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Articles

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DRAWING A LINE BETWEEN INTELLIGENCE AND COMBAT: THE USE OF CIVILIAN CONTRACTORS IN AERIAL INTELLIGENCE, SURVEILLANCE, RECONNAISANCE, AND TARGET ACQUISITION OPERATIONS

MAJOR CHRISTOPHER B. RICH, JR.[*]

I. Introduction

In August 2015, the U.S. Department of Defense (DoD) announced its intention to drastically increase the daily number of combat air patrols (CAPs) employing Unmanned Aerial Vehicles (UAVs) from approximately 65 to 90 by the year 2019.[1] Such an increase reflects the

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[*] Judge Advocate, United States Army. Presently assigned as Chief of National Security Law, 1st Special Forces Command, Fort Bragg, North Carolina. LL.M., 2018, The Judge Advocate General's School; J.D., 2008, University of Virginia School of Law; B.A., 2004, Brigham Young University. Previous assignments include Brigade Judge Advocate, 116th Military Intelligence Brigade (Aerial Intelligence), Fort Gordon, Georgia, 2015-2017; Operational and International Law Attorney, U.S. Army Africa, Vicenza, Italy, 2014-2015; Defense Counsel, TDS Europe, Vicenza Field Office, Vicenza, Italy, 2012-2014; Trial Counsel, 4th Infantry Division, Fort Carson, Colorado, 2011-2012; Chief of Client Services and Claims Judge Advocate, U.S. Division-North, COB Speicher, Iraq, 2010-2011; Chief of Legal Assistance, 4th Infantry Division, Fort Carson, Colorado, 2010; Tax Center Officer-in-Charge, Fort Carson, Colorado, 2009-2010; Legal Assistance Attorney, 4th Infantry Division, Fort Carson, Colorado, 2009. Member of the bar of Utah. This article was submitted in partial completion of the Master of Laws requirements of the 66th Judge Advocate Officer Graduate Course and received the Major General George S. Prugh Award for Writing Excellence in National Security Law.

[1] Paul D. Shinkman, *A Slippery Slope for Drone Warfare?: The Pentagon's Plan to Let Contractors Pilot Reconnaissance Missions Could Lead Down a More Deadly Path*, LA TIMES (Aug. 21, 2015, 4:19 PM), https://www.usnews.com/news/articles/2015/08/21/pentagon-opening-drone-missions-to-private-contractors.

intense worldwide demand for so-called "drones" across many different mission sets from humanitarian assistance to targeted killings.[2] Although the DoD stated these new missions would largely be manned by individuals drawn from the Army, Air Force, and Special Operations community, a shortage of trained military personnel will require the extensive use of civilian contractors in order to fill the gap.[3]

The proposed use of civilians to execute CAPs was met with intense scrutiny by academics and the press.[4] In response, DoD officials repeatedly emphasized that contractors would only be engaged in intelligence, surveillance, and reconnaissance (ISR) missions; not in combat. For instance, then Secretary of Defense Ash Carter told reporters that "we don't envision a time when [contractor-operated UAVs] will be armed or need to be armed."[5] Several days later, Air Force Chief of Staff General Mark A. Welsh further explained,

> We have used contractors in the intelligence business and in the ISR business for a long time . . . . What we're talking about doing is expanding right now the use of contractors to actually operate government-owned systems for the near term until we can get our training pipeline mature enough that it can sustain the load over time . . . . We don't anticipate at all that [contracted UAV operators] would be involved in kinetic activity or direct targeting of forces on the ground. They would be doing intelligence, surveillance and reconnaissance missions.[6]

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[2] News Transcript, Department of Defense Press Briefing with Secretary Carter in the Pentagon Press Briefing Room (Aug. 20, 2015), https://www.defense.gov/News/Transcripts/Transcript-View/Article/614330/department-of-defense-press-briefing-with-secretary-carter-in-the-pentagon-pres/ [hereinafter Carter Transcript].

[3] News Transcript, Department of Defense Press Briefing by Secretary James and Gen. Welsh on the State of the Air Force in the Pentagon Press Briefing Room (Aug. 24, 2015), https://www.defense.gov/News/Transcripts/Transcript-View/Article/614654/department-of-defense-press-briefing-by-secretary-james-and-gen-welsh-on-the-st/ [hereinafter Welsh Transcript].

[4] *See, e.g.*, Shinkman, *supra* note 1; W.J. Hennigan, *Air Force Hires Civilian Drone Pilots for Combat Patrols; Critics Question Legality*, LA TIMES (Nov. 27, 2015, 3:00 AM), http://www.latimes.com/nation/la-fg-drone-contractor-20151127-story.html.

[5] Carter Transcript, *supra* note 2.

[6] Welsh Transcript, *supra* note 3.

Finally, in November 2015, Air Force General Herbert Carlisle assured skeptics that contractors would not be allowed to designate targets with lasers or fire missiles.[7] According to Carlisle, these contractors "are not combatants."[8]

In making these statements, Carter, Welsh, and Carlisle did little more than reiterate current DoD policy concerning the use of civilian contractors during military operations. This policy bars contractors from performing certain inherently governmental activities such as combat, or what Welsh termed "kinetic activity." At the same time, contractors are permitted to engage in other non-combat activities such as the collection, analysis, and dissemination of intelligence.[9]

Despite this seemingly straightforward partition, there is no agreed upon point at which the collection of intelligence stops and participation in combat begins.[10] Such ambiguity is especially troublesome during operations that utilize manned or unmanned aerial platforms with remote sensing capabilities. These technologies permit individuals many thousands of miles away to control aircraft and to

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[7] Hennigan, *supra* note 4.

[8] *Id.*

[9] *See infra* Section IV. In domestic law, intelligence is a term of art which indicates that a particular activity involving the collection of information that is subject to specific Executive and Congressional oversight requirements. The boundary between intelligence activities, which are subject to these requirements, and military activities, which are not, is not always clear. This article will not seek to resolve these issues. Instead, it will use the term "intelligence" in a more general sense that includes both surveillance and reconnaissance in support of ongoing military operations. Because a particular activity is labeled as intelligence for the purposes of determining whether it is inherently governmental does not necessarily mean that it would constitute intelligence for the purposes of oversight. *See, e.g.*, Matthew R. Grant and Todd C. Huntley, *Legal Issues in Special Operations*, *in* GEOFFREY S. CORN, ET.AL., EDS., U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 553, 559-62 (2016); Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5. J. NAT'L SECURITY L. & POL'Y 539; DEPARTMENT OF DEFENSE MANUAL 5240.01, PROCEDURES GOVERNING THE CONDUCT OF DOD INTELLIGENCE ACTIVITIES (2016).

[10] *See* Information Paper, Plans and Integration Directorate, Army G-2, subject: Calculating Army Processing, Exploitation, and Dissemination (PED) Analyst Requirements and Authorizations (25 Apr. 2016) (on file with author) [hereinafter Information Paper]; Major Keric D. Clanahan, *Wielding a "Very Long, People-Intensive Spear": Inherently Governmental Functions and the Role of Contractors in U.S. Department of Defense Unmanned Aircraft Systems Missions*, 70 A.F. L. REV. 119, 164-67, 178-82 (2013). This assertion is also based on the author's recent professional experiences as Brigade Judge Advocate for the 116th Military Intelligence Brigade (Aerial Intelligence) from July 2015 to July 2017 [hereinafter Professional Experiences].

provide near real time analysis of ongoing operations, including the identification of potential targets on the ground. The advent of remote warfare has raised a number of questions concerning the boundaries of combat and intelligence. For example, is it dispositive that a contractor-piloted aircraft is or is not armed? Does combat encompass only the launching of a missile or direction of a laser beam? Is a contractor who provides real time analysis of a video feed depicting kinetic operations taking part in combat, or merely disseminating intelligence? Uncertainty concerning the precise meaning of DoD policy in regard to these issues has led to significant confusion over long-term manning requirements within the military services and has resulted in a variety of disparate practices during operations.[11] Perhaps more importantly, the use of civilians in any role during tactical ISR operations has significant ramifications under international humanitarian law, which may in fact render these individuals "combatants," and unlawful ones at that.[12]

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[11] *Id.*

[12] A number of able commentators have considered these issues from various perspectives over the last decade or so. Some have focused on the domestic implications of these activities, some on the international implications, while others have addressed both to one degree or another. Although the conclusions presented herein are not radically different from those of previous authors, this article seeks to sharpen their arguments in light of the ongoing confusion within the Department of Defense (DoD) about how to properly use contractors to perform aerial ISR activities, as well as the publication of the new DoD Law of War Manual. It also addresses a number of subjects that commentators have heretofore given insufficient attention. For example, prior writings have not adequately distinguished the legal status of contractors who perform ISR functions during a non-international armed conflict from that of contractors who do so during an international armed conflict. Further, there has been insufficient analysis concerning the definition of combat under domestic policy and how an intelligence or security activity may evolve into combat. Finally, previous works have presented almost no practical guidance to commanders about how to appropriately use contractors in various circumstances. *See, e.g.*, Clanahan, *supra* note 10; Lieutenant Colonel Duane Thompson, *Civilians in the Air Force Distributed Ground System (DCGS)*, JOINT CTR. FOR OPERATIONAL ANALYSIS J., June 2008, at 18; Memorandum from SAF/GC to AF/A2, subject: Contractor Personnel and Remotely Piloted Aircraft (RPA) Operations (7 Jun. 2012) (on file with author) [hereinafter RPA Memo]; Major Jess B. Roberts, *Inherently Governmental Functions: A Bright Line Rule Obscured by the Fog of War*, ARMY LAW., Apr. 2014, at 3; LIEUTENANT COLONEL TRAVIS L. NORTON, INST. OF DEF. ANALYSES, IDA PAPER P-5253, STAFFING FOR UNMANNED AIRCRAFT SYSTEMS (UAS) OPERATIONS (2016); Alice S. Debarre, *U.S.-Hired Private Military and Security Companies in Armed Conflict: Indirect Participation and Its Consequences*, 7 HARV. NAT'L SEC. J. 437 (2016); Charles Kels, *Contractors in the "Kill Chain"? At the Nexus of LOAC and Procurement Law*, LAWFARE (Jan. 24, 2016, 7:03 AM), https://www.lawfareblog.com/contractors-kill-chain-nexus-loac-and-procurement-law.

This article argues that current guidance from the DoD concerning the use of civilian contractors to perform aerial ISR activities is insufficient to ensure that contractors will retain their protections under international law and act in compliance with domestic law and policy. Contractor involvement in aerial ISR involves two primary legal risks: (1) A contractor may become an unprivileged belligerent who is subject to criminal liability for his or her actions, and (2) A contractor may perform an inherently governmental function, such as combat. This article considers both risks in detail. The analysis shows that during an international armed conflict, contractors may become unprivileged belligerents if they perform tactical ISR missions against enemy forces. In contrast, during a non-international armed conflict, contractors may legitimately engage in belligerent conduct if they are authorized to do so by domestic law. But, however a conflict is characterized, this article demonstrates that contractors who collect, analyze, and disseminate tactical intelligence may impermissibly engage in the inherently governmental function of combat if their activities have a direct impact on the execution of a deliberate destructive or disruptive action against an enemy force; and if their activities take place in close temporal proximity to such a destructive action. Next, the article synthesizes the limitations placed on contractors who perform aerial ISR activities and applies them to potential real-world operations. Finally, this article proposes solutions for both tactical and strategic leaders to ensure that contractors are properly utilized throughout the aerial ISR enterprise.

II. Civilian Contractors in the Aerial ISR Enterprise

Aerial ISR is a broad set of interrelated activities that can fulfill both strategic and tactical intelligence requirements.[13] It encompasses the initial collection of information by means of sensors mounted on manned or unmanned aircraft as well as the creation and distribution of finished intelligence products during the processing, exploitation, and dissemination (PED) phase.[14] Concurrently, aerial ISR has important

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[13] MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., R41284, INTELLIGENCE, SURVEILLANCE, AND RECONNAISSANCE (ISR) ACQUISITION: ISSUES FOR CONGRESS 1-4 (2013); U.S. DEP'T OF AIR FORCE, AIR FORCE DOCTRINE DOCUMENT 2-0, GLOBAL INTEGRATED INTELLIGENCE, SURVEILLANCE, & RECONNAISSANCE OPERATIONS 1-4 (6 Jan. 2012) [hereinafter AFDD 2-0].

[14] AFDD 2-0, *supra* note 13, at 47-51; U.S. DEP'T OF DEF., DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 118 (Feb. 2018) [hereinafter DOD DICTIONARY]. The

operational applications.[15] Many aerial ISR platforms such as the MQ-1C Grey Eagle UAV or the better-known MQ-1 Predator are capable of employing weapons or designating a target with a laser as part of their tactical mission set.[16] Even unarmed ISR platforms such as the Army's fixed-wing Enhanced Medium Altitude Reconnaissance and Surveillance System (EMARSS) aircraft may engage in target acquisition functions.[17] Such activities are defined by the DoD as the "detection, identification, and location of a target in sufficient detail to permit the effective employment of weapons."[18]

This article focuses on the use of contractors to perform aerial ISR activities on a tactical level, particularly in a target acquisition role. In so doing, it considers three key personnel who collectively accomplish aerial ISR missions: the pilot of the aircraft, the sensor operator, and the intelligence analyst or "screener" who executes PED for a particular mission.[19] The pilot and sensor operator are charged with controlling an aircraft and collecting relevant information, while the intelligence analyst reviews the information and provides his or her analysis to the supported command for action.[20] Often, all of these activities take place simultaneously. Consider an ISR aircraft equipped with a full motion video (FMV) sensor. While the pilot and sensor operator keep the FMV focused on the appropriate point in space, the analyst reviews the live video stream and provides continuous feedback to both the operators and the supported command in order to identify targets on the ground.[21] If the ISR platform is armed, the operators may then employ a weapon against the target after they receive permission from a target engagement authority

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term "PED" is colloquially used to describe the remote analysis of a sensor feed and the subsequent dissemination of information gathered from that feed. This usually takes place in real time or near real time. Professional Experiences, *supra* note 10

[15] DoD DICTIONARY, *supra* note 14, at 118; Thompson, *supra* note 12, at 18.

[16] Clanahan, *supra* note 10, at 132-33; *Grey Eagle UAS*, GEN. ATOMICS AERONAUTICAL, http://www.ga-asi.com/gray-eagle (last visited Feb. 21, 2018).

[17] Kris Osborn, *Army EMARSS Connects with Ground-Based Intel*, DEFENSE SYSTEMS (Mar. 7, 2017), https://defensesystems.com/articles/2017/03/07/emarss.aspx.

[18] DoD DICTIONARY, *supra* note 14, at 227.

[19] Clanahan, *supra* note 10, at 121-23, 137-40; NORTON, *supra* note 12, at 3. This article does not consider other enabling functions for ISR platforms such as maintenance and launch-recovery.

[20] *Id.*

[21] Adam Stone, *How Full Motion Video Is Changing ISR*, C4ISRNET (Mar. 23, 2016), https://www.c4isrnet.com/intel-geoint/isr/2016/03/23/how-full-motion-video-is-changing-isr/; AFDD 2-0, *supra* note 13, at 39.

(TEA).[22] Otherwise, the information collected by these personnel may be passed on to another aircraft for immediate kinetic action, or it may be used to develop a pattern-of-life for the target. Depending on the ISR platform used, some or all of these activities may be performed remotely, perhaps thousands of miles away from where an aircraft is actually located.[23] But, regardless of where they are executed, each of these activities is necessary for creating a final intelligence product or employing a weapon against a target on the ground.

Since the September 11 attacks, contractors have had an important and often controversial role in aerial ISR missions as both operators and analysts. For instance, in one 2010 incident, an armed Predator UAV was used to provide over-watch for a special operations team that was on the ground in Uruzgan Province, Afghanistan. The primary imagery analyst for the mission was a civilian contractor. Based on information received from the analyst, the ground force commander determined that a nearby convoy of vehicles was hostile and ordered a missile strike from two orbiting helicopters. However, the analysis was incorrect, and the strike ultimately killed at least 15 Afghan civilians.[24] Six years later during operations against ISIS, a manned ISR aircraft with a civilian tail number and paint scheme crashed in northern Iraq. Three of the four crewmembers of the aircraft were civilian contractors, including the pilot, co-pilot, and the FMV specialist. The only member of the Armed Forces on the aircraft operated the signals intelligence (SIGINT) sensor.[25]

With the DoD's announcement in 2015, this reliance on contractors for aerial ISR is sure to last many years to come. To name just a few examples, in January 2018, the Naval Air Systems Command announced that it intends to award a contract to General Atomics – Aeronautical Systems, Inc. for up to one year of ISR support to U.S. Central Command (CENTCOM) utilizing MQ-9 Reaper UAVs. The award stipulates that General Atomics will provide the aircraft, pilots, and sensor operators as well as a launch and recovery crew for the aircraft in order to "augment the existing ISR capabilities with requirements to provide Group 5 UAS

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[22] *See infra* notes 180-191 and accompanying text.
[23] Clanahan, *supra* note 10, at 135-138; AFDD 2-0, *supra* note 13, at 25-37.
[24] Clanahan, *supra* note 10, at 121-23.
[25] Joseph Trevithick, *How a Secretive Special Operations Task Force is Taking the Fight to ISIS*, THE DRIVE (May 1, 2017), http://www.thedrive.com/the-war-zone/9848/how-a-secretive-special-operations-task-force-is-taking-the-fight-to-isis.

ISR services for [Task Force Southwest] and USMC ground forces."[26] Three weeks later, the DoD announced that it had awarded AAI Corp. a $15 million contract for "unmanned aircraft systems (UAS) intelligence, surveillance, and reconnaissance (ISR) services, to include supporting force protection efforts," at two major airfields in Afghanistan.[27] Civilian contractors also maintain an essential role as remote PED analysts in numerous locations throughout the United States.[28]

Within the DoD a broad range of opinions exist concerning how civilian contractors may be utilized during tactical ISR missions.[29] Based on current DoD policy, some organizations have concluded that contractors cannot be used during missions that include the employment of a weapon even in an analytical role.[30] Others have determined that this poses no legal or policy problems insofar as contractors do not make the ultimate determination to employ a weapon.[31] These differing attitudes have led to significant variation in the way that contractors are used across the DoD's aerial ISR enterprise.[32] Such disparity across the DoD is troublesome in and of itself, yet it also creates significant legal risk for civilian contractors who perform ISR tasks under both domestic and international law.

