



# Filling Special Operations Gaps with Civilian Expertise

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# Foreword

The Department of Defense (DoD) *Total Force*, as described by former Secretary of Defense Donald H. Rumsfeld, comprises active and reserve uniformed military components, civil servants, and government contractors. These categories of professionals constitute our nation's warfighting capability and capacity. In support of our congressionally mandated special operations activities and emerging nontraditional, unconventional tasks and requirements, the United States Special Operations Command (USSOCOM) is committed to locating, assessing, selecting, developing, and providing the best mix of people equipped with the right skills at the precise moment on the battlefield.

Our military history, documented as far back as the 16th century, is rich with stories of civilians on the battlefield. The numerous vignettes depicting sutlers furnishing commanders with supplies otherwise unobtainable is formidable evidence. Similar examples exist in every single military operation since the Revolutionary War. The categories of support provided at one time or another during this century include food, water, laundry, sanitation, shower service, security, recreation, translator/interpreter service, terminal and base camp operations, water and power production, livestock, medical service support, safe-cracking, and oil-fire fighting. The trend is clear: as technology advances and battlefield systems become more complex, the need for civilians increases.

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The same factors currently driving requirements for civilian expertise will eventually drive requirements for skills and competencies beyond those of current inventories of the uniformed service components of USSOCOM. Not since the World War II Office of Strategic Services has the need for outsourcing specialized expertise been greater. The complexities of today's battlefield, coupled with the irregular nature of stateless actors/opponents, are the root causes of this new, emerging requirement. Unfortunately, as the need for civilian expertise increases, so does their proximity to the fight and their

risk of direct involvement in conflict. That portends an altogether legal issue facing commanders at every level.

This monograph posits using civilians to fill emerging, nontraditional, special operations-related skill and competency gaps. It should be of interest to government, military, and industry readers who would like to learn about existing international law, U.S. law, and DoD policy relating to the use of civilians to accompany U.S. Armed Forces in general as well as accessing civilian expertise to fill emerging special operations requirements in particular.

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# About the Author

**J**ames F. Powers, Jr. is the Director, Office of Homeland Security for the Commonwealth of Pennsylvania and serves as an associate fellow with the JSOU Strategic Studies Department. He is the coauthor of *Civil Affairs: A Function of Command, Military Review* (U.S. Army Command and General Staff College, 1995) and the author of *National Assistance and Civil-Military Operations: The Gap in Professional Military Education* (U.S. Army War College, 1996) and *Civil-Military Operations and Professional Military Education* (Joint Special Operations University, May 2006). As a faculty instructor at the U.S. Army War College, he authored three core lessons and five electives: Special Operations, Civil Affairs, Psychological Operations, Civil-Military Operations, and Special Operations Case Studies.

Before his 2001 retirement from active duty as a U.S. Army Special Forces colonel, he served as the Director of Special Operations for the U.S. Army War College. Other military duties included command of the U.S. Army's only active duty Civil Affairs battalion and various command and staff assignments in the United States, Korea, and Germany. Since his retirement, he has served as a Special Operations consultant supporting the Assistant Secretary of Defense and a program manager and adjunct faculty instructor for the U.S. Army War College.

Mr. Powers is a graduate of the University of Alabama (B.A. in German), the U.S. Army Command and General Staff College, and the U.S. Army War College. He has a Masters of Public Administration (MPA) from Shippensburg University in Pennsylvania.



# 1. Introduction

The time has come to consider adaptive techniques in accessing the skills and expertise required for special operations mission success. This monograph looks at leveraging civilian personnel outside USSOCOM who possess unusual skills that can enhance and support special operations-designated activities. It also suggests solutions for bringing these uniquely skilled people in for a brief period and addresses using technology to aid in locating, assessing, managing, and retaining these experts.

Filling existing and emerging special operations-related gaps in skills and competencies with civilian expertise affords the most innovative and cost-effective means of mission support while ensuring Special Operations Forces (SOF) remain focused on core competencies and congressionally mandated special operations activities. Specific objectives are as follows:

- a. Provide an innovative look at leveraging civilian personnel outside USSOCOM who possess certain nontraditional, special operations-related skills and competencies.
- b. Determine whether current U.S. law and Department of Defense (DoD) policy would permit the use of civilians to alleviate, on a temporary basis, recruiting and retention shortages.
- c. Provide some practical solutions on how to contract these uniquely skilled civilians for a short time period.
- d. Provide a discussion on the use of technology to aid in locating/targeting, recruiting, assessing and selecting, developing/training, managing, and retaining these civilians for repeated, case-by-case use.

The personnel management systems currently used by the uniformed services will continue to focus on developing the conventional, common skills and competencies required for general war against a conventional opponent. That is not the case for USSOCOM, which has neither the same missions nor skill and competency requirements as the services. The intent of this paper is to suggest ways to increase access to the enormous pool of skills and competencies available throughout the civilian sector and thus mitigate emerging operational risk due to lack of specific expertise. From a mission

analysis perspective this dilemma is stated using the following formula: (Required Skills + Competencies) – (Available Skills + Competencies) = Risk.

To accomplish the four objectives, this monograph identifies four germane areas of interest. Section 2 establishes a frame of reference for the discussion of categorizing civilians, highlights historical examples of civilians accompanying/supporting the armed forces, and traces the precedent established by President Roosevelt and Major General William J. “Wild Bill” Donovan during World War II with the Office of Strategic Services (the precursor to the Central Intelligence Agency). Section 3 provides a general discussion of the general skills and competencies required for emerging and future special operations activities. Section 4 provides an in-depth discussion of the legal aspects of civilians while accompanying the armed forces, some thoughts on the possibility of using civilians to alleviate recruiting and retention problems, and a discussion of some of the major concerns of field commanders having civilians supporting their units. Section 5 suggests some practical solutions for short-term use as well as using technology for locating/targeting, recruiting, assessing and selecting, developing/training, managing, and retaining these civilians for future, case-by-case use.

The author would like to express his sincere gratitude for the assistance and advice provided by Colonel W. Hays Parks (U.S. Marine Corps, Retired), the legal counsel for International Affairs Division, Office of General Counsel, DoD. His enthusiasm for this project, prior research, advice, opinions, and experience were invaluable. Colonel Parks’ understanding of international law and the implications on the morphing nature of U.S. military policy and doctrine towards civilians accompanying the armed forces provided unparalleled insight.

## 2. Candidates, Historical Examples, and Precedents

Whether military egos accept it or not, there are times when the best education, planning, equipment, training, and physical prowess simply fall short. Life's events cannot be forecasted. In war, sometimes situations require skills that are beyond those of a uniformed force. Notwithstanding recruiting slogans, the military cannot be prepared to do everything, at any place, at any time. And it is not about *leadership or warrior ethos*—it is about physics. When mission requirements exceed available assets, *risk* occurs. Leveraging civilian expertise to fill gaps in available special operations skills can afford the USSOCOM an immeasurable pool of talent and a wide range of possibilities and reduces the risk. The categories of civilians used in this discussion comprise domestic and foreign, government and nongovernment, government consulting employees, and consultants and contractors. Section 2 includes a discussion of these categories of potential candidates, provides historical examples and trends, and highlights some vignettes of the Office of Strategic Services.

Using a macro approach, the discussion separates all potential civilian candidates into two groups: U.S. legal citizens and foreign nationals.<sup>1</sup>

### U.S. Citizens as Candidates

The first group is not only broad but also has complicating legal implications. Within the group are two categories: a) those currently employed by the Federal Government, hereafter referred to as *government employees*<sup>2</sup> and b) those not currently employed by the Federal Government, hereafter referred to as *nongovernment civilians*. The second category is the larger of the two, covering all other U.S. citizens, without regard for their particular avocation or how they classify themselves.

Government employee	Federal employee—civilian employed by a U.S. Government department Expert and consultant—civilian employed by a government on a retained and/or contractual basis
Nongovernment civilian	Independent contractor/consultant—civilian providing services on a contractual basis Noncontractor/consultant—civilian providing expertise on an ad hoc, contractual basis

**Government Employees.** Establishing a baseline for subsequent discussions, and clarifying what legally constitutes a *government employee*, requires a definition from Title 5 United States Code (USC), section 2105.<sup>3</sup> For the purpose of this title, *employee*, except as otherwise provided or when specifically modified, means an individual who is:

- a. Appointed in the civil service by one of the following acting in an official capacity—the President, a member(s) of Congress or the Congress, a member of a uniformed service, an individual who is an employee under this section, the head of a government-controlled corporation, or an adjutant general designated by the Secretary concerned
- b. Engaged in the performance of a Federal function under authority of law or an executive act
- c. Subject to the supervision of an individual named in (a) above while engaged in the performance of the duties of his position
- d. A DoD employee hired under the provisions of Title 10 USC<sup>4</sup>
- e. An expert and/or consultant—that is, when authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof.<sup>5</sup>

**Nongovernment Civilians.** This category comprises all other legal U.S. citizens and potentially affords USSOCOM the largest pool of candidates having nontraditional, unconventional, and/or special operations-enabling skills and competencies. Presented here are terms and definitions related to the civilian work force in general.



Independent contractor/ consultant	A general rule is that the payer has the right to control or direct only the result of the work done by an independent contractor, not the means and methods of accomplishing the result.
Common-law employee	Under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done. This is true even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed. <sup>6</sup>
Statutory employee	If workers are independent contractors under the common-law rules, such workers may nevertheless be treated as employees by statute.

### Foreign Nationals as Candidates

The second group is referred to generally as *host nation* and *third country nationals*.<sup>7</sup> Unlike U.S. citizens, they may not have the legal constraints prohibiting contracting. With the current focus on cultural awareness, language, and cross-cultural communications skills, there is probably greater need for foreign nationals than U.S. citizens.

### Historical Examples

Leveraging civilian expertise and having civilians accompany the military during armed conflict is neither a new nor innovative concept. If current operations are any indication, this concept will not stop any time soon. But most of these examples depict civilians performing combat support or combat service support functions vice taking a *direct* part in hostilities. To understand the legal aspects of these various roles, one needs to understand *State practice*—that is, what laymen refer to as history. What historians know, and what most laymen do not, is that civilians have played a variety of roles in support of military forces, including taking a *direct* part in hostilities. What follows are examples from the 17th century through the reign of Saddam Hussein in Iraq:

- a. The *hired* [meaning contracted military] **Norwegian** armies of the 17th and 18th centuries, lacking the necessary organic logistical infrastructure to sustain operations, brought their own support communities: civilian contractors, wives,

children, men, and prostitutes—all essential to sustaining the force.<sup>8</sup>

- b. During the **American Revolution**, General George Washington used civilian wagon drivers to haul military supplies.
- c. During the **19th century**, civilian trappers such as Kit Carson were hired by the U.S. Army as foragers, scouts, and fighters in various campaigns.<sup>9</sup>
- d. In 1863, the U.S. Army published **General Orders No. 100**, also known as *The Lieber Code (Article 50)*, establishing the legality of civilians accompanying the armed forces.<sup>10</sup>
- e. First Aid Nursing Yeomanry (**FANY**), formed in 1907 as a voluntary civilian women's organization, served with the British Special Operations Executive around the world, providing planning, intelligence, operations, logistics, research, security, cryptology, transport, and administrative support.<sup>11</sup>
- f. In 1941 on **Wake Island**, 1,150 civilian contractors were employed in construction of the U.S. naval base. When Japanese forces began their assault in December, the civilian construction workers aided the armed forces in the island's defense. Those civilians captured were treated as prisoners of war, whether having taken a direct part in hostilities or not.<sup>12</sup>
- g. The American Volunteer Group, an aviation unit popularly known as the **Flying Tigers**, took a direct part in hostilities while under contract to Central Aircraft Manufacturing Company of China. In support of British and American forces, they flew combat operations against the Japanese in Burma and China from 20 December 1941 to 10 July 1942.<sup>13</sup>
- h. Using various resistance groups comprising the indigenous Kachin peoples of northern Burma, the Office of Strategic Services coordinated and contracted these tribes into Allied guerrilla units known as the **Kachin Rangers**.<sup>14</sup>
- i. **The Shetland Bus (World War II)** was a fleet of British-recruited, Norwegian fishing boats manned by Norwegian refugees. The refugees were paid a bonus for each trip made to Norway to infiltrate or extract British military, Norwegian resistance members, and/or supplies for either. The boats and their crews were armed, although their weapons were concealed. The crews initially wore civilian clothing, but

subsequently wore Norwegian naval uniforms obtained by the British. For all intents and purposes, they were a private military company.<sup>15</sup>

