

February 2015

Cry Havoc: Are Incompetent Private Military Companies Ruining the Defense Base Act?

William Burke

Follow this and additional works at: <https://scholarship.law.wm.edu/wmblr>



Part of the [Labor and Employment Law Commons](#), and the [Military, War, and Peace Commons](#)

Repository Citation

William Burke, *Cry Havoc: Are Incompetent Private Military Companies Ruining the Defense Base Act?*, 6 Wm. & Mary Bus. L. Rev. 287 (2015), <https://scholarship.law.wm.edu/wmblr/vol6/iss1/9>

Copyright c 2015 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmblr>

CRY HAVOC: ARE INCOMPETENT PRIVATE MILITARY COMPANIES RUINING THE DEFENSE BASE ACT?

WILLIAM BURKE^{*}

ABSTRACT

The Defense Base Act (“DBA” or “Act”) provides a no-fault, insurance-backed workers’ compensation mechanism for compensating private security contractors who are injured overseas. Critics of the Act allege that it should be fundamentally altered or replaced because combat zone work is uninsurable, the Act’s compensation is insufficient, and it is less efficient than the alternatives. This Note argues that, on the contrary, the DBA insurance market is functional and improving, its benefits are sufficient when viewed in combination with contractors’ other compensation, and it is a far more efficient compensation system than is offered by tort litigation. The flaws cited by the DBA’s critics are more likely a result of problems that are extrinsic to the Act. Not least of these are the risks posed by some inexperienced, unprofessional private military companies that are more dangerous for their employees and more likely to attempt to short-circuit the Act than are better-credentialed private military companies. Existing trade associations that carefully credential their members offer a potential solution: amend contracting regulations to require private security contractors to be certified by third parties like the International Stability Operations Association. This would allow the government to exclude the most dangerous actors from the market and send a strong standardizing signal to the industry.

^{*} J.D. Candidate, 2015, William & Mary Law School. M.A. International Studies, 2010, Old Dominion University. B.S. Political Science, 2001, United States Naval Academy. The author served for eleven years as a commissioned officer in the U.S. Navy, rising to the rank of Lieutenant Commander. While in the Navy, he completed several deployments overseas including one to the Multinational Forces Iraq Resource Management directorate in Baghdad. He would like to thank his wife, Jennifer, for her support during the process of drafting and revising this Note. He would also like to thank Chris Abel, Len Fleisig, Adam Casagrande, and Bob Korroch for their encouragement, suggestions, and guidance.

TABLE OF CONTENTS

| | |
|--|-----|
| INTRODUCTION | 289 |
| I. PMCS AND THE DBA | 293 |
| II. THE DBA INSURANCE MARKET IS FUNCTIONING AND PROVIDES SUFFICIENT COMPENSATION TO INJURED CONTRACTORS..... | 298 |
| <i>A. The Uninsurability Critique</i> | 298 |
| <i>B. The Insufficiency Critique</i> | 300 |
| III. THE DBA IS THE MOST EFFICIENT ALTERNATIVE FOR FULFILLING ITS POLICY OBJECTIVES | 303 |
| <i>A. DBA Insurance Premiums Do Not Make PMCs Too Expensive</i> | 304 |
| <i>B. The No-Fault System Is More Efficient than Litigation</i> | 306 |
| <i>C. The LHWCA's Problematic Border Zones Demonstrate the Risks of Allowing Tort Suits to Penetrate the DBA's Exclusivity</i> | 311 |
| IV. UNPROFESSIONAL PMCS EXACERBATE THE DBA'S FLAWS..... | 313 |
| V. EXISTING CREDENTIALING STANDARDS OFFER AN EFFICIENT <i>PRO HOC</i> MECHANISM FOR ENSURING PMC COMPETENCE..... | 320 |
| CONCLUSION..... | 322 |

