GOV to McDonald’s).

³³ See 41 C.F.R. § 301-10.201(c).

³⁴ Fed. Aviation Admin., B-254296, 1993 U.S. Comp. Gen. LEXIS 1134 (Nov. 23, 1993). This opinion is the only legal opinion/decision interpreting 41 C.F.R. § 301-2.6(a) (1993) which is now subparagraph (c) of 41 C.F.R. § 301-10.201.

³⁵ *Id.* at *1 (emphasis added).

³⁶ *Id.* at *2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at *3 n.1.

⁴⁰ *Id.* at *1.

⁴¹ *Id.* at *3.

agency discretion.”⁴² Boosted by the Comptroller General’s expansive interpretation in *Federal Aviation Administration*, the ramifications of subparagraph (c) of 41 C.F.R. § 301-10.201 on the use of GOVs in the military for life support activities are significant.

2. *The Ramifications of Subparagraph (c)*

The ramifications of subparagraph (c) of 41 C.F.R. § 301-10.201 are two-fold. First, subparagraph (c) is the foundation for the DOD’s use of GOVs for non-recreational life support activities for members on temporary duty.⁴³ Second, subparagraph (c), in conjunction with the liberal interpretation by the GAO in *Federal Aviation Administration*, authorizes the use of GOVs for *recreational* life support activities under limited circumstances.⁴⁴ This article now discusses each of these ramifications, beginning with GOV support for non-recreational life support activities.

B. Non-Recreational Life Support

1. *Temporary Duty Personnel*

Most military members who have traveled on temporary duty (TDY) orders that authorize a GOV are familiar with the effects of 41 C.F.R. § 301-10.201 regarding non-recreational life support activities. For example, when a military defense counsel travels to another installation to represent a criminal accused, he is frequently lodged off-base and given a GOV to get around. He uses the GOV to go to restaurants and to travel between the hotel and the installation. If he needs to go to the dry-cleaner, or get a haircut before trial, he drives there too. These otherwise-prohibited personal errands⁴⁵ qualify as official uses because they are necessary for the sustenance, comfort and health of the member and thereby “foster the continued efficient performance of Government business.”⁴⁶ These uses are expressly authorized by *DOD Reg. 4500.36-R*, paragraph C2.5.4⁴⁷ and the implementing Service regulations.⁴⁸ The potential applications of 41 C.F.R. § 301-10.201, *DOD Reg. 4500.36-R*, and the service regulations stretch wider, however, than this familiar use of GOVs by personnel on temporary duty. One of those applications is the establishment of shuttle bus service to life support activities.

2. *Shuttle Bus Service*

An installation commander at a deployed or remote location can utilize GOVs for life support activities in a variety of ways to help foster the accomplishment of the mission. For example, *DOD Reg. 4500.36-R*, paragraph C.5.3.2 authorizes commanders in “isolated sites”⁴⁹ to use GOVs for a shuttle bus service to life support activities.⁵⁰ Paragraph C5.3.2 provides that, “[i]n isolated sites with limited support facilities where D[O]D personnel and dependents need additional [life] support

⁴² *Id.*

⁴³ See DOD REG. 4500.36-R, *supra* note 1, para. C2.5.4.2.

⁴⁴ Both of these principles have been extended by the DOD to apply to qualifying “remote” or “isolated” areas as well, which are for practical purposes almost always overseas. U.S. DEP’T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 5-4 (24 Oct. 2006) [hereinafter AR 215-1].

⁴⁵ See AR 58-1, *supra* note 9, para. 2-4(c) (“Government vehicles must not be used for transportation to or be parked at commissaries, post exchanges (including all concessions), bowling alleys, officer and noncommissioned officer clubs, or a nonappropriated fund activity unless personnel using the vehicles are on official Government business or temporary duty travel (TDY).”).

⁴⁶ Pub. Contracts and Prop. Mgmt., 41 C.F.R. § 301-10.201(c) (2006). The need for an “official use” determination is satisfied by the military member’s travel orders.

⁴⁷ See DOD REG. 4500.36-R, *supra* note 1, para. C2.5.4.2 (providing that “[w]hen public transportation is not available or its use is impractical, the use of D[O]D-owned or -controlled vehicles is authorized between places of business, lodging, eating establishments, places of worship, and similar places required for the comfort or health and welfare of the member.”).

⁴⁸ See AR 58-1, *supra* note 9, para. 2-3(i)(3); AFI 24-301, *supra* note 9, para. 2.6.1; MCO P11240.106B, *supra* note 9, para. 2003.2.a.

⁴⁹ Nothing in *DOD Reg. 4500.36-R* limits “isolated sites” to only deployed or overseas locations. Isolated sites can be any qualifying installation that lacks on site life support services. See DOD REG. 4500.36-R, *supra* note 1, para. C5.3.

⁵⁰ See *id.* para. C5.3.2. Fare-free scheduled shuttle service is ordinarily restricted to transportation of personnel on or between installations between offices and work areas, and to enlisted personnel between troop billets and work areas. *Id.* paras. C5.3.1.1 and C5.3.1.2.

(medical, commissary, and religious) which directly affects health, morale and welfare of the family, shuttle bus service may be provided.”⁵¹ “Shuttle bus services are provided fare-free.”⁵²

This shuttle bus exception for isolated sites authorized by DOD does not apply equally across the military Services. On one end of the scale, the Army and the Navy adopt the exception virtually verbatim.⁵³ On the opposite end of the scale, the Marine Corps and the Air Force omit the language authorizing shuttle bus service to life support activities in isolated sites.⁵⁴ Instead, both the Marine Corps and the Air Force authorize more restricted alternatives. The Marine Corps authorizes a group transportation service⁵⁵ that can accomplish the same goal where the installation’s isolated circumstances justify it, but an elevated approval authority and an involved application process are required.⁵⁶

Air Force Instruction 24-301 (AFI 24-301), paragraph 9.7 expressly prohibits GOV shuttle bus service from traveling to “any recreational or shopping areas.”⁵⁷ Unlike *DOD Reg. 4500.36-R*, no exception is authorized for Airmen at isolated sites. An exception does exist, however, for Airmen on “temporary duty.” *Air Force Instruction 24-301*, paragraph 9.7.3 authorizes installation commanders to utilize “special shuttle bus services at installations to accommodate large numbers of TDY personnel and transient aircrews when the service would be the most cost effective and efficient support.”⁵⁸ Furthermore, since an Air Force commander may authorize any TDY member to utilize a GOV to access life support services, such as food, lodging and on base non-appropriated fund activities,⁵⁹ the logical conclusion is that travel to these types of locations may also be authorized for groups of TDY personnel via a shuttle.⁶⁰

The Air Force does authorize the establishment of no-fare “military mass transit service” in isolated areas. This consists of bus transportation of twelve or more passengers between military installations, including on-base domiciles, on-base shopping areas, and installation recreation activities if the traffic volume warrants.⁶¹ The approval level for a mass transit service overseas, however, is the major command, and the information required to apply for such a system is thorough and potentially time-consuming.⁶² These hurdles would likely render a mass transit service in a temporary deployed location much less practical than a shuttle bus service authorized by the installation commander.