- j. By the **Korean War**, contractors were hired by the DoD to stevedore, perform road and rail maintenance, and transport troops and supplies.
- k. During the **Malaya Emergency**, 1948–1960, British-hired Borneo headhunters tracked and assisted in hunting down units and members of the insurgent Malaya Communist Party (MCP). Armed with blowpipes with poisonous darts, the headhunters also were used against MCP sentries. These Borneo headhunters were private contractors, not members of the British forces.<sup>16</sup>
- l. In **Vietnam**, contractors moved into logistics by providing base construction and operations, water, and ground transportation, fuel, and high-tech system maintenance and support.
- m. With the end of the **Cold War**, outsourcing skills and services accelerated in the U.S. and in other nations as governments sought a *peace dividend* by reducing the size of their large standing military forces.<sup>17</sup>
- n. During the Persian **Gulf War**, 9,200 contractors deployed in support of the U.S. forces and provided maintenance of high-tech equipment, water, food, construction, and other services. Serving in crucial combat support/combat service support roles during the buildup, deployment and sustainment phases were DoD civilians, civilian contractors, and other nonmilitary personnel.<sup>18</sup>

Before and following the 1991 conflict, there was interest in improving the “teeth to tail” ratio of uniformed combat arms personnel over combat support and combat service support. The U.S. Congress mandated increased reliance upon outsourcing within the DoD in lieu of uniformed military forces.<sup>19</sup>

- o. **The Balkans** contingency provided field-testing for new outsourcing techniques via the Logistics Civil Augmentation Program whereby civilians performed combat service support

missions. Unfortunately the Balkan contracting experience was viewed as a template for future operations, without bearing in mind possible Law of War implications.<sup>20</sup>

- p. During the conflict between **Eritrea and Ethiopia**, 1997–1998, an Ethiopia-hired Russian private military company (PMC) operated Sukhoi-27 Fitter combat aircraft for operations against Eritrea. The Russian PMC provided the aircraft, aircrew, maintenance and support staff, and command and control personnel to plan the combat missions. The Ethiopian General Staff also hired a number of former Russian Army flag officers who directly assisted the General Staff in planning and executing Ethiopian military operations.<sup>21</sup>
- q. During the **Kosovo** contingency, Kellogg, Brown & Root Co. provided \$1 billion worth of logistics support for the military. Their contract activities included engineering, construction, base camp operations and maintenance, structure maintenance, transportation services, road repair, vehicle maintenance, equipment maintenance, cargo handling, railhead operation, water production and distribution, food services, laundry operations, power generation, refueling, hazardous materials and environmental services, staging and onward movement operations, fire fighting, and mail delivery.<sup>22</sup>
- r. When U.S. forces were committed to **Afghanistan** in 2001, civilian contractors played a significant but customary role maintaining, servicing, and in some cases operating highly technical equipment. And the contracting was not confined to U.S. civilians. As one participant has commented, “You cannot buy an Afghan’s loyalty, but you can rent it.”<sup>23</sup> Tribes aligned with the Taliban regime were hired away to join either the Northern or Southern Alliance. In each case, these were civilian fighters hired to take a direct part in hostilities against tribes with which previously they had been allied. They, too, were private military companies.<sup>24</sup>
- s. Things took on a different twist following the defeat of Saddam Hussein’s government in **Iraq** during Operation Iraqi Freedom, 2003. Following the defeat of the Iraqi military, coalition forces found themselves in the legal role of *occupying power*. And with this role came a new responsibility prescribed in

Article 43 of the Annex to the 1907 Hague Convention IV of an occupying power:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the laws in force in the country. ... This history is broader than the meaning of what constitutes taking a “direct part in hostilities.” It is offered for an appreciation of the overall picture. The experience prompted the DoD to reassess and update the role of outsourcing vis-à-vis use of uniformed military forces. There were other reasons for a reassessment, including statutory changes that necessitated determining precisely what roles could be performed by the private sector.<sup>25</sup>

The international implications of becoming an occupying power eventually led DoD officials to realize that the Law of War had indeed become a part of the process. Two questions surfaced regarding civilians accompanying the U.S. Armed Forces:

- a. To what extent should current military duties be outsourced to civilian contractors? As part thereof, what military and DoD civilian positions are inherently governmental and therefore not to be contracted?
- b. At what point would a position that is converted from military to civilian (or civilian contractor) be regarded as taking a “direct part in hostilities”?<sup>26</sup>

With the transfer of authority for infrastructure buildup passing to the Coalition Provisional Authority, the focus within DoD remained on military transformation. But when insurgent/ criminal elements began targeting foreign civilians and civilian objects, including the offices of the United Nations, the International Committee of the Red Cross, and other private organizations, the focus returned to the question of “direct part in hostilities.”<sup>27</sup>

DoD policy had to be developed consistent with domestic law and U.S. international law obligations, including the Law of War. With regard to the latter, a general guide was

the Law of War principle of distinction, obligating each government to distinguish between the civilian population and combatants.<sup>28</sup>

Development of DoD policy involved a phalanx of lawyers representing a variety of fields of expertise—acquisition law, personnel law, military justice, international law (Law of War, status of forces agreements, and other areas). It necessitated review of existing statutory and treaty law as well as relevant regulations. From a Law of War standpoint, *State practice* was essential in suggesting not only how governments had employed civilians in previous conflicts but also how enemy governments had treated civilians accompanying the armed forces when captured.<sup>29</sup>

The research and education process necessitated learning more about current trends in outsourcing the military. Fortunately, several scholarly works on the issue of outsourcing the military have been produced in recent years.<sup>30</sup>

Lawyers and others involved in the decision-making process relating to outsourcing would be remiss without this background knowledge. These works and others identified two important trends:<sup>31</sup>

- a. The practice of outsourcing the military is global rather than unique to recent U.S. operations in Afghanistan and Iraq. Governments historically have relied upon civilians and civilian contractors and increasingly are turning to outsourcing of duties previously regarded as exclusively military.<sup>32</sup>
- b. Trends reported in these scholarly works show that civilian contractors, PMC (sometimes referred to private military firms) or private security contractors increasingly are being employed by governments (ministries of foreign affairs, military departments, and other government agencies), non-government organizations, private industry, and the United Nations.<sup>33</sup>

The legal community appears to agree that modern conflicts will follow the pattern of uniformed forces of a government facing uniformed forces of an opposing government.

I have found no evidence that civilians authorized to accompany the armed forces who took a direct part in hostilities

and were captured were denied prisoner-of-war status, much less classified as unprivileged belligerents. ... they may be attacked ... [when] ... taking a direct part in hostilities. But in an international armed conflict, civilians authorized to accompany the armed forces do not relinquish their entitlement to prisoner-of-war status if captured.<sup>34</sup>

The ongoing conflicts in both Afghanistan and Iraq continue to provide historians and doctrine writers with new vignettes depicting creative ways to incorporate nonmilitary civilians into military operations. As creative ideas emerge and become more commonplace in field operations, military forces will gain a better feel for former Secretary of Defense Donald Rumsfeld's description of the *Total Force*.<sup>35</sup>

### **The Precedent: The Office of Strategic Services (OSS)**

There was, however, a World War II organization whose very existence and modus operandi were based on a nonstandard, unconventional approach to strategic-level tasks for which there was no clear, existing military structure. The OSS, like the British Special Operations Executive (SOE), developed profiles required for tasks, then recruited candidates possessing those qualities desired.

In World War II the OSS was created to provide a variety of agents for special, typically covert, tasks—for example, undercover activities, creation of propaganda, translation, recruitment, and radio operators. General William J. “Wild Bill” Donovan employed thousands of officers and enlisted men seconded from the armed services, and he also found military slots for many of the people who came to OSS as civilians. U.S. Army [and Army Air Forces] personnel comprised about two thirds of its strength, with civilians from all walks of life making up another quarter; the remainder was from the Navy, Marine Corps, or Coast Guard.<sup>36</sup>

The success of the OSS depended on the quality and ingenuity of the people it recruited (Rhodes scholars, lawyers, paratroopers, and even debutantes). For special skills, safecrackers were sprung from prisons. German prisoners of war were even recruited to penetrate the Reich.

Seeing war as a nationally supported task led the OSS to analyze every aspect of the German war effort. The Research and Analysis

Branch made one of its biggest contributions in its support to the Allied bombing campaign in Europe. Analyses by the Enemy Objectives Unit, a team of Research and Analysis economists, sent Allied bombers toward German fighter aircraft factories in 1943 and early 1944. After the Luftwaffe's interceptor force was weakened, Allied bombers could strike German oil production, which the Enemy Objectives Unit identified as the choke-point in the Nazi war effort. When American bombers began hitting synthetic fuel plants, Ultra<sup>37</sup> intercepts quickly confirmed that the strikes had nearly panicked the German high command. Although the fighting in Normandy that summer delayed the full force of the *oil offensive*, in the autumn of 1944 Allied bombers returned to the synthetic fuel plants. The resulting scarcity of aviation fuel greatly hindered Hitler's Luftwaffe, and by the end of the year, diesel and gasoline production had also plummeted, immobilizing thousands of German tanks and trucks.

On 28 September 1945, General Donovan bade farewell to his troops in a converted skating rink down the hill from his headquarters.

We have come to the end of an unusual experiment. This experiment was to determine whether a group of Americans constituting a cross-section of racial origins, of abilities, temperaments, and talents could meet and risk an encounter with the long-established and well-trained enemy organizations. ...You can go with the assurance that you have made a beginning in showing the people of America that only by decisions of national policy based upon accurate information can we have the chance of a peace that will endure.<sup>38</sup>

Donovan had demonstrated great skill in accessing a wide variety of skilled civilians who could contribute to the military mission. Section 3 specifically addresses special operations.



### 3. Special Operations Skills and Competencies: Defining the Unconventional

Section 2 dealt with the potential candidates, historical examples of civilians accompanying and supporting military operations, and a brief but pertinent overview of how these lessons learned coupled with the need for a strategic-level solution to fill wartime gaps in unconventional skills culminated in the activation of the OSS. This section addresses the most salient questions relating to unconventional skills and competencies:

- a. What are the critical special operations skills and competencies?
- b. Who is the designating authority?
- c. Is there a trend based on the last 10–15 years?
- d. Do gaps currently exist?
- e. How long are these gaps projected to remain?
- f. How do we plan for unknown gaps?

In general, the conventional armed forces have designated certain military specialties, based on the required skills and competencies supporting general military operations. But in this nonlinear, asymmetric, irregular warfare environment, requirements for nonstandard expertise are beginning to emerge that are not currently found within the inventories of the uniformed services. When these nonstandard and unconventional requirements emerge, USSOCOM should assume the responsibility to provide them based on its charter to provide expertise beyond the capabilities of conventional armed forces. Since it is difficult to forecast these unconventional requirements, a general assessment needs to be performed in an array of categories in order to establish a pool of candidates. Notwithstanding our best efforts, we must admit that

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*... in this nonlinear, asymmetric, irregular warfare environment, requirements for nonstandard expertise are beginning to emerge that are not currently found within the inventories of the uniformed services.*

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we do not know what we do not know—no one knows what gaps in skills and competencies will exist in 20 years or beyond.

However, in order to establish a framework for discussion, three distinct categories are provided:

- a. Those skills and competencies linked to the congressionally mandated special operations activities currently defined by Title 10 USC, section 167<sup>39</sup>
- b. Emerging special operations activity-related skills and competencies for which there exist no USSOCOM service component skill-producing training courses
- c. Emerging skills and competencies perceived by the uniformed services as beyond the scope of conventional forces and for which there is no uniformed-service specialty, rating, or occupational specialty.