INTRODUCTION

On March 30, 2004, four Americans working as contract security guards in Iraq were escorting a small convoy of flatbed trucks for a company that was providing logistics services to the U.S. Army.¹ The four contractors got lost in the city of Fallujah where local insurgents ambushed, beat, and killed all four, then hanged two.² Pictures of the contractors' desecrated bodies went viral, depicting "scenes reminiscent of Mogadishu circa 1993."³ But when the administrator of the deceased contractors' estates sued the contractors' employer for wrongful death and fraud, the result was a protracted and procedurally complex court battle that did not end until 2011, with all of the plaintiffs' claims dismissed.⁴

When private security contractors⁵ are injured, they fall under the Defense Base Act's workers' compensation scheme.⁶ The DBA provides substantial benefits to injured contractors and death benefits to their survivors if they are killed, but in the wake of the Fallujah incident, many critics of the current regulatory regime have argued that the DBA's exclusive remedy is insufficient.⁷ Much analysis has gone into the Act's problems, but none of it has explored the economic links between the problems the DBA's critics identify and the other major line of criticism aimed at private military contractors (PMCs): the lack of accountability for PMC misconduct.

This criticism reached fever pitch after an incident that occurred in Baghdad, Iraq, in September of 2007.⁸ A convoy of private security contractors

¹ *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 581 (4th Cir. 2006).

² *Id.*; see also Steve Fainaru & Saad al-Izzi, *U.S. Security Contractors Open Fire in Baghdad*, WASH. POST (May 27, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/26/AR2007052601394.html>.

³ Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 515 (2005); see also Mark Calaguas, Note, *Military Privatization: Efficiency or Anarchy?*, 6 CHI.-KENT J. INT'L & COMP. L. 58 (2006).

⁴ *Blackwater Sec. Consulting, LLC v. Nordan*, No. 2:06-CV-49-F, 2011 WL 237840, at *11 (E.D.N.C. Jan. 21, 2011) (confirming arbitrator's dismissal of all claims with prejudice).

⁵ "Private security contractors," like the four killed in Fallujah, generally work as independent contractors for "Private Military Companies" or "PMCs." Calaguas, *supra* note 3, at 59–60. The companies themselves are also often referred to as private security contractors or companies (PSCs). *Id.* They are sometimes also called Private Military Firms (PMFs) or Private Military and Security Companies (PMSCs). *Id.* For clarity, this Note will refer to the companies as PMCs and the individual contractors as either "contractors" or "private security contractors."

⁶ *Division of Longshore and Harbor Workers' Compensation (DLHWC)*, U.S. DEP'T OF LABOR (last visited Nov. 19, 2014), <http://www.dol.gov/owcp/dlhwc/ExplainingDBA.htm#1>.

⁷ See *infra* Part II.B.

⁸ Kim Gamel, *Iraqi Police Say Security Contractors Open Fire in Western Baghdad, Killing at Least 9*, ASSOCIATED PRESS, (Sept. 16, 2007, 11:14 PM), available at <https://>

working for Blackwater,⁹ the same PMC that employed the four killed in the Fallujah incident, opened fire on civilians in Nisoor Square, killing nine and wounding at least a dozen more.¹⁰ The incident spawned a wave of scholarly legal writing calling for greater *post hoc* accountability for PMCs and contractors, whether through tort liability or criminal sanctions.¹¹ For the most part, PMC critics' calls for more *post hoc* accountability have been answered.¹²

One of the Coalition Provisional Authority's many blunders was the decision to exempt PMCs from criminal liability for their actions in Iraq.¹³ Congress solved that issue via the National Defense Authorization Act of 2007, which contains a provision subjecting PMCs to the Uniform Code of Military Justice while working under military command.¹⁴ In addition, under the Military Extraterritorial Jurisdiction Act, all private security contractors supporting the Department of Defense (DoD) in overseas contingency operations are subject to U.S. criminal jurisdiction.¹⁵ Finally, the new Status of Forces Agreement between the United States and Iraq subjects PMCs operating there to Iraqi criminal law.¹⁶

advance.lexis.com/document/?pdmfid=1000516&crd=54ebe9e8-2147-4b12-8994-80b34af5aa01&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4PP0-K4X0-TWCX-N17F-00000-00&pddocid=urn%3AcontentItem%3A4PP0-K4X0-TWCX-N17F-00000-00&pdcontentcomponentid=138211&ecomp=vhyg&earg=sr2&prid=96f6b9dd-234f-4491-90f0-0809fea3911a.c.