III. The Status of Civilian Contractors Under the Law of Armed Conflict

The Law of Armed Conflict generally divides people into two major categories; civilians and combatants.[33] These classifications

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[26] *CO/CO Group 5 UAS for ISR in support of Task Force Southwest and U.S. Central Command Area of Operations*, FEDBIZOPS.GOV (Jan. 9, 2018, 5:52 PM), https://www.fbo.gov/index?s=opportunity&mode=form &id=e6f479d2f5be6c37145dcfd7cc2fd04e&tab=core&_cview=0.

[27] Press Release, U.S. Dep't of Def., Contracts (Jan. 26, 2018), https://www.defense.gov/News/Contracts/ Contract-View/Article/1425283/.

[28] Information Paper, *supra* note 10; Professional Experiences, *supra* note 10.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Protocol Additional to the Geneva Conventions of 12 Aug., 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(2), 50, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL para. 4.2 (Dec. 2016) [hereinafter LAW OF WAR MANUAL]; INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 14-15 (2017) [hereinafter OPERATIONAL LAW HANDBOOK]. This article does not address the category of "non-combatants," which includes members of the armed

derive from the principle of distinction, which requires all parties to a conflict to affirmatively distinguish between those individuals who take an active part in belligerent activities and those who do not. Distinction is the central pillar of modern treaties concerning armed conflict and has come to be accepted as a customary rule of international law.[34] As a result, each of these categories gives rise to certain rights, duties, and protections relating to the application of violence during an armed conflict.[35] The most pertinent are: (1) The right to directly participate in hostilities; and (2) The ability to be the direct object of an attack.[36]

In a broad sense, any individual who directly participates in hostilities might be considered a "*de facto* combatant."[37] However, the law generally uses the term combatant to refer only to those individuals who have been granted a legal right to directly participate in hostilities.[38] For the sake of precision, combatants who have a right to directly participate in hostilities are referred to in this article as lawful combatants, while those who do not are referred to as unprivileged belligerents.

It is essential to determine where contractors fit within this structure of civilians and combatants in order to establish what functions they may lawfully perform during military operations, what risks they may incur, and what penalties they may face for acting outside of accepted boundaries. The law has created relatively clear divisions between civilians and combatants during international armed conflicts, but these divisions are less well defined during non-international armed conflicts.

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force who may not directly engage in hostilities, such as chaplains and medical personnel.

[34] INT'L COMM. OF THE RED CROSS, CUSTOMARY IHL DATABASE, RULE 1, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (last visited Mar. 23, 2018) [hereinafter IHL DATABASE]; LAW OF WAR MANUAL, *supra* note 33, para. 2.5, n. 80. For further discussion, see Lieutenant Colonel Mark David "Max" Maxwell & Major Richard V. Meyer, *The Principle of Distinction: Probing the Limits of its Customariness*, ARMY LAW., Mar. 2007, at 1.

[35] LAW OF WAR MANUAL, *supra* note 33, para. 4.4.

[36] *Id.*; AP I, *supra* note 33, arts. 43, 51.

[37] LAW OF WAR MANUAL, *supra* note 33, para. 4.3.2.3; Geoffrey Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, 33 U. PA. J. INT'L L. 313, 321 (2011). It should be noted that Professor Corn and Lieutenant Colonel Jenks used the term "*de facto* combatant" to refer specifically to members of non-state armed groups during a non-international armed conflict in order to distinguish between these individuals and private persons who directly participate in hostilities.

[38] *Id.*; AP I, *supra* note 33, art. 43(2).

Since direct participation in hostilities serves as a basic test for belligerent conduct in both circumstances,[39] it is first necessary to define the term in relation to aerial ISR activities. The status of contractors employed in these activities during international and non-international conflicts will then be examined in turn.

A. Aerial ISR Functions and Direct Participation in Hostilities

The precise boundaries of direct participation in hostilities remain unsettled and extraordinarily contentious under international law.[40] Indeed, the International Committee of the Red Cross (ICRC) and the United States have each created separate tests, which each deems authoritative for determining if a particular activity amounts to direct participation.[41] Despite the differences between these tests, both lead to the conclusion that many functions associated with aerial ISR constitute direct participation in hostilities even outside the application of kinetic force. At a minimum, these include control of a manned or unmanned aircraft engaged in tactical ISR activities in preparation for an attack, control of intelligence collection equipment on board such an aircraft, and remote PED of any intelligence that is collected.

The ICRC's test for direct participation is based on an analysis of three elements: (1) threshold of harm; (2) direct causation; and (3) belligerent nexus.[42] For the present analysis, the first and second elements are the most important.

The threshold of harm prong stipulates that in order for a particular action to amount to direct participation in hostilities, it must cause

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[39] *See* AP I, *supra* note 33, art. 51(3); Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978, art. 13(3), 1125 U.N.T.S. 610 [hereinafter AP II].

[40] *See, e.g.* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 5-7 (2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, N.Y.U. J. INT'L L. & POL. 833, 833-36 (2010).

[41] INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (Nils Melzer, ed. 2009) [hereinafter INTERPRETIVE GUIDANCE]; LAW OF WAR MANUAL, *supra* note 33, para. 5.8.3.

[42] INTERPRETIVE GUIDANCE, *supra* note 41, pt.V.

actual injury to a belligerent party.[43] This does not necessarily require death or physical destruction, but incorporates all acts that are reasonably likely to cause "any consequence adversely affecting the military operations or military capacity of a party to the conflict."[44] Examples of non-kinetic activities that amount to direct participation under this definition include "wiretapping the adversary's high Command," or "transmitting tactical targeting information for an attack."[45]

The direct causation prong further requires "a sufficiently close" causal link between a hostile act and the harm suffered by a belligerent party.[46] According to the ICRC, this means that the harm must be brought about "in one causal step."[47] However, geographical proximity to the ultimate harm is not necessary.[48] Such proximity is "merely indicative" of causal proximity.[49] Moreover, the ICRC has also concluded that individual acts that do not cause direct harm by themselves may still amount to direct participation if "the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm."[50] In this context, the ICRC specifically examined attacks carried out by means of a UAV and concluded that all persons involved in such an attack are directly participating in hostilities regardless of their individual functions.[51] These persons include "computer specialists operating the vehicle through remote control, individuals illuminating the target, aircraft crews collecting data, specialists controlling the firing of missiles, radio operators transmitting orders, and an overall commander."[52]

The United States has not embraced the ICRC's approach toward direct participation in hostilities.[53] Unlike the three-part test favored by

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[43] *Id.* pt. V, para. 1(a).
[44] *Id.*
[45] *Id.*
[46] *Id*. pt. V, para. 2(b).
[47] *Id*.
[48] *Id.* pt. V, para. 2(d).
[49] *Id.*
[50] *Id*. pt. V, para. 2(c).
[51] *Id.*
[52] *Id*.
[53] LAW OF WAR MANUAL, *supra* note 33, para. 5.8.1.2. For criticism of various aspects of the ICRC's Interpretive Guidance, see, e.g., Schmitt, *supra* note 40; W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010); Kenneth Watkin,

the ICRC, the DoD Law of War Manual has adopted a more flexible factor-based analysis.[54] Although the U.S. approach would generally yield a broader range of activities that may be considered direct participation in hostilities,[55] the fundamental principles upon which it is based are essentially identical to those proposed by the ICRC.

The Law of War Manual affirms that "[a]t a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy."[56] Such harm is not limited to the direct application of violence, but extends to "certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations."[57] Nevertheless, mere support for a belligerent party or general contributions to the war effort are excluded from the definition.[58] The Manual goes on to list several pertinent examples of direct participation that are non-kinetic in nature. These include "providing or relaying information of immediate use in combat operations, such as acting as an artillery spotter or member of a ground observer corps or otherwise relaying information to be used to direct an airstrike, mortar attack, or ambush; and acting as a guide or lookout for combatants conducting military operations."[59]

Regardless of which approach is used, it is clear that individuals who collect, analyze, and disseminate tactical intelligence in preparation for an attack are directly participating in hostilities.[60] This is true whether or not a particular ISR aircraft is armed or is capable of designating a target through mechanical means. The accumulation of this kind of information is by itself a direct and concrete harm against an adversary's ability to conduct combat operations. Whether a commander ultimately uses this information to execute an airstrike

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Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in the Hostilities" Interpretive Guidance, 42 N.Y.U. J. INT'L L. & POL. 641 (2010).

[54] LAW OF WAR MANUAL, *supra* note 33, para. 5.8.3.

[55] The ICRC's "one causal step" approach is particularly limiting in this regard. *See id.* n. 243 and accompanying text, para. 5.8.3.1.

[56] *Id*. para. 5.8.3.

[57] *Id*.

[58] *Id.*

[59] *Id*. para. 5.8.3.1.

[60] This conclusion is widely shared among commentators. *See*, e.g., Clanahan, *supra* note 10, at 173-74; Debarre, *supra* note 12, at 461-63; Michael Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 543-44 (2005).

or to maneuver forces out of harm's way, the enemy has been materially disadvantaged thereby. In fact, both the ICRC's Interpretative Guidance and the DoD Law of War Manual specifically list this kind of activity as an example of direct participation.[61] Regardless of geographical location, the resultant harm may be imputed either individually or collectively to all of those persons involved in the collection and processing of the intelligence, including those who control the aircraft, those who operate the sensors, and those who analyze and transmit the intelligence for use. To the extent that civilian contractors perform any of these functions during an armed conflict, they are directly participating in hostilities.

B. Civilian Contractors in International Armed Conflict

During a conflict between two or more state parties, DoD contractors are not lawful combatants.[62] Instead, they are civilians who are granted the special status of persons accompanying the armed forces.[63] Although this status provides some protections comparable to those of a lawful combatant, contractors do not have a comprehensive right to directly participate in hostilities.[64] If contractors do so and become *de facto* combatants, they may be attacked by the enemy. Moreover, if they directly participate in hostilities outside of a narrowly defined support role, they will become unprivileged belligerents who can be held criminally liable for their actions.

Generally speaking, lawful combatants are defined as those individuals who are members of the regular armed forces of a state, militia and volunteer corps making up the armed forces of a state, other militia and volunteer groups insofar as they fulfill certain conditions such as carrying their arms openly, or a *levée en masse*.[65] Civilians are defined as

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[61] *See supra* text accompanying notes 45-52, 59.

[62] Under the Law of Armed Conflict, any government may incorporate a paramilitary or armed law enforcement agency into its regular armed forces in order to become lawful combatants. *See* AP I, *supra* note 33, art. 43(3). However, some scholars argue that civilian contractors are unlikely to qualify for incorporation. Schmitt, *supra* note 60, at 523-31; Kels, *supra* note 12.

[63] AP I, *supra* note 33, art. 50(1).

[64] *Id*. art. 43(2); LAW OF WAR MANUAL, *supra* note 33, para. 4.15.4.

[65] AP I, *supra* note 33, art. 43; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 4, Aug. 12, 1949, 6 U.S.T. 3114, 75, U.N.T.S. 31 [hereinafter GC III], The Hague Convention (IV) with Respect to the Law and Customs of War on Land, Annex to the Convention: Regulations

all individuals within a belligerent state who are not members of these organizations.[66] Persons accompanying the armed forces are civilians who have been specifically authorized to work for the armed forces in order to provide essential support services.[67] They include civilian members of military aircraft crews, war correspondents, and various contractors.[68] Civilian contractors who execute aerial ISR missions on behalf of the DoD may fall into this last category insofar as their contracts provide the requisite authorization and they are provided with an appropriate identification card.[69]

Perhaps the most important difference between lawful combatants and civilians during an international armed conflict is the availability of the combatant's privilege.[70] This ancient and venerable doctrine stipulates that a lawful combatant may not be held criminally liable for acts of violence committed against enemy forces as long as they are otherwise compliant with the law of war.[71] As expressed in the seminal Lieber Code of 1863, "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."[72] Additional Protocol I to the Geneva Conventions affirms that lawful combatants "have the right to participate directly in hostilities."[73] But there is another side to this privilege. The right to employ violence also entails the ability to be

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Respecting the Laws and Customs of War on Land art. 1-2, October 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV].

[66] AP I, *supra* note 33, art. 50(1). The United States does not consider members of hostile, non-state armed groups to be civilians for the purposes of attack even though they are not members of a regularly constituted armed force. *See infra* note 93 and accompanying text.

[67] LAW OF WAR MANUAL, *supra* note 33, para. 4.15; GC III, *supra* note 65, art. 4(4); Hague IV, *supra* note 65, art. 13.

[68] LAW OF WAR MANUAL, *supra* note 33, para. 4.15; GC III, *supra* note 65, art. 4(4); Hague IV, *supra* note 65, art. 13.

[69] LAW OF WAR MANUAL, *supra* note 33, para. 4.15; GC III, *supra* note 65, art. 4(4); Hague IV, *supra* note 65, art. 13.

[70] LAW OF WAR MANUAL, *supra* note 33, para. 4.4.3; AP I, *supra* note 33, art. 43(2).

[71] For examples of the combatant's privilege stretching back to Hugo Grotius, see GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 41-42 (2010). For a discussion of several controversies surrounding the combatant's privilege in early 19th century America, see JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 109-38 (2012).

[72] Adjutant Gen.'s Off., U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, Gen. Ord. No. 100 art. 57 (Apr. 24, 1863).

[73] AP I, *supra* note 33, art. 43(2).

the object of violence.[74] Thus, a lawful combatant may be individually targeted by the enemy at any time unless he is *hors de combat*.[75] Additionally, if a lawful combatant is captured by the enemy, he is entitled to prisoner-of-war status and all of the protections included therein.[76]

In contrast, individual civilians and the civilian population as a whole "enjoy general protection against dangers arising from military operations."[77] As a customary rule of international law, a civilian who does not take part in belligerent activities may not be made the deliberate object of an attack.[78] But in exchange for this blanket protection, civilians have no right to directly participate in hostilities and cannot claim the combatant's privilege. If a civilian were to directly participate in hostilities, she would become an unprivileged belligerent and could be prosecuted under domestic law for any "offense arising out of the hostilities."[79] Such an individual loses many of the protections afforded to civilians without gaining the protections afforded to lawful combatants. In other words, an unprivileged belligerent may be the deliberate object of an attack, while she also may be held criminally liable for any warlike acts she commits.

It is important to note that unprivileged belligerency is not a *per se* violation of international law.[80] Under the Law of Armed Conflict, the only sanction for such activities is the denial of those protections and

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[74] *Id.* art. 51; IHL DATABASE, *supra* note 34, Rule 1; OPERATIONAL LAW HANDBOOK, *supra* note 33, at 14-15; SOLIS, *supra* note 71, at 41-42; LAW OF WAR MANUAL, *supra* note 33, para. 4.4, 5.7.

[75] LAW OF WAR MANUAL, *supra* note 33, para. 5.7.1; AP I, *supra* note 33, art. 41; GC III, *supra* note 65, art. 3(1); Hague IV, *supra* note 65, art. 23(c).

[76] AP I, *supra* note 33, art. 44; GC III, *supra* note 65, art. 4.

[77] AP I, *supra* note 33, art. 51(1).

[78] *Id.* art. 51(2); LAW OF WAR MANUAL, *supra* note 33, para. 4.8; IHL DATABASE, *supra* note 34, Rule 1; Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (May 9, 1986), *reproduced in* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 234 (2017).

[79] AP I, *supra* note 33, art. 45(2); LAW OF WAR MANUAL, *supra* note 33, para. 4.8.4, 4.18.3; Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants"*, 85 INT'L REV. RED CROSS 45, 70-71 (2003); Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 NAVAL WAR C. INT'L L. STUD 119, 121 (2012); Schmitt, *supra* note 60, at 519-22.

[80] Kels, *supra* note 12; Schmitt, *supra* note 60, at 520-21; Schmitt, *supra* note 79, at 121; David J. R. Frakt, *Direct Participation in Hostilities as a War Crime: America's Failed Efforts to Change the Law of War*, 46 VAL. U. L. REV. 729, 732-34 (2012).

immunities that are normally afforded lawful combatants, such as the combatant's privilege. But without this privilege, civilians who directly participate in hostilities may be held liable for any conduct that violates the domestic law of a state.[81] An unprivileged belligerent who kills a lawful combatant could be indicted for murder, even if the attack was otherwise lawful under international law. On the other hand, an unprivileged belligerent who purposely kills a civilian would be in violation of both domestic and international law. In either case, an unprivileged belligerent who is captured on the battlefield is not entitled to prisoner-of-war status, although the law affords these individuals certain basic protections.[82]

Persons accompanying the armed forces such as DoD contractors are subject to a curious blend of the conditions that the law imposes on lawful combatants and civilians. As civilians, DoD contractors may not be made the direct object of an attack unless they directly participate in hostilities.[83] But if captured, these individuals are afforded prisoner-of-war status.[84] The United States has adopted the further position that contractors accompanying the force may be authorized to directly participate in hostilities in a support role without incurring liability under domestic law.[85] For example, a contractor might help to repair a vital piece of war-fighting equipment even in the midst of combat without being subject to prosecution.[86] Nevertheless, the full combatant's privilege does not apply to them. Consequently, if a contractor takes a direct part in hostilities outside of a support role, he or she is an unprivileged belligerent and may be punished for any violations of a state's domestic law.[87]

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[81] LAW OF WAR MANUAL, *supra* note 33, para. 4.8.4, 4.18.3.
[82] AP I, *supra* note 33, art. 45(3).
[83] *Id.* arts. 50-51.
[84] *Id.* art. 44(6); GC III, *supra* note 65, art. 4(4).
[85] LAW OF WAR MANUAL, *supra* note 33, para. 4.15.4. Major Charles Kels has argued that the distinction between direct participation in hostilities in a support role and a non-support role is "fairly inconsequential as a matter of international law." Kels, *supra* note 12. *See infra* note 87.
[86] LAW OF WAR MANUAL, *supra* note 33, para. 4.15.4 n. 318.
[87] At least one commentator has argued that based on the text of article 4(A)(4) of Geneva Convention (GC) III, civilian members of military aircraft crews including UAV crews should be given POW status even if they directly participate in hostilities. Kels, *supra* note 12. However, it is not clear that this should extend to civilian crewmembers who directly participate in a manner other than support. Neither the treaty nor the 1960 ICRC Commentary precisely defines what is meant by the phrase "civilian members of military aircraft crews." Given a broad reading, it might even include civilians who serve as pilots or bombardiers on combat aircraft. The Commentary states that the text of

In short, the Law of Armed Conflict places civilian contractors in an extraordinarily dangerous position if they execute tactical ISR functions against another state actor. Since they are directly participating in hostilities, they may be the object of an attack. Yet because they cannot invoke the combatant's privilege, they may also be prosecuted for their illegal activities.