The third category raises an interesting question: Does the declaration alone thrust the responsibility upon USSOCOM? Many believe so, using the argument that USSOCOM was established to execute those missions beyond the capability of the conventional uniformed services. Hence the reason for Title 10 USC section 167. Using current and forecasted special operations unit manning levels through fiscal year 2011, required core competencies, school matriculation trends, Operations Tempo, Personnel Tempo, and retention and recruiting indicators, one might reasonably derive and validate the following assumptions:

- a. Current core competencies will remain valid based on war-time operational indicators.
- b. Requirements for *nonstandard*/unconventional skills and competencies will continue to emerge as the battlefield becomes more complicated.
- c. It will not be cost effective to develop, on an ad hoc basis, a training course to meet every *nonstandard*/unconventional skill and/or competency requirement. The primary constraints are lack of skilled instructors and time.
- d. *Nonstandard*/unconventional skills do exist in some form within the civilian/private sector. Aside from actual combat skills (excluding tactical police units), every current military specialty is replicated in the civilian sector.

- e. Accessing/leveraging the required expertise residing within the civilian sector is a more cost-effective and efficient method than attempting to replicate it with active duty training courses.

### Category 1

One logical method to ensure coverage of each congressionally mandated (Title 10 USC section 167) special operations activity (see table, first column) is to directly link them: a) to a specific USSOCOM service component and force and b) to a service-owned, individual skill-producing course/school.

Special Operations Activity, Service and Force	Required Unit Capabilities	Supporting Individual Skills and Competencies
(I) Direct Action <i>Army</i> Special Forces	Synergistic coordination of individual skills and competencies	Examples: C2, operational planning, intelligence synthesis, communications, ground tactics, weapons systems, construction techniques, demolitions and explosives, and emergency medical procedures
(10) Such other activities as may be specified by the President or the Secretary of Defense	Unknown	Unknown

Tracking and linking each congressionally mandated special operations mission activity directly to a specific USSOCOM service component and further to a force within that component identifies gaps, capability redundancy, and thus where adjustments are required.<sup>40</sup> But an analysis of this type would also surface the requirement to provide more specificity to the USSOCOM commander regarding special operations activity No. 10 (e.g., some idea of the unit capability and supporting individual skill/competency required).

From both a macro and micro perspective, it is reasonable to conclude that the USSOCOM service components have adequately prepared both units and individuals for special operations activities

1 through 9. That has not been the case, however, for No. 10 because no activity parameters can be set in advance by those that craft U.S. policy.

No. 10 presents a real concern because it exposes a gap in USSOCOM's existing and adaptive human resource system—a system that must be capable of rapidly identifying and accessing civilian expertise when both conventional and unconventional skills are either not available or do not exist in the U.S. Armed Forces. Sadly, what occurs most often is an attempt to pit an *available* asset against a mission requirement vs. tailoring the force to the mission requirements. True and unbiased mission analysis will produce valid requirements. And any attempt to fill a valid personnel requirement with less than the right person directly affects the mission and adds one more constraint. Too easily forgotten is the military planner's mantra: The requirement is the requirement, regardless of what is available to fill it. Clearly what is needed is a system facilitating access to any required skill and/or competency outside USSOCOM and DoD (which will be discussed in Section 5).

## Category 2

A second category comprises the future capabilities of the uniformed services to address emerging battlefield requirements. The ongoing operations in Afghanistan and Iraq have led the Army to establish several working groups chartered to study *irregular challenges*—that is, the challenges outside the normal range of conventional operations and tasks. The charter provides for addressing current U.S. Army capacities and recommending initiatives to improve land component effectiveness in addressing the threat. Analyzing every type of contingency, these working groups examine capacities and capabilities and identify gaps in coverage.

The goal is to produce a new set of capacities for which the Army must prepare. And this will, in turn, produce a new list of skills and competencies. To be sure, these newly defined Army capacities will include skills and competencies in language training, cultural and regional awareness, foreign internal defense, and counterinsurgency training and operations. The identification of these required uniformed-service capacities, if approved and incorporated into legislation, may subsequently produce a domino effect within USSOCOM.

In essence, the analysis performed by the uniformed services may indirectly produce additional special operations activities and thus new required skills and competencies.

But can USSOCOM afford to wait until the services decide which missions and activities they will undertake and those they will declare as a special operations activity simply because the skills, tactics, techniques, and procedures are beyond their current capability? The new capacities required of SOF may generate additional skill and competency requirements. When finished with its own analysis, USSOCOM may too conclude that new and/or greater capacities and capabilities are required in one existing special operations activity while others remain sufficient.

### Category 3

The third category of skills and competencies have yet to reveal themselves—that is, there are few signs and indications as to what they might comprise. This category presents the greatest enigma because it taunts the professional planner and strategist. There are those never-say-die military planners who refuse to give in to uncertainty. But the facts remain indisputable—things do occur with no prior indications or warnings.

Thus military planners and strategists will inevitably arrive at the same nexus of uncertainty. If micro analysis cannot define the unknowns, perhaps a macro solution is the answer. Rather than attempting to determine the myriad of unknown, uncertain, contingent details, why not develop a system predicated on expeditious access to civilian-based skills and competencies? Could it be that the lack of individual, service-trained skills and competencies presents an opportunity to provide a better and more cost-effective solution? Could civilian expertise fill that gap? A reasonable person would assume that civilians are as experienced in their particular vocations as the military personnel are in theirs.

**Civilian-Based Skills and Competencies.** Too easily forgotten or taken for granted are the inherent skills and competencies of civilians. Civilians recruited from nontraditional pools of candidates will be operators of some kind, albeit different than fully qualified special operations personnel, but operators in their own fields nonetheless.<sup>41</sup>

**Attempts to Determine Required Skills and Competencies.** There are some indications derived from working groups (such as the Army's irregular challenges previously mentioned) that future force capabilities must include the ability to synthesize the cultural and psychological profiles of our potential adversaries. The idea of accessing and contracting cultural and social anthropologists, psychiatrists, city managers, bankers, and teachers are neither ill-conceived nor focused solely on current events. It reflects the sentiments of many viewing the current military operations—military and civilians—as necessary for stability and support operations and eventually transferring responsibility for operations to host nation civilian authority.

Regardless of how our strategists and planners derive the potential special operations activities, the lists developed from Categories 1, 2, and 3 will remain incomplete. There will always exist the caveat to conduct other special operations activities as determined by the Secretary of Defense and the President of the United States.

No national leader—civilian, industry, and/or military—has any idea what will be required during the next war, conflict, or crisis. Is it not prudent then to devote time now on *how* to acquire the unknown skills and competencies once the requirement is known? One step towards developing a process for acquiring requisite talent is to resolve legal issues associated with the initiative. Section 4 addresses the legal basis.

## 4. The Legal Basis: Can it be done? What are the costs?

Using the previous discussion of civilian candidates, historical examples, and general skills and competencies as a frame of reference, this section addresses legal issues affecting the concept. In an attempt to dispel any previously conceived notions, it is necessary to review some historical and legal myths and popular issues. The discussion then addresses the conflict spectrum and its relevance to the issue, according to the legal community. A discussion of the new DoD Instruction (DoDI) 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces (the “bible” for this particular subject), follows. Section 4 concludes with a discussion of whether or not civilians are authorized to temporarily contribute toward alleviating recruiting and retention shortages, followed by responses to questions that commanders typically ask.

Although the OSS had success using civilians in World War II, the international laws that emerged in its aftermath and some current DoD constraints may hinder USSOCOM from following suit. The current conflict in Iraq has surfaced the question: To what degree may civilians and, in particular, civilian contractors form a part of participating military forces? Incredible as it sounds, the role of civilian contractors increased dramatically as the coalition moved from the *decisive operations* phase into the *stabilize* phase as the occupying power on or about 1 May 2003. The situation has caused the DoD to take a long and hard look at the issues raised.<sup>42</sup>

### Historical and Legal Myths

Myths and urban legends abound concerning U.S. and international law and military justice. Before stomping through the legal minefield associated with this issue, it is important to dispel or validate what knowledge we think we have. When DoD began its analysis of civilian contractors accompanying the armed forces, it concluded that, from a Law of War standpoint, one of the first things that had to be accomplished was addressing various military, historical, and legal myths. Among these myths are:

- a. All wars are international armed conflicts.
- b. Most wars are fought on linear battlefields, some on nonlinear battlefields.
- c. Civilians provide only logistics and combat service support well behind friendly lines.
- d. Civilians accompanying military forces may not be armed.
- e. The *Law of War* prohibits a civilian from taking a direct part in hostilities.
- f. A civilian accompanying the armed forces who takes a direct part in hostilities is an unprivileged belligerent if captured.

None of the above is correct.<sup>43</sup>

**Historical Basis for Protection of Civilians.** Beginning with Operations Desert Shield/Storm, DoD's review of the Law of War concluded that the provisions have been consistent. Regardless of the pundits and their social beliefs, the evidence and legal basis are clear as cited below. Civilians who accompany the armed forces in the field are entitled to prisoner-of-war status.

Article 50, U.S. Army General Orders No. 100 (1863) (The Lieber Code): Citizens who accompany an army *for whatever purpose* ... if captured, may be made prisoners of war.

Article 13, Annex to Hague Convention IV (1907): Individuals who follow an army without directly belonging to it, such as ... contractors, who fall into the enemy's hands ... are entitled to be treated as prisoners of war ....

Article 4, paragraph A(4), Geneva Convention Relative to the Treatment of Prisoners of War (1949): Prisoners of war ... [include] persons who accompany the armed forces without actually being members thereof, such as civilian members of aircraft crews ... supply contractors ....

Article 4, paragraph A(5), Geneva Convention Relative to the Treatment of Prisoners of War (1949): Members of crews ... of the merchant marine and the crews of civil aircraft of the Parties to the conflict ....

Article 85, Geneva Convention Relative to the Treatment of Prisoners of War (1949): Prisoners of war prosecuted under the laws of the detaining power for acts committed prior to



capture shall retain, even if convicted, the benefits of the present Convention.

Article 51, paragraph 3, 1977 Additional Protocol I: Civilians are protected from attack “unless and for such time as they take a direct part in hostilities.”<sup>44</sup>

### The Popular Issues

Assessing the legality of using civilians to fill special operations-related gaps can be a daunting task. Deciding to actually do it presents an altogether different challenge when considering public reaction. But the general public is usually supportive when the argument, facts, and laws are clearly rendered. In this section some pertinent facts about civilians working for the Federal Government are provided.

The primary source for the employment and control of all government employees is Title 5, USC. The individual sections having applicability to this monograph are too numerous to list here. To understand the holistic issue regarding use of civilians, one must recognize the supporting and relative aspects of the issue. What follows are the more relative ones:

- a. Authority of the President of the United States to run the government
- b. Deployment as a condition of the job
- c. Government employees with exceptions
- d. Direction of Federal employees to perform their jobs.

**The Constitution.** The President of the United States uses the cabinet heads (each Secretary) to help run the government. In simplistic terms, this means that the heads of Federal agencies (including the Secretary of Defense) can order any Federal employee to do anything that is legal. The employee has the choice to either obey or disobey that order by walking out, thus suffering the consequences (e.g., firing). He may choose to challenge the order, but will not stand a chance as long as the order is legal.<sup>45</sup>

**Classification of Federal Employees.** All Federal employees are considered Title 5 USC government employees. Although civilians, they are referred to throughout Title 5 USC as civilian, federal, and government employees. Civilians hired under specific sections of other titles (e.g., Title 10 USC) are sometimes referred to as *Title 10 employees*,

but still considered Title 5 USC government employees (as previously mentioned in Section 2).<sup>46</sup>

**Deployment as Condition of the Job.** As one would expect, uniformed military personnel have to deploy when ordered. For the most part, civilians do not, says Peter Grier (in “Civilians in Harm’s Way,” *Air Force Magazine*, July 2005). The underlying question here is whether government employees are aware of their own employment provisions.