⁵¹ *Id.* Shuttle bus service is defined as the transport of “groups of individuals on official business between offices on installations or between nearby installations . . .” *Id.* para. C5.1.2.2.

⁵² *Id.* para. C5.1.2.2.

⁵³ As noted in *supra* note 12, SECNAVINST 11240.8G simply incorporates verbatim *DOD Reg. 4500.36-R*. *Army Regulation 58-1*, para. 5-2(c) adopts the DOD exception, but adds the limitation that, “Such an isolated area must not be adequately served by regularly scheduled, timely, commercial mass transportation services.” AR 58-1, *supra* note 9, para. 5-2.c.

⁵⁴ See MCO P11240.106B, *supra* note 9, para. 2006 (referring to shuttle bus service as “installation or activity bus service”). As a result, shuttle bus service to life support activities is not authorized for personnel *permanently* assigned to isolated sites.

⁵⁵ The group transportation service created by *MCO P11240.106B*, paragraph 2006, is an abbreviated hybrid of the mass transit service and shuttle bus service authorized by *DOD Reg. 4500.36-R*. See MCO P11240.106B, *supra* note 9, para. 2006.

⁵⁶ See MCO P11240.106B, *supra* note 9, para. 2005.1 (authorizing requests to CMC (LFS-2) to establish group bus service).

The following considerations will determine the basis for approval of such services:

- a. Installation so located with respect to the source of manpower that some form of Government assistance is necessary to ensure adequate required transportation for personnel.
- b. In *overseas* commands where, due to the absence of adequate public or private transportation, local political situations, security, personal safety, or the geographic location of duty station, such transportation is essential to the effective conduct of Government business.

Id. para. 2006.2 (emphasis added).

⁵⁷ AFI 24-301, *supra* note 9, para. 9.7.1.1.

⁵⁸ *Id.* para. 9.7.3.

⁵⁹ *Id.* para. 2.6.1.

⁶⁰ As a result, Air Force shuttle bus service to life support activities is not authorized for personnel permanently assigned to isolated sites.

⁶¹ *Id.* paras. 9.3, 9.4.

⁶² *Id.*

3. Flexibility to Meet the Mission

The traditional GOV for TDY personnel, and the shuttle bus service for isolated installations, are only examples of the ways that GOVs can be used to provide mission-enhancing life support activities. Most potential uses for GOVs are not enumerated in the regulations. Fortunately, the rules controlling GOVs are designed to be flexible, giving commanders wide discretion in determining what is an official use. The following are two “real world” examples of what can be done when a commander sees a mission need for GOVs. Though not drawn from a deployed or remote setting, these examples concern the creative use of GOVs for non-recreational life support activities.

a. Overseas House-Hunting with the Housing Office

The fiscal principles guiding the use of GOVs are meant to be sufficiently flexible to give commanders the tools they need to meet the needs of the mission. Where not otherwise prohibited, and where the facts and circumstances justify it, a commander’s official use determination can authorize a novel use of GOVs for life support needs. For example, in 1994 the Air Force commander at an overseas air base wanted its housing office to be able to assist newly arrived military members by transporting them to potential rental properties in the local communities.⁶³ As justification, the command cited “foreign traffic laws, language barriers, and in some cases, delayed delivery of POVs [privately-owned vehicles] as potential obstacles to a member’s smooth transition at overseas duty assignments.”⁶⁴

In response to the commander’s query, a legal opinion from the office of The Judge Advocate General of the Air Force (AFJAG) opined that, “Sustaining morale and situating members quickly to perform their military duties are legitimate official ends served by such transportation. Therefore, the provision of such service, especially under the circumstances you describe at overseas locations, constitutes ‘public business’ when provided by the Housing Manager’s office.”⁶⁵ The substance of this opinion regarding house-hunting overseas was later incorporated into *AFI 24-301*, thus shifting this once-novel use of a GOV into the list of those that are expressly authorized.⁶⁶

b. GOVs for Reserve Individual Mobilization Augmentees (IMAs)

In another example of a novel use of a GOV, an installation commander wanted to authorize Air Force Reserve IMAs to use GOVs for travel to/from temporary quarters while performing inactive duty training (IDT).⁶⁷ The commander was of the opinion that he could not authorize such a use unless the IMAs were considered to be in TDY status. In response to the commander’s query on this issue, the office of the AFJTAG opined that an IMA is not in TDY status, but that the ultimate issue did not rest solely upon the duty status of the IMA. “Instead, this determination must be made on a case-by-case basis after an examination of the relevant facts and circumstances . . . [and] an IMA’s duty status is just one of many factors to consider.”⁶⁸ The AFTJAG reasoned that, “based on the specific circumstances of a particular IDT, use of a GOV may be authorized for IMAs, notwithstanding the fact they are not in a TDY status.”⁶⁹ The opinion further reasoned that the IMA’s use of the GOV to travel to temporary quarters did not violate the prohibition against using a GOV to travel from one’s residence to their place of employment, “because these temporary quarters are not the type of ‘residence’ contemplated by the statute.”⁷⁰

Our discussion now shifts to the use of GOVs for recreational life support. As can be anticipated, the necessity for a well-reasoned official use determination by the commander is just as critical, if not more so, in the context of transportation to recreational activities.

⁶³ Use of Government Vehicles (GOVs) for House Hunting Purposes in Overseas Locations, Op. JAG, Air Force, No. 1994/87 (2 Dec. 1994).