C. Civilian Contractors in Non-International Armed Conflict

During a conflict between a state and a non-state armed group, civilian contractors working on behalf of a state retain their civilian status. But unlike the case in an international armed conflict, contractors may directly participate in hostilities if they are authorized to do so by domestic law. Nevertheless, contractors who participate in hostilities under these circumstances must obey other applicable laws relating to belligerent conduct. In addition, these contractors may be attacked by non-state armed groups as a matter of international law.

The roles of combatants and civilians are not as clearly delineated in a non-international conflict as they are during an international armed conflict. While the terms "armed forces," "dissident armed forces," "organized armed groups," and "civilians" are used in applicable treaty law, they are not specifically defined.[88] Furthermore, there is significant disagreement as to whether the concept of lawful combatancy is even

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article 4(A)(4) was based on that of article 29 of the 1929 Geneva Convention, and article 13 of Hague IV, which describe civilians who are authorized to accompany the armed forces. INT'L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION III: RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 64-65 (Jean S. Pictet, ed., 1960). The examples provided by all three of these articles indicate that they were meant to apply to support personnel who are not directly engaged in combat such as sutlers, journalists, etc. GC III, *supra* note 65, art. 4(A)(4); Hague IV, *supra* note 65, art. 13, Convention of July 27, 1929, Relative to Treatment of Prisoners of War art. 29, Jul. 27, 1929, 47 Stat. 2021, T.S. No. 846. Thus, when the article refers to "civilian members of military aircraft crews," it is not referring to pilots or bombardiers, but rather to mechanics or other support personnel. Of course, this is not to say that such activities do not amount to direct participation in hostilities. But it is almost certainly for this reason that the United States has taken the position that there is a legal distinction between direct participation in a support role and a non-support role.

[88] AP II, *supra* note 39, art. 1; GC III, *supra* note 65, art. 3; IHL DATABASE, *supra* note 34, Rules 3, 5.

applicable during hostilities against a non-state armed group.[89] For this reason, many commentators discussing non-international armed conflict eschew the term "combatant" altogether. The Manual on the Law of Non-International Armed Conflict simply uses the term "fighters" in order to distinguish groups that conduct belligerent activities from those that do not.[90]

Despite these terminological difficulties, it is accepted that the principle of distinction applies to hostilities against a non-state armed group just as it does to hostilities between two states.[91] Thus, the law grants civilians blanket immunity from attack as long as they do not directly participate in hostilities.[92] But without an agreed upon definition of "civilian," this provision has been construed in a number of divergent ways. Some states contend that during a non-international armed conflict, civilian status applies to all persons who are not members of a state's armed forces, including members of a non-state armed group.[93] Under this interpretation, a member of a non-state armed group must directly participate in hostilities before he or she may be attacked. On the other hand, the United States has adopted a narrower construction of civilian that does not include members of a non-state armed group. Instead, the United States analogizes these individuals to members of the armed forces for whom affiliation with a particular organization confers belligerent status rather than individual conduct.[94] As a result, the United States argues that members of a non-state armed group are subject to attack at any time irrespective of their activities, just like members of the armed forces.[95] Regardless of which definition is used, DoD contractors

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[89] *See, e.g.*, Schmitt, *supra* note 79, at 121; Corn & Jenks, *supra* note 37, at 313 n. 1; Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 Tex. Int'l L.J. 323, 334-35, 342-43 (2009); INT'L INS. HUMANITARIAN L., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 4 (Michael N. Schmitt, et al. eds., 2006) [hereinafter NIAC MANUAL].

[90] NIAC MANUAL, *supra* note 89, at 4; *but see* IHL DATABASE, *supra* note 34, Rule 3.

[91] LAW OF WAR MANUAL, *supra* note 33, para. 17.5.

[92] AP II, *supra* note 39, art 13; GC III, *supra* note 65, art. 3; LAW OF WAR MANUAL, *supra* note 33, para. 17.5; NIAC MANUAL, *supra* note 89, at 8-11.

[93] LAW OF WAR MANUAL, *supra* note 33, para. 5.8.2.1.

[94] *Id.* para. 5.7.1-5.7.3, 5.8.2.1; OPERATIONAL LAW HANDBOOK, *supra* note 33, at 19-20. THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 20 (2016). *See also* IHL DATABASE, *supra* note 34, Rules 5, 6.

[95] LAW OF WAR MANUAL, *supra* note 33, para. 5.7.1-5.7.3, 5.8.2.1; OPERATIONAL LAW HANDBOOK, *supra* note 33, at 19-20. THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND

retain their civilian status as they do not belong to an armed group of any kind. Therefore, contractors are immune from attack unless they directly participate in hostilities.[96]

Perhaps even more contentious than the definition of civilian is the applicability of the combatant's privilege during a non-international armed conflict. The ICRC has adopted the "orthodox position"[97] that the combatant's privilege simply does not exist during hostilities against a non-state armed group.[98] Under this view, international law does not provide immunity to any person who undertakes belligerent conduct under these conditions, regardless of his or her affiliation. Instead, an individual's right to directly participate in hostilities is governed solely by domestic law.[99] Thus, a state may choose to grant immunity for belligerent activities to certain individuals and withhold it from others based only on domestic considerations. For instance, a state might grant immunity to civilian contractors directly participating in hostilities on behalf of the government while denying immunity to uniformed fighters of a non-state armed group fighting against the government.

The U.S. position on these issues is more nuanced. The United States agrees that the combatant's privilege does not apply to private citizens or to members of non-state armed groups during a non-international armed conflict. Consequently, such persons may be prosecuted under domestic law for a variety of crimes stemming from their participation in hostilities.[100] But the United States contends that a version of the combatant's privilege endures for state actors even in these circumstances. Citing the influential *Caroline* affair,[101] the DoD Law of War Manual

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RELATED NATIONAL SECURITY OPERATIONS 20 (2016). *See also* IHL DATABASE, *supra* note 34, Rules 5, 6.

[96] AP II, *supra* note 39, art 13; LAW OF WAR MANUAL, *supra* note 33, para. 4.15, 5.8.2.; OPERATIONAL LAW HANDBOOK, *supra* note 33, at 19.

[97] Jens David Ohlin, *The Combatant's Privilege in Asymmetric and Covert Conflicts*, 40 YALE J. INT'L L. 337, 338 (2015). Some scholars argue either that this is not an accurate description of the law, or that the law should be changed in order to better reflect current realities. *See id.*, at 339-40; Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come To Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253, 285-93 (2011).

[98] IHL DATABASE, *supra* note 34, Rule 3.

[99] *Id*.

[100] LAW OF WAR MANUAL, *supra* note 33, para. 17.4.1.1.

[101] In late 1837, American and Canadian militants occupied an island on the Canadian side of the Niagara River in order to support an uprising against the British government.

argues that "the privileges and immunities afforded lawful combatants and other State officials" are still applicable during hostilities against a non-state armed group.[102] In other words, these individuals are protected from prosecution for their belligerent acts under international law as well as under domestic law.

Although this idea is only sketched out in the Law of War Manual, it appears that the United States is advocating for a "state actor's privilege" that exists during a non-international armed conflict. Such a concept is significantly broader than the traditional combatant's privilege. The Manual notes that during hostilities against a non-state armed group, state actors such as judges and police have a vital part to play against insurgent forces that might be considered direct participation in hostilities.[103] Traditionally, these individuals would be considered civilians. However, the United States would likely argue that these individuals are actually lawful combatants who are entitled to some form of privilege based on principles set out in the *Caroline* case.[104] Such protections could even be extended to civilian contractors who have been authorized to directly participate in hostilities on behalf of a state.[105]

Whether or not a state actor's privilege is recognized under international law, civilian contractors may perform aerial ISR activities and other belligerent conduct against a non-state armed group insofar as they are authorized to do so by governing domestic

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On December 29, British regulars and Canadian militiamen crossed to the American side of the river, then attacked and sank the American steamship *Caroline* which had been hired to transport supplies and reinforcements to the militants. The event initiated a diplomatic crisis between the United States and Great Britain, particularly after the state of New York placed an alleged Canadian participant on trial for arson and murder. WITT, *supra* note 71, at 111-17; DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, 518-19, 673 (2007). In an influential exchange of letters with British officials concerning the matter, Secretary of State Daniel Webster wrote that the "the attack upon the steamboat 'Caroline' was an act of public force, done by the British colonial authorities, and fully recognized by the Queen's Government at home; and that, consequently, no individual concerned in that transaction can, according to the just principles of the laws of nations, be held personally answerable in the ordinary courts of law as for a private offense." Letter from Daniel Webster to Mr. Fox (Apr. 24, 1841) *in* II GOULD'S STENOGRAPHIC REPORTER 361, 362 (1841).

[102] LAW OF WAR MANUAL, *supra* note 33, para. 17.4.1.1.

[103] *Id.* para. 17.5.2.2.

[104] *See supra* note 100 and accompanying text.

[105] Some commentators have likewise argued for an internationally recognized privilege that applies to government forces during non-international armed conflict and that is broader than the standard combatant's privilege. *See* Kels, *supra* note 12.

law.[106] This seems almost certain to be the case in circumstances where the United States is involved in a non-international armed conflict within the territory of another state with the consent of that state.[107] At the same time, it presents a striking contrast to the conditions that contractors face during an international armed conflict. But like all individuals who directly participate in hostilities, contractors must adhere to other relevant provisions of the Law of Armed Conflict.[108] Furthermore, contractors who directly participate in hostilities are subject to attack by insurgent forces as a matter of international law.[109]

IV. The Use of Civilian Contractors Under U.S. Law and Policy

In addition to the obligations imposed by international law, the United States has established a domestic framework for the procurement of goods and services governing the use of civilian contractors during military operations. This body of statutes and regulations prohibits contractors from engaging in activities deemed to be inherently governmental in nature. These activities include, most significantly, combat, security operations that are closely related to combat, and certain intelligence activities. It further requires that activities closely related to inherently governmental functions should not be performed by contractors whenever possible.[110] As previously stated, there is significant disagreement within the DoD about how these prohibitions should be applied to contractors who execute aerial ISR functions. Based on a careful reading of the relevant policy, it is evident that many ISR activities are not inherently governmental and may be performed by civilian contractors insofar as they are in compliance with the Law of Armed Conflict. However, these same aerial ISR activities

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[106] IHL DATABASE, *supra* note 34, Rule 3.

[107] This formulation raises at least two potential issues that are in need of further analysis. The first involves non-consensual incursions into a state in order to attack a hostile non-state armed group. Under these circumstances, that state might seek to exercise criminal jurisdiction over a civilian contractor for his or her belligerent conduct. The second involves foreign fighters who operate within the territory of a state where the United States is conducting operations with the consent of that state. If the home state of a foreign fighter claims extra-territorial jurisdiction over crimes that are committed against its citizen, the home state might also attempt to exercise jurisdiction over a civilian contractor. It is perhaps for these situations that the United States wishes to assert a broad "state actor's privilege."

[108] LAW OF WAR MANUAL, *supra* note 33, para. 17.2.

[109] AP II, *supra* note 39, art 13; GC III, *supra* note 65, art. 3.

[110] *See infra* Part IV.A. & B.

may become inherently governmental as their proximity to kinetic operations increases.

A. Inherently Governmental Functions

The concept of inherently governmental functions has evolved over the last 60 years as a method of walling off certain activities performed by the government from privatization.[111] In the aftermath of massive federal expansion during the New Deal, the Eisenhower Administration declared in 1955 that the U.S. government would not "start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."[112] In 1966, the Johnson Administration adopted this position in OMB Circular A-76, which in revised form remains the official policy of the United States.[113] Despite a stated preference for private industry to supply commercial services to the government, it is understood that some activities are so fundamentally intertwined with the sovereign power of the United States that they are inherently governmental and cannot be performed by private entities. To this end, the 1999 revision of Circular A-76 issued by the Clinton Administration affirmed that "[c]ertain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees."[114] The current revision originally issued by the George W. Bush Administration emphasizes that executive agencies must "[p]erform inherently governmental activities with government personnel."[115]

Prior to the Obama Administration, there were three major definitions of "inherently governmental functions" promulgated by Circular A-76, the Federal Acquisition Regulation (FAR), and the

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[111] Clanahan, *supra* note 10, at 140-57; Roberts, *supra* note 12, at 6-8; JOHN R. LUCKEY, ET AL., CONG. RESEARCH SERV., R40641, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES, AND OPTIONS FOR CONGRESS 4-6 (2009) [hereinafter IGF ISSUES].

[112] *Quoted in* IGF ISSUES, *supra* note 111, at 5.

[113] *Id.*; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIR. NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (May 29, 2003) [hereinafter CIR. A-76 2003].

[114] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES para. 5(b) (Aug. 4, 1983 (Revised 1999)).

[115] CIR. A-76 2003, *supra* note 113, para. 4(b).

Federal Activities Inventory Reform (FAIR) Act of 1998.[116] Although these definitions were similar to each other, there remained considerable ambiguity concerning how to properly identify an inherently governmental function.[117] By the late 2000s, however, public controversies surrounding the extensive use of civilian contractors during the wars in Iraq and Afghanistan spurred Congress to take action on the subject.[118]

In October 2008, Congress passed the FY09 National Defense Authorization Act which required the Director of the Office of Management and Budget (OMB) to

> review the definitions of the term "inherently governmental function" . . . to determine whether such definitions are sufficiently focused to ensure that only officers or employees of the Federal Government or members of the Armed Forces perform inherently governmental functions or other critical functions necessary for the mission of a Federal department or agency.[119]

The director of OMB was also instructed by Congress to "develop a single consistent definition" of the term in order to ensure that the heads of all government departments are "able to identify each position within that department or agency that exercises an inherently governmental function.[120]

The law further stated it was the "sense of Congress" that "security operations for the protection of resources . . . should ordinarily be performed by members of the Armed Forces if they will be performed in highly hazardous public areas…and could reasonably be expected to require [offensive] deadly force."[121] Congress also felt that "regulations issued by the Secretary of Defense . . . should ensure that private security contractors are not authorized to perform inherently governmental

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[116] Roberts, *supra* note 12, at 8; Clanahan, *supra* note 10, at 144-48.
[117] Roberts, *supra* note 12, at 8.
[118] *Id.* at 9; Clanahan, *supra* note 10, at 149.
[119] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 321(a)(1), 122 Stat. 4356, 4411 (2008).
[120] *Id.* §§ 321(a)(2)-(a)(3).
[121] *Id.* § 832(1).

functions in an area of combat operations."[122] Three years later, Congress provided in the FY12 National Defense Authorization Act that "nothing in [Title 10 U.S.C.] may be construed as authorizing the use of contractor personnel for functions that are inherently governmental even if there is a military or civilian personnel shortfall in the Department of Defense."[123] In 2012, Congress even directed Combatant Commanders to provide a comprehensive risk assessment and mitigation plan concerning their reliance on contractors to perform critical functions like security and intelligence during operations that are likely to involve combat.[124] That assessment must consider physical risks to U.S. Forces and to the contractors, as well as government control over the contractors, and risks to institutional capability.[125]

In short, between roughly 2008 and 2012, Congress provided by law that the Executive Branch must create a consistent definition of what constitutes an inherently governmental function and ensure that civilian contractors are not executing those functions. Congress did not provide any specific examples of inherently governmental functions in the legislation, although the wording indicates that Congress as a whole did not consider private security or intelligence operations to be inherently governmental. Nevertheless, Congress indicated that it was concerned with contractors performing these activities in a combat zone, especially when such activities are likely to require the offensive use of deadly force. Finally, Congress was concerned with a lack of government control over contractors and the possibility that government capabilities in key areas would atrophy. In June 2010, Senator Russ Feingold gave voice to these concerns when he argued that "[f]or the last nine years, the government has failed to establish meaningful control over security contractors in war zones, as a result, numerous civilians have been killed in both Iraq and

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[122] *Id.* § 832(4).

[123] National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, §931, 125 Stat. 1298, 1542 (2011), *amending* 10 U.S.C. § 129a(f)(2). The law also provided that contractors could not be restricted from performing "functions closely associated with inherently governmental functions," as long as there are "adequate resources to maintain sufficient capabilities within the Department in the functional area being considered for performance by contractor personnel," and "there is adequate Government oversight of contractor personnel performing such functions." *Id. amending* 10 U.S.C. § 129a(f)(3).

[124] National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, §846, 126 Stat. 1632, 1848-50 (2012).

[125] *Id.* §846(c).

Afghanistan, [and] the reputation of the United States has been tarnished . . . ."[126]

After a period of review and public comment,[127] the Office of Federal Procurement Policy (OFPP) responded to Congress' mandate by issuing Policy Letter 11-01 in September 2011.[128] This document once again reiterated that all federal agencies must "ensure that contractors do not perform inherently governmental functions."[129] It adopted the definition of inherently governmental function found in Section 5 of the FAIR Act, which describes these activities as "so intimately related to the public interest as to require performance by Federal Government employees."[130] In order to aid decision makers, the Policy Letter provides an illustrative list of activities that are inherently governmental *per se*. These include combat, security operations that are closely related to combat, and the direction and control of intelligence operations.[131] However, the Policy Letter does not provide definitions for these activities.[132]

If a particular activity is not included on the illustrative list or designated by statute as inherently governmental, the Policy Letter establishes two tests for determining if the activity fits under the general definition.[133] The nature of the function test asks if a particular activity involves "the exercise of sovereign powers of the United States."[134] In contrast, the exercise of discretion test asks if a particular activity requires the exercise of discretion that "commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies . . . ."[135] Finally, in compliance with the provisions of 10 U. S. C. § 2330a, the Policy Letter requires that the Department of Defense will "to the maximum extent practicable . . . minimize reliance on contractors

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[126] *Quoted in* Roberts, *supra* note 12, at 9.
[127] *Id.* at 8.
[128] Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Sept. 12, 2011) [hereinafter OFPP 11-01].
[129] *Id*. § 4(a)(1).
[130] *Id*. § 3.
[131] *Id*. app. A, para. 5.
[132] *Id.;* Clanahan, *supra* note 10, at 155.
[133] OFPP 11-01, *supra* note 128, § 5-1.
[134] *Id*. § 5-1(a)(1).
[135] *Id*.

performing function closely associated with inherently governmental functions. . . ."[136]

Based on the Policy Letter, the current version of the FAR likewise defines inherently governmental functions as "a function that is so intimately related to the public interest as to mandate performance by Government employees."[137] Interestingly, however, the FAR states, "this definition is a policy determination, not a legal determination."[138] Further mirroring the Policy Letter, the FAR describes inherently governmental functions as "activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government."[139] This might include the "interpretation and execution of the laws of the United States so as to . . . [s]ignificantly affect the life, liberty, or property of private persons," but normally does not include "gathering information for or providing advice, opinions, recommendations, or ideas to Government officials."[140]

A year prior to the release of Policy Letter 11-01, the DoD issued a revised version of Department of Defense Instruction (DoDI) 1100.22, Policy and Procedures for Determining Workforce Mix.[141] This document lays out current DoD guidelines concerning what activities may be performed by civilian contractors and what activities are inherently governmental. In line with the Policy Letter, DoDI 1100.22 singles out combat, security operations related to combat, and certain intelligence activities as inherently governmental.[142] Moreover, the instruction requires that many of these activities be performed by uniformed service members rather than by DoD civilians.[143] The document also provides a useful definition of combat that is lacking in Policy Letter 11-01.[144]

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[136] *Id.* § 5-1(a)(2).
[137] Federal Acquisition Regulation (FAR) § 2.101 (2017).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] U.S. DEP'T OF DEF., INSTR. 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX (Apr. 12, 2010) (C1, Dec. 1, 2017) [hereinafter DoDI 1100.22].
[142] *Id.* encl. 4, para. 1.
[143] *Id.*
[144] *Id.*

Together, Policy Letter 11-01 and DoDI 1100.22 lay a foundation for determining if a particular DoD activity is inherently governmental. Most aerial ISR activities can be grouped into two categories, which are specifically addressed in both documents; combat and intelligence. In certain circumstances, they might also be placed in the security category. It is therefore necessary to explore all of these categories in order to determine what ISR functions civilian contractors may perform under domestic law and policy.