DoD civilian employees are not required to go to Iraq or to deploy anywhere else they might be in harm’s way, unless they have already accepted the possibility of such a deployment as a condition of a job.<sup>47</sup>

**Consultants and Contractors.** The same stipulation applies to consultants/contractors if the accepted Statement of Work indicates that the job is contingent upon being able to deploy to do the work. The terms of the deployment would normally be specifically stated in clear and unambiguous terms (e.g., to a combat zone to accompany the armed forces, to Afghanistan to support the American Embassy, and to world-wide locations in order to conduct physical security assessments).<sup>48</sup>

**Categories of Duties Performed.** The use of civilians to support the armed forces is also affected by the category of work performed. And the *type* of work changes in relation to the surrounding circumstances. An example follows.

In consideration of the role of civilians and contractors accompanying the military, several problems [have been] identified [thru scholarly research]. First, categories of duties performed by the military are far from static. For example, there are three general categories of military duties: combat, combat support, and combat service support. Consider the role of a U.S. Air Force military policeman. If the individual is performing air base law enforcement duties, he or she is in a *combat service support* role. If he is guarding enemy prisoners of war, he is in a *combat support* role. And if he is engaged in air base defense, he is in a combat role. Military duties do not always and consistently fall into neat boxes.<sup>49</sup>

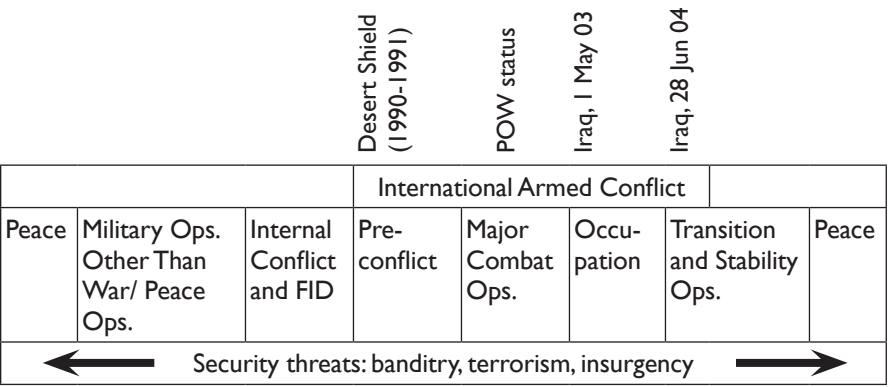
**Terminology Conflicts.** Were legal terms and categories not enough to confuse commanders, DoD discovered that each category of specialists (e.g., personnel law, acquisition law, Law of War, and military doctrine writers) use different terminology even when speaking the same language. Where the Law of War refers to *combatants*, *noncombatants*, *civilians who accompany the force*, and *civilians*, the personnel and acquisition law practitioners refer to emergency-essential (civilian) personnel, civilian contractors, and positions “inherently governmental.”

### Where are we on the conflict spectrum?

The Law of War issue of *where* one is and *what* one is doing along the spectrum of conflict is yet another consideration facing USSOCOM human resource planners and commanders considering whether to use civilians. The legal community generally sees this continuum differently than the military where the spectrum is simply bounded by *peace and war*. Whether military doctrine phrasing should consider international law implications or ignore it is not germane to this monograph, yet worth noting to understand the implications. And of course, the international legal community is under no obligation to mirror or follow any nation’s military doctrine or political science tenets. Thus, each instance of a civilian on the battlefield must be analyzed for all the hidden factors, considerations, and potential pitfalls.

The international law community generally sees the conflict spectrum as broad; see graphic depiction. The range is from peace through peace operations, internal conflict (which includes providing what the U.S. terms *foreign internal defense* (FID) assistance in training and providing other assistance to the military of a nation faced with an internal conflict) through pre-conflict (i.e., the period of buildup to participation in an international armed conflict, such as the U.S. and its coalition partners experienced prior to the 1991 liberation of Kuwait) into international armed conflict, and eventually returning to peace. In purely strategic terms, there are separate phases in an international armed conflict. That is not to say, however, that every operation in the conflict is in the same phase; individual units and individuals within units may be in separate phases

along this continuum depending on their specific tasks in relation to the overall effort underway.



Used by permission from W. Hays Parks

Using recent terminology and the graphic, the first phase involving uniformed forces of one government engaging the uniformed forces of another government is termed by the legal community as *major combat operations*.<sup>50</sup> Entitlement to prisoner-of-war status is applicable only in this phase of international armed conflict when the military forces of two or more governments are engaged against one another.

If the military forces of one State party to the conflict defeat its opponent and formally occupy the territory of its former adversary, the *belligerent occupation* phase begins. As indicated earlier, the government assuming the role of *occupying power* assumes new responsibilities under both Hague and Geneva law. Civilians supporting the belligerent occupation and assisting the occupying power in the lawful discharge of its responsibilities may not be regarded as taking a direct part in hostilities in the same sense as they might have been during the major combat operations phase.

However, once the *belligerent occupation* phase ends, there is usually a *transition* phase in which the State party that previously was the occupying power retains forces at the request of the new government as part of stability operations. [Such is the new focus on stability and support operations within U.S. military and State Department doctrine.] If there remains some instability as the new government takes

hold and assumes its responsibilities, civilians supporting the remaining military forces may not be regarded as taking a direct part in hostilities in the same sense as they might have been during the major combat operations phase.<sup>51</sup>

Research performed by W. Hays Parks and other notable authorities on this subject have attempted to synthesize the myriad of legal documents and opinions and formulate, in clear and concise terms, the essence of the issue.

Research of the Law of War and State practice suggests answers to several questions. Neither Article 51, paragraph 3 of Additional Protocol I nor Article 13, paragraph 3 of Additional Protocol II prohibits a civilian from taking a direct part in hostilities. If a civilian accompanies the armed forces, he or she may be subject to lawful direct attack for such time as he or she is taking a direct part in hostilities. ... the issue of whether a civilian may be regarded as taking a direct part in hostilities must be viewed not only from the standpoint of the government employing the civilian but also how the civilian and his or her duties may be viewed by an enemy. Put another way, were a government to employ a civilian in a position or duty previously performed by a soldier, and an enemy sniper were to attack that individual, would the sniper be subject to prosecution for a war crime for making this civilian the object of a direct attack? More importantly, would the prosecution be able to sustain its burden of proof that a war crime had been committed?<sup>52</sup>

### Developing U.S. DoD Policy

As indicated by Parks, the process of developing DoD policy was of value in gaining clarity on these seemingly ambiguous and arguable points; some became clear early in the deliberative process. At least at the DoD level, policy-drafters and advisors are not currently looking to substitute civilian employees or contractors in traditional war-fighting roles (e.g., infantry, artillery, armor, combat engineers, flying combat aircraft, or command and control of naval vessels).

To the extent outsourcing is under consideration, it is in support roles, often distant from the battlefield. In the ground

forces, there is an appreciation that rear area security remains a military mission, even on a linear battlefield.<sup>53</sup>

DoD policy development has centered on several documents. One has been promulgated as DoDI 3020.41; another is DoDI 1100.22, “Guidance for Determining Workforce Mix” (7 September 2006), and its summary follows:

- a. Implements policy in DoD Directive 1100.4 for determining the appropriate mix of manpower (military and civilian) and private sector support necessary to accomplish Defense missions consistent with applicable laws, policies, and regulations.
- b. Provides the Manpower Mix Criteria and guidance for risk assessments to be used when identifying and justifying activities that are inherently governmental (IG), commercial but exempt from private sector performance, and commercial and subject to private sector performance.
- c. Provides the Manpower Mix Criteria to designate activities for DoD civilian or military performance. Manpower authorities shall use the Manpower Mix Criteria to distinguish between functions that are IG and commercial. The Manpower Mix Criteria also shall be used to identify which IG and commercial functions shall be performed by military personnel and which shall be performed by DoD civilian personnel.
- d. Provides guidance to support strategic planning and daily management of the Defense workforce. By understanding the underlying rationale for the workforce mix of an activity, Defense officials can assess the risk that manpower shortfalls have on IG responsibilities, readiness, workforce management, and mission accomplishment.

**When work may be outsourced.** The first issue states when work may be outsourced. It requires the use of the least costly form of personnel consistent with military requirements and other needs of the DoD, while identifying commercial activities that are exempt from private sector performance based on the readiness and management needs of the DoD.

There are clear distinctions between what a government official or member of the military may do compared to a private sector contractor. There are differences as to what may be demanded of a

military member and any civilian, whether a government employee or a private contractor. DoDI 3020.41 acknowledges that in combat, only military forces provide the appropriate authorities and controls (command and discretionary decision authority), discipline, weapons, equipment, training, and organization to execute combat missions on behalf of the U.S. Government.<sup>54</sup>

**How work may be outsourced.** The second issue explains *how* work may be outsourced once the *when* has been decided. It provides greater elaboration of longstanding DoD practices as to processing DoD civilian employees and private sector contractors prior to their deployment into a theater of operations, to include Law of War training. It prohibits a civilian (whether a Federal Government employee or private contractor) from possessing a *privately owned firearm or ammunition*. A weapon for personal self defense may be issued to either category of person only upon the express approval of the combatant commander and satisfaction that the person can handle the weapon safely and responsibly. DoDI 3020.41 also states that “contractors shall be used cautiously ... where major combat operations are ongoing or imminent.”<sup>55</sup>

The approach taken by DoDI 3020.41 is conservative towards outsourcing. Many duties that may be regarded as taking a direct part in hostilities are restricted due to necessities for their performance by uniformed military personnel. (The details of DoDI 3020.41 are worthy of further study and analysis and far more complex than this summary.) Issues such as these have been under scrutiny and analysis by the DoD for at least the last 2 years. Examining exactly what constitutes “direct part in hostilities” raises many questions without necessarily providing all the answers.<sup>56</sup>

While DoD analysts have reached their own conclusions, other scholars and analysts sought different approaches. Dr. Robert Spulak, director of Strategic Studies at Sandia Labs posits: “Since these nontraditional recruits will be operators of some type, participating in military missions and potentially placing their lives at risk and engaging the enemy, they must become military personnel.”<sup>57</sup> Many others indeed share this same view.

The difference between DoD and outside researchers seems to be in the details—the use and definition of the word *operator*. Although civilians most assuredly will arrive fully qualified in their selected field

and may even be referred to by their employer as true *operators*, the term and definition are not mutually shared by DoD. As previously mentioned, the term *operators* generally implies a person holding an inherently government position for which participation in hostilities may be required. Secondly, these civilians may not all be operators in either sense. Some skill/expertise requested by USSOCOM may comprise scientific skills and competencies. In these cases, use of the term *operators* would seem inappropriate.

## Alleviating Recruiting and Retention Shortages

An ancillary issue of the monograph was to determine the feasibility of USSOCOM alleviating certain recruiting and retention shortages with civilian expertise. Although much has changed since the days of the OSS and more legal constraints exist today than in World War II, the question is still moot.

*Recruiting shortages* implies a lack caused by insufficient candidates to fill entry level special operations positions (usually grades E-5 and O-3). The intent of this question is to determine whether civilians can be used *temporarily* to fill those vacant operations positions.

*Retention shortages* implies a lack caused by departure of trained personnel in special operations-coded positions from either USSOCOM or the uniformed-service components. The intent of this question is to determine whether civilians can be used *temporarily* to fill those vacant operational positions (e.g., either a position vacant due to personnel departing military service or to a position vacant due to the incumbent assuming a higher position within the system—i.e., promoted to a higher grade). In these cases, filling the vacated position would appear to be more difficult than filling an entry level position.