⁶⁴ *Id.*

⁶⁵ *Id.* The opinion further opined that *individual* members are not authorized the personal assignment of a GOV for the purpose of house hunting because they are not performing “public business.” *Id.*

⁶⁶ See *AFI 24-301*, *supra* note 9, para. 2.6.20.

⁶⁷ Op. JAG, Air Force, No. 1996/57, *supra* note 22.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* Pursuant to 31 U.S.C. § 1344(a)(1), “transporting any individual . . . between such individual’s residence and such individual’s place of employment is not transportation for an official purpose,” and is prohibited. 31 U.S.C. § 1344(a)(1) (2000).

C. Recreational Life Support

In order for government employees to be able to use GOVs for recreational life support activities pursuant to 41 C.F.R. § 301-10.201, the proposed activity must qualify as an official use. To do that, the isolated nature of the remote or temporary duty location must combine with a sufficient lack of available recreational resources. In addition, there must be adequate controls in place to ensure accountability.⁷¹ At a minimum, these controls require that the appropriate level supervisor determine that the proposed recreational use rises to the level of an official use. Most practitioners will not need to begin their field analysis, however, with 41 C.F.R. § 301-10.201. Their first step will be to examine the implementing guidance provided in the DOD motor vehicle regulation.

I. Department of Defense Reg. 4500.36-R: Authorized MWR

*Department of Defense Reg. 4500.36-R*⁷² implements the provisions of 41 C.F.R. § 301-10.201, but reshapes the limitations on GOV recreational transport in a way that reflects the military's emphasis on unit morale. Similar to subparagraph (c) of 41 C.F.R. § 301-10.201, *DOD Reg. 4500.36-R* expressly authorizes a member on temporary duty to use a GOV "between places of business, lodging, eating establishments, places of worship, and similar places required for the comfort or health and welfare of the member."⁷³ Unlike the FAA in *Federal Aviation Administration*, however, the drafters of *DOD Reg. 4500.36-R* were careful not to use the term, "recreation," in describing activities that are suitable for GOV support.⁷⁴ Instead, *DOD Reg. 4500.36-R* uses the broad terms "welfare" and "Military Community Activities" to describe recreation-like activities.⁷⁵ Paragraph C2.5.5 states that "[t]ransportation support of *groups* may be provided for authorized activities such as installation-sponsored athletic teams, Military Community Activities,⁷⁶ and Chaplain's programs when the installation commander determines that *failure* to provide such service would have an adverse effect on morale"⁷⁷ [hereinafter the "Morale Requirement"]. In other words, while *DOD Reg. 4500.36-R* does not authorize the use of GOVs for purely recreational purposes, GOV transport for recreational uses is permissible for deployed personnel when done within the context of commander-authorized Military Community Activities.⁷⁸ But not just any Military Community Activities activity will fit within the exception. Only in those situations where the installation commander determines that "failure to provide such service would have an adverse effect on morale," i.e., the Morale Requirement, may a non-reimbursable GOV be used for MWR.⁷⁹

By choosing to structure the authorization to use of GOVs for recreation in this restrictive fashion, *DOD Reg. 4500.36-R* creates the "adequate controls to prevent abuse and ensure accountability" that are discussed in *Federal Aviation Administration*.⁸⁰ When on temporary duty, only official Military Community Activities will be eligible for use of nonreimbursable GOVs to travel to recreational activities. As a prerequisite for their use, the installation commander must affirmatively determine that a failure to provide such service would have an adverse effect on morale. Furthermore, because

⁷¹ See Fed. Aviation Admin., B-254296, 1993 U.S. Comp. Gen. LEXIS 1134, at *3 (Nov. 23, 1993).

⁷² DOD REG. 4500.36-R, *supra* note 1.

⁷³ *Id.* para. C2.5.4.2.

⁷⁴ In fact, *DOD Reg. 4500.36-R*'s immediate predecessor expressly prohibited GOV support for "recreational" uses by personnel on temporary duty. It stated that, "[u]sing either a DOD-owned or leased vehicle for transportation to or from entertainment or recreational facilities is prohibited." See U.S. DEP'T OF DEFENSE, REG. 4500.36-R, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para.C2.5.4.2 (29 Mar.1994) [hereinafter 1994 version of DOD REG. 4500.36-R]. This former prohibition on recreational use, however, was somewhat misleading. In its effect, the 1994 version of *DOD Reg. 4500.36-R* was not much different than the plain meaning of subparagraph (c) of 41 C.F.R. § 301-10.201, and the current version of *DOD Reg. 4500.36-R*, because it carved out a large exception to the prohibition of recreational uses under the umbrella of MWR.

⁷⁵ DOD REG. 4500.36-R, *supra* note 1, para. C.5.7 (Military Community Activities), para. C.2.5.4.2 (welfare).

⁷⁶ "Military Community Activities" is the new buzzword for the old term, "Morale, Welfare, and Recreation (MWR)." Of the regulations discussed in this article, only *DOD Reg. 4500.36-R* has incorporated its usage, and so both terms are referenced in this article and can be viewed as substantively interchangeable.

⁷⁷ *Id.* para. C2.5.5 (emphasis added).

⁷⁸ This reflects the special importance that the military places on morale and its relationship to the accomplishment of the mission. "The Department of Defense recognizes that MWR programs are vital to mission accomplishment and form an integral part of the non-pay compensation system." U.S. DEP'T OF DEFENSE, DIR. 1015.2, MILITARY MORALE, WELFARE, AND RECREATION (MWR) para. 4.2 (June 14, 1995).

⁷⁹ In essence, this is the DOD way of saying that, in order to qualify as an "official use," the recreational purpose must be necessary for the "sustenance, comfort, or health of the employee to foster the continued efficient performance of Government business." Pub. Contracts and Prop. Mgmt., 41 C.F.R. § 301-10.201(c) (2006).

⁸⁰ See Fed. Aviation Admin., B-254296, 1993 U.S. Comp. Gen. LEXIS 1134, at *3 (Nov. 23, 1993).

the use of GOVs under these circumstances qualifies as an official use, the GOV support to Military Community Activities must be on a non-fee basis to military members.⁸¹ If these conditions are not met, then the Military Community Activities trip would be compelled to hire either commercial transportation using nonappropriated funds or GOVs on a reimbursable basis if commercial transportation is not available.⁸²

The Morale Requirement makes good sense because it empowers commanders to use GOVs to accomplish the needs of the mission, while maintaining the controls and accountability required by the applicable statutes and regulations. Unfortunately, however, the disjointed way that the recently superseded 1994 version of *DOD Reg. 4500.36-R* was drafted caused some unnecessary confusion over when the Morale Requirement must be applied. As a result, the four military Services each applied the Morale Requirement in a different and sometimes incorrect manner in their respective motor vehicle regulations. While the new 2007 version of *DOD Reg. 4500.36-R* has eliminated the ambiguity and clearly applies the Morale Requirement to regardless of duty status, the Service regulations have not yet been updated.