B. Combat, Intelligence, and Security

Policy Letter 11-01 and DoDI 1100.22 treat combat, intelligence, and security as separate activities. Of the three, only combat is inherently governmental *per se* and must always be performed by uniformed service members.[145] Intelligence and security are not inherently governmental although they may become so based on a number of factors.[146] Despite this regulatory demarcation, it can be difficult to cleanly separate these categories from one another during real-world operations. Both DoDI 1100.22 and Policy Letter 11-01 explicitly recognize that security operations can quickly evolve into combat.[147] As argued below, the same is true of intelligence.[148] This highly fluid and ambiguous space at the boundaries of combat, intelligence, and security is one explanation for why contractors have been employed in such disparate ways during aerial ISR missions.

In truth, aerial ISR is often thought of as nothing more than an intelligence activity. It was in this sense that Secretary Carter and other DoD officials spoke of contractors performing CAPs in 2015.[149] Although certain missions that are executed with ISR platforms clearly do not belong in the intelligence category, such as an airstrike, it can still be argued that there are discrete ISR functions that always remain intelligence activities, regardless of the overall mission.[150] ISR analysts who provide real time intelligence about a potential target are notable examples of this claim.[151] Even during an airstrike, it is not immediately obvious whether these

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[145] *Id*. encl. 4, para. 1.c.
[146] *Id*. encl. 4, para. 1.d, 1.g.
[147] *Id*. encl. 4, para. 1.d; OFPP 11-01, *supra* note 128, app. A, para. 5.
[148] *See infra* Section IV.B.2.
[149] *See supra* Section I.
[150] *See infra* Section IV.B.2.
[151] Professional Experiences, *supra* note 10.

analysts are essentially performing a combat function or an intelligence function.

This section of the article delineates combat, intelligence, and security in the context of aerial ISR. It also clarifies when intelligence and security activities may evolve into combat and require performance by a member of the armed forces. In so doing, it proposes two factors to consider when evaluating whether a particular ISR function is or is not combat. These are (1) The degree to which the performance of an ISR function could directly impact the execution of a deliberate destructive or disruptive action against an enemy force; and (2) The degree of temporal proximity which the performance of an ISR function has to the execution of a deliberate destructive or disruptive action against an enemy force.

1. Combat

Policy Letter 11-01 and DoDI 1100.22 agree that combat is an inherently governmental function, regardless of the circumstances.[152] This also appears to be the sense of Congress.[153] Combat, as defined in DoDI 1100.22, is

> an authorized, deliberate, destructive, and/or disruptive action against the armed forces or other military objectives of another sovereign government or other armed actors on behalf of the United States (i.e., planning, preparing, and executing operations to actively seek out, close with, and disrupt and/or destroy an enemy, hostile force, or other military objective). Includes employing firepower and/or other destructive/disruptive capabilities to the foregoing ends.[154]

The instruction further stipulates that all DoD activities must be coded for performance by members of the Armed Forces if

[152] OFPP 11-01, *supra* note 128, app. A, para. 4, DoDI 1100.22, *supra* note 141, encl. 4, para. 1.c.
[153] *See supra* notes 121-25 and accompanying text.
[154] DoDI 1100.22, *supra* note 141, Glossary, pt. II.

> the planned use of destructive combat capabilities is part of the mission assigned to this manpower (including destructive capabilities involved in offensive cyber operations, electronic attack, missile defense, and air defense). This includes manpower located both inside and outside a theater of operations if the personnel operate a weapon system against an enemy or hostile force (e.g., bomber crews, inter-continental ballistic missile crews, and unmanned aerial vehicle operators).[155]

However, combat does not include "technical advice on the operation of weapon systems or other support of a non-discretionary nature performed in direct support of combat operations."[156] Furthermore, the definition of combat does not "limit in any way the inherent right of an individual to act in self-defense."[157] Policy Letter 11-01 is even more explicit in this regard. In laying out restrictions for security operations, it states that contractors are not precluded from "taking action in self-defense or defense of others against the imminent threat of death or serious injury."[158]

It is important to note that the definition of combat provided in DoDI 1100.22 is not co-extensive with direct participation in hostilities under the Law of Armed Conflict.[159] Direct participation in hostilities is a much broader concept and may include actions which create harm for an adversary without necessarily causing an immediate destructive or disruptive effect.[160] Tactical intelligence activities are a stereotypical example.[161] For this reason, current DoD policy does not specifically bar contractors from direct participation in hostilities during an armed conflict.[162] On the other hand, combat encompasses only those deliberate

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[155] *Id*. encl. 4, para. 1.c(2).
[156] *Id*.
[157] *Id*. Glossary, pt. II.
[158] OFPP 11-01, *supra* note 128, app. A, para. 5.
[159] Kels, *supra* note 12.
[160] *See supra* Section III.A.
[161] *Id*.
[162] For example, DoD regulations concerning operational contract support provide that "contracted services may be utilized in applicable contingency operations for all functions not inherently governmental." DEP'T OF DEF., INSTRUCTION 3020.41, OPERATIONAL CONTRACT SUPPORT encl. 2, para. 1.a(1) (Dec. 20, 2011) (C1, Apr. 11, 2017). The DoD Law of War program requires that "DoD contractors assigned to or accompanying deployed Armed Forces," observe and enforce the "law of war obligations of the United States." U.S. DEP'T OF DEF., DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM para. 4.2 (May 9, 2006) (C1, Nov. 15, 2010) [hereinafter DoDD 2311.01E]. It

actions that are meant to create a destructive or disruptive effect. The relevant action may be kinetic in nature (firing a missile) or non-kinetic (an electronic attack). Although combat is primarily offensive, it can also include defensive activities such as missile defense and air defense if these activities involve the use of destructive combat power.[163] Even so, it bears repeating that genuine self-defense is not combat as long as it does not involve the offensive use of such power.

While combat is fundamentally connected with some kind of destructive or disruptive act, DoDI 1100.22 emphasizes that an individual does not need to actually employ a weapon in order to participate in combat. Combat may also include planning and preparing for a destructive activity as well as seeking out the enemy in anticipation of an attack.[164] Moreover, combat does not require geographical proximity to the battlefield. An individual can participate in combat and be thousands of miles away from a planned destructive action if that individual remotely operates some kind of a weapon system.[165]

The instruction goes on to explain why combat must be considered inherently governmental and be performed by members of the Armed Forces. It argues that combat involves both the exercise of sovereign power and the exercise of substantial discretion in a manner that can "significantly affect the life, liberty, or property of private persons or international relations."[166] In short, the use of destructive combat power fulfills both of the tests outlined in Policy Letter 11-01. Moreover, the United States might be held liable for the misuse of combat power.[167] The instruction therefore contends that the DoD must be able to hold "military commanders and their forces accountable for the appropriate and controlled use of combat power and adherence to rules of engagement and the law of war."[168] Commanders simply do not exercise that kind of control over civilian contractors.

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further compels "contractors to institute and implement effective programs to prevent violations of the law of war by their employees and subcontractors." *Id.* para. 5.7.4. But as discussed above, direct participation in hostilities by civilians is not a *per se* violation of the Law of Armed Conflict. *See supra* notes 80-82 and accompanying text.

[163] DoDI 1100.22, *supra* note 141, encl. 4, para. 1.c.(2).

[164] *Id.* encl. 4, para. 1.c.

[165] *Id.* encl. 4, para. 1.c.(2).

[166] *Id.* encl. 4, para. 1.c.(1)(b).

[167] *Id.* encl. 4, para. 1.c.(1)(c).

[168] *Id.* encl. 4, para. 1.c.(1)(c)(2).

At the very least, the principles outlined in DoDI 1100.22 prohibit contractors who operate manned or unmanned ISR platforms from employing a weapon against a target on the ground or from designating a target in order to facilitate kinetic action from another source. Employing a weapon against a target is destructive by its very nature and is likely to "significantly affect the life, liberty, or property of private persons."[169] It is, in fact, an act of sovereign power by the United States. While designating a target with a laser is not destructive in and of itself, it cannot be viewed in isolation. Firing a missile and guiding a missile to its final objective are both necessary elements of the same destructive act even if they are performed by separate individuals. Consequently, they are both combat functions even if the individuals involved are located outside the theater of operations. Such activities are inherently governmental by definition and must be performed by members of the Armed Forces. This conclusion is entirely uncontroversial among commentators,[170] and it is neatly summed up by the "no armed drones" mantra that Secretary Carter and other DoD officials have publicly espoused concerning the use of contracted manpower.[171]

More problematic are ISR functions that do not involve the direct employment of a weapon, but which are substantially involved in kinetic activity nonetheless.[172] Intelligence analysts executing PED are an obvious example.[173] These individuals do not actually control a weapon system or pull a trigger, yet they may provide all of the predicate information necessary to facilitate a destructive action in real time. This example can be expanded to include all personnel involved in the operation of an unarmed ISR platform. Like the analyst, these individuals do not control a weapon system. Nevertheless, they collect information concerning potential targets that they can immediately relay to another aircraft capable of deploying a weapon or to troops involved in offensive operations on the ground. Under these circumstances, the boundary between intelligence and combat can become both hazy and permeable.

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[169] *Id*. encl. 4, para. 1.c.(1)(b).

[170] *See, e.g.*, Clanahan, *supra* note 10, at 179-80, 182; Norton, *supra* note 12, at 18, app. A, at 11-12; RPA Memo, *supra* note 12, at 27.

[171] *See supra* Section I.

[172] Clanahan, *supra* note 10, at 166-67, 173-78, 181-82; Professional Experiences, *supra* note 10.

[173] Norton specifically excludes intelligence analysts from his analysis of the proper role of contractors during UAV operations. Norton, *supra* note 12, app. A, at 11.

2. Intelligence

Policy Letter 11-01 and DoDI 1100.22 emphasize that intelligence is not an inherently governmental function although certain enumerated intelligence functions are. Nevertheless, the DoD recognizes that activities such as aerial ISR straddle a line between intelligence and military operations. Consequently, these activities may evolve into combat and require performance by members of the Armed Forces.

Intelligence is not defined in Policy Letter 11-01 or DoDI 1100.22. However, the DoD elsewhere defines intelligence as the "product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations."[174] Intelligence also includes "activities that result in the product."[175] Policy Letter 11-01 states that "gathering information" and "providing advice, opinions, recommendations, or ideas to Federal Government officials" are not inherently governmental under most circumstances.[176] In other words, collection, analysis, and dissemination of intelligence can typically be performed by government contractors. However, the "direction and control" of intelligence activities is always inherently governmental and cannot be performed by contractors under any circumstances.[177] Furthermore, DoDI 1100.22 provides that when intelligence activities are "performed in hostile areas where security necessary for DoD civilian performance cannot be provided," they should be coded for military performance.[178]

Within the DoD, some maintain that aerial ISR activities that do not involve the direct employment of a weapon should generally be viewed as intelligence.[179] Such a claim is implicit to the statements that Secretary Carter and others have made in regard to contractor-operated UAVs.[180] In truth, there is language in both DoDI 1100.22

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[174] DOD DICTIONARY, *supra* note 14, at 116.
[175] *Id.*
[176] OFPP 11-01, *supra* note 128 § 3(b)(1).
[177] *Id.* app. A, para. 12.
[178] DoDI 1100.22, *supra* note 141, encl. 4, para. 1.g.
[179] Clanahan, *supra* note 10, at 173-78; Professional Experiences, *supra* note 10.
[180] *See supra* Section I.

and Policy Letter 11-02 that could be read to support this perspective. The instruction states that personnel located outside a relevant theater of operations are participating in combat "if the personnel operate a weapon system against an enemy or hostile force."[181] This provision could be read inversely to mean that out-of-theater personnel who do not operate a weapon system against a hostile force are *not* participating in combat. Such a reading could potentially exclude pilots who remotely operate unarmed ISR platforms, as well as intelligence analysts who provide PED for both armed and unarmed platforms. In either case, it could be argued that these individuals are not actually operating a "weapon system." In the same vein, it could be argued that remote analysts execute a non-discretionary role that really consists of "gathering information" and "providing advice" to decision makers who then choose a particular course of action. If this construction is accurate, it too could place remote analysts outside the definition of combat.[182]

From a manpower perspective, this permissive reading of the instruction is very attractive to DoD components that may have a shortage of trained military personnel to execute aerial ISR missions. Insofar as uniformed Soldiers, Sailors, Marines, or Airmen operate all armed aircraft, a commander at least has the option to contract out other ISR functions. Moreover, there is a kind of intuitive sense to the argument. Can a person really be involved in combat when they are thousands of miles away and do little more than look at a computer screen and relay what they see to others?

Be that as it may, a careful examination of DoDI 1100.22 in conjunction with real-world experience demonstrates that these views of combat are much too narrow. While the operation of a manned or unmanned weapon system is perhaps the quintessential example of combat, it is not an exclusive example. In fact, the instruction clearly states that actively seeking out the enemy in preparation for a deliberate attack is included under the definition of combat.[183] Further, the instruction also describes "high-risk, [on-the-spot] judgements on . . . whether [a] target is friend or foe" as inherently governmental.[184] Together, these provisions embrace a large number of aerial ISR activities

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[181] DoDI 1100.22, *supra* note 141, Glossary, pt. II.
[182] *See infra* notes 5-8 and accompanying text.
[183] *Id.* encl. 4, para. 1.c.
[184] *Id.* encl. 4, para. 1.d(1)(e). It should be noted that this statement is in the section concerning security operations, but the principle involved has general applicability.

that take place before and during an attack but do not by themselves create a destructive effect.

In doctrinal publications, the DoD forthrightly acknowledges that ISR is not a purely intelligence function. Indeed, the official DoD Dictionary defines ISR as an "integrated operations and intelligence activity . . . ."[185] The integration of operations and intelligence is most clearly perceived when ISR personnel engage in target acquisition. The target acquisition process obviously requires the collection and dissemination of information regarding a hostile force, activities that sound much like intelligence. Nevertheless, locating, identifying, and tracking a target are also necessary components of any kinetic action. The recently superseded Joint Publication 1-02 clearly emphasized the operational dimension of ISR during target acquisition by providing a definition of "intelligence-related activities" that excluded "programs that are so closely integrated with a weapon system that their primary function is to provide immediate-use targeting data."[186]

For these purposes, it is useful to consider aerial ISR operations in the context of the joint targeting cycle.[187] The joint targeting cycle is the DoD's doctrinal process for "selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities."[188] It includes the relatively quick "dynamic" targeting process as well the more methodical "deliberate" process.[189] The planning, execution, and assessment phase of the targeting cycle includes six steps: find, fix, track, target, engage, and assess (also known as F2T2EA or the "kill chain").[190] The first three steps of the kill chain are "ISR-intensive"[191] and include finding and identifying a target, fixing that target's

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[185] DOD DICTIONARY, *supra* note 14, at 118.

[186] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 115-16 (Nov. 8, 2010). This definition has been removed from the current DoD dictionary.

[187] Major Clanahan spends significant time in his study considering whether civilian contractors performing UAV functions are part of the so-called "kill chain" within the joint targeting cycle. He concludes that "[t]he more closely related an activity is to the kill chain, the greater the likelihood the activity should be barred from contractor performance." Clanahan, *supra* note 10, at 165-67, 181-86 (quotation at 183).

[188] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING vii (Jan. 31, 2013) [hereinafter JP 3-60].

[189] *Id*. ch. II, para. 2.a.

[190] *Id*. ch. II, para. 3.g.