*Recruiting* and *retention* herein refer solely to uniformed military (not civilian) positions; civilians filling designated government civilian positions is beyond argument. Secondly, the intent of the law stated previously and the direction provided in DoDI 3020.41 do not permit filling *inherently governmental* functions (positions) with civilians. DoDI 1100.22 now completes the picture. We now understand how current law and the other DoDI affect this issue. The effects on USSOCOM and its potential ability to use civilians to fill the aforementioned positions are indicated here:



- a. USSOCOM comprises units having both operational and support functions.<sup>58</sup>
- b. USSOCOM units can be categorized by type, based on their intended purpose, as combat arms, combat support, and combat service support.
- c. The intent of DoDI 3020.41 is to provide for and facilitate civilian contractors accompanying the armed forces in other than combat roles and functions; it does not endorse civilians fulfilling combat roles.
- d. DoDI 110.22 requires the uniformed services and USSOCOM to designate which functions are to be coded as *inherently governmental* functions.
- e. Inherently governmental functions require the use of uniformed military personnel. Thus, functions not designated as inherently governmental are authorized for fill by civilians.

### Commander's Concerns

Now that DoDI 110.22 has been published, commanders will likely ask two key questions at the center of this issue and relevant to their current and future operations:

- a. What is the legal status of these civilians accompanying my force?
- b. By what process do I hold them accountable for their actions?

Regarding international law and legal status, DoDI 3020.41 specifically states:

Under applicable law, contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with an appropriate identification card under the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War (1949). If captured during armed conflict, contingency contractor personnel accompanying the force are entitled to prisoner-of-war status.<sup>59</sup>

Regarding the effect of host nation (HN) and third country (TCN) laws, DoDI 3020.41 states:

Subject to the application of international agreements, contingency contractor personnel must comply with applicable HN and TCN laws. They may be hired from U.S., HN, or TCN sources. Their legal status may change depending on where they are detailed to work by their employer under the contract. DoD component commanders shall ascertain how HN and TCN laws may affect contract support, to the extent feasible, and consider any limiting factors in both deliberate and crisis action planning and in the development of applicable contracts, in coordination with their planners and contracting officers and with the assistance of the servicing legal office. Limiting factors may include workforce and hour restrictions; medical, life, and disability insurance coverage; taxes, customs and duties; cost-of-living allowances; hardship differentials; and danger pay.<sup>60</sup>

Regarding the right to inherent self defense, DoDI 3020.41 states:

Contingency contractor personnel may support contingency operations through the indirect participation in military operations, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, and providing security services according to subparagraph 6.3.5 and logistic services such as billeting and messing. Contingency contractor personnel retain the inherent right of individual self-defense as addressed in subparagraph 6.3.4.<sup>61</sup>

**Accountability.** The issue of contractor accountability will continue to draw attention from both the media and military. How that accountability is handled will receive even greater scrutiny, but these isolated instances of misconduct are to be expected. It would be unreasonable to expect otherwise. Armed conflict affords the unscrupulous many opportunities; it does not solely attract the honorable. In addition, as new cases emerge, international legal bodies will review existing policies and jurisdictional authorities to determine whether development of new policies and laws are required to ensure civilians who commit

crimes—and in particular, violate the Law of War—are brought to justice.

The five questions and answers that conclude this section were derived from interviews with military legal advisors familiar with these issues. They offer insight into the thought process regarding accountability of contractor actions when accompanying the armed forces.<sup>62</sup>

- Q: How does the military legal community generally view these violations of the Law of War?
- A: General DoD policy is that the requirement for order and discipline of the U.S. Armed Forces outside the U.S. extends to civilians employed by or accompanying the U.S. Armed Forces, and that such persons who engage in conduct constituting criminal offenses shall be held accountable for their actions as appropriate. Such civilians remain subject to U.S. laws and regulations and must also comply with applicable host nation and third country national laws (subject to the application of international agreements).<sup>63</sup>
- Q: Can contracts be written to ensure the contracting firm and/or its subcontractors are considered to be subject to the laws under 10 USC (Uniform Code of Military Justice)?
- A: Congress creates and establishes Federal criminal jurisdiction. Parties to a contract may comment on their understanding of the applicable existing Federal laws in the contract, but contracting parties cannot create Federal criminal jurisdiction over citizens. The creation of Federal criminal jurisdiction rests with the empowered sovereign state and its legislative branch (not private corporations, Federal agencies, or departments of the sovereign state).
- Q: Since the contractors are civilians, why not refer the charges to the DoD Contracting Office and deal with them either through the host nation channels or U.S. civilian laws?
- A: For minor offenses, alternative administrative measures may be sufficient—for example, loss of security clearance or employment, removal from the country, barring from any future employment associated with the Federal Government or its contractors, and hiring provisions by the contractor that result in forfeiture of pay. The requirements of good

order and discipline (e.g., deterrence, protection of other persons and property, accountability for wrongful conduct, and U.S. setting the example for the host nation) demand workable solutions for exercising criminal jurisdiction and imposing punishment on accompanying or employed civilians who engage in misconduct that would constitute felony offenses within U.S. territory. The U.S. Federal Government cannot overlook the impact of felony offenses.

Q: If none of the relevant parties to the act (e.g., U.S., HN, and TCN) lists the act as a chargeable offense, what needs to be done?

A: If the conduct does not constitute a violation of U.S. Federal criminal law or the criminal law of any applicable foreign country where the conduct occurred, a criminal act probably does not exist. If the conduct is considered improper or bad judgment with adverse consequences but not criminal, administrative measures may be a satisfactory course of action.

Q: Does the new DoDI 3020.41 address any solutions for these emerging violations?

A: Yes, to some extent. However, DoDI 5525.11 (3 March 2005) implements the policies and procedures resulting from the Military Extraterritorial Jurisdiction Act and is more instructive on the specific issue of criminal jurisdiction.<sup>64</sup>

Having considered a number of legal issues in the hiring of civilians to fill military needs, Section 5 offers some solutions for finding and recruiting skilled civilian personnel.

## 5. Practical Solutions for Short-Term Use

Presenting background data, the general nature of special operations-related skills and competencies, and an overview of pertinent international and domestic legal statutes/policy directives is of course easier than providing a solution. However, depending on the method selected and human resource systems used, USSOCOM could begin accessing skilled civilians immediately. Presented in this section are some practical solutions and courses of action for leveraging current technology to target, locate, market, recruit, assess, manage, train, and retain these nonstandard specialists in support of SOF.

**Existing Human Resource Management Systems.** Within the U.S. Government, there are two entities by which USSOCOM can set this concept into motion—that is, develop a synergy otherwise not attainable:

- a. The Office of Personnel Management
- b. The human resource/personnel commands of the uniformed services.

**Office of Personnel Management (OPM).** In simple terms, the OPM is the government's human resource and personnel services agency—the locator, marketer, recruiter, assessor, and manager of talent.

OPM works with the President, Congress, departments and agencies, and other stakeholders to implement human capital policies that assist Federal agencies in meeting their strategic goals. The implementation is accomplished by recruiting citizens to Federal service, by serving as the main portal for employment information, and connecting job applicants with Federal agencies and departments. OPM connects people and their skills and talents to Federal agencies that need specific human resources and provides these agencies with policies and guidance that enable them to capitalize on these skills and talents.<sup>65</sup>

**Human Resource/Personnel Commands of the Uniformed Services.** The uniformed services perform their human resource functions through

organic recruiting and management commands/ centers. Each has the responsibility to identify, recruit, assess, and manage personnel. Thus each could serve as surrogate recruiters to identify and recruit potential candidates for USSOCOM.<sup>66</sup> Two that are often forgotten yet also sources for highly skilled candidates are the Public Health Service and the commissioned officer corps of the National Oceanographic and Atmospheric Administration.

### **Solutions/Courses of Action (COA)**

The solutions/COA derived for this concept produced both short- and long-term categories—that is, some ideas, although valid, would take longer to implement than others. While the focus here is on some potential solutions for short-term use, each can be used to effectively sustain the program indefinitely. In addition, each solution provides a different degree of control and oversight and addresses the marketing, recruiting, assessment and selection, vetting, training, maintenance of skills, and retention functions. The best solution for USSOCOM may even be a hybrid of those depicted. The commonalities of all COA are provided first, followed by the recommended COA.

**Concepts Common to All COA.** There should exist, at the DoD level, a primary point of contact to provide oversight, ensure standardization across the uniformed Services, interface with other DoD and U.S. Government agencies, and deconflict legal and other potential issues. This focal point should be the Assistant Secretary of Defense (ASD) for Special Operations/Low Intensity Conflict, who provides:

Overall supervision of Special Operations (SO) and Low Intensity Conflict (LIC) activities of DoD, including oversight of policy and resources. Principal civilian advisor to Secretary of Defense on SO/LIC matters.<sup>67</sup>

As the primary point of contact, the ASD (SO/LIC) would monitor all public relations aspects of candidate recruiting, but would defer to USSOCOM and its service component commands for handling specific queries, assessment and selection, vetting, clearances, training, management, and retention issues.<sup>68</sup> This focus could be managed within USSOCOM by a Special Operations Human Resources Directorate (SOHRD) vice the current Special Operations J1 staff directorate that exists to perform joint personnel management and plans,

not individual service-specific management policies and procedures as depicted herein.<sup>69</sup>

Once approved, USSOCOM service components would forward vetted/approved candidate applications to USSOCOM SOHRD for contracting via OPM or the ASD (SO/LIC). Once contracted, SOHRD would then execute the normal personnel management process (e.g., medical care, post-contract medical care for injuries/conditions incurred during the contract, pay, weapons status, shots, and train-up period).

COA 1	OPM administers and DoD—ASD (SO/LIC)—monitors program to ensure standardization across the services; USSOCOM provides assessment and selection system to identify approved candidates for contractual hire by OPM.
COA 2	DoD—ASD (SO/LIC)—oversees program to ensure standardization across the uniformed services. USSOCOM administers the entire program through its service components.
COA 3	DoD—ASD (SO/LIC)—provides oversight of program to ensure standardization across the uniformed services but outsources the marketing, recruitment, application, and database functions process to a civilian company specializing in personnel services (prime contractor). USSOCOM provides assessment and selection system to identify approved candidates for contractual hire by the prime contractor.

### **Use of Technology for Locating, Assessing, Managing, and Retaining**

The physical and mental techniques and systems used by the OSS to identify, recruit, and assess men and women are no less sound today than during World War II. Although today's technology affords the Internet and vast arrays of databases upon which to draw information, the physical process of face-to-face meetings cannot be overstated. Equally important are the budgetary and manpower constraints placed on USSOCOM and the uniformed services. From a cost-benefit perspective, why should USSOCOM develop a new system? Why not leverage the knowledge and systems used by marketing and recruiting experts to identify highly talented civilians? Unless there are underlying reasons for creating and managing such a system within the confines of USSOCOM, why not let the experts do it?

**Targeting, Locating, Marketing, and Recruiting.** Targeting and locating potential candidates for any job is difficult. Marketing and recruiting are less cumbersome once the target audience has been defined. Every organization desires bright, innovative, creative people. Given the strengths of professional agencies used to locate creative talent, USSOCOM should consider both the U.S. Government (OPM) and outsourcing to locate, market, and recruit. The start-up costs—time, effort, and resources—would greatly hinder USSOCOM from taking on this task with the same degree of expertise currently exercised by either OPM or civilian headhunting/personnel services firms.

**Assessing, Selecting, and Training.** At the heart of this concept is a USSOCOM assessment and selection program—the key to culling the potentials from the risks. Although USSOCOM currently has and executes rigorous, service-specific selection and assessment programs, the one proposed in this concept is of another type—nonmilitary. USSOCOM and its service components will develop an assessment and selection program unlike any currently used because they will not necessarily be looking for a candidate possessing the same degree of physical stamina and ability as current service members. Like the OSS, they will have to adjust their assessment tools to find the desired skills and competencies. Rather than start from scratch, USSOCOM should learn from the OSS recommendations after analyzing its own procedures and adjudged defects:

At the end of their report on the OSS program, *Assessment of Men*, the OSS staff gave recommendations that they hoped would remedy some defects of the assessment programs as practiced in the OSS .... While the recommendations were formulated as definite rules, they were no more than a set of hypotheses to be tested in the planning and operating of hopeful subsequent assessment centers.

1. Select a staff of suitable size and competence, diversified in respect to age, sex, social status, temperament, major sentiments, and specific skills but uniform in respect to a high degree of intellectual and emotional flexibility.
2. Before designing the program of assessment procedures, conduct a preliminary study of the jobs and job holders of the organization.