⁹ The PMC formerly known as "Blackwater" has been through a number of fundamental transformations since these and the many other ugly incidents involving the company were identified. For a discussion of how the company's journey from "Blackwater" to "Academi" shows that it is possible to distinguish between good and bad PMCs, see *infra* Part IV.

¹⁰ Gamel, *supra* note 8.

¹¹ See, e.g., Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 259 (2008); Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT'L L. 239, 240 (2009); Craig S. Jordan, *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309 (2009).

¹² Finer, *supra* note 11, at 259–65.

¹³ See Kristine Huskey & Scott Sullivan, *United States: Law & Policy Governing Private Military Contractors After 9/11*, in MULTILEVEL REGULATION OF MILITARY AND SECURITY CONTRACTORS: THE INTERPLAY BETWEEN INTERNATIONAL, EUROPEAN AND DOMESTIC NORMS 350 (Christine Bakker & Mirko Sossai eds., 2012) (discussing Coalition Provisional Order 17).

¹⁴ MOLLY DUNIGAN, VICTORY FOR HIRE: PRIVATE SECURITY COMPANIES' IMPACT ON MILITARY EFFECTIVENESS 6–7 (Stanford Univ. Press 2011).

¹⁵ 18 U.S.C.A. §§ 1361–67 (West 2013).

¹⁶ SHAWN ENGBRECHT, AMERICA'S COVERT WARRIORS: INSIDE THE WORLD OF PRIVATE MILITARY CONTRACTORS 11–13 (Potomac Books, Inc. 2011); Huskey & Sullivan, *supra* note 13, at 351–52.

But despite this progress on PMC accountability, there has yet to be any significant action on PMC competence.¹⁷ The Department of State (DoS) has introduced a more rigorous credentialing process that has eliminated some of the most egregious problems.¹⁸ Additionally, DoD and DoS signed a Memorandum of Agreement (MoA) in December 2007, in the aftermath of the Nisoor Square massacre, that provided some rules for conducting background checks on private security contractors, but contained no real competency requirements.¹⁹ The only competency requirement in the MoA is that armed contractors must pass the Army's basic marksmanship test.²⁰ If contractors cannot clear this very low hurdle, however, the embassy's regional security officer is permitted to waive it.²¹ When the MoA was implemented, its clear intent was not to vet or control military provider firms, but rather to try to keep track of what they were doing.²²

The lack of a mandatory competence-based certification for PMCs leaves the market open to fly-by-night companies that employ unqualified contractors who are unprepared for the pressures of combat.²³ These individuals are more likely to get themselves hurt or killed, or to lose control and inflict civilian casualties. When the demand for PMC services outstripped the supply of competent providers, small, informally organized PMCs flooded into Iraq and Afghanistan to fill the gap.²⁴ Unlike their experienced, professional predecessors, these new PMCs tended to employ the least qualified candidates, who are "always the first to come unglued when the bullets start[] flying."²⁵ As one former private security contractor and PMC CEO explains, "when the call came for Iraq, the amateurs trampled the old guard in the stampede to the trough of free taxpayer money."²⁶ As a result, these under-qualified

¹⁷ C. Douglas Goins, Jr., Gregory L. Fowler, & Taavi Annus, *Regulating Contractors in War Zones: A Preemptive Strike on Problems in Government Contracts*, 07-3 BRIEFING PAPERS 1, *15 (West 2007).

¹⁸ ENGBRECHT, *supra* note 16, at 13.

¹⁹ Memorandum of Agreement between Dep't of Def. & Dep't of State, *available at* <http://prhome.defense.gov/Portals/52/Documents/PR%20Docs/DOS-DOD%20Memo%20of%20Agreement%20on%20Protection%20and%20Evacuation.pdf>.

²⁰ *Id.* at 5.

²¹ *Id.*

²² Author's personal experience while assigned to the headquarters staff in Baghdad and assisting in the process of creating the small entity tasked with implementing the MoA for DoD.