2. Applicability of the Morale Requirement

The 1994 version of *DOD Reg. 4500.36-R* contained unclear provisions regarding the applicability of the Morale Requirement. At first glance, the 1994 version appeared to grant greater latitude to personnel on permanent duty status than to those on temporary duty. In other words, the language of the 1994 version made it appear that the Morale Requirement did not apply to personnel on permanent duty status. Paragraph C5.8 of the 1994 version of *DOD Reg. 4500.36-R* authorized no-fare, non-reimbursable GOV bus support for MWR tours and trips for those on *permanent* duty status,⁸³ just as paragraph C2.5.5 of the current *DOD Reg. 4500.36-R* does for personnel on temporary duty.⁸⁴ Unlike paragraph C2.5.5 in the current *DOD Reg. 4500.36-R*, however, the only limitations paragraph C5.8 of the 1994 version of *DOD Reg. 4500.36-R* placed on MWR bus support to personnel on permanent duty status was that it be nonreimbursable, approved by the installation commander,⁸⁵ and provided only when it could be done “without detriment to the DOD mission.”⁸⁶ There was no mention of the Morale Requirement found in paragraph C2.5.5, i.e., that the installation commander must affirmatively determine that failure to provide such service would have an adverse effect on morale.⁸⁷ This ambiguity in the 1994 version raised the question of whether the Morale Requirement applied to members on both permanent and temporary duty status, or just those on temporary duty.

As a result of this confusion, the military Services each responded differently to the imprecise and seemingly counter-intuitive guidance provided by the 1994 version of *DOD Reg. 4500.36-R*. Furthermore, none of the Services’ motor vehicle regulations have been updated to reflect the new 2007 version of *DOD Reg. 4500.36-R*. Therefore, the treatment of the applicability of the Morale Requirement across the four Services remains inconsistent. Despite the current state of flux, and draftsmanship faults of the 1994 version of *DOD Reg. 4500.36-R*, however, in this author’s opinion, the Army got it right. The Army expressly applies the Morale Requirement to no-fare MWR trips and tours⁸⁸ for members on both temporary and permanent duty status.⁸⁹ This is important, because if the Morale Requirement was dispensed with for personnel on permanent duty status, it would be difficult for the DOD to lawfully justify a recreational MWR trip as an official use. To satisfy the conditions of subparagraph (c) of 41 C.F.R. § 301-10.201, a commander must determine that the use of GOVs for no-fare MWR is an official use. The Morale Requirement triggers such a determination by the commander.⁹⁰ It also focuses

⁸¹ DOD REG. 4500.36-R, *supra* note 1, para. C5.7.1. In addition, a GOV may only be used “after mission requirements have been met.” *Id.*

⁸² AFI 24-301, *supra* note 9, para. 9.8.1.2 (authorizing that GOV “[t]ransportation may be provided to MWR/NAF category C revenue generating organizations” on a *reimbursable* basis).

⁸³ 1994 version of DOD REG. 4500.36-R, *supra* note 74, para. C5.8. This is in addition to paragraph C2.5.4.2’s authorization to use no-fare GOVs for MWR trips and tours for personnel on temporary duty. DOD REG. 4500.36-R, *supra* note 1, para. C2.5.4.2.

⁸⁴ DOD REG. 4500.36-R, *supra* note 1, para. C2.5.5.

⁸⁵ 1994 version of DOD REG. 4500.36-R, *supra* note 74, para. C5.8.1.

⁸⁶ *Id.* para. C5.8.

⁸⁷ See DOD REG. 4500.36-R, *supra* note 1, para. C2.5.5.

⁸⁸ The Service regulations still use the MWR terminology, rather than the new Military Community Activities term.

⁸⁹ “Transportation may be provided to support authorized . . . morale, welfare, and recreation groups . . . when it has been determined by the commander that failure to provide such service would have an adverse effect on moral of service members, family members and DOD civilians.” AR 58-1, *supra* note 9, paras. 2-3(e).

⁹⁰ Pub. Contracts and Prop. Mgmt., 41 C.F.R. § 301-10.201(c) (1998). The only other way to logically approach the issue would be to conclude that DOD made a blanket official use determination for all no-fare MWR trips for members on permanent duty status. However, to predetermine that all such MWR

the commander's official use determination on the specific facts and circumstances that make the use of a GOV for a MWR activity necessary to "foster the continued efficient performance of Government business."⁹¹

The Marines also got it right, but not as succinctly. *Marine Corps Order P11240.106B*, paragraph 2003.2.b expressly imposes the Morale Requirement on all uses of GOVs to transport personnel to MWR activities, whether on permanent or temporary duty.⁹² Paragraph 2003 does not, however, include the DOD-imposed condition that the use must be fare-free.⁹³ Instead, the fare-free condition is provided in paragraph 2006.3.a.7.⁹⁴ Thus, these two paragraphs must be read together in order to understand how to properly authorize the use of GOVs for MWR activities.⁹⁵

The Air Force, on the other hand, fails to mention the Morale Requirement *anywhere* in its instructions concerning the use of no-fare GOVs for MWR.⁹⁶ Just because *AFI 24-301* failed to include the Morale Requirement does not mean the DOD provision does not apply. Even in a deployed location where non-appropriated fund [NAF] and commercial transportation are not available, the Air Force commander must still determine that failure to provide such no-fare service would have an adverse effect on morale.

The Air Force does, however, impose a different requirement that is severely limiting. *Air Force Instruction 24-301* requires that, "[w]hen available, NAF and/or commercial transportation sources *will* be used."⁹⁷ Practically speaking, this requirement to use NAF and/or commercial transportation sources eliminates the use of no-fare GOVs in virtually all situations other than deployments and the most remote of CONUS locations.⁹⁸ Air Force installations located where NAF or commercial transportation are available for MWR trips cannot take advantage of no-fare GOV transport for MWR.