2.1 Make an adequate functional analysis of each of the roles for which candidates are to be assessed, as well as an analysis of the environments in which each role must be fulfilled.

2.2 Obtain from members of the organization a list of personality attributes that, in their opinion, contribute to success or failure in the performance of each role.

2.3 After a careful survey, analysis, and classification of the information obtained by these observations and interviews (recommendations 2.1 and 2.2), make a tentative list of the personality determinants of success or failure in the performance of each role. These determinants will constitute the variables which, if possible, will be measured by the assessment procedures.

2.4 Define, in words that are intelligible to members of the organization, a tentative rating scale for each personality variable on the selected list and for the overall variable, Job Fitness.

2.5 Devise a satisfactory system for appraising the performance of members of the organization both at this time and later.

2.6 Obtain appraisals of a properly distributed sample of the present members of the organization.

2.7 Examine the defects of the appraisal system as revealed in practice (recommendation 2.6) and correct these by revising, where necessary, the lists of variables, definitions, rating scales, or other elements.

2.8 Obtain the figures necessary for a brief numerical statement of the personnel history of the organization over the last 4 or 5 years.

3. Design a program of assessment procedures that will reveal the strength of the selected variables; for assessing these variables, set up scales that conform to the rating scales defined for the purpose of appraisal.

4. Build a conceptual scheme in terms of which formulations of different personalities can be made.

5. Assess candidates for a long trial period without reporting ratings for decisions to the organizations.<sup>70</sup>

### **A Lesson Worth Remembering**

During the first year of its operation, there were three channels of entry into the OSS: recruitment of military personnel by the Personnel Procurement Branch, recruitment of civilians by the Civilian Personnel Branch, and recruitment of both military and civilian personnel through the initiative of individual OSS members.<sup>71</sup>

**Managing.** Depending on which course of action USSOCOM selects, OPM, USSOCOM (SOHRD), or the selected civilian headhunting/personnel services firm could manage approved candidates. Of the two governmental agencies, OPM is better-suited because it is operating and functionally designed to perform the management function; USSOCOM would have to further structure (e.g., establish a human resource department). The livelihood of civilian firms likewise depends on their ability to identify, target, recruit, and manage candidates. This strength, like that of OPM, would place them in a better position to perform this function than any newly created human resource department within USSOCOM.

**Retaining.** The human resource department of an organization also typically focuses on cultivating the candidate's desire to continue. Every unit within USSOCOM will share this co-responsibility because that is where the sense of belonging and desire to continue will be instilled. Where there is no support and sense of camaraderie, there will be no desire. Regardless of *how* USSOCOM chooses to manage its civilian, nontraditional, nonuniformed warriors, it bears responsibility for cultivating a sense of teamwork. In reality, both parties need each other.

**The Final Suggestion: Research and Analysis Branch.** Inclusive to this concept of contracting for civilian expertise, USSOCOM might also consider resurrecting a concept used by the OSS referred to as the Research and Analysis Branch. This branch would comprise a council of strategic advisors, brought together when required under a Strategic Research and Analysis Branch of the USSOCOM Director of Intelligence. As civilians they would be unencumbered by the

military decision-making process—free thinkers. Like their predecessors in the OSS, this branch would be comprised of *nonmilitary* experts, scholars, and scientists having expertise in analyzing people, history, and events relevant to a specific region (e.g., cultural anthropologists, social anthropologists, psychologists, sociologists, clergy, geologists, archeologists, geographers, educators, government policy writers, law (local) experts, philosophers, political scientists, business (marketers), financiers, history (regional experts), economists, scientists, and other scholars as required.

Staffing Research and Analysis was not a problem. The branch recruited from many disciplines, but especially favored historians, economists, political scientists, geographers, psychologists, anthropologists, and diplomats. Professors all over America welcomed the chance to serve the war effort with their academic skills.<sup>72</sup>



## 6. Summary and Conclusions

By now, most everyone with access to any form of news media is aware that the *Total Force* of the U.S. Armed Forces comprises active and reserve military, civilian, and contractor personnel. Former Secretary of Defense Donald Rumsfeld emphasized this point especially when queried about the duration of combat operations, length of tours, end-strength, and contractors on the battlefield. But too little attention has been given to the expertise available in the civilian sector, whether contractor or otherwise. For USSOCOM, this untapped pool of nontraditional expertise affords an unlimited source for skills and competencies not accessible by uniformed SOF.

The concept of leveraging personnel outside of USSOCOM organic units, specifically civilians, encompasses civilians from every avocation. Domestic and foreign, government employees and nongovernment civilians, government consulting employees, and consultants and contractors all have some inherent skill and/or ability that may be of use to SOF.

The historical examples of civilians supporting and accompanying the armed forces, too numerous to list in this monograph, provide clear evidence as to their validity and usefulness to the Total Force. At a time when there seemed to be less regulations and constraints, the OSS found a way to access the very strengths required for mission success. Perhaps it was a combination of national strategic leadership, fear, and necessity. Regardless of the considerations and factors affecting the concept, the OSS proved to be the special operations manifestation of forward-thinking, creativity, innovation, and skill profiling to locate and use the right person, for the right job, at the right time.

Any attempt to analyze which particular skills and competencies (traditional and nontraditional) might be appropriate for outsourcing will eventually conclude that while it is relatively easy to compare and contrast congressionally mandated special operations activities with service component specialties and ratings, it will become apparent that trying to forecast what might be required in the future is impossible. Therefore, a systemic approach to accessing any skill is far better than attempted fortune telling.

The legal aspects of this concept afford opponents a wealth of ammunition. Arguments based on myth and legend will be many, yet few will be germane to the constantly changing landscape of international law and how the community views its approach to civilians accompanying armed forces. Add to this confusion caused by the military terminology of each nation and it is no wonder commanders at every level question whether the overall concept is a valid idea or not. “Better safe than sorry” say many, and that translates to uncertainty of legality and eventually to not worthy of pursuing the issue. However, U.S. policy has recently changed, and when read in concert with international law, it affords the opportunity for the combatant commands and services to access talent residing in the civilian sector. The administrative effort may be great, but the rewards will outweigh the effort.

Perhaps the dilemma in this concept is *how* to make it happen—that is, what kind of system is required to actually engage the civilian expertise and use it to augment SOF. Part of that dilemma and USSOCOM’s decision is whether to create something new or use an existing system.

## Conclusions

Although the transformation of the conventional U.S. Armed Forces continues, their inherent skills and competencies will remain focused on defeating an opponent’s *conventional* (not unconventional) forces.

The intent and implications of international law can be puzzling. When reviewed against U.S. law, U.S. policy, DoD directives, DoD instructions, and DoD policies, it can become a quagmire. In addition, *ground truth* is changing daily as new policies are developed. Some general conclusions can be derived, however, from existing State practice, Law of War treaties, and emerging U.S. DoD policy:

- a. Civilians may accompany the military in armed conflict.
- b. Civilians authorized to accompany the armed forces in armed conflict are entitled to prisoner-of-war status if captured.
- c. The Law of War does not prohibit civilians accompanying the armed forces from taking a direct part in hostilities.

- d. Civilians accompanying the armed forces are subject to attack for such time as they take a direct part in hostilities, but do not relinquish their entitlement to prisoner-of-war status.
- e. Private civilians are subject to attack for such time as they take a direct part in hostilities.
- f. The classification of “unprivileged belligerent” historically has been reserved for private citizens (other than members of a *levee en masse*) who engage in unauthorized combatant acts.
- g. *Recruiting* and *retention* are terms referring to uniformed military, not civilian, positions. The intent of U.S. DoD policy, at least currently, does not permit filling of inherently governmental functions (positions) with civilians.
- h. Until USSOCOM concludes an analysis of inherently governmental functions it will be difficult to discern which positions civilians are authorized to fill.

The practical solutions for short-term use indicate a delineation of roles and responsibilities along functional lines, with ASD (SO/LIC) providing oversight:

- a. OPM or a civilian firm should manage the administrative functions—targeting, marketing, recruiting, vetting, managing, and retaining candidates.
- b. USSOCOM and its components should perform the operational and training functions—assessing, selecting, training, and appraising performance.

The lessons derived from military history and the OSS recruitment and assessment techniques provide the following conclusions:

- a. A gap will always exist between required skills and competencies and available skills and competencies.
- b. Civilians have always been on the battlefield accompanying military forces.
- c. USSOCOM should routinely look to civilian expertise when mission requirements exceed available resources. ↑





## Endnotes

1. Citing the U.S. Constitution's 14th Amendment, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Although the Constitution provides the framework for the law, the law fills in the gaps via Title 8 USC.

Per 8 USC section 1401, the following are declared citizens of the United States at birth:

- a. Anyone born inside the United States
  - b. Any Indian or Eskimo born in the United States, provided being a citizen of the U.S. does not impair the person's status as a citizen of the tribe
  - c. Anyone born outside the United States, both of whose parents are citizens of the U.S., as long as one parent has lived in the U.S.
  - d. Anyone born outside the United States, if one parent is a citizen and lived in the U.S. for at least 1 year and the other parent is a U.S. national
  - e. Anyone born in a U.S. possession, if one parent is a citizen and lived in the U.S. for at least 1 year
  - f. Anyone found in the U.S. under the age of five, whose parentage cannot be determined, as long as proof of noncitizenship is not provided by age 21
  - g. Anyone born outside the United States, if one parent is an alien and as long as the other parent is a citizen of the U.S. who lived in the U.S. for at least 5 years (with military and diplomatic service included in this time)
  - h. A final, historical condition is a person born before 24 May 1934 of an alien father and a U.S. citizen mother who has lived in the U.S.
2. The Internal Revenue Service provides clarification regarding an employee. A general rule is that anyone who performs services for you is your employee if you can control what will be done and how it will be done.
  3. U.S. Congress, Title 5 USC 2105, *Government Organization and Employees* (Washington, DC: 6 April 2006), Part III, Subpart A—General Provisions, available from [www4.law.cornell.edu/uscode/html/uscode05/usc\\_sup\\_01\\_5\\_10\\_III.html](http://www4.law.cornell.edu/uscode/html/uscode05/usc_sup_01_5_10_III.html) (accessed 23 April 2006).
  4. Title 10 USC employees, as General Service (GS), are considered government employees under 5 USC because the legal aspects and regulations regarding their employment are governed by Title 5 USC, not Title 10 USC.  
Per 10 USC 113, the term *personnel* means members of the Armed Forces of the United States and civilian employees of the DoD.

Per 10 USC 4021 (chapter 373, 12 July 2005), the Secretary of the Army may employ as many civilians as professors, instructors, and lecturers at the Army War College or the United States Army Command and General Staff College as the Secretary considers necessary.

Per 10 USC 1595 (paragraphs a through c, 12 July 2005, regarding civilian faculty members at certain DoD schools, their employment and compensation): **Authority of Secretary**—The Secretary of Defense may employ as many civilians as professors, instructors, and lecturers at the institutions specified in subsection (c) as the Secretary considers necessary. **Covered Institutions**—This section applies with respect to the following institutions of the DoD: The National Defense University, The Foreign Language Center of the Defense Language Institute, The George C. Marshall European Center for Security Studies, The English Language Center of the Defense Language Institute, The Asia-Pacific Center for Security Studies, and The Western Hemisphere Institute for Security Cooperation.

5. Per 5 USC 3109 and for the purpose of this monograph, *agency* has the section 5721 meaning and includes a military department. *Employee* means an individual employed in or under an agency. *Continental United States* means the several states and the District of Columbia, but not Alaska or Hawaii. *Government* means the government of the United States and the government of the District of Columbia. *Appropriation* includes funds made available by statute under section 9104 of Title 31. *United States* means the several states, District of Columbia, Commonwealth of Puerto Rico, Commonwealth of the Northern Mariana Islands, territories and possessions of the United States, and areas and installations in the Republic of Panama that are made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements (as described in section 3(a) of the Panama Canal Act of 1979). *Foreign Service of the United States* means the Foreign Service as constituted under the Foreign Service Act of 1980.