[191] *Id*. ch. II, para. 3.g(4).

location in space, and tracking the target's movements prior to engaging the target.[192] During the targeting step, a target is validated to ensure that it "meet[s] the objectives and criteria outlined in the commander's guidance . . . [and complies] with [the] law of war and [Rules of Engagement]."[193] After this a target engagement authority (TEA) makes the final determination to attack the target.[194] While this is occurring, ISR personnel continue to track the target and report any changes that might affect the TEA's decision. An approved attack will then be executed during the engagement phase, potentially by the same individuals who control the ISR platform if it is armed.[195] Finally, during the assessment phase, ISR personnel help to evaluate whether the desired effect has been achieved or if the target must be re-attacked.[196]

Throughout the F2T2EA process, pilots of both manned and unmanned aircraft, sensor operators, and intelligence analysts must work together in order to collect information, analyze it, and disseminate finished products to the TEA for a decision. During dynamic targeting in particular, this procedure can take place extraordinarily quickly as analysts identify new targets of opportunity and relay them to the supported command for prosecution in real time. Even if ISR personnel do not have independent authority to initiate a kinetic strike, their efforts to "actively seek out . . . a hostile force,"[197] to track it, and to rapidly assess whether a target "is friend or foe"[198] ultimately provides the basis for the TEA's decision.[199]

When an unarmed ISR platform is actively engaged in a target acquisition role, its crew cannot be disassociated from the destructive acts that they facilitate any more than an artillery spotter located on the battlefield can be disassociated from a fire mission that is based on his or her observations. In civil law terms, there is no break in the chain of causation from these ISR activities to a subsequent destructive effect.[200] Although ISR personnel may not directly employ a weapon or make the

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[192] *Id*. ch. II, para. 3.g(4)(a)-(c).
[193] *Id*. ch. II, para. 3.g(4)(d)(3).
[194] *Id*. ch. II, para. 3.g(4)(e)(3).
[195] *Id*.
[196] *Id*. ch. II, para. 3.g(4)(f).
[197] DoDI 1100.22, *supra* note 141, encl. 4, para. 1.c.
[198] *Id*. encl. 4, para. 1.d(1)(e).
[199] *See infra* note 191 and accompanying text.
[200] Lieutenant Colonel Thompson uses a similar tort law analogy in his discussion of direct participation in hostilities. Thompson, *supra* note 12, at 20-21.

final decision to do so, such a consequence is reasonably foreseeable based upon the information which they provide. In fact, it is the very purpose for which they provide it. The collection, analysis, and dissemination of targeting information, and the employment of a weapon based on that information, are all component parts of the same destructive action. Reasonable people may disagree concerning the level of discretion that ISR personnel actually exercise under these circumstances.[201] But even so, their activities are so intimately connected to an act of sovereign power likely to "significantly affect the life, liberty, or property of private persons" that they must be considered combat and be performed by uniformed service members.[202]

There can perhaps be no bright-line rule about when an intelligence activity evolves into combat. However, the two most important factors to consider in making this determination are the degree to which a particular ISR function could directly impact a deliberate destructive or disruptive action, and the temporal proximity of a particular ISR function to that action.[203] The combination of these

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[201] Arguments defending the use of contractors to perform aerial ISR functions such as analysis in close temporal proximity to kinetic action often hinge on whether the contractor must exercise substantial discretion concerning the target. The crux of the argument is that a target engagement authority (TEA) must make the final decision to engage the target. Consequently, a contractor who is providing targeting data is not actually exercising discretion, but rather providing information or advice to the TEA. As a result, this function is not inherently governmental. Information Paper, *supra* note 10; Professional Experiences, *supra* note 10. Nevertheless, Policy Letter 11-01 provides that a "function is not appropriately performed by a contractor where the contractor's involvement is or would be so extensive, or the contractor's work product so close to a final agency product, as to effectively preempt that Federal officials' decision-making process, discretion or authority." OFPP 11-01, *supra* note 128, § 5-1(a)(ii)(C). Although a target engagement authority must exercise intendent discretion before authorizing a strike, his or her judgement is so dependent on the information provided by ISR personnel that it may be difficult if not impossible to separate the two. Even if contractor personnel exercised no discretion whatsoever, in these circumstances their activities would still amount to combat based on their intimate connection to deliberate destructive action, which is a sovereign act of the United States.

[202] OFPP 11-01, *supra* note 128, § 3(a)(3); DoDI 100.44, *supra* note 33, encl. 4, para. 1.c(1)(b); Clanahan, *supra* note 10, at 184-85; Norton, *supra* note 12, at 18, app. A, at 11-12. Although Lieutenant Colonel Norton agrees that UAS crews may be involved in combat even if the aircraft they control is not armed, he does not address remote analysts who execute PED for ISR missions. Norton, *supra* note 12, app. A, at 11.

[203] A recent Air Force legal opinion concluded that "the closer – in time and causality – [a remotely piloted aircraft]-related activity is to war fighting or other sovereign act, the greater the likelihood the activity will trigger significant legal issues if performed by

elements establishes an unbroken causal relationship between the collection, analysis, and dissemination of intelligence and a subsequent kinetic effect. If an ISR activity will have little or no impact on a destructive action, then it certainly cannot be said to have brought that action about or to be a part of that action. Moreover, if an ISR activity does not take place in close temporal proximity to a destructive action, the causal link between the two grows more tenuous until it is ultimately extinguished. Yet when an ISR activity provides the information upon which a destructive action is predicated, and provides that information as the destructive action is about to be carried out, it cannot be said that there is any meaningful distinction between the two. They have effectively become a single incident of combat.

Suppose that the aircrew of an unarmed UAV consisting of a pilot, sensor operator, and analyst identify a potential target on the ground and track the target for some time in order to establish a pattern-of-life. However, there is no effort to immediately attack the target, and the UAV ultimately lands after collecting valuable data. The information that the aircrew collected may certainly have a direct impact on a destructive action against the target at some indefinite point in the future. But with no temporal proximity to an actual destructive effect, the aircrew is not taking part in combat for the purposes of DoDI 1100.22. Instead, they have been employed in an intelligence capacity.

On other hand, consider a remote analyst who is viewing information being collected in real time from an ongoing kinetic strike. The analyst has no ability to communicate with anyone involved in the strike and later incorporates the information into an intelligence product that is disseminated for use but has no immediate application. This analyst is likewise not participating in combat. Although her activities may occur in close temporal proximity to a destructive action, they have no direct impact on that action. Her activities therefore constitute intelligence.

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contractor employees." RPA Memo, *supra* note 12, at 2. Clanahan generally looks to the relationship of a particular contractor activity to the "kill chain" and to "combat operations." Clanahan, *supra* note 10, at 184-85. Although Norton does not lay out a precise test, he considers the degree to which "UAS crews are directly supporting forces engaged in, or face the near term potential of, hostilities," because "the decisions and contributions made by the UAS crew in the act of such support, whether their aircraft is armed or not, [will] have a great influence on the outcome and likely survival of those supported forces." Norton, *supra* note 12, app. A, at 12.

Finally, once more consider the three-person aircrew of an unarmed UAV that have been tracking a potential target for some time. So far, the mission is arguably intelligence.[204] Now suppose that the crew begins to continuously transmit targeting data to another aircraft that is preparing to employ a weapon against the target. In this case, all three ISR functions have a direct impact on a deliberate destructive action. The collection and dissemination of that information ultimately form the basis for an attack. Likewise, all members of the aircrew are performing their individual functions in close temporal proximity to a destructive action. Under these circumstances, the aircrew's intelligence mission has evolved into combat and must be performed by members of the Armed Forces.

This same analysis is applicable to circumstances in which ISR personnel are providing over-watch to Soldiers involved in offensive operations on the ground.[205] When ground troops engage in deliberate destructive or disruptive activities against the enemy, this indisputably falls under the definition of combat. If aerial ISR personnel provide continuous real-time intelligence to those troops concerning the disposition of enemy forces, they too are involved in combat. Their activities have a direct impact on deliberate destructive activities and are in close temporal proximity thereto. Even if these personnel are located thousands of miles away and are incapable of directly employing a weapon, they cannot be disassociated from the act of sovereign power that they are facilitating.

A more difficult question involves purely defensive actions in which personnel on the ground are attacked by enemy forces. As previously discussed, self-defense and the defense of others has been specifically exempted from the definition of combat under Policy Letter 11-01 and DoDI 1100.22.[206] However, defensive actions that include the use of "destructive combat capabilities" are still considered combat.[207] Therefore, if an ISR platform responded to this scenario by employing destructive combat capabilities, such as firing

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[204] If the ISR mission in question was designed to "seek out the enemy" in order to facilitate a deliberate destructive action, then it may be considered combat from its inception. DoDI 1100.22, *supra* note 141, encl. 4, para. 1.c.

[205] *See* Norton, *supra* note 12, app. A, at 11-12.

[206] OFPP 11-01, *supra* note 128, app. A, para. 5; DoDI 1100.22, *supra* note 141, Glossary, pt. II.

[207] DoDI 1100.22, *supra* note 141, encl. 4, para. 1.c(2).

a missile, this activity would fit under the definition of combat and require military performance.[208] Based on the direct impact/temporal proximity analysis, civilian ISR personnel would likewise be prohibited from facilitating the employment of destructive combat capabilities by providing continuous targeting information to others. Nevertheless, there is still a possibility that contractors employed in an ISR capacity could respond to a genuine self-defense engagement by providing information to the troops on the ground including the strength and disposition of the attackers. However, this possibility should be considered in light of DoD guidance concerning the employment of contractors to perform security operations.[209]

3. Security

Like intelligence, security is not an inherently governmental function. However, security operations may become inherently governmental if they have a high potential to evolve into combat.[210] Although security is not defined in either Policy Letter 11-01 or DoDI 1100.22, the Department of Defense describes security as "[m]easures taken by a military unit, activity, or installation to protect itself against all acts designed to, or which may, impair its effectiveness."[211] The FAR further defines private security functions as the "[g]uarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party," or "[a]ny activity for which personnel are required to carry weapons in the performance of their duties . . . ."[212] Security certainly may involve the use of deadly force. Nevertheless, security is ultimately defensive in nature. Its purpose is to protect personnel and equipment rather than to deliberately inflict harm upon the enemy. In this way, security can be differentiated from combat, which is primarily offensive.

Be that as it may, Policy Letter 11-01 and DoDI 1100.22 recognize that the line between defensive and offensive action can be very thin

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[208] Lieutenant Colonel Norton likewise argues that "the use of offensive firepower under 'self-defense' Rules of Engagement (ROE) (i.e., employing weapons from an UAS in support of another force currently under, or impending, attack) . . . is an offensive employment and requires military personnel." Norton, *supra* note 12, app. A, at 11.
[209] *See* Clanahan, *supra* note 10, at 184.
[210] OFPP 11-01, *supra* note 128, app. A, para. 5; DoDI 1100.22, *supra* note 141, encl. 4, para. 1.d(1).
[211] DoD DICTIONARY, *supra* note 14, at 206.
[212] FAR, *supra* note 137, § 25.302-2.

indeed. Therefore, these documents prohibit contractors from performing security functions "in direct support of combat operations as part of a larger integrated armed force."[213] Moreover, contractors cannot perform security functions "in environments where there is such a high likelihood of hostile fire, bombings, or biological or chemical attacks by groups using sophisticated weapons and devices that, in the judgment of the military commander, the situation could evolve into combat."[214] Echoing Congress's concerns from 2008,[215] DoDI 1100.22 further prohibits contractors from executing missions where "an offensive response to hostile acts or demonstrated hostile intentions would be required to operate in, or move resources through, a hostile area of operation."[216] This might include the need for a contractor to "assault or preemptively attack" a hostile force.[217] Finally, contractors may not perform security operations that "entail assisting, reinforcing, or rescuing [private security contractors] or military units who become engaged in hostilities . . . because [these operations] involve taking deliberate, offensive action against a hostile force on behalf of the United States."[218]

Thus, under existing policy, contractors may only be employed for security operations that are essentially static in nature, or have a very low risk of hostile fire. For example, contractors who perform aerial ISR might provide support for force protection at a military airfield just as AAI Corp. was recently hired to do in Afghanistan.[219] In this capacity, ISR contractors could provide information concerning the disposition of enemy forces for defensive purposes, although they could not provide real time targeting data in order to facilitate a kinetic strike. Moreover, contractors should not be assigned as some kind of quick reaction force (QRF).

As alluded to in the previous section, the restrictions placed on combat-related security operations appear to diminish the ability of civilian contractors to come to the aid of troops who are in contact with the enemy. DoDI 1100.22 states that contractors may not assist or reinforce personnel who are under attack because it involves

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[213] OFPP 11-01, *supra* note 128, app. A, para. 5(a).
[214] DoDI 1100.22, *supra* note 141, encl. 4, para. 1.d(1)(b).
[215] *See supra* note 121 and accompanying text.
[216] DoDI 1100.22, *supra* note 141, encl. 4, para. 1.d(1)(d).
[217] *Id*.
[218] *Id*. encl. 4, para. 1.d(1)(c).
[219] *See supra* note 27 and accompanying text.

"taking deliberate, offensive action against a hostile force."[220] As a result, contractors who operate an ISR platform certainly could not employ an offensive weapon against an attacking enemy, nor provide targeting data to facilitate the employment of a weapon by another aircraft. These actions would plainly violate established limitations on security operations, and they would be considered combat under a direct impact/temporal proximity analysis. Yet even with these restrictions in place, contractors could still plausibly respond to a call for help in a genuine self-defense scenario. Under these circumstances, contractors could provide personnel on the ground with information concerning the strength and disposition of enemy forces. Such a response would not necessarily involve deliberate, offensive action. It also complies with the spirit of Policy Letter 11-01, which allows contractors to "tak[e] action in self-defense or defense of others against the imminent threat of death or serious injury."[221] The response would have to be limited in scope however. Notably, the contractors should not provide continuous PED support to reinforcing troops since this involves offensive action. Moreover, even in a defensive situation, the preference would be for military personnel to perform the mission.[222]

V. Applying Law and Policy to Potential Aerial ISR Operations

As the foregoing sections have demonstrated, the Law of Armed Conflict and domestic government policy severely restrict the manner in which U.S. military commanders may employ civilian contractors to perform aerial ISR activities. Commanders do retain wide latitude to employ civilian contractors for aerial ISR during humanitarian assistance operations and similar missions that do not take place during an armed conflict and where combat is unlikely. Under these circumstances, the

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[220] DoDI 1100.22, *supra* note 141, encl. 4, para. 1.d(1)(c).

[221] OFPP 11-01, *supra* note 128, app. A, para. 5.

[222] Other commentators appear to disagree with even this narrow exception, however. Major Clanahan concludes that "when an operator remotely pilots a drone to an area for the purpose of engaging an adversary using UAV delivered munitions, collecting intelligence that will be delivered to combat forces currently engaged in hostilities, or gathering and delivering intelligence data to troops facing circumstances with 'significant potential . . . to evolve into combat' . . . [these] UAV operations would be regarded as inherently governmental . . . ." Clanahan, *supra* note 10, at 184. Lieutenant Colonel Norton argues that the act of "informing ground forces which direction enemy fire is coming from," requires substantial discretion and therefore military performance is required. Norton, *supra* note 12, app. A, at 12.

Law of Armed Conflict simply does not apply,[223] and ISR functions are not considered inherently governmental under DoD workforce policy.[224] However, appropriately utilizing civilian contractors for ISR missions during an armed conflict can be extraordinarily knotty.

During military operations against a non-state armed group such as ISIS or Al-Qaeda, contractors may directly participate in hostilities if they have been authorized to do so by applicable domestic law.[225] Such activity is also permitted by DoD policy.[226] Nevertheless, contractors are prohibited from participating in combat or performing security activities that are likely to evolve into combat. Once again, combat is not limited to the employment of a weapon or designation of a target. Combat also includes the operation of unarmed aircraft as well as remote PED if these activities will have a direct impact on a deliberate destructive action, and if they are in close temporal proximity to that destructive action.

Thus, civilian contractors who execute aerial ISR during a non-international armed conflict may engage in strategic intelligence and non-combat security. These are arguably not direct participation in hostilities,[227] nor are they prohibited by domestic policy. Contractors may also engage in tactical intelligence with certain caveats. Although the performance of tactical intelligence is direct participation in hostilities, it is not prohibited by international law. But if any of these missions evolve into combat based on the direct impact/temporal proximity analysis, they must be performed by members of the Armed Forces.

As previously mentioned, intelligence and security operations may evolve into combat very quickly. An ISR mission meant to collect pattern-of-life information might be dynamically re-tasked to

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[223] By policy, U.S. military forces must comply with Law of Armed Conflict during all military operations. However, it is not immediately clear what that would mean during a humanitarian operation. DoDD 2311.01E, *supra* note 162, para. 4.5.

[224] It should always be remembered that the "direction and control of intelligence" is inherently governmental. OFPP 11-01, *supra* note 128, app. A, para. 12.

[225] *See supra* Section III.C.

[226] *See supra* note 156 and accompanying text.

[227] Many commentators agree that strategic intelligence activities should not be considered direct participation in hostilities. *See, e.g.*, Clanahan, *supra* note 10, at 173-74; Debarre, *supra* note 12, at 461-63; Schmitt, *supra* note 60, at 534. As Debarre points out, the United States has not taken a firm position on whether strategic intelligence activities amount to direct participation. Debarre, *supra* note 12, at 462.

provide support for an airstrike. A target of opportunity may suddenly appear during a mission that was meant to obtain intelligence for future operations. This porous boundary between intelligence, security, and combat will present a formidable challenge to commanders seeking to appropriately use contractors for aerial ISR missions even during a non-international armed conflict.

An armed conflict in which the United States takes military action against another state party such as North Korea or Syria presents an even more problematic scenario for civilian contractors. Under these circumstance, contractors are still prohibited from engaging in combat under U.S. domestic policy. However, the Law of Armed Conflict creates an even more formidable barrier. Under this regime, both combat and tactical intelligence are considered direct participation in hostilities.[228] If a contractor were to engage in either of these activities during an international armed conflict, he or she would be considered an unprivileged belligerent who could be prosecuted for any violations of domestic law.[229] Thus, in a war against North Korea, the only ISR activities contractors could perform while maintaining their protected status under international law and complying with domestic policy are strategic intelligence, non-combat security,[230] or some kind of support function such as maintenance.[231] In contrast, participation in tactical ISR operations would turn contractors into unprivileged belligerents and potentially violate domestic prohibitions against civilians engaging in combat. This state of affairs presents a significant danger for the United States based on its current use of contractors to perform tactical ISR mission sets.

VI. The Way Ahead

Although the combination of international law and domestic policy creates enormous challenges for the use of civilian contractors to execute tactical ISR activities, contractors will be required to fulfill at least some of these roles in the short to medium term.[232] Consequently, it is necessary

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[228] *See supra* Section III.A.
[229] *See supra* Section III.B.
[230] During an international armed conflict, security function should be limited to security against criminals or other non-state actors. Otherwise, this security risks becoming direct participation on hostilities. *See* Schmitt, *supra* note 60, at 538-39.
[231] *See supra* Section III.B, Section IV.B.
[232] *See supra* Section I, II.

to implement policies both on a tactical and strategic level in order to ensure that contractors are properly utilized, and to create a standard of practice throughout the DoD.