²³ See Deborah Avant, *Think Again: Mercenaries*, FOREIGN POLICY (July 1, 2004), http://www.foreignpolicy.com/articles/2004/07/01/think_again_mercenaries.

²⁴ John Riley & Michael Gambone, *Men with Guns*, 28 WIS. INT'L L.J. 39, 45 (2010).

²⁵ ENGBRECHT, *supra* note 16, at 41. Engbrecht provides a number of anecdotes describing this phenomenon in graphic, heart-wrenching detail, driving home again and again the point that inexperienced, inadequately trained contractors are the ones most likely both to get themselves or others killed and to commit atrocities. *Id.* at 100–22.

²⁶ *Id.* at 7.

PMCs rapidly amassed a long list of both contractor and civilian casualties.²⁷ Addressing the full sweep of this problem is beyond the scope of this Note.

Instead, this Note will focus narrowly on the controversy over the DBA and argue that, contrary to the weight of academic argument, its problems are not symptoms of inherent deficiency. The Act is the best response to a difficult problem, and any struggles are more likely because its compensation infrastructure has been overloaded and short-circuited by the bad actors that have proliferated in the industry since its explosive growth began early in the Iraq War.²⁸ Regardless of any new *post hoc* accountability measures, the reality of the market is that demand for private security services still well exceeds supply,²⁹ so even the least qualified candidates and companies can find employment.³⁰ Some critics of PMCs would have the government address this problem from the demand side, by simply reducing or even discontinuing its use of PMCs altogether.³¹ But this is too drastic: PMCs provide real fiscal and strategic benefits that make a ban inadvisable.³²

Instead, by requiring basic competency certification, the government can mitigate, and could eventually eliminate, many of the remaining problems associated with its use of PMCs. In the short term, the current market failure conditions would persist, but the worst consequences would be avoided by the ban on unqualified contractors. Prices would go up, but in the long run, this would exert pressure on other PMCs to reform in order to remain in or re-enter the market, thereby increasing the supply of qualified PMCs and contractors overall. With fewer incompetent and unethical PMCs in the market, private security contract work would be safer, leading to a lower volume of DBA claims and lower DBA insurance premiums, and the PMCs remaining

²⁷ *Id.*, at 20, 41; *see infra* Part IV.

²⁸ ENGBRECHT, *supra* note 16, at 111–12 (explaining that by the end of 2004, there were over 100 PMCs operating in Iraq.).

²⁹ Avant, *supra* note 23 (“The market pressures, technology, and social change of a globalized world create multiple demands that national militaries have difficulty meeting.”).

³⁰ *See* ENGBRECHT, *supra* note 16, at 110–11 (arguing that economic pressures associated with recruiting and transporting replacements prevented many PMCs in Iraq from replacing incompetent or even dangerous contractors).

³¹ *See, e.g.*, Joshua P. Nauman, *Civilians on the Battlefield: By Using U.S. Civilians in the War on Terror, Is the Pot Calling the Kettle Black?*, 91 NEB. L. REV. 459, 497 (2012) (recommending that the U.S. cease using PMCs for combat-related tasks); *see also* Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism As a Paradigm of Foreign War*, 29 U. PA. J. INT’L L. 1, 31 (2007) (arguing that PMCs are too expensive and not as effective as regular military forces).

³² This conclusion is bolstered by the fact that few countries have seriously considered imposing such a ban. *See* LINDSEY CAMERON & VINCENT CHETAUL, *PRIVATIZING WAR* 676 (2013). The only example the authors cite is a draft bill being considered by pacifist Switzerland. *Id.*

in the market would be more likely to fulfill their obligations under the Act, leading to more reliable and prompt compensation for injured contractors.

Part I of this Note provides a brief overview of the PMC industry, the DBA injury compensation mechanism, and the main lines of criticism of the Act. Part II responds to arguments that combat zone activities are uninsurable and that DBA compensation is insufficient. Part III focuses on the argument that the DBA is an inefficient system of compensation. Part IV offers an alternative explanation for the DBA's apparent problems. Part V concludes with a discussion about regulatory action that could address this problem.