Pursuant to this section, the Office of Personnel Management shall prescribe regulations necessary for the administration of this section. Such regulations shall include criteria governing the circumstances in which it is appropriate to employ an expert or consultant under the provisions of this section, criteria for setting the pay of experts and consultants under this section, and provisions to ensure compliance with such regulations. Available from [www.law.cornell.edu/uscode/html/uscode05/usc\\_sec\\_05\\_00003109----000-.html](http://www.law.cornell.edu/uscode/html/uscode05/usc_sec_05_00003109----000-.html) (accessed 19 October 2006).

Each agency shall report annually to the Office of Personnel Management the number of days each expert or consultant was employed by the agency and the total amount the agency paid these persons for such work during the period. Available from [www.law.cornell.edu/uscode/html/uscode05/usc\\_sec\\_05\\_00003109----000-.html](http://www.law.cornell.edu/uscode/html/uscode05/usc_sec_05_00003109----000-.html) (accessed 19 October 2006).

6. To determine whether an individual is an employee or independent contractor under the common law, the relationship of the worker and the business must be examined. All evidence of control and independence must be considered. In an employee-independent contractor determination, all information that provides evidence of the degree of control and degree of independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties.

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered. As far as this monograph is concerned, the agency requesting the work will ultimately be the U.S. Government. It is critical that the U.S. Government (OPM, the services, and USSOCOM) correctly determine whether the individual providing the service is an employee or independent contractor. Generally, all employers (U.S. Government included) must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. An employer does not generally have to withhold or pay any taxes on payments to independent contractors. Available from [www.irs.gov/businesses/small/article/0,id=99921,00.html](http://www.irs.gov/businesses/small/article/0,id=99921,00.html) (accessed 10 January 2006).

7. The term *foreign government*—as used in 18 USC 11 (3 August 2005) except in sections 112, 878, 970, 1116, and 1201—includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.

Both host nation and third country nationals can be contracted as well. As cited in DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces (Washington, DC: Under Secretary of Defense for Acquisition, Technology, and Logistics, 3 October 2005), 1:

Under the authority of references (a) and (b), this instruction establishes and implements policy and guidance, assigns responsibilities, and serves as a comprehensive source of DoD policy and procedures concerning DoD contractor personnel authorized to accompany the U.S. Armed Forces. Includes defense contractors and their employees and subcontractors at all tiers under DoD contracts, including third country national and host nation personnel, who are authorized to accompany the U.S. Armed Forces under such contracts. Collectively, these persons are referred to as *contingency contractor personnel* of which one significant subcategory—*contractors deploying with the force*—is subject to special deploy-

ment, redeployment, and accountability requirements and responsibilities.

8. W. Hays Parks, "Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces" paper summarizing an informal PowerPoint presentation offered at the Third Meeting of Experts on "Direct Participation in Hostilities" (Geneva, 25 October 2005), 7.
9. Fremont Expeditions (1842–1845), the Bear-Flag Rebellion (1846), the Mexican-American War (1846), the U.S. Civil War (1861–1863), and various wars against the Navajo (1863–1864).
10. "Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war and be detained as such. The monarch and members of the hostile-reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government are, if captured on belligerent ground and if unprovided with a safe-conduct granted by the captor's government, prisoners of war." Available from [www.civilwar-home.com/liebercode.htm](http://www.civilwar-home.com/liebercode.htm) (accessed 9 February 2006).

Thus begat a question key to this monograph: At what point would a civilian accompanying U.S. forces be regarded as taking a direct part in hostilities and therefore subject to lawful attack? While the concept of punishment of unprivileged belligerents was codified in the 1863 U.S. Army General Orders No. 100, one of two Law of War documents prepared by Francis Lieber, a clear distinction was drawn between a private citizen illegally engaging in unauthorized attacks and a civilian accompanying the military and fighting alongside them. (Parks, Geneva), 5.

11. Thirty-seven members parachuted clandestinely into German-occupied France on armed missions in support of the French resistance. Thirteen captured were murdered under the authority of Hitler's decree. The most famous case was the *Trial of Wolfgang Zeuss and Others (The Natzweiler Trial)*, *V War Crimes Trials* (1949). Three of the four Natzweiler victims were FANY. See also Sarah Helm, *A Life in Secrets: The Story of Vera Atkins and the Lost Agents of SOE* (U.K.: Little, Brown, 2005), which details the investigation of murders of the female SOE agents. FANY personnel recognized that as members of a voluntary civilian organization (rather than military), their chances of claiming prisoner-of-war status were slim. In 1999, FANY was renamed the Princess Royal's Volunteer Corps (PRVC) and now referred to as FANY PRVC (Helm, 78 and Parks, Geneva, 2). For further details of FANY in World Wars I and II, see [www.fany.org.uk/about/index.html](http://www.fany.org.uk/about/index.html) (accessed 19 October 2006).
12. Gregory J. W. Urwin, "The Wake Island Militia," *Naval History* (November/December, 1997), 39–44. Ninety-eight civilians retained on the island to operate heavy construction equipment were murdered on

- 8 October 1943 by their captors as U.S. forces prepared to recapture the island. Their murder had nothing to do with whether or not they had taken a direct part in hostilities in the 1941 defense of the island. The Japanese commander, Rear Admiral Shigimatsu Sakaibara, was tried, convicted, and executed after the war for his war crimes. (Ibid.), 5.
13. The Flying Tigers were a voluntarily discharged group of former U.S. military personnel (pilots and ground support personnel). For more information, see [www.flyingtigersavg.com/](http://www.flyingtigersavg.com/) (accessed 19 October 2006).
  14. Predominantly Kachins, but also Karens, Chins, Kukis and Nagas.
  15. Refugee members of the Shetland Bus remained civilians rather than become members of the Royal Navy or Norwegian Navy. David Howarth, *The Shetland Bus: A WWII Epic of Escape, Survival, and Adventure* (New York: The Lyons Press, 1951), pp. 13, 16, 51, 61. For more information on the Shetland Bus, see [www.shetland-heritage.co.uk/shetlandbus/](http://www.shetland-heritage.co.uk/shetlandbus/) (accessed 19 October 2006).
  16. Parks, Geneva, 9.
  17. Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003), 259. "One of fifty Americans deployed to the [Persian] Gulf in 1990 [for Operations Desert Shield and Desert Storm] was a privately employed civilian. By the time of the Bosnia deployment in 1995–1996, the ratio was down to 1 in 10."
  18. DoD, *Final Report to Congress: Conduct of the Persian Gulf War* (April 1992), Appendix N, pp. 599–604. (W. Hays Parks, "Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces," 2005.)
  19. For example, the 1996 DoD Authorization Act directed DoD to convert 10,000 uniformed positions into civilian jobs by 30 September 1997; see Public Law 104-106, section 1032, 110 Stat. 186. (W. Hays Parks, "Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces" paper presented to the Expert Workshop for the Swiss Initiative with the International Committee of the Red Cross with regard to Private Military/Security Companies, see Hotel Sonne, Küsnacht am Zürichsee, Switzerland, 16–17 January 2006.)
  20. But this was not unique to DoD. The Department of State relies upon private security contractors for personal security details and protection of U.S. embassies and missions abroad. Such peacetime reliance continued into the armed conflicts in Afghanistan and Iraq without full appreciation for potential Law of War issues. (Parks, Geneva), 2.
  21. Singer, *Corporate Warriors*, n. 2, at 11, 173.
  22. Karen L. Douglas "Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority" *Air Force Law Review*, Spring, 2004, available from [www.findarticles.com/p/articles/mi\\_m6007/is\\_55/ai\\_n8585594](http://www.findarticles.com/p/articles/mi_m6007/is_55/ai_n8585594) (accessed 30 November 2005).

23. Gary Schroen, *First In: An Insider's Account of How the CIA Spearheaded the War on Terror in Afghanistan* (New York: Presidio Press, 2005), 359.
24. Parks, Geneva, 9.
25. Belligerent occupation by democracies in modern history has been a responsibility relinquished by military commanders to civilian control, and to civilian employees, as a model of restricted exercise of military power. In the 1918 Allied administration of the Rhineland and in the Allied occupation of Germany following World War II, transformation of the occupation from military to civilian control was rapid and substantial. Hence Iraq was not a first-time experience. See, for example, Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupational Government of the Rhineland 1918–1923* (1944), at 10; and Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944–1946* (1975), at 404. (Ibid.), 3.
26. Article 51, paragraph 3 of the 1977 Additional Protocol I states: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities. Although the United States is not party to Additional Protocol I, this phrase is regarded as a useful general threshold for the point at which a civilian loses his or her immunity from direct attack. It was important to examine the issue not only from a U.S. standpoint but also of a potential adversary. Thus while it might be argued that a government may hire a civilian contractor to service a combat aircraft on the flight line in a theater of operations, an enemy sniper might regard that civilian as taking a direct part in hostilities and thus subject to lawful attack.” (Parks, Geneva), 4.
27. Ibid.
28. Ibid., 7.
29. Ibid., 5.
30. David Shearer, *Private Armies and Military Intervention* (Adelphi Paper 316, 1998); Singer, *Corporate Warriors*, n. 2; and Deborah Avant, *The Market for Force* (2005). (Ibid.)
31. Parks, “Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces” (Copyright 2005), 5.
32. Singer, *Corporate Warriors*, at 19–39.
33. Ibid., 6.
34. Ibid., 9.
35. Former Secretary of Defense Rumsfeld provides a clear and unambiguous definition of the Total Force and its place within the National Military Strategy in the recent Quadrennial Defense Review (DoD, Washington, DC: Office of the Secretary of Defense, 6 February 2006), 75:  

The Department’s Total Force—its active and reserve military components, its civil servants, and its contractors—constitutes its warfighting capability and capacity.

The Department and military services must carefully distribute skills among the four elements of the Total Force (active component, reserve component, civilians, and contractors) to optimize their contributions across the range of military operations, from peace to war. In a reconfigured Total Force, a new balance of skills must be coupled with greater accessibility to people so that the right forces are available at the right time. Both uniformed and civilian personnel must be readily available to joint commanders.

36. "What Was OSS?" available from [www.cia.gov/cia/publications/oss/art03.htm](http://www.cia.gov/cia/publications/oss/art03.htm) (accessed 25 April 2006), OSS Assessment Staff, *Assessment of Men* (New York: Rinehart and Co., Inc., 1948) and Michael Warner, CIA History Staff, May 2000, available from [www.cia.gov/cia/publications/oss/art04.htm](http://www.cia.gov/cia/publications/oss/art04.htm) (accessed 12 January 2006).
37. Ultra was the British name for intelligence resulting from decryption of German communications in World War II.
38. "What Was OSS?" (See endnote 35 for listing.)
39. For purposes of this section, special operations activities include each of the following: a) direct action, b) strategic reconnaissance, c) unconventional warfare, d) foreign internal defense, e) civil affairs, f) psychological operations, g) counterterrorism, h) humanitarian assistance, i) theater search and rescue, and j) such other activities as may be specified by the President or the Secretary of Defense. (U.S. Congress, Title 10 USC 167(j), 12 July 2005.)
40. USSOCOM forces, by component include Army (Special Forces, Ranger, Special Operations Aviation, Civil Affairs, and Psychological Operations), Navy (SEAL Teams, SEAL Delivery Vehicle Teams, and Special Boat Teams), Air Force (primary and supporting aerial weapons and personnel delivery systems, Para-Rescue Jumpers, Combat Control, and Foreign Internal Defense), and Marine Corp (Foreign Internal Defense).
41. Dr. Robert G. Spulak, Jr. provided an excellent treatise on "Perspectives on Recruit Selection from Nontraditional Sources for Special Operations Forces (SOF) for Life (S4L)" 15 June 2003, in a paper prepared for USSOCOM Future Concepts Working Group Meeting. Included in the research was the concept of utilizing former and retired special operations personnel beyond their uniformed service years to continue to support the USSOCOM in nonuniformed ways. Recruiting, selecting, assessing, and training could therefore be tailored to avoid lengthy, standardized train-up program of instruction. In some cases they may even have a greater degree of technical expertise than a military-trained, fully qualified special operations service member.
42. Interview with W. Hays Parks, telephone conversation 10 February 2006. His comments and findings were delivered in "Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contrac-



tors Accompanying the Armed Forces” at the Third Meeting of Experts on “direct participation in hostilities” (Geneva, 25 October 2005).