3. Individual Recreation

An interesting question arises whether the use of GOVs for recreational activities is restricted to authorized Military Community Activities for "groups," or whether individuals may also use GOVs for this purpose. The Comptroller General's opinion in *Federal Aviation Administration* clearly illustrates that 41 C.F.R. § 301-10.201 permits a single individual to use a GOV for recreational purposes where the appropriate supervisor determines that the remoteness of the location justifies it.⁹⁹ On the other hand, *DOD Reg. 4500.36-R*, paragraph C2.5.5 expressly references transportation for groups on temporary duty, and paragraph C5.7 refers to motor vehicle support of authorized Military Community Activities programs.¹⁰⁰ Once again, the answer to this question depends on what military Service owns the GOV.

The Army and the Air Force both expressly authorize individuals who are on temporary duty to use GOVs for limited recreational activities. The Army regulation does so with a negative construction, i.e. by defining what a Soldier cannot do. *Army Reg. 58-1*, paragraph 2-3(i)(3) states that, "[u]sing a NTV to travel to or from *commercial* entertainment facilities (that

trips no matter where located or what the circumstances rise to the level of an official use, would be a huge stretch. Rather, it makes more sense to conclude that the Morale Requirement applies to members regardless of duty status. Further, it would seem nonsensical to impose more stringent requirements for temporary duty personnel, whose needs and circumstances most justify the no-fare MWR service.

⁹¹ See Pub. Contracts and Prop. Mgmt., 41 C.F.R. § 301-10.201(c) (2006).

⁹² See MCO P11240.106B, *supra* note 9, para. 2003.2.b. ("Installation commanders may authorize group transportation support for authorized activities such as athletics, welfare, recreation, morale, and chaplains' programs if failure to provide such service would have an adverse effect on the morale of service members, and such transportation is available without detriment to the installation's mission.").

⁹³ *Id.*

⁹⁴ *Id.* para. 2006(3)(a)(7).

⁹⁵ Some further disjointedness is injected by the seemingly inconsistent language in paragraph 2006 regarding whether GOV support to MWR trips should be reimbursable. Paragraph 2006.3. refers to "reimbursable bus service" for MWR support services, while language in paragraph 2006.3.a states that transportation for MWR "recreational tours and trips" is restricted to a "non-reimbursable basis." See *id.* para. 2006.3. The author suspects that this seemingly contradictory language refers to the difference between GOV support to revenue-producing MWR organizations versus non-self-supporting ones. The distinction between Category A, B and C sponsored activities is discussed more fully at pages 12 through 15.

⁹⁶ See AFI 24-301, *supra* note 9. Paragraph 9.8.1.1.5 authorizes "[b]ase sponsored tours and trips when operated on a nonprofit basis . . . only after mission requirements have been met." *Id.* para. 9.8.1.1.5.

⁹⁷ *Id.* para. 9.8 (emphasis added).

⁹⁸ In a deployed location, this requirement is less likely to be an obstacle as adequate NAF and commercial transportation will probably not be available.

⁹⁹ See Fed. Aviation Admin., B-254296, 1993 U.S. Comp. Gen. LEXIS 1134, at *3 (Nov. 23, 1993).

¹⁰⁰ See DOD REG. 4500.36-R, *supra* note 1, paras. C2.5.5 and C2.5.7.

is professional sports, concerts, and so forth) is not authorized.”¹⁰¹ Because only “commercial” entertainment facilities are prohibited, non-commercial entertainment facilities, such as parks, rivers, and museums, are authorized. Further, the Army regulation makes no distinction between on or off-base facilities. In other words, as long as the recreational activity is not commercial, it is not prohibited by virtue of being off-base.

The Air Force, on the other hand, allows Airmen on temporary duty to use a GOV to get to any “on-base non-appropriated fund activity,” such as a golf course and gun club, regardless of its revenue-generating nature.¹⁰² Use of Air Force GOVs to travel to any other type of entertainment or recreational facilities, however, is expressly prohibited.¹⁰³ In short, unlike the Army, commercial-type recreation on-base is authorized by the Air Force, but *off-base* recreation for individuals is entirely prohibited.¹⁰⁴

The Navy and Marine regulations do not contain any specific guidance regarding individuals (as opposed to groups on authorized MWR trips) using GOVs to travel to recreational facilities.¹⁰⁵ Thus, the legal parameters of the Navy and Marine regulations coincide with the parameters of *DOD Reg. 4500.36-R*. As a result, they are at least as broad as the Army and Air Force regulations, and potentially more.¹⁰⁶ However, the lack of an express authorization for individuals on temporary duty to use a GOV for recreational activity creates an ambiguity with undesirable ramifications. Without an express authorization in the regulations, prudence requires a commander’s official use determination for each and every instance where an individual wants to travel to a recreational activity. Any Sailor or Marine who fails to obtain a commander’s authorization is running the risk that, if exposed to scrutiny, his use of the GOV could be deemed unlawful. On the positive side, the lack of express guidance means that installation commanders have greater discretion in the types of recreational uses that they can authorize for individuals.¹⁰⁷ Though no legal authority has addressed this point, the extent of the commander’s discretion is logically defined by the parameters of subparagraph (c) of 41 C.F.R. § 301-10.201.

D. Limitations on Appropriated Fund Support to MWR

So far, our discussion has centered on 41 C.F.R. § 301-10.201, *DOD Reg. 4500.36-R*, and the four service regulations that control the use of GOVs. In a nutshell, these regulations describe what constitutes official use of a GOV. Often, these regulations will be the only sources a legal practitioner need refer to when helping their commander make an official use determination. However, issues involving GOV support to MWR¹⁰⁸ programs require an additional step of analysis.

The last piece of the puzzle concerns the regulations that control appropriated fund (APF) support to MWR programs. Because GOVs are essentially appropriated funds on wheels, the funding guidelines found in *DOD Instruction 1015.10, Programs for Military Morale, Welfare, and Recreation (MWR) (DODI 1015.10)*,¹⁰⁹ significantly affect how commanders can use GOVs for MWR programs. The use of a GOV to support a particular MWR activity must conform with the APF funding guidelines of *DODI 1015.10*. Thus, even though *DOD Reg. 4500.36-R* permits fare-free GOV transportation for MWR, fare-free transportation will not be authorized unless such use also complies with *DODI 1015.10*.