A. Tactical Leadership

Tactical commanders and their legal advisors must immediately re-evaluate the manner in which they use civilian contractors to perform aerial ISR in order to ensure that they do not engage in combat. As previously discussed, contractors may directly participate in hostilities during a non-international armed conflict as long as it is permitted by domestic law.[233] Thus, contractors may freely engage in tactical intelligence activities insofar as they comply with other applicable legal requirements. But the use of contractors to perform combat remains a violation of government policy regardless of circumstances. Commanders should therefore analyze contractor activities based on the direct impact/temporal proximity test.[234] At the very least, this means that contractors should not be allowed to control an ISR platform or to execute real-time PED when some kind of offensive destructive or disruptive action is imminent. This is true whether or not the relevant platform is armed. If a contractor is either controlling an aircraft or executing PED during this kind of scenario, the contractor should be replaced with a uniformed service member for the duration of the mission.[235]

Given the ease with which intelligence activities may evolve into combat, this may require extensive forward planning in regard to personnel. Commanders must have a sufficient number of service members available in order to execute ISR activities that support deliberate offensive operations. However, commanders must also have a sufficient number of service members available in order to assume control of operations in the event that a contractor-executed intelligence mission evolves into combat. A substitution procedure such as the one proposed here has enormous practical drawbacks. It is not a simple thing to have a service member seamlessly assume

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[233] *See supra* Section III.B.
[234] *See supra* Section IV.B.2.
[235] The idea of "swapping" contractor crew members for military crew members and the problems it engenders is also considered by Lt. Col. Norton. Norton, *supra* note 12, app. A, at 11 n. 48.

performance of a particular ISR function while a mission is ongoing.[236] Nevertheless, such maneuvers will be necessary if contractors are permitted to perform tactical ISR.

In the event of an international armed conflict, direct participation in hostilities will become deeply problematic for contractor personnel.[237] A tactical commander should not assume the risk of authorizing contractors to perform duties such as tactical intelligence, which may render them unprivileged belligerents. Although direct participation in hostilities is not prohibited by DoD guidance,[238] nor is it a *per se* violation of the Law of Armed Conflict,[239] it places individual contractors and potentially the United States in a dangerous legal position. Therefore, such a determination should be made at least at the Combatant Command if not the Secretary of Defense level.

Finally, tactical commanders must be able to provide an honest assessment to their superiors concerning the extent to which they are reliant on civilian contractors to perform tactical ISR activities. Such an assessment is necessary in order to evaluate the scope of the problem and for future planning efforts.

B. Strategic Leadership

Strategic commanders and civilian policy makers must continue to recruit and train an increased number of military personnel in order to execute aerial ISR missions on the tactical level. Otherwise, the United States may be at a serious disadvantage during future hostilities. When contractors are employed in a non-international armed conflict such as operations against ISIS, it is at least possible to shield them from engaging in combat. As a result, the continued use of contractors for tactical ISR is possible within this context. But if the United States were to become involved in an international armed conflict, contractors could not perform tactical intelligence activities without forfeiting their protected status. In the end, there can be no adequate substitute for providing a sufficient

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236 *Id.*; Professional Experiences, *supra* note 10.
237 *See supra* Section III.C.
238 *See supra* note 156 and accompanying text.
239 *See supra* note 80-82 and accompanying text.

number of uniformed service members to control tactical ISR aircraft and to execute PED.[240]

At the same time, strategic leaders must create explicit policy guidance concerning the use of contractors for aerial ISR activities that goes beyond DoDI 1100.22 and vague statements to the press about the control of armed aircraft. Such guidance is badly needed in order to standardize the diverse practices currently taking place across the DoD. As the FAR notes, whether a particular activity is an inherently governmental function is "a policy determination, not a legal determination."[241] Strategic leaders could create guidance that permits contractors to perform the full gamut of tactical ISR missions based on a definitive determination that these activities do not constitute inherently governmental functions. Nevertheless, it seems unlikely that Congress would acquiesce to significant contractor involvement in combat operations.[242] Moreover, altering domestic policy would not solve the underlying problem of contractors becoming unprivileged belligerents during international armed conflicts.

Short of taking these more radical steps, the new policy should reassert the current prohibitions against using contractors to perform inherently governmental functions and provide tactical commanders with useful direction concerning when security and intelligence activities may evolve into combat. This direction should be based on the direct impact/temporal proximity analysis. The policy should also discuss the application of the Law of Armed Conflict to aerial ISR. Finally, the policy must provide specific approval authorities for permitting civilian contractors to directly participate in hostilities during an international armed conflict. If policy makers seriously contemplate the use of contractors to perform ISR missions as unprivileged belligerents, they should retain this authority within the senior levels of the DoD.

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[240] *See* Clanahan, *supra* note 10, at 176-80, 184-95.
[241] FAR, *supra* note 137, § 2.101; *see also* RPA Memo, *supra* note 12, at 3.
[242] *See supra* notes 121-25 and accompanying text.

VII. Conclusion

When Secretary Carter and other senior military leaders announced their decision to use contractors to preform CAPs in 2015, they understood that there are legal and regulatory restrictions concerning how those contractors may be employed for aerial ISR activities. For this reason, the use of contractors to perform CAPs is not a perfect solution, as they all seemed perfectly willing to admit at the time. Indeed, General Welsh argued that employing contractors to conduct aerial ISR is only a temporary expedient until such time as the DoD "can get our training pipeline mature enough."[243] Nevertheless, the apparent focus on whether or not contractors will operate armed ISR platforms is a red herring. It ultimately minimizes the scale of the problem facing the DoD, and sends a confusing message to lower-level commanders about what is and what is not permissible. Moreover, the assertion that contractors who engage in tactical ISR are not "combatants" is, at best, misleading.[244]

The fact is that contractors who operate unarmed ISR platforms or who execute PED are more than capable of engaging in combat in violation of domestic policy and losing their protected status under international law. It is therefore imperative that leaders across the DoD clearly understand the relevant issues and address them unambigiously. While there are policies that can be implemented immediately in order to shield contractors from participating in combat during operations against various non-state armed groups, the only long-term solution to these issues is to train an adequate force of military personnel to execute tactical ISR missions.

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[243] Welsh Transcript, *supra* note 3.
[244] Hennigan, *supra* note 4.

TIME IS MONEY—A PROPOSAL FOR MANDATORY ALTERNATIVE DISPUTE RESOLUTION FOR THE BOARD OF CONTRACT APPEALS

MAJOR TAMERA R. STERLING*

"When will mankind be convinced and agree to settle their difficulties by arbitration?" - BENJAMIN FRANKLIN[1]

I. Introduction

In 1993, testimony before the U.S. Senate Subcommittee on Courts and Administrative Practice revealed that contract disputes resolved through arbitration cost seventy percent less than disputes resolved through litigation.[2] In 1995, Army contract attorneys saved approximately 2,190 days of work by resolving just nine cases using Alternative Dispute Resolution (ADR).[3] Case complexity and prolonged discovery only add to contract litigation costs.[4] The Armed Services Board of Contract Appeals (ASBCA) is seeing the effect of this with time-consuming cases creating a significant backlog.

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* Judge Advocate, United States Air Force. Presently assigned as Executive Officer, Commercial Law and Litigation Directorate, Air Force Legal Operations Agency, Joint Base Andrews, Maryland. J.D., 2010, Northwestern University School of Law; M.S., 2003, Johns Hopkins University; B.S., 1999, Southern Illinois University at Carbondale. Previous assignments include Chief of Operational Contracts, Space and Missile Systems Center, Los Angeles Air Force Base, California, 2014-2016; Staff Judge Advocate Executive Officer, Joint Task Force Guantanamo, Cuba, 2014-2015; Chief of Adverse Actions, 51st Fighter Wing, Osan Air Base, Korea, 2013-2014; Chief of Contracts, Fiscal Law, Environmental Law and Ethics, 19th Airlift Wing, Little Rock Air Force Base, Arkansas, 2012-2013; Chief of Legal Assistance and Administrative Law, 19th Airlift Wing, Little Rock Air Force Base, Arkansas, 2011-2012. Member of the Bars of Illinois, the Air Force Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

[1] Conrad C. Daly, *Accreditation: Mediation's Path to Professionalism*, 4 AM. J. MED'N 39, 39 n.5 (2010) (citing Letter from Benjamin Franklin to Joseph Banks (July 27, 1783), *reprinted in* 1 THE PRIVATE CORRESPONDENCE OF BENJAMIN FRANKLIN 132 (3d ed., 1818)).

[2] *The Cost Savings Associated with the Air Force Alternative Dispute Resolution Program*, MEDIATE, http://www.mediate.com/articles/airforceadr.cfm# (last visited Jan. 15, 2019).

[3] *Id*.

[4] Senator Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1, 4 (1992).

Therefore, to minimize litigation and reduce the backlog, the ASBCA should mandate use of ADR procedures prior to litigation.

In 1978, Congress promulgated the Contracts Disputes Act (CDA) which authorized the Department of Defense (DoD) to establish an independent, informal board of contract appeals, distinct from the DoD, and outside its management authority.[5] The ASBCA was established to resolve post-award contractual disputes between government contractors and the DoD.[6] The Board has approximately twenty to thirty administrative law judges who adjudicate between 500 and 900 appeals per year.[7] However, there is a significant backlog in appeals cases according to the ASBCA's annual report of transactions

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[5] Michael J. Schaengold & Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 FED. CIR. B.J. 279, 283 (2008) (internal citations omitted). *See also* 41 U.S.C § 7105. The Contracts Disputes Act (CDA) centralized the adjudication of government contract claims allowing contractors to choose to file an action in the Court of Federal Claims or to appeal at a board of contract appeals (BCA). Schaengold & Brams, *supra*, at 279. Additionally, the CDA allowed the General Services Administration, Tennessee Valley Authority, and Postal Service to establish individual BCAs. 41 U.S.C § 7105. Although BCAs already existed prior to the CDA, the adjudicators were not only chosen by the agency involved in the dispute, they also reported to and were paid by that same agency. S. Rep. No. 95-1118, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5237. The CDA sought to change this and specifically authorized federal agencies to establish BCAs to serve as "'independent, quasi-judicial' forums that do not act as representatives of and, in fact, are 'quite distinct from' their respective procuring agencies." Schaengold & Brams, *supra*, at 283. Additionally, the CDA drafters wanted the BCAs to be full-time positions to ensure that the judges remained impartial. S. Rep. No. 95-1118, at 12.

[6] Schaengold & Brams, *supra* note 5, at 283. The ASBCA was formed in 1949 when the Army and Navy's independent boards were merged. *Id*. (citing Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 L. & CONTEMP. PROBS. 39, 56 (1964)). At that time, the ASBCA was divided into three panels that represented the Army, Navy, and Air Force. Shedd, *supra*, at 56. Each panel serviced contract disputes solely for its department. *Id*. When the CDA was promulgated in 1978, the ASBCA's jurisdiction expanded to include contract disputes between government contractors and the National Aeronautics and Space Administration, the Central Intelligence Agency, and other organizations that the Board enters into agreements with to assist in resolving disputes. *See also* ARMED SERVICES BOARD OF CONTRACT APPEALS, http://www.asbca.mil (last visited Jan. 15, 2019).

[7] ARMED SERVS. BD. OF CONTRACT APPEALS, REPORT OF TRANSACTIONS AND PROCEEDINGS OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS FOR THE FISCAL YEAR ENDING 30 SEPTEMBER 2016 (2016), http://www.asbca.mil/Reports/FY2016%20Reports/FY2016_annual.pdf [hereinafter ASBCA ROT FY 16].

and proceedings for fiscal year (FY) 2016.[8] Though the number of appeals filed annually has remained relatively steady since 2011, the number of appeals pending before the Board on 1 October 2016, increased by more than ninety percent compared to 1 October 2011.[9] Specifically, there were 566 pending appeals in 2011 compared to 1,077 in 2016.[10] Thus, the ASBCA is taking longer to resolve cases, creating an increasing number of pending appeals.[11]

Yet, the ASBCA was created to be a faster method for handling contractual disputes, and it offers several types of ADR to expedite the process.[12] When ADR is agreed upon by the parties, proceedings are generally concluded within 120 days of approval by the ASBCA's chairman.[13] Conversely, contested proceedings can take two to four years before reaching a resolution.[14] Although ADR is a free service

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[8] Bruce Mayeaux, *Recent Developments: Administrative Law to Taxation*, 64 LA. B.J. 149, 150 (2016). The ASBCA is the largest Board of Contract Appeals, and it issues the most decisions. *Id.*

[9] ASBCA ROT FY 16, *supra* note 7, at 3.

[10] *Id*.

[11] William M. Pannier, *United States: Recent Data Suggests Contractors are Getting a Fair Shake Before the ASBCA*, HOLLAND & KNIGHT: GOV'T CONTS. BLOG (Nov. 6, 2015), http://www.mondaq.com/unitedstates/x/441948/Government+Contracts+Procurement+PPP/Recent+Data+Suggests+Contractors+Are+Getting+A+Fair+Shake+Before+The+ASBCA.

[12] ARMED SERVS. BD. OF CONT. APPEALS, RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS, ADDENDUM II: ALTERNATIVE METHODS OF DISPUTE RESOLUTION 1 (Jul. 21, 2014), http://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20pgl.pdf#page=1 [hereinafter ASBCA RULES, ADD. II].

[13] *Guidance*, ADR.GOV, https://www.adr.gov/adrguide/asbcanot.html (last visited Jan. 17, 2019) [hereinafter *Guidance*]. "All appeals and requests for Alternative Dispute Resolution (ADR) are reviewed by the board chairman as he is "responsible for establishing appropriate divisions of the Board to provide for the most effective and expeditious handling of appeals." *Charter*, ARMED SERVICES BOARD OF CONTRACT APPEALS, http://www.asbca.mil/Charter/charter.html (last visited Jan. 22, 2019) [hereinafter *Charter*]. *See also* 41 U.S.C.A. § 7105.

[14] Eldon H. Crowell, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183, 201 (1990). The ASBCA also offers expedited resolution for cases not resolved using ADR. Schaengold & Brams, *supra* note 5, at 325 (citing 41 U.S.C. § 7106(a)). For claims up to $50,000, the ASBCA offers resolution within 120 days. *Id*. Additionally, for claims up to $100,000, the ASBCA offers resolution within 180 days. *Id*. However, neither the 120-day nor 180-day resolution timeframe is guaranteed. *Id*. If the claim exceeds the threshold for expedited procedures, resolution can take two to four years. Crowell, *supra*, at 201. Similarly, the Court of Federal Claims takes

that has been shown to save time and money, ASBCA litigants continue to choose litigation over ADR.

It is unclear why ASBCA litigants tend to prefer litigation when ADR has proven to be successful throughout the federal government. For instance, the Federal Aviation Administration (FAA) reported resolving ADR disputes in approximately sixty-seven calendar days.[15] Additionally, from 2001 to 2005, the Department of the Navy alone saved nearly $3 million in direct expenses and potential interest by using ADR.[16] Moreover, beyond the time and cost savings, ADR helped to maintain and rebuild relationships that otherwise may have been adversely affected by litigation.[17] Furthermore, parties that use ADR, whether voluntary or mandatory, generally prefer ADR to litigation.[18]

This article will briefly discuss a history of the CDA and the ASBCA. It will also examine ASBCA statistics, specifically the number of appeals filed versus the number of requests for mediation. Additionally, the article will discuss observations from state judiciaries that have implemented mandatory ADR. Furthermore, government entities such as the FAA and the U.S. Air Force successfully use ADR. The article will review the structure of their ADR programs, why they have been successful, and what, if any, processes can be applied to the ASBCA to improve its ADR program. It will also outline the advantages and

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approximately two years to resolve a litigated case. Schaengold & Brams, *supra* note 5, at 321.

[15] OFF. OF ATT'Y GEN., REPORT FOR THE PRESIDENT ON THE USE AND RESULTS OF ALTERNATIVE DISPUTE RESOLUTION IN THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT 100 (2007), https://www.adr.gov/pdf/iadrsc_press_report_final.pdf [hereinafter REPORT ON THE USE AND RESULTS OF ADR IN THE EXECUTIVE BRANCH]. An updated report was issued in 2016; however, the report does not discuss any substantive changes that affect the content of this paper. *See* OFF. OF ATT'Y GEN., 2016 REPORT ON SIGNIFICANT DEVELOPMENTS IN FEDERAL ALTERNATIVE DISPUTE RESOLUTION (2017), https://www.adr.gov/pdf/2016-adr-rpt.pdf [hereinafter REPORT ON SIGNIFICANT DEVELOPMENTS]. The Federal Aviation Administration's (FAA's) ability to complete ADR within sixty-seven days is notable as it is expeditious compared with other agencies. For instance, the ASBCA takes approximately 120 days to resolve a case using ADR, while the Air Force averages approximately ten months. *Guidance*, *supra* note 13.

[16] *Id*.

[17] *Guidance*, *supra* note 13.

[18] Deborah Thompson Eisenberg, *What We Know and Need to Know About Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245, 254 (2016). Several state court systems currently mandate ADR prior to litigation. *Id*. *See infra* Section II. B. for further discussion and definitions of voluntary, mandatory, binding, and nonbinding ADR. *See infra* Section III for further discussion of some of these mandatory ADR practices.

disadvantages of ADR, and detail the types of ADR the ASBCA makes available to the parties. Finally, it will look at how the ASBCA is using ADR to resolve complicated disputes, and discuss how mandatory ADR can be implemented to increase efficiency.