43. Ibid.

44. The interviews with Parks surfaced the following information:

- a. Attendees at the first meeting of experts on the meaning of “taking a direct part in hostilities” were introduced to the hypothetical “Bob the truck driver.” Hypothetical Bob was a civilian truck driver in a convoy of military trucks carrying military supplies and ammunition to military positions. The driver of the first truck in the convoy was a uniformed soldier. Bob was driving the ammunition-laden second truck and was followed by a truck driven by a soldier, who in turn was followed by a military truck driven by another civilian, and so on. The question was whether Bob was taking a direct part in hostilities and could be lawfully targeted.

Some argue Bob was taking a direct part in hostilities and therefore could be targeted. Others argue that as Bob was a civilian (whether regarded as taking a direct part in hostilities or not), he could not be targeted, but was at risk of injury or death as a result of direct attack of the truck he was driving.

More importantly, the debate over whether Bob the truck driver could be targeted is not new. Parks suggested it began more than 30 years ago between two members of the U.S. delegation to the Diplomatic Conference—Waldemar (Wally) A. Solf and Richard (Dick) Fruchterman—as the “direct participation in hostilities” provision and other Additional Protocol I language was under consideration. Parks witnessed their discussion of Bob on more than one occasion. He raised it anew in a meeting of Canadian, British, New Zealand, and U.S. military Law of War experts at Old Sarum in November 1989. Parks concludes there is nothing to suggest that Bob’s status would be other than a prisoner of war, as articulated in Article 4, paragraph A(2), Geneva Convention Relative to the Treatment of Prisoners of War (1949).

This information is related to the “unprivileged belligerent” status issue raised in efforts against international terrorism since the Al Qaeda attack of September 11, 2001. Members of Al Qaeda captured by coalition forces have been characterized as unprivileged belligerents, an historic classification for private citizens who engage in combatant activities not authorized by a government. Denial of combatant and prisoner-of-war status to private citizens—again, other than a *levee en masse*—has a very long history. It is separate and apart from the issue of when a civilian lawfully may be targeted as a result of acts regarded as taking a direct part in hostilities. Parks also highlighted that the focus of the meeting of legal experts has so far been solely on ascertaining when a civilian may be regarded as taking a direct part in hostilities and lawfully targeted—whether a private citizen, a civilian employee of a government that is a State party to an armed conflict, or a civilian



- contractor hired by a State party to an armed conflict. Assessing whether Bob the truck driver is taking a direct part in hostilities and therefore may be the object of direct attack is separate and apart from his status if captured.
- b. Parks stressed that within the DoD, the meaning of the phrase “taking a direct part in hostilities” was considered primarily from the standpoint of the degree to which outsourcing might be done. Whether as a matter of policy it should be done was a separate issue altogether.
45. Interview with William B Wiley, October 2005. In addition to his law degree, Mr. Wiley has a M.S. in Organizational Psychology from San Francisco State University. For his additional background, see *Inter-agency Connection* (Oklahoma City: Oklahoma Federal Executive Board, February 2006), 11, available from [www.oklahoma.feb.gov/Forms/2006FebNews.pdf](http://www.oklahoma.feb.gov/Forms/2006FebNews.pdf) (accessed 19 October 2006).
46. Ibid.
47. Peter Grier, “Civilians in Harm’s Way,” *Air Force Magazine*, July 2005 (Vol. 88, No. 7), available from [www.afa.org/magazine/July2005/0705civil.html](http://www.afa.org/magazine/July2005/0705civil.html) (accessed 21 January 2006).
48. Interview with Wiley, October 2005.
49. Interview with Parks, 10 February 2006.
50. Currently U.S. military doctrine describes the phases as follows: 0, Shape; I, Deter; 2, II, Seize the Initiative; III, Dominate; IV, Stabilize; and V, Enable Civil Authority. U.S. DoD, Joint Operation Planning, Revision Third Draft (3), Joint Publication 5-0 (Washington, DC: Joint Chiefs of Staff, 10 August 2005), iv-31.
51. The phrase *direct part in hostilities* also is used in Additional Protocol II (Article 13, paragraph 3). This suggests attention to its original intent—that is, to address the issue of the farmer by day, guerrilla by night, and when he or she may be lawfully targeted as an exception to provisions in Additional Protocols I and II prohibiting making civilians the object of attack (Article 51, paragraph 2, Additional Protocol I, and Article 13, paragraph 2, Additional Protocol II). The road to clarity and specificity has proved challenging; there is no bright line. At the same time, the phrase as used in Additional Protocols I and II was intended only to address when a civilian lawfully may be the object of direct attack. From interview with W. Hays Parks, 10 February 2006.
52. Parks, “Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces.”
53. Ibid.
54. Due to differences in roles and missions of the U.S. military services, implementation responsibility is entrusted to each individual service. See DoDI 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces” (Washington, DC: Secretary of Defense, 3 October 2005) for additional details.

55. Parks, "Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces."
56. Ibid.
57. Spulak, "Perspectives on Recruit Selection from Nontraditional Sources for Special Operations Forces (SOF) for Life (S4L)."
58. Operational functions include the *units* designated specifically to execute those special operations activities (see endnote 38 for listing) mandated in 10 USC 167. Support functions to these units include the units and personnel designated specifically to provide admin. and maintenance.
59. DoDI 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces" (Washington, DC: Secretary of Defense, 3 October 2005), 6-7.
60. Ibid., 7.
61. Ibid.
62. Interviews with Colonel Mike Hoadley (a U.S. Army Judge Advocate General officer assigned to the U.S. Army War College, Carlisle Barracks, PA) 1-10 February 2006 and W. Hays Parks.
63. COL Hoadley highlighted four germane cites to this opinion:
  - a. DoD policy (DoDI 5525.11 [March 3, 2005]) and Federal law state basically that civilians employed by or accompanying the U.S. Armed Forces outside the U.S. who commit felony offenses while outside the U.S. are subject to U.S. Federal criminal jurisdiction as applicable under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000 (18 USC 3261 through 3267). Recognizing that MEJA applies to only certain Federal criminal offenses committed outside U.S. territory and does extend jurisdiction to all potential criminal acts, there are other legal bases for exercising jurisdiction.
  - b. Federal criminal jurisdiction may also apply to conduct that constitutes a violation of the Law of War when committed by a U.S. civilian national under the War Crimes Act (18 USC 2441).
  - c. Further, if the criminal conduct is committed on a military installation or facilities in a foreign country, Federal criminal jurisdiction may exist under 18 USC 7.
  - d. There is a long-standing U.S. policy of maximizing U.S. jurisdiction over U.S. citizens. Employed or accompanying civilians do remain, however, subject to the domestic criminal laws of the host nation or foreign country they are in (absent a status of forces agreement or other international agreement or diplomatic notes to the contrary). Under certain circumstances, U.S. citizens may be delivered to the authorities of a foreign country for trial because their conduct violated that foreign country's criminal laws.
64. DoDI 3020.41, p. 7, states that contingency contractor personnel remain subject to U.S. laws and regulations. For example, contingency contractor personnel fulfilling contracts with the U.S. Armed

Forces may be subject to prosecution under Federal law, including but not limited to the MEJA, 18 USC 3261, reference (k), which extends U.S. Federal criminal jurisdiction to certain DoD contingency contractor personnel, for certain offenses committed outside U.S. territory. For such cases, the DoD regulations to be followed for complying with MEJA are contained in DoDI 5525.11, reference (l). Pursuant to the War Crimes Act, 18 USC 2441, reference (m), Federal criminal jurisdiction also extends to conduct that is determined to constitute a violation of the Law of War when committed by a civilian national of the United States. In addition, when there is a formal declaration of war by Congress, DoD contingency contractor personnel may be subject to prosecution under the Uniform Code of Military Justice, reference (n). Other laws may allow prosecution of offenses by contingency contractor personnel, such as 18 USC 7(9), reference (o), which may provide for prosecution of U.S. nationals who commit offenses on military facilities in foreign countries. Immediate consultation with the servicing legal office and the contracting officer is required in all cases of suspected criminal conduct by contingency contractor personnel.

65. Office of Personnel Management Web site, [www.opm.gov/html/goals.asp](http://www.opm.gov/html/goals.asp) (accessed 13 May 2006). OPM oversees the Federal work force and provides the American public with up-to-date employment information. OPM also supports U.S. agencies with personnel services and policy leadership including staffing tools, guidance on labor-management relations, and programs to improve work force performance.
66. During the course of the recruitment process the uniformed service recruiting commands will identify civilians who may not meet their specific recruiting needs, goals, and skill sets, but may, however, be what is required by USSOCOM. When this occurs, the names of the individual could be provided to USSOCOM recruiters.
67. ASD/SOLIC Web site, [www.defenselink.mil/policy/sections/policy\\_offices/solic/index.html](http://www.defenselink.mil/policy/sections/policy_offices/solic/index.html) (accessed 13 May 2006).
68. The service components of USSOCOM include the U.S. Army Special Operations Command, U.S. Naval Special Warfare Command, U.S. Air Force Special Operations Command, and U.S. Marine Special Operations Command.

USSOCOM should consider forming and conducting an OSS-like assessment using a panel of psychologists and sociologists. This assessment would matriculate a pool of graduates suitable for employment/deployment once the specific details of the requested requirements were defined. Once approved, these candidates could return home until called for employment.

69. To ensure the SOF truth that humans are more important than hardware, USSOCOM should develop a system that manages warriors, both traditional and nontraditional, for selection for entry level, promotions, assignments, professional military education (not a separate school), experience identifiers to track SOF personnel, education, training, and language. Special operations enabling personnel (intelli-

gence, communications, and logistics or the others who support SOF) also need to be educated, tracked, and grown in the unique requirements of SOF operations.

70. OSS Assessment Staff, *Assessment of Men* (New York: Rinehart and Company, 1948). Donald W. MacKinnon, *How Assessment Centers Were Started in the United States* (Bridgeville, PA: Development Dimensions International, Inc., 1974), 14-15, available from [www.ddiworld.com/pdf/ddi\\_HowAssessmentCentersWereStarted\\_mg.pdf](http://www.ddiworld.com/pdf/ddi_HowAssessmentCentersWereStarted_mg.pdf) (accessed 19 October 2006).

During World War II, Dr. MacKinnon was a member of the assessment board and from June 1944 to August 1945, he was director of Station S in the Office of Strategic Services (the precursor to the Central Intelligence Agency). From 1947 until his retirement in 1970, Dr. MacKinnon served as director of the Institute of Personality Assessment and Research on the University of California, Berkeley campus. Dr. MacKinnon was the author of several scientific articles and coauthor of two books: *Assessment of Men*, a report of the OSS's assessment program during World War II, and *Experimental Studies in Psychodynamics*. Dr. MacKinnon was the American Psychological Association's 1962 Walter Van Dyke Bingham Memorial Lecturer. In 1967 he received the American Psychological Association's Richardson Creativity Award in recognition of his research in creativity. Dr. MacKinnon died in 1987.

71. MacKinnon, *How Assessment Centers Were Started in the United States*, 2. (See endnote 69 for listing.)
72. The Research and Analysis roster reads like a Who's Who of two generations of scholars. Arthur Schlesinger, Jr.; Walt W. Rostow; Edward Shils; Herbert Marcuse; H. Stuart Hughes; Gordon Craig; Crane Brinton; John King Fairbank; Sherman Kent; Ralph Bunche; and a host of distinguished colleagues and students joined the branch. The branch veterans included seven future presidents of the American Historical Association, five of the American Economic Association, and two Nobel Laureates. See Michael Warner, CIA History Staff, May 2000, available from [www.cia.gov/cia/publications/oss/art04.htm](http://www.cia.gov/cia/publications/oss/art04.htm) (accessed 12 January 2006).