¹⁰¹ See AR 58-1, *supra* note 9, para. 2-3(i)(3) (emphasis added).

¹⁰² See AFI 24-301, *supra* note 9, para. 2.6.1.3 (providing a GOV may be used “[b]etween places of business or lodging and installation bowling centers, officer and noncommissioned officer clubs, gymnasiums or any on-base non-appropriated fund activity (i.e., golf courses, rod & gun clubs, etc.) facilities required for the comfort or health of the member”).

¹⁰³ *Id.* As discussed at pages 7 through 8 this restriction applies to individuals and not to commander authorized MWR trips for groups.

¹⁰⁴ Even on base, AFI 24-301, para. 2.6.1.3, still requires that the activity must be necessary “for the comfort or health of the member.” *Id.* para. 2.6.1.3.

¹⁰⁵ SECNAVINST 11240.8G adopts verbatim *DOD Reg. 4500.36-R*, and MCO P11240.106B does not contain any provisions on the subject. See SECNAVINST 11240.8G, *supra* note 12; MCO P11240.106B, *supra* note 9.

¹⁰⁶ When read together, the outside parameters of the Army and Air Force regulations encompass an individual using a GOV for any on-base non-appropriated fund activity, and for any off-base non-commercial activity.

¹⁰⁷ The lists of expressly authorized uses are not exclusive. See the discussion at pages 4 through 5.

¹⁰⁸ MWR is used here rather than Military Community Activities because *DODI 1015.10* still uses the MWR terminology.

¹⁰⁹ See U.S. DEP’T OF DEFENSE, INSTR. 1015.10, PROGRAMS FOR MILITARY MORALE, WELFARE, AND RECREATION (MWR) para. 4.2 (Nov. 1995) [hereinafter *DODI 1015.10*].

Department of Defense Instr. 1015.10 divides MWR programs into three main categories: A, B, and C.¹¹⁰ In general, the amount of APF that can be spent on an MWR program is determined by the category that a particular program falls under. Category A programs are labeled “mission sustaining” and are considered “most essential in meeting the organizational objectives of the Military Services.”¹¹¹ As a result, Category A programs, such as physical fitness centers and installation parks, “are entitled to the highest degree of APF support, and virtually all expenses should be supported with APFs.”¹¹² Category B programs are “community support programs,”¹¹³ such as outdoor recreation programs and automotive crafts, that have a “limited ability to generate NAF revenues, and are therefore entitled to a substantial level of APF support.”¹¹⁴ Category C activities are revenue generating programs, such as officers’ clubs and golf courses, that “have the highest abilities to generate NAF revenues.”¹¹⁵ As a result, APF support to Category C programs should be “limited.”¹¹⁶ The impact of these three categories on the use of GOVs for MWR essentially boils down to this: nonreimbursable GOV support to Category A and B programs is generally permissible, while nonreimbursable GOV support to Category C programs is not.

1. Category C Activities: “Limited” APF Support

The regulatory constraints of *DODI 1015.10* primarily affect the use of GOVs for Category C programs, because Category C activities are authorized only limited APF support. Therefore, the expenditure of more than limited APF resources, including GOVs, on Category C activities is unlawful.¹¹⁷ The key question is how much support is limited APF support? Fortunately, the answer to this question, at least in the context of GOVs, is reasonably specific.

Pursuant to *DODI 1015.10*, encl. 6, paragraph 3.c, limited APF support consists of the use of GOVs for Executive Control and Essential Command Supervision (ECECS).¹¹⁸ The ECECS is defined as “[t]hose managerial staff functions and positions located above the direct program managerial and operational level of individual MWR programs that support planning, organizing, directing, coordinating, and controlling the overall operations of MWR programs.”¹¹⁹ In other words, GOVs may only be used to support managerial oversight of Category C activities. “Other [support] than to assist in ECECS” is specifically prohibited by paragraph 3.c.(2) of enclosure 6.¹²⁰ Consequently, the general rule is that GOV support for Category C activities is restricted to ECECS.¹²¹ Moreover, the recently updated *DOD Reg. 4500.36-R* also reflects this same guidance, stating that “[s]taff members of Categories A, B, and C [activities] . . . engaged in direct administrative support of th[e]se activities may be provided transportation services.”¹²²

Because nonreimbursable GOV support for Category C activities is restricted to ECECS, no-fare GOV transport may not be used for Category C programs/activities.¹²³ Since MWR (a.k.a. Military Community Activities) trips and tours are often operated through Category C programs, this restriction can present a problem for commanders wanting to use no-fare GOVs

¹¹⁰ A table listing the various activities that fall under each category is found at *DODI 1015.10*, encl. 4. *Id.*

¹¹¹ *Id.* para. 4.3.1.

¹¹² *Id.* encl. E7, para. E7.1.4.1 (“APF funding for Category A is a minimum of 85 percent of total expenditures.”).

¹¹³ *Id.* para. 4.3.2.

¹¹⁴ *Id.* encl. E7, para. E7.1.4.2 (“Category B . . . APF funding is a minimum of 65 percent of the total expenditures.”).

¹¹⁵ *Id.* encl. E7, para. E7.1.4.3.

¹¹⁶ *Id.*

¹¹⁷ Most recreational MWR trips at a CONUS installation are operated as revenue-generating Category C activities. An example would be a weekend bus trip to a local snow ski resort, where each traveler is charged a fare.

¹¹⁸ *Id.* encl. 6, para. 3.c.

¹¹⁹ *Id.* encl. 2, para. E2.1.13. “ECECS consists of program, fiscal, logistical, and other managerial functions that are required to ensure oversight.” *Id.*

¹²⁰ *Id.* encl. 6, para. 3.c.(2). Only the use of GOVs on a “reimbursable lease” basis is authorized for other than ECECS. *Id.*

¹²¹ This same restriction is also reflected in the Service’s regulations. See AR 215-1, *supra* note 44, tbl. D-1, para. 5-1(c) and app. D.5(a); U.S. DEP’T OF THE AIR FORCE, INSTR. 65-106, FINANCIAL MANAGEMENT: APPROPRIATED FUND SUPPORT OF MORALE, WELFARE, AND RECREATION (MWR) AND NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIS) att. 2, para. 5 (11 Apr. 2006) [hereinafter AFI 65-106].

¹²² See DOD REG. 4500.36-R, *supra* note 1, para. C2.5.12; see also *id.* para. C5.7.1.2.