II. History of the ASBCA and CDA

A. The Armed Services Board of Contract Appeals and the Contracts Disputes Act

The ASBCA was formed in 1949 as a quick, cost-effective method for resolving disputes.[19] Yet, over time, the ASBCA evolved into a more structured process as the demand for due process increased.[20] This led to lengthy resolution timeframes, and the ASBCA still lacked due process mechanisms to manage large, complex claims as it was initially contemplated to have limited discovery and subpoena powers.[21] Thus, Congress sought to remedy this issue when it drafted the CDA in 1978.[22]

In accordance with the CDA, Boards of Contract Appeals are designed to provide "to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes" arising from government contracts.[23] One of the primary objectives of the CDA was "to induce resolution of disputes with the government by negotiation rather than litigation and provide alternative forums for dispute resolution."[24] Congress also intended that the CDA "equalize the bargaining power of the parties when a dispute exists."[25] The CDA's legislative history states that "[t]he contractor should feel that he is able to obtain his 'day in court' at the agency boards and *at the same time have saved time and money through the agency board process*."[26] Thus, the CDA

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[19] S. Rep. No. 95-1118, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5237.
[20] *Id*.
[21] *Id*. at 2.
[22] *See generally Id*.
[23] Schaengold & Brams, *supra* note 5, at 283 (quoting S. Rep. No. 95-1118, at 25).
[24] Great Lakes Educ. Consultants v. Fed. Emergency Mgmt. Agency, 582 F. Supp. 193, 195 (W.D. Mich. 1984) (citing S. Rep. No. 95-1118, at 33).
[25] S. Rep. No. 95-1118, at 1.
[26] Schaengold & Brams, *supra* note 5, at 283.

sought to create a fair and balanced system to adjudicate disputes between the government and its contractors.[27]

Today, the ASBCA is comprised of twenty-two full-time, independent attorneys who serve as administrative judges appointed by "the Under Secretary of Defense for Acquisition, Technology and Logistics, the General Counsel of the Department of Defense, and the Assistant Secretaries of the Military Departments responsible for acquisition."[28] Additionally, in accordance with the CDA, the ASBCA is now required to offer ADR as an option to resolve disputes.[29] Typically, a panel of two to three judges decide cases; however, when using ADR, often one judge decides disputes.[30] Thus, the ASBCA has developed a robust structure with highly qualified judges to ensure a more efficient process.[31]

B. Background and Statistics on the Armed Services Board of Contract Appeals

Alternative Dispute Resolution is a term generally applied to a group of methods used to resolve disputes informally without going to court, usually under the guidance of an impartial third-party who assists the parties in resolving the dispute.[32] Although dispute resolution has been practiced for centuries, ADR did not gain widespread use until the 1960s.[33] Since that time, the use of ADR has continued to grow, and many court systems now mandate that disputants use ADR prior to attempting to resolve the issue through litigation.[34] From the mid-1990s until today, the ASBCA has aggressively encouraged disputants to use ADR.[35] In 2014,

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[27] S. Rep. No. 95-1118, at 1.
[28] *Charter*, *supra* note 13.
[29] 41 U.S.C. §§ 7101-7109 (2012).
[30] Schaengold & Brams, *supra* note 5, at 285-86.
[31] Prior to serving as judges for the ASBCA, the judges have had diverse legal experience as military judge advocates, Department of Defense (DoD) Senior Executive Service procurement specialists, patent prosecutors, law school professors, and a variety of other distinguished professions. *Biographies*, ARMED SERVICES BOARD OF CONTRACT APPEALS, http://www.asbca.mil/Bios/biographies.html (last visited Jan. 23, 2019).
[32] Brad Spangler, *Alternative Dispute Resolution (ADR)*, Beyond Intractability (June 2003), http://www.beyondintractability.org/essay/adr.
[33] *Id*.
[34] *Id*.
[35] REPORT ON SIGNIFICANT DEVELOPMENTS, *supra* note 15, at 160.

the ASBCA revised its rules of procedure to incorporate ADR.[36] Yet, although the ASBCA strongly encourages its use,[37] a relatively small number of cases are resolved at the ASBCA using ADR.[38]

The ASBCA conducts both binding and nonbinding ADR. Binding ADR occurs when the parties agree that a decision or ruling rendered by the ASBCA, acting as a third-party neutral, is "final, conclusive, not appealable, and may not be set aside, except for fraud."[39] Conversely, nonbinding ADR does not obligate the parties to accept the ASBCA's decision as it is merely an advisory opinion that may be rejected.[40] Additionally, all requests for ADR at the ASBCA must be voluntary. Mandatory ADR for government acquisitions, a procedure requiring that parties attempt to resolve disputes through ADR prior to litigation, is not allowable under the Federal Acquisition Regulation (FAR).[41] Thus,

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[36] INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP, NEW DISPUTE RESOLUTION PROGRAMS IN THE FEDERAL GOVERNMENT 2014 UPDATE 3 (2014), https://www.adr.gov/2014-interagency-report.pdf. Prior to 2014 the ASBCA used ADR under a supplement to its rules entitled "Notice Regarding Alternative Dispute Methods of Resolution." *Id.*

[37] The ASBCA has a "highly successful, award winning Alternative Dispute Resolution program," which strongly encourages parties to resolve their dispute without litigation. Armed Services Board of Contract Appeals, *Welcome*, https://www.asbca.mil/index.html (last visited Jan. 29, 2019). Additionally, the ASBCA makes it very easy for the disputants to choose ADR. The ADR process begins with a joint request from the parties. *Id.* Sample agreements are posted on the ASBCA's website and the ASBCA's "Notice Regarding Alternative Methods of Dispute Resolution" is prominently posted on its website and provided to litigants when they file an appeal. Armed Services Board of Contract Appeals, *Alternative Dispute Resolution (ADR)*, https://www.asbca.mil/ADR/adr.html (last visited Jan 29, 2019). Furthermore, although the amount of focus each judge gives to ADR may vary, all ASBCA judges mention it to the disputants as an option. Telephone Interview with Judge Craig S. Clarke, A.L.J, ASBCA (Feb. 22, 2017).

[38] ASBCA ROT FY 16, *supra* note 7, at 3. Only six percent of ASBCA litigants requested ADR in 2016. *Id.* However, ADR is not appropriate in all cases. It is most appropriate where both sides face some litigation risk and is typically not appropriate or necessary where one side will clearly prevail. *See generally* Nicholas "Chip" P. Retson & Craig S. Clarke, *Overjudicialization of the Contract Disputes Process—Fact or Fiction*, 28 PUB. CONT. L.J. 613 (1999).

[39] ASBCA RULES, ADD. II, *supra* note 12, at 2.

[40] *Id.*

[41] Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11.2 CARDOZO J. CONFLICT RESOL. 479, 481 (2010). The FAR, the primary regulation for federally purchased services and supplies, states, "[A]n essential element of ADR is [a] voluntary election by both parties to participate in the ADR process." FAR Part 33.214(a)(2) (2014). Although the FAR does not explicitly speak to mandatory ADR, it can be inferred through its explicit statement that ADR must be voluntary. *Id.*

the ASBCA requires that the parties "jointly request ADR procedures," and that the ASBCA chairman approve the request prior to entering into ADR proceedings.[42]

Despite the fact that there were nearly 1,100 appeals pending before the ASBCA in FY 2016, parties requested ADR only forty-one times out of the 654 appeals filed that year.[43] Of the forty-two ADR requests that were concluded, including requests from previous years, three were for binding ADR and thirty-four were requests for nonbinding ADR.[44] Additionally, three nonbinding requests were unsuccessful and two were withdrawn.[45]

The ASBCA has recorded statistics on ADR success rates since the late 1980s. Nonbinding ADR has had a high success rate.[46] Since 1987, the success rate has been consistently over ninety percent, with the exception of FY 2016, which had an eighty-six percent success rate.[47] Furthermore, only five years have been below ninety-five percent.[48] Interestingly, both FY 2013 and FY 2014 had 100 percent success rates out of 145 cases in the two years combined.[49] These statistics show a thirty-year track record of success in using ADR to resolve cases without going to trial. Implementing a mandatory ADR process in the ASBCA may contribute to even more savings in DoD time and money, as has been in the case in several states.

III. Mandatory ADR Observations

In recent years, several states have instituted mandatory ADR programs for both civil and criminal matters.[50] Specifically, these state court systems require that disputants use ADR for civil issues such as

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[42] ASBCA RULES, ADD. II, *supra* note 12, at 1.
[43] ASBCA ROT FY 16, *supra* note 7, at 3.
[44] *Id*. The concluded requests were not limited to requests made in fiscal year 2016. *Id*.
[45] *Id*.
[46] *Id*.
[47] ARMED SERVS. BOARD OF CONT. APPEALS, A GUIDE TO ADR ACTIVITY AT THE ASBCA (2016), http://www.asbca.mil/ADR/ADR%20Statistics%20table%20Letterhead%2020161020.pdf.
[48] *Id*. Statistics for fiscal years 1987-1999 are combined in the ASBCA historical data and show a ninety-seven percent success rate. *Id*. Because those years are combined, it is unclear if any individual year within that timeframe was at or below ninety percent.
[49] *Id*.
[50] *See* Eisenberg, *supra* note 18, at 245.

divorce proceedings, child welfare, and small claims.[51] There has been considerable research to study some of the mandatory ADR programs and its effectiveness.[52] Although a state court system does not function like the ASBCA, and the types of cases that a state court reviews differ from contracts, similarities such as case complexity and high contentiousness make the ADR research valuable tool in determining whether the ASBCA could be successful in requiring mandatory ADR.

In 2014, the Maryland Judiciary completed a study on the use of ADR.[53] The Maryland study is unique among current ADR research in that it examined the impact of using ADR to resolve a dispute as a distinct factor, separate from the effect of the ultimate resolution in the case.[54] Maryland has ADR processes integrated statewide throughout its court system to include the district, circuit, appellate, and orphan's courts.[55] The study was a cost-benefit analysis of its ADR program using information compiled from July 2010 to January 2013.[56] The study compared disputants who resolved their cases through litigation with those who used ADR.[57] Most of the ADR cases were resolved

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[51] Eisenberg, *supra* note 18, at 254. Some states also use ADR in criminal cases as a restorative justice process in the form of mediation between the victim and offender. *Id*.

[52] *See* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons From the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399 (2005). Empirical data was gathered from Indiana, California, Missouri, and Minnesota. *Id*. at 406-407. Overall, the judges' and litigants' perceptions regarding the use of ADR in their respective court systems have been positive. *Id*. Specifically, they felt that it saved time without adding undue cost, that mediation agreements had a higher chance of being maintained, and that parties who participate in mediation had more realistic expectations about case resolution and were more likely to acknowledge their responsibility in the conflict. *Id*. at 406.

[53] Eisenberg, *supra* note 18, at 255 (citing *Executive Summary*, STATEWIDE EVALUATION OF ADR IN MD., https://sites.google.com/a/marylandadrresearch.org/new/landscape/executive-summary (last visited Feb. 8, 2019)).

[54] Eisenberg, *supra* note 18, at 256 (citing *Articles & Publications*, STATEWIDE EVALUATION OF ADR IN MD., https://sites.google.com/a/marylandadrresearch.org/new/publications (last visited Feb. 8, 2019)).

[55] *Executive Summary*, STATEWIDE EVALUATION OF ADR IN MD., *supra* note 53.

[56] *ADR Landscape*, STATEWIDE EVALUATION OF ADR IN MD., https://sites.google.com/a/marylandadrresearch.org/new/landscape (last visited Feb. 8, 2019).

[57] Eisenberg, *supra* note 18, at 255.

through mediation; however, a few were resolved through a settlement conference, where an attorney facilitated resolution.[58]

The study found that when ADR was used, the parties were more satisfied with the system than were those who reached agreements without ADR.[59] Additionally, those parties that used ADR were more likely to acknowledge their responsibility in causing the dispute, and more likely to feel that all of the disputed issues were resolved.[60] Overall, the results of the Maryland study "suggests that there is something significant about participating in the mediation or ADR process itself that generates greater party satisfaction and confidence in the judiciary, separate from the outcome of reaching a settlement on their own."[61] Party satisfaction and confidence in the judiciary are both important factors to be considered when making broad changes to any court system. The positive results from the Maryland study demonstrate how litigation at the ASBCA can be improved to more closely align with the CDA's intent to provide an informal, expeditious method for dispute resolution. There are already some indicators within the government that ADR use can be a successful tool: the FAA and U.S. Air Force experiences with ADR.

IV. Success in Government Use of ADR

A. Federal Aviation Administration Office of Dispute Resolution

The Federal Aviation Administration Office of Dispute Resolution for Acquisition (ODRA) is unique among federal agencies as it is exempt from the FAR and the CDA.[62] Instead, the "ODRA is the sole, statutorily designated tribunal for all contract disputes and bid protests under the FAA's Acquisition Management System."[63] The FAA's policy for

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[58] *Id*.
[59] *Id*. at 256-257 (citing *Articles & Publications*, STATEWIDE EVALUATION OF ADR IN MD., *supra* note 54).
[60] *Id*.
[61] *Id*. at 257.
[62] C. Scott Maravilla et al., *How and Why the FAA Employs Alternative Dispute Resolution*, 49 PROCUREMENT LAW. 13, 13 (2014). The FAA is exempt from the FAR is important because, as such, the FAA is not bound by any regulation, but—through policy—promulgates its own procurement rules, giving the FAA full autonomy of its procurement processes. *Id*.
[63] *Office of Dispute Resolution for Acquisition (ODRA)*, FEDERAL AVIATION ADMINISTRATION, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/ (last visited Feb. 8, 2019) [hereinafter FAA].

resolving disputes is "to use voluntary ADR to the maximum extent practicable."[64]

Since 1998, more than nine hundred ODRA filings have been made.[65] Although the use of ADR is voluntary, the ODRA "expects parties to 'make a good faith effort to explore ADR possibilities . . . and to employ ADR in every appropriate case.'"[66] Thus, "approximately ninety percent of all contract disputes . . . have been resolved in the ADR process without an adjudicated decision."[67] In fact, ADR is often used even when it is not likely to resolve a case in its entirety, as the mere process of negotiating an ADR agreement can often expedite a case.[68] Specifically, the voluntary exchange of information in ADR often leads to resolution of many of the underlying issues, resulting in "a more streamlined adjudication of the remaining case."[69]

The ODRA initiates the ADR discussion during an "initial status conference, which generally is held within five business days of a . . . contract dispute filing."[70] "Of the more than 124 pre-dispute matters handled by the ODRA [from 1998 to 2014], only three percent have required adjudication."[71] Additionally, contract disputes at the ODRA utilizing ADR take approximately eighty-six calendar days to complete, while adjudicated decisions take approximately 162 calendar days.[72]

Subsequently, the ODRA has found that parties that utilize ADR note that ODRA meets its "goals of providing fair, fast, and efficient dispute resolution."[73] Furthermore, the ODRA has observed that by

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[64] Maravilla et al., *supra* note 62, at 13 (citing 14 C.F.R. § 17.35). Of note, the ODRA utilizes ASBCA judges to serve as ADR neutrals and to adjudicate contract claims. Anthony N. Palladino et al., *The FAA ODRA: A Tenth Anniversary Report*, 43 PROCUREMENT. LAW. 1, 13 (2008).

[65] FEDERAL AVIATION ADMINISTRATION, *supra* note 63. The FAA website only provides case management statistics through December 31, 2014. *Id*.

[66] Palladino et al., *supra* note 64, at 13. The ODRA strongly encourages ADR settlement agreements in all cases, but places particular emphasis on its use where there is significant litigation risk. *Id*. at 16.

[67] FEDERAL AVIATION ADMINISTRATION, *supra* note 63.

[68] Palladino et al., *supra* note 64, at 15.

[69] *Id*.

[70] *Id*.

[71] FAA, *supra* note 63.

[72] Palladino et al., *supra* note 64, at 11.

[73] *Id*. The FAA has been recognized for its achievements in contracting by both the American Bar Association Section of Public Contract Law and the Under-Secretary-

working with each other through the ADR process, the FAA and its contractors often forge stronger relationships.[74] Although the ODRA processes are not mandatory, an "attempt at ADR is made in virtually all ODRA cases" because the "process does not rely on the parties to initiate ADR," and the ODRA "expects parties to 'make a good faith effort to explore ADR possibilities.'"[75] Thus, the ODRA's widespread use of ADR on large FAA contracts shows what might be gained by mandating ADR at the ASBCA. The Air Force's experience with ADR is similarly positive.

B. The Air Force ADR Program

In 2002, the Air Force created the Air Force ADR program—ADR First.[76] Even prior to ADR First, the Air Force had great success using ADR. In late 1999 or early 2000, the Air Force used ADR to resolve a claim for $785 million that had been in dispute with Boeing for over ten years.[77] Additionally, in 2001, the Air Force saved $23 million by using ADR to resolve a dispute over B-1 bomber parts.[78] That year, the Air Force reportedly "save[d] about [$]100 million . . . with a ninety-eight percent success rate" by using ADR.[79] From FY 2002 through FY 2006, the Air Force reported an annual savings of approximately $57.6 million in liability.[80] By 2012, the Air Force estimated its savings at nearly $275 million over the life of the ADR First program.[81] Today, the program continues to boast savings in excess of $1 billion and a ninety-three percent success rate.[82]

General of the United Nations. FAA, *supra* note 63. It has also won the Office of Management and Budget's Outstanding ADR Program Award. *Id*.

[74] Palladino et al., *supra* note 64, at 15.

[75] *Id*. at 13 (quoting 14 C.F.R. § 17.31(b)).

[76] CPR Institute for Dispute Resolution, *Moving Up the Chart: Air Force Elevates ADR in Structure—and With New Programs*, 20 ALTERNATIVES TO HIGH COST LITIG. 113, 113 (2002).

[77] *Reports to the President*, ADR.GOV, https://www.adr.gov/presi-report.htm (last visited Jan. 24, 2019).

[78] *Id*. at 114. The article does not expound on the reasons for the cost savings nor are reasons otherwise publically available. Therefore, it is unclear whether the savings are due to anticipated litigation costs or the result of a better negotiation.

[79] *Id*. at 113.

[80] REPORT ON THE USE AND RESULTS OF ADR IN THE EXECUTIVE BRANCH, *supra* note 15, at 10.

[81] REPORT ON THE AIR FORCE ADR PROGRAM, *supra* note 15, at 1.

[82] *Id*.

The Air Force has been innovative in the implementation of its ADR program. The Air Force has reaped benefits by implementing ADR agreements with twenty-five of its top contractors and significantly reducing the time to resolve large disputes.[83] Specifically, "large disputes that took an average of five years to resolve through litigation are now being resolved by the use of ADR in an average of just over twelve months."[84] Furthermore, the Air Force offers the use of ADR in over eighty percent of its contractual disputes and considers ADR to be the default resolution method.[85] "Cost savings from the [Air Force's] use of ADR flows primarily from reduced cycle time, and include years of lawyer and staff effort, direct expenses of litigation such as witness fees, travel, and document production, and Contract Disputes Act interest on contractor claims."[86] The success the Air Force has had in implementing its ADR program shows that even large-scale disputes with the nation's top defense contractors can be efficiently resolved at tremendous time and cost savings. The use of ADR at the ASBCA can be equally effective in resolving similar disputes.

V. Alternative Dispute Resolution at the Armed Services Board of Contract Appeals

A. Types of ADR Offered by the ASBCA

The ASBCA offers several different types of ADR methods. The two most common are mediation and summary trial with binding decision. However, other agreed-upon methods may be utilized.[87]

First, mediation is a nonbinding method of ADR. A third-party neutral who assists the parties in the settlement process usually conducts mediations.[88] At the ASBCA, an administrative judge serves

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[83] REPORT ON THE USE AND RESULTS OF ADR IN THE EXECUTIVE BRANCH, *supra* note 15, at 155. The contractors signed voluntary pledges to engage in ADR prior to litigation. *See* ALT. DISP. RESOL., CORP.-LEVEL ADR INDUSTRY PLEDGES WITH AF (Nov. 3. 2010), http://www.adr.af.mil/Resources/Fact-Sheets/Display/Article/421755/corporate-level-adr-industry-pledges-with-af.