I. PMCS AND THE DBA

PMCs provide a variety of military support services, ranging from feeding and supplying troops, to technical support for information and weapons systems, to armed security support.³³ Despite some concern over their use,³⁴ PMCs have been part of the American way of war since 1775.³⁵ Immediately following the end of the Cold War, however, the United States began to use PMCs more and more frequently; now it uses them more than ever before.³⁶

The end of the bipolar conflict between the United States and the Soviet Union ushered in a much more complex international security environment.³⁷ Non-state actors emerged as both threats and targets, as increasingly powerful and active drug cartel and terror networks found international non-governmental organizations and multinational corporations to be relatively soft targets.³⁸ At the same time, post-Cold War military demobilizations resulted in a large supply of trained, experienced, and professional soldiers willing and able to step into the security gap.³⁹ Western governments, riding an ideological

³³ See Goins, Fowler, & Annus, *supra* note 17, at *4.

³⁴ See *infra* Parts II.A and III.C.

³⁵ Matthew Underwood, "Jealousies of A Standing Army": *The Use of Mercenaries in the American Revolution and Its Implications for Congress's Role in Regulating Private Military Firms*, 106 NW. U. L. REV. 317, 325 (2012); see also Robert H. Patton, *The Unlikely Role of a Patriot Pirate Navy*, U.S. NEWS & WORLD REPORT (June 27, 2008), <http://www.usnews.com/news/national/articles/2008/06/27/the-unlikely-role-of-patriot-pirates> (describing the Colonial reliance on privateer naval forces in the Revolutionary War). The similarity between Colonial privateers and modern PMCs is underscored by the fact that both Thomas Paine and George Washington were shareholders in proto-corporate privateering ventures. DUNIGAN, *supra* note 14, at 6–7.

³⁶ Peter W. Singer, *Outsourcing War*, Foreign Affairs, BROOKINGS (March/April 2005), available at <http://www.brookings.edu/research/articles/2005/03/01usdepartmentofdefense-singer>.

³⁷ *Id.*

³⁸ Riley & Gambone, *supra* note 24, at 47.

³⁹ *Id.* at 43–44; see also DUNIGAN, *supra* note 14, at 2–3, 8–9 (attributing the emergence of the modern PMC to the post–Cold War "peace dividend").

wave favoring privatization of government services quickly saw that they could save billions of dollars by outsourcing traditional military support functions to the emerging PMC industry⁴⁰ and their use expanded rapidly throughout the 1990s.⁴¹

The model of using these contractors as proxy forces for U.S. national security and foreign policy missions began in earnest in 1994 with the Clinton Administration's decision to surreptitiously assist Croatia in its fight against Serbia by allowing Military Professional Resources, Inc. (MPRI) to deploy contractors to Croatia.⁴² MPRI was ostensibly in Croatia to lead a course called the "Democratic Transition Assistance Program," aimed at enhancing the Croatian military's understanding of the need to subordinate itself to civilian control in the service of democracy.⁴³ Whatever MPRI actually taught the Croatian Army about civil-military relations, it is evident that it also shared some more practical lessons as well: only nine months after DTAP's inception, the Croats launched an offensive that employed American-style maneuver warfare doctrine, including "[c]lose coordination of armor, airpower, and artillery," to win back in the span of one week all of the territory their erstwhile incompetent army had lost to the Serbs since 1991.⁴⁴

At the same time, DoD became aware of potential savings PMCs could offer in logistics support.⁴⁵ Partly in response to the logistics contracting chaos of the 1991 Gulf War, DoD awarded the first five-year comprehensive Logistics Civil Augmentation Program contract (LOGCAP I) to Brown & Root Services in 1992,⁴⁶ freeing DoD to shift more of its resources from logistics and support functions to those more directly related to war-fighting.⁴⁷ Brown & Root went on to support forward-deployed American

⁴⁰ DUNIGAN, *supra* note 14, at 10–11. Secretary of Defense Dick Cheney commissioned a Defense Science Board study of privatization options in 1996 that found that an aggressive shift to outsourcing could save the DoD between seven and twelve billion dollars. *Id.* A subsequent study by the Government Accountability Office found that this projection was overstated by as much as 30 percent, however, this still left a projected savings per annum of at least five billion dollars under peacetime conditions. *Id.*