¹²³ *Department of Defense Reg. 4500.36-R*, paragraph C5.7 limits motor vehicle support of Category C activities to “the performance of executive control and essential command supervision.” See DOD REG. 4500.36-R, para. C5.7. Similarly, *AR 58-1*, paragraph 5-5(a) provides that bus service is limited to “some limited support of Category C MWR activities.” See AR 58-1, *supra* note 9, para. 5-5(a). *Army Reg. 215-1*, paragraph 5-1(a) provides that direct APF support “is generally limited to Categories A and B MWR programs.”

for MWR. Fortunately for commanders at deployed or remote locations, special provisions in the rules enable MWR activities to comply with the restrictions created by *DODI 1015.10*, if they are carefully planned and organized. Basically, two options exist to ensure that no-fare GOV transportation for MWR will not run afoul of the APF funding guidelines of *DODI 1015.10*. First, a special exception found in *DODI 1015.10*, paragraph 4.3.3, authorizes certain installations in designated “remote and isolated” locations to provide Category C programs with the same APF support as Category B programs.¹²⁴ Second, if the remote and isolated exception does not apply to an installation, the commander can organize the MWR trip or tour so that it is not operated by a Category C program.

2. When a C is a B: Designated Remote or Isolated Locations

Category C programs at designated MWR remote and isolated locations may receive the same type of APF support as Category B programs.¹²⁵ The rationale behind this exception to the general rule is that Category C programs at remote and isolated locations are not able to successfully operate revenue-generating programs “due to extenuating circumstances.”¹²⁶ Consequently, these disadvantaged programs need the additional APF funding in order to provide their services to the installation. On its face, this remote and isolated exception solves the practical limitations involving the use of no-fare GOVs for Category C programs.¹²⁷ Since remote and isolated Category C programs receive the same APF support as Category B programs,¹²⁸ no-fare GOVs can lawfully be used to transport personnel on MWR trips operated by Category C programs at designated remote and isolated locations.¹²⁹

The potential problem with this exception is that the process to become approved as a remote and isolated MWR location is extensive.¹³⁰ Merely being deployed to the “middle of nowhere” does not automatically qualify your installation. The good news is that many overseas installations are already officially designated as remote and isolated for the purposes of this exception.¹³¹ If, however, you are deployed to an installation that has not been officially designated remote and isolated pursuant to *DODI 1015.10*, paragraph 4.3.3, then your short-term option is limited to organizing an MWR trip or tour so that it is not operated by a Category C program.

3. Non-Category C Option

If you are not located at a designated remote and isolated MWR installation, non-reimbursable GOV support may only be provided to Category A and B MWR activities, not Category C.¹³² Therefore, an installation commander who wants to use non-reimbursable, no-fare GOV transportation for a MWR trip must organize the activity under a Category A or B program. Examples of MWR programs that could sponsor a qualifying MWR trip include “Shipboard, Company, and/or

¹²⁴ See *DODI 1015.10*, *supra* note 109, para. 4.3.3.

¹²⁵ See *id.* See also AR 215-1, *supra* note 44, para. 5-4; AFI 65-106, *supra* note 121, para. 2.1.3.

¹²⁶ *DODI 1015.10*, *supra* note 109, at encl. 5, para. E5.2.

¹²⁷ An example of a Category C program that can take advantage of this exception to sponsor MWR activities utilizing no-fare GOV support is Military Clubs (officer and enlisted). See AR 215-1, *supra* note 44, fig. 3-1; AFI 65-106, *supra* note 121, fig. 2.1.

¹²⁸ “Category B [programs] . . . are therefore entitled to a substantial level of APF support. . . a minimum of 65% of the total expenditures.” See DOD REG. 1015.10, *supra* note 109, para. E7.1.4.2.

¹²⁹ The table at AFI 65-106, attachment 2, paragraph 5.a(2), clearly illustrates this point by creating a separate designation for “Category C Remote and Isolated (C R&I)” that expressly authorizes GOV support for C R&I. See AFI 65-106, *supra* note 121, att. 2, para. 5.a(2). Remember, an important caveat to any non-reimbursable GOV support to either Category A, B, or C programs is that the GOV’s use may not be “related to revenue generating.” *Id.*

¹³⁰ DOD REG. 1015.10, *supra* note 109, encl. 5, para. E5.3.1. “The major factors in evaluating potential candidates for remote and isolated status are the installation’s financial capability, performance, and degree of assistance provided by major commands and the Military Service.” *Id.* Other extenuating circumstances considered that may seriously hinder operation of the installation’s Category C programs include: special security conditions, significant currency fluctuation, extreme climatic or environmental conditions, significant temporary increase or decrease in personnel, short tour locations; geographic separation, and significant cultural differences. *Id.* The Service regulations have incorporated these same criteria. See AR 215-1, *supra* note 44, para. 5-4; AFI 65-106, *supra* note 120, paras. 3.1 and 3.2.

¹³¹ The Service regulations include lists of their respective designated remote and isolated installations. See AR 215-1, *supra* note 44, tbl. 5-2; AFI 65-106, *supra* note 121, fig. 3.1. To obtain a current list, though, will require a Service-specific inquiry.

¹³² See the discussion on APF support to Category C programs at pages 13 through 14.

Unit Level Programs,” a Category A program,¹³³ and “Directed Outdoor Recreation,” a Category B program.¹³⁴ The key is that the MWR trip be operated so that it is not related in any way with revenue-generating programs.

In a deployed location, the MWR programs are often managed by a small number of people in a single office. This should not, however, pose a problem for non-reimbursable GOV support to MWR. No restriction prevents the collocating of different category MWR activities.¹³⁵ Prudence dictates, though, that the MWR “hats” be kept distinct through the keeping of separate operational and management records for each category of program. Records that clearly show the nature of the program/activity that received the non-reimbursable GOV support is important for the justification of the use of the GOVs. The benefits derived from taking the time to do it right are worth the effort.