[84] REPORT ON THE USE AND RESULTS OF ADR IN THE EXECUTIVE BRANCH, *supra* note 15, at 155.

[85] *Id*. at 28.

[86] *Id*.

[87] ASBCA RULES, ADD. II, *supra* note 12, at 2.

[88] *Id*.

as the neutral.[89] The administrative judge has no decision-making authority; however, he may make nonbinding recommendations as to resolution of the dispute.[90]

Mediation is a widely used method because it is informal, and can be tailored to meet the disputants' needs.[91] There are two types of mediation—facilitative and evaluative.[92] During facilitative mediation the neutral "facilitates discussions between the parties and does not evaluate or opine on the merits of the parties' respective positions."[93] Evaluative mediation differs in that the neutral shares his views of the merits of the parties' respective positions and makes suggestions for resolution.[94]

Another popular method of ADR at the ASBCA is the binding summary trial. The ASBCA judge hears argument from both parties and renders a binding decision that may not be appealed in this informal, expedited process.[95] It resembles a trial, but the judge's decision "will not contain any findings of fact or conclusions of law."[96]

Although not frequently used, the ASBCA may also conduct mini-trials.[97] A mini-trial is a "highly flexible, expedited, but structured, procedure."[98] This method relies on the participation of senior principals from both parties and a third-party neutral facilitates.[99] In a mini-trial, the parties agree on the manner of presentation of the case to a panel

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[89] *Id*. When choosing mediation, the parties must "agree not to subpoena the Neutral in any legal action or administrative proceeding of any kind to produce any notes or documents related to the ADR proceeding or to testify concerning any such notes or documents or concerning his/her thoughts or impressions." *Id*.

[90] *Id*.

[91] U.S. DEP'T AIR FORCE OFF. GEN. COUNS. CONFLICT RESOL. DIVISION, ALTERNATIVE DISPUTE RESOLUTION DESKBOOK FOR ACQUISITION PROFESSIONALS 7 (May 13, 2016), https://www.adr.af.mil/Portals/82/documents/AFD-160520-024.pdf?ver=2016-08-01-121743-293 [hereinafter ADR Deskbook].

[92] *Id*.

[93] *Id*.

[94] *Id*. The mediator's role is not to "impose a settlement upon the parties," but instead "to assist the parties in fashioning a mutually satisfactory solution to resolve the issue in controversy." *Id*.

[95] ASBCA RULES, ADD. II, *supra* note 12, at 2.

[96] ADR DESKBOOK, *supra* note 91, at 9.

[97] Reba Ann Page & Paul Williams, *The ASBCA's Path to the "Mega ADR" in Computer Sciences Corporation*, 49 PROCUREMENT L. 1, 18 (2013).

[98] *Id*.

[99] ADR DESKBOOK, *supra* note 91, at 8.

comprised of a senior principal with decision-making authority from each side and the third-party neutral.[100] Additionally, there is limited discovery, and each party may present its case in an abbreviated hearing.[101] Following the hearing, the panel meets to discuss resolution.[102]

The disputants may also agree on other informal methods of ADR to resolve the dispute.[103] These methods may be binding or nonbinding and may also include hybrid methods.[104] The key factor is that they "are structured and tailored to suit the requirements of the individual case."[105]

Some of the popular hybrid methods include mediation followed by binding summary trial, and mediation followed by binding summary decision.[106] Both of these methods begin with evaluative mediation, but they differ in how they proceed if the mediation fails.[107] Specifically, if the mediation is unsuccessful where parties choose mediation followed by a summary decision, the judge then issues a binding decision based solely on the information presented during the mediation.[108] However, parties that agree to mediation followed by summary trial are allowed to present additional evidence that the judge considers along with information presented during the mediation.[109] The ASBCA's flexibility in using a variety of ADR methods, including hybrids, makes it well suited to conduct ADR on a wide-scale basis because it has several tools from which to choose.

B. Mega Alternative Dispute Resolution

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[100] *Id*.
[101] *Id*. The case is presented as either "a summary or abbreviated hearing with or without oral testimony." *Id*.
[102] *Id*. The neutral may also participate in this session as an "advisor, mediator or fact-finder" if allowed under the terms of the ADR agreement. *Id*.
[103] ASBCA RULES, ADD. II, *supra* note 12, at 3.
[104] *Id*. at 2. The maturation of ADR over the past twenty years has enabled the ASBCA to be more creative in its use of ADR, allowing the ASBCA to use tailored processes that can address a wide variety of issues. *See* 2016 REPORT ON SIGNIFICANT DEVELOPMENTS, *supra* note 15, at 1.
[105] *Id*.
[106] *Id*. Cases resolved using binding ADR have no precedential value. *Id*.
[107] ADR DESKBOOK, *supra* note 91, at 9.
[108] *Id*.
[109] *Id*.

Over the years, the ASBCA has used hybrid ADR techniques to resolve extremely complicated, high-value cases. The ASBCA provided ADR services in two intricate cases—Boston's Big Dig (Big Dig) and Computer Sciences Corporation (CSC). Both cases involved multibillion-dollar claims and some practitioners have labeled them as *megaprojects* or *Mega ADR* due to their large scale and complexity.[110] It is useful to explore these cases to understand why implementing mandatory ADR in the ASBCA makes sense.

1. The Big Dig

The ASBCA is often requested to assist entities outside of the Armed Services to resolve disputes. The Big Dig was a major construction project that began in the early 1990s to reroute the Central Artery Interstate through the middle of Boston.[111] The project took an incredible fifteen years and $15 billion.[112] Additionally, there were twenty-five thousand disputes and claims arising from this project.[113] Twenty-nine claims valued at approximately $175 million went to a dispute resolution board, and approximately seventy-five percent of the recommendations were accepted or led to settlement.[114] The ASBCA provided judges to sit on mediation panels composed of two to three mediators who guided the parties through the evaluative mediation process.[115] "Overall, the structured negotiation/mediation program closed out disputes and claims with an aggregate claimed value of more than 500 million dollars."[116]

Requesting assistance from the ASBCA made sense because there were strong similarities between state and federal contract terms for public construction projects.[117] Although the Big Dig was not a claim brought

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[110] *See generally* Kurt L. Dettman et al., *Resolving Megaproject Claims: Lessons from Boston's "Big Dig,"* 30 CONSTRUCTION LAW. 5 (2010); Page & Williams, *supra* note 97.
[111] Dettman et al., *supra* note 110, at 5.
[112] *Id*.
[113] *Id*. at 13.
[114] *Id*.
[115] *Id*. at 10. The ASBCA suggested the use of co-mediators because of the parties' agreement to use evaluative mediation as well as to alleviate any public interest concerns. *Id*. at 12.
[116] *Id*. at 14.
[117] *Id*. at 5, n. 35. Over fifty percent of the funding for the Big Dig came from the federal government through a Federal Highway Administration grant from the U.S.

before the ASBCA, it was analogous to the large claims that the ASBCA reviews. Specifically, the military enters into extremely complex, large-scale contracts for planes, submarines, satellites, missiles, and other intricate systems. Oftentimes, these projects involve multiple prime and subcontractors, and they frequently last for several years at significant cost. Thus, the ASBCA's involvement in the resolution of the issues in this case demonstrates the skill of the ASBCA judges at resolving large-scale, complex disputes with ADR techniques, and that mandatory ADR can work.

2. Computer Sciences Corporation

The ASBCA also helped resolve a complex, multibillion-dollar dispute between Computer Sciences Corporation (CSC) and the U.S. Army. In 2007, the Army and CSC entered into litigation over a contract for an update to the Army's logistics management system.[118] Initially, CSC claimed it was due $858 million, but the claim increased as time progressed.[119] The Army submitted counter claims, and by 2010, fourteen appeals had been docketed.[120] The total amount in dispute reached over $2 billion.[121] It had been three years since the original claim was filed, with no end in sight.[122] To make matters worse, approximately $60,000 in potential CDA-mandated interest was accruing per day.[123] Because both the Army and CSC faced

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Department of Transportation. *Id*. U.S. Department of Transportation acquisitions are subject to the FAR *See* U.S. DEP'T OF TRANSP. TRANSPORTATION ACQUISITION REGULATION, https://www.transportation.gov/administrations/assistant-secretary-administration/transportation-acquisition-regulation-tar (last visited Jan. 29, 2019).

[118] Page & Williams, *supra* note 97, at 21.

[119] *Id*. The parties entered into the contract in 1999. *Id*. at 20. In 2003, the government requested corrective action due to delays in Computer Sciences Corporation (CSC) deploying the system. *Id*. at 21. The contract was restructured in 2005, but "[i]n 2006, CSC filed fourteen requests for equitable adjustment (REAs)," which were denied by the contracting officer in 2007. *Id.* Consequently, CSC filed appeals at the ASBCA. *Id*. The amount of the claim grew after the government filed a counterclaim. *Id*. Computer Sciences Corporation subsequently stated that "it intended to submit an additional REA and would seek in excess of 1.2 billion dollars for the government's alleged breach of contract." *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id*. By 2010 a trial to determine entitlement only had been set for 2011. *Id.*

[123] *Id*. at 22.

significant litigation risks, the Army and CSC entered into ADR at the ASBCA.[124]

After consultation with the board, the parties agreed to use a nonbinding, evaluative mediation followed by mini-trial.[125] They also agreed to attempt to resolve both docketed and non-docketed matters.[126] ADR offered the parties the flexibility to include matters that had not been docketed.[127] The parties established a schedule for joint and private mediation sessions, and set time aside for a final session to conclude negotiations and develop a final agreement.[128] After engaging in protracted litigation for four years, ultimately, the parties were able to attain resolution using ADR.[129] Additionally, the parties were able to maintain their working relationship and, as part of the mediation, agreed to a $1 billion follow-on contract.[130] Had the ASBCA required mandatory ADR, it would have saved the parties a significant amount of time and money. The success of the CSC case can translate across the spectrum of

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> Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim . . . until the date of payment of the claim. Interest shall accrue and be paid at a rate which the Secretary of the Treasury shall specify . . . . The rate shall be determined by the Secretary of the Treasury taking into consideration current private commercial rates of interest for new loans maturing in approximately five years.

41 U.S.C § 7109(a)-(b).

[124] Page & Williams, *supra* note 97, at 22. Alternative Dispute Resolution is often not appropriate until litigation risk has been assessed. Retson & Clarke, *supra* note 38, at 632. The DoD Inspector General investigation into the appropriateness of ADR for the dispute between the Army and CSC identified significant litigation risk for the government. Page & Williams, *supra* note 97, at 17. The attorneys for CSC came to a similar conclusion. *Id*. at 22. Thus, the parties agreed to enter into ADR. *Id*.

[125] Page & Williams, *supra* note 97, at 22.

[126] *Id*. at 22, 25.

[127] *Id*. at 22. The ASBCA judges cannot grant remedies for non-docketed matters using litigation as they do not have jurisdiction. *Id*.

[128] *Id*. at 25.

[129] *Id*.

[130] Page & Williams, *supra* note 97, at 22, 25.

> Under the terms of the settlement, [CSC] received 277 million dollars in cash and a five-year extension (four base years plus one option year) with an estimated value of one billion dollars to continue to support and expand the capabilities of the systems covered by the original contract [which was] scheduled to expire in December 2011.

Id. at 25 (internal citations omitted).

appeals, and the ASBCA's expertise in ADR and adaptability in approach to the CSC case highlights its suitability for implementation of mandatory ADR.

VI. Implementing Mandatory ADR at the ASBCA

Although ADR has been in practice for many years, parties and attorneys are still accustomed to litigation to resolve contract disputes. In some situations, initiating mediation may be perceived as a sign of weakness.[131] Additionally, some may feel that they would reveal their hand if forced to use ADR, or that ADR is a waste of time and money.[132] Because of this, many do not choose ADR. However, their fears are largely unfounded.

Parties are generally happier with ADR than without, even in cases where settlement was not reached. The studies discussed earlier in this article prove that ADR is relevant and useful at the ASBCA. ADR is a very useful tool because the government and its contractors want to preserve, and maybe even enhance, their working relationships. The contractor and government relationship is symbiotic, mainly because the parties rely on each other and draw on the other's strengths. Success stories like the FAA and the Air Force show that tremendous cost and time-savings can be achieved by conducting ADR. Additionally, cases like the Big Dig and CSC demonstrate that ASBCA judges have the capability and the acumen to successfully conduct ADR in large-scale matters.

Although today the ASBCA notifies all litigants of the option to conduct ADR, only a small portion choose it despite the fact that ADR has proven to be successful. Thus, in order for ADR to be the most beneficial for the ASBCA, nonbinding ADR must be made mandatory. One of the main benefits in successful implementation of mandatory ADR is ASBCA judges continuing to provide cost-free, neutral services to disputants.[133] However, binding ADR would still function in the same manner as it currently does.[134] Only if parties

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[131] Quek, *supra* note 41, at 483.

[132] *See generally* Crowell, *supra* note 14, at 201.

[133] In a state court, neutrals often charge for mandatory ADR services. Frank E. Sander et al., *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 887 (1996).

[134] "Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines." FAR Part 33.214(g). For many government entities the head of the

cannot agree might a judge direct them toward a specific method, which, in complicated cases, may result in a hybrid, nonbinding ADR method.

Although litigants at the ASBCA are often very savvy, some may have the impression that using ADR is not beneficial because they must compromise and cannot "win."[135] However, most view the ASBCA as a reputable forum, trust its decision-making authority and comply with its rules. [136] Thus, although they may not voluntarily agree to use ADR, most litigants will acquiesce to mandatory ADR and many may subsequently learn to appreciate it.

Additionally, in a state court system, the parties are frequently forced into mediation without a choice of ADR method.[137] However, with ADR at the ASBCA, the parties and the judges would have several options from which to choose. By allowing the parties to select the type of ADR method they use, the parties would take ownership of ADR because they would have more of a say in the process.

Some states impose financial penalties upon parties that do not actively participate in court-mandated mediation.[138] However, a financial penalty is not suggested as a method of controlling non-compliance at the ASBCA, as the intent is not to dissuade disputants from filing appeals. A more practical approach would be for the ASBCA to refuse to docket the cases of non-compliant litigants and force them to litigate their case at the Court of Federal Claims—another forum with jurisdiction to hear their appeal.[139]

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respective agency must be able to reject the arbitrator's decision before it becomes binding. *See generally* ADR DESKBOOK, *supra* note 91, at 7. Litigants should not be required to submit to binding ADR as this will be a major deterrent and would deny disputants their additional right to file suit in the Court of Federal Claims. *See* Major Patrick E. Tolan, Jr., *The Role of Alternative Dispute Resolution in Resolving Air Force Contract Disputes*, 40 A.F. L. REV. 89, 93 (1996).

[135] Spangler, *supra* note 32.

[136] *See generally* David A. Churchill et al., *Report of the Federal Contract Claim and Remedies Committee on Ways of Expediting Appeals Before the Boards of Contract Appeals*, 16 PUB. CONT. L.J. 161 (1986).

[137] *See generally* McAdoo & Welsh, *supra* note 52.

[138] *See generally* Paul C. Williams, *Court-Annexed Arbitration and Nevada's Unique Penalty Provisions: Introducing an Arbitrator's Findings at a Trial De Novo*, 11 NEV. L.J. 282 (2010).

[139] The Court of Federal Claims is often more expensive than the ASBCA and it does not provide free neutral services; thus, it is unlikely that litigants will find it to be a more attractive option. *See* Schaengold & Brams, *supra* note 5, at 286.

Another suggestion for implementation is to allow the ASBCA judge discretion to decide that a particular case should not require ADR, as is currently done in many state courts.[140] Along with this provision, litigants will have an opportunity to opt out of ADR by filing a motion with the judge.[141] Although the judge should only grant such motions in cases where ADR is not appropriate, the judge will be allowed to give deference to individual disputants' situations.[142] This is particularly important because small business owners may not be able to afford both ADR and a trial if ADR is unsuccessful.[143]

The biggest hurdle in implementing mandatory ADR at the ASBCA is the FAR. Currently, FAR Part 33.214(a) states that an essential element of ADR is "voluntary election by both parties to participate in the ADR process."[144] Thus, mandatory ADR is prohibited. Nevertheless, the FAR regularly undergoes revisions based on the ever-changing contracting world.[145] Therefore, the FAR should be updated to allow the ASBCA to mandate ADR.

VII. Conclusion

The ASBCA would be more efficient if it employed mandatory ADR prior to litigation. Both civilian courts and litigants realize time

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[140] Sander et al., *supra* note 133, at 866.

[141] *Id*. at 887.

[142] Alternative Dispute Resolution may not be appropriate where there is a case of first impression or other question of law that requires a published decision. Tolan, *supra* note 134, at 99. It also may not be appropriate where there is clearly no chance of successful resolution, or where a judge foresees that ADR may be extremely cost-prohibitive. *See Id*. at 99-100. Additionally, ADR is inappropriate where there is "no bona-fide dispute and the other's case is wholly without merit." *Id*. at 101. Thus, the ASBCA judge must assess the litigation risk for both sides prior to requiring the parties to engage in ADR. *Id*.

[143] Although the ASBCA's services are free, ADR requires active participation that results in time away from the business. This may result in lost opportunity costs. Additionally, although the disputant may appear pro se, there may be lawyer fees, should he decide to retain one. Schaengold & Brams, *supra* note 5, at 313.

[144] FAR Part 33.214(a).

[145] The FAR "is issued within applicable laws under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator, Office of Federal Procurement Policy, Office of Management and Budget." FAR, *supra* note 41, Foreword.

and cost savings from mandatory ADR. The current backlog of cases cannot be allowed to continue to increase as the ASBCA takes longer and longer to decide a case. The optimal solution to reduce the backlog is mandatory ADR. Mega ADR examples such as the Big Dig and CSC demonstrate that the ASBCA is successful at effectively resolving even extremely complex, multibillion-dollar contracts using ADR. Although complicated cases that are unsuccessful in ADR may still take significant time to be adjudicated, they can be resolved more expeditiously because both sides have focused the issues prior to trial. It is time to require mandatory ADR so that the ASBCA more closely meets the intent of the CDA by providing the most efficient resolution times.