⁴¹ Riley & Gambone, *supra* note 24, at 44–45 (stating that the U.S. troop-to-contractor ratios for World War I, World War II, and Vietnam were, respectively, 24:1, 7:1, and 5:1.); *see also* Huskey & Sullivan, *supra* note 13, at 334–35 (stating that in Iraq and Afghanistan, U.S. troop-to-contractor ratios have hovered around 1:1 with occasional spikes as high as 1:1.29 in Iraq and 1:1.42 in Afghanistan); Avant, *supra* note 23 (describing that while PMCs are not new, their use has nevertheless markedly increased).

⁴² ENGBRECHT, *supra* note 16, at 78.

⁴³ *Id.*

⁴⁴ *Id.* at 78–79.

⁴⁵ *Id.* at 73–75.

⁴⁶ *Id.* at 74–75. *See also* Riley & Gambone, *supra* note 24, at 45.

⁴⁷ Riley & Gambone, *supra* note 24, at 45 (quoting a senior officer in Baghdad explaining: "We fight the war, and they do the shit work.").

forces in Somalia, Kuwait, Rwanda, and Bosnia, building a substantial record of successes.⁴⁸

As the distinction between MPRI and Brown & Root's activities suggests, the companies that emerged in this environment were not all the same.⁴⁹ Different companies do different things, giving rise to different risks of injury and different legal questions regarding DBA insurance coverage.⁵⁰ "Military Provider Firms" that provide armed operatives for defensive combat and security services⁵¹ are the most relevant type here because armed security is the most dangerous contract task, and these firms accordingly bear the greatest risk of contractor injuries and deaths.

When regular military service members are injured, they enjoy substantial health and compensation benefits provided by the military services and the Veterans Administration,⁵² but they are barred from suing the government by the doctrine of sovereign immunity.⁵³ Private security contractors, aside from the DBA's provisions, are in the opposite position, with no care or compensation, but also no bar against suit.⁵⁴ Thus, with more contractors suffering more injuries, the government would have exponentially greater exposure to the costs associated with tort suits arising out of those injuries.⁵⁵ Fortunately,

⁴⁸ ENGBRECHT, *supra* note 16, at 74–75. In 1997, DynCorp, one of the other most prominent PMCs, won the bidding for the LOGCAP II contract which ran from 1997–2002, but there were no major deployments calling for LOGCAP support during that period. *Id.* In 2001, Brown & Root, soon to become Kellogg, Brown & Root, or KBR, won the bid for LOGCAP III in large part on the strength of its demonstrated success during the much more active LOGCAP I period. *Id.* LOGCAP III's period of performance was from 2002 to 2007. *Id.* However, with the Iraq War "surge" at its height in 2006–2007, the negotiations, bidding, and implementation of LOGCAP IV were somewhat delayed and KBR's LOGCAP III contract was extended. Author's personal experience while serving as a Management Analyst in the Multinational Force, Iraq, Resource Management directorate in Baghdad, Iraq.

⁴⁹ SINGER, *supra* note 36, at 2.

⁵⁰ *Id.*

⁵¹ DUNIGAN, *supra* note 14, at 12–13 (citing PETER W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 93–97 (2003)). Singer's typology breaks PMCs down into three categories: "Military Support Firms" that provide only non-lethal logistics support, "Military Consultant Firms" that provide operational analysis and training services, and "Military Provider Firms." *Id.*

⁵² Hugh Barrett McClean, *Defense Base Act Insurance: Allocating Wartime Contracting Risks Between Government and Private Industry*, 41 PUB. CONT. L.J. 635, 645 (2012).

⁵³ See *Feres v. United States*, 340 U.S. 135, 146 (1950) ("[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.").

⁵⁴ See David Isenberg, *Thinking of Suing a Private Military Contractors? There May Be a Way ...*, TIME (Jan. 7, 2013), <http://nation.time.com/2013/01/07/thinking-of-suing-a-private-military-contractor-there-may-be-a-way/> (discussing sovereign immunity doctrine and the doctrine's applicability to private military contractors.).