IV. Conclusion: The Rest of the Story

The introduction to this article cited a particular example where Airmen newly deployed to Gwangju Air Base, Republic of Korea, needed basic life support. The “tent city” had been flooded by heavy September rains, damaging uniforms and personal items. Airmen had been working non-stop for two weeks to raise camp while executing flight operations, and morale was wearing thin. At the time, Gwangju Air Base had the proverbial “chips-and-candy-rack” exchange and no military clothing sales. The MWR facilities consisted of a minimal gym and a combined military club. The city of Gwangju was not accustomed to an American presence, and a segment of the local population, sometimes throwing stones and bottles, protested outside the gate on almost a daily basis. The commander wanted his Airmen to have access to basic life support goods. He also wanted to do something for their morale. To meet these goals, bus transportation using no-fare GOVs was established between Gwangju Air Base and Kunsan Air Base.¹³⁶ Every Saturday for the duration of the deployment, Airmen were transported to Kunsan Air Base to use its new gymnasium, shop at the base exchange, and take advantage of the many MWR facilities (including a first-rate community center with Internet café).¹³⁷

To establish fare-free GOV transportation to Kunsan Air Base, the first step in the process was to conduct an official use determination. To accomplish this, the commander determined that the transportation required for the “comfort or health and welfare” of his Airmen.¹³⁸ He also determined that “failure to provide such service would have an adverse effect on morale.”¹³⁹ The second step was to verify that the use of the GOV bus on Saturdays would not interfere with other mission needs.¹⁴⁰ The third step was to ensure that the proposed use was not otherwise prohibited by any applicable statutes or regulations. In our scenario, no regulations prohibited the proposed use of GOVs, and in fact, our circumstances fit nicely under expressly authorized uses. Because the purpose of the trip was to support both non-recreational and recreational life support activities for the entire unit, the transportation was doubly authorized as a no-fare shuttle bus service for TDY Airmen,¹⁴¹ and as a no-fare MWR trip.¹⁴²

Finally, the MWR manager at Gwangju Air Base complied with the guidelines of *DODI 1015.10* for APF funding of MWR programs. He accomplished this two separate ways, both of which were independently sufficient to satisfy the

¹³³ DODI 1015.10, *supra* note 109, encl. 4, para. E4.1.7. Defined as “[s]upport and activities that maintain mission readiness, improve unit teamwork, and create esprit de corps.” *Id.*

¹³⁴ *See id.* encl. 4, para. E4.2.3. Defined as “[p]rograms that provide instruction and structured outdoor recreational activities (archery, hunting, fishing, rappelling, hiking, backpacking, bicycling, mountain biking, boating, canoeing, camping jamborees, water and snow skiing, etc.)” *Id.*

¹³⁵ Examples of Category C activities frequently collocated in Categories A and B facilities include recreation equipment rental operations, snack bars, and other resale activities. *See* AFI 65-106, *supra* note 121, fig. 2.2.

¹³⁶ Kunsan Air Base was the closest military facility with adequate base exchange and MWR facilities. The original idea was to go to Osan Air Base which had a huge base exchange, but guidance from the 7th Air Force legal office advised that it was not justifiable to drive a longer distance than was necessary to accomplish the commander’s intent.

¹³⁷ The Air Expeditionary Group at Gwangju Air Base was a geographically detached unit of Kunsan Air Base.

¹³⁸ DOD REG. 4500.36-R, *supra* note 1, para. C.2.5.4.2. *See* the discussions of subparagraph (c) of 41 C.F.R. § 301-10.201 at pages 4 through 6, and of *DOD Reg. 4500.36-R* at pages 9 through 11.

¹³⁹ *See* the discussion of the “Morale Requirement” at pages 9 through 11.

¹⁴⁰ *See* DOD REG. 4500.36-R, *supra* note 1, para. C5.7.1.6 (Support to Military Community Activity programs can be made available “only after mission requirements have been met.”). And because we were the Air Force, it was also verified that NAF and/or commercial transportation was not reasonably available. *See* AFI 24-301, *supra* note 9, para. 9.8.

¹⁴¹ *See* the discussion of the no-fare shuttle bus service at page 6 through 7.

¹⁴² *See* the discussion of the no-fare MWR trips at pages 12 through 14.

restrictions imposed by *DODI 1015.10*. First, the MWR manager operated the trip using no-fare GOV buses that were unrelated to any revenue-generating Category C programs. He kept the records for the trip to Kunsan Air Base separate from the Category C trips.¹⁴³ Because non-revenue-generating Category A and B programs may lawfully utilize GOV transportation support, the use of GOVs to travel to Kunsan Air Base was consistent with *DODI 1015.10*.¹⁴⁴ Second, the MWR manager also benefited from the fact that Gwangju Air Base was already officially designated as an isolated and remote MWR installation.¹⁴⁵ Therefore, Gwangju Air Base's Category C programs were equivalent to a Category B for APF funding purposes.¹⁴⁶ As a result, all categories of MWR programs at Gwangju Air Base were lawfully eligible for a variety of GOV support under *DODI 1015.10*, as long as the support was not related to revenue-generating activities.¹⁴⁷

A written legal opinion memorialized the commander's official use determination. The motor vehicle management community gave some pushback because the trip to Kunsan Air Base was not an everyday use of GOVs that they were accustomed to seeing.¹⁴⁸ But in the end, the Airmen lawfully obtained access to the services they needed.

¹⁴³ Category C trips included a revenue-generating MWR trip to Seoul, and a sports fishing trip to a nearby port.

¹⁴⁴ See the discussion of the non-Category C option at page 13.

¹⁴⁵ See AFI 65-106, *supra* note 121, fig. 3.1. Kunsan Air Base is officially designated as an isolated and remote MWR installation, and Gwangju Air Base was, at that time, a geographically detached unit of Kunsan Air Base.

¹⁴⁶ See the discussion of remote and isolated MWR installations at pages 13 through 14. The remote and isolated MWR designation was not required to conduct the trip, as long as the trip was operated through a Category A or B program.

¹⁴⁷ While the fact that Gwangju Air Base qualified as an isolated and remote MWR installation negated the need to operate the trip under the auspices of a Category A or B program, the MWR manager operated the trip separately from the Category C programs anyway because it took little effort to do so, and it was the way he felt comfortable doing it. *DODI 1015.10*, *supra* note 109, para. C5.7.

¹⁴⁸ Motor vehicle management personnel tend to be conservative stewards of the GOVs under their care, and rightfully so. There simply are not enough GOV assets available to meet every need, and this shortage is exacerbated in an overseas environment. No one has their private vehicle in a deployment, and everyone has somewhere they need (or want) to go. Responsible husbandry of resources, however, does not require circumscribing a commander's lawful discretion in the use of GOVs.