⁵⁵ See, e.g., McClean, *supra* note 52, at 639 ("Between January and June 2010, more military contractors than uniformed service members were killed in Afghanistan and Iraq.").

this problem was apparent long before the current PMC boom: in July 1941, in order to avoid the uncertainty and great expense associated with insuring against and litigating contractor tort suits, the Secretary of War asked Congress to create a no-fault compensation mechanism to compensate injured contractors.⁵⁶ Congress did so by passing the Defense Base Act,⁵⁷ which extends the insurance-based workers' compensation scheme of the Longshore and Harbor Workers' Compensation Act (LHWCA) to government contractors injured overseas.⁵⁸

In 1958, Congress amended the DBA to extend its coverage to workers performing service contracts overseas but not injured while actually on a U.S. military base, expressly including armed private security contractors injured by intentional third party attacks.⁵⁹ The 1958 enactment also included the stand-alone War Hazards Compensation Act (WHCA). The WHCA essentially steps in to cover those aspects of PMCs' employment which are uninsurable or are only insurable at great cost, but where continued PMC participation is important enough to the government to warrant its special protection—for example, personal security details for diplomats and intelligence officers.⁶⁰

The DBA requires employers either to obtain adequate insurance for their contractors and employees or to obtain Department of Labor (DoL) certification as a qualified self-insurer.⁶¹ It provides for a no-fault compensation system in which “the defenses of ‘fellow servant’, ‘assumption of risk’, and ‘contributory negligence’ are not available” to an employer.⁶² Instead, the DBA extends the LHWCA's workers' compensation system to compensate contractors for any “accidental injury or death arising out of and in the course of employment[.]”⁶³ For the purposes of the Act, “accidental” means an unexpected and undesired event,⁶⁴ including third parties' intentional acts.⁶⁵

⁵⁶ O’Keeffe v. Pan Am. World Airways, Inc., 338 F.2d 319, 322 (5th Cir. 1964).

⁵⁷ 42 U.S.C.A. §§ 1651–54 (West, 2013) [hereinafter DBA or the Act].

⁵⁸ 33 U.S.C.A. §§ 901–50 (West, 2013) [hereinafter LHWCA].

⁵⁹ See, e.g., Jeffrey L. Robb, *Workers’ Compensation for Defense Contractor Employees Accompanying the Armed Forces*, 33 PUB. CONT. L.J. 423, 427 (Winter 2004).

⁶⁰ *Id.* at 429. For example, private security contractors Glen Doherty and Tyrone Woods, both of whom were killed in the September 11, 2012, attack on the United States Consulate in Benghazi, Libya, were part of Ambassador Chris Stevens’s personal security detail. Fran Townsend, *Former Navy SEALs Died After Coming to the Aid of Others*, CNN (Sept. 23, 2012), <http://www.cnn.com/2012/09/21/world/africa/libya-consulate-attack/>.

⁶¹ John Chamberlain, Insurance and Waivers Presentation at the Loyola Law School & U.S. Department of Labor OWCP DBA Conference (Oct. 2008), available at <http://www.dol.gov/owcp/dlhwc/DBAInsuranceandWaivers.pdf>.

⁶² *Id.* at 4.

⁶³ LHWCA, 33 U.S.C.A. § 902(2) (West 2013).

⁶⁴ *Martin v. Halliburton*, 808 F. Supp. 2d 983, 989 (S.D. Tex. 2011); see also *Pac. Emp’rs Ins. Co. v. Pillsbury*, 61 F.2d 101, 103 (9th Cir. 1932).

⁶⁵ LHWCA § 902(2).

DBA benefits include reimbursement for medical expenses, compensation for disability of any extent or duration, death benefits to a deceased contractor's surviving dependents, and vocational rehabilitation for those who are permanently disabled.⁶⁶ Insurers and self-insuring employers have fourteen days from notification of an injury to begin paying benefits.⁶⁷ After paying out benefits, the insurer may apply to DoL for indemnification under the WHCA if the injury was the result of a qualifying war hazard.⁶⁸

DBA compensation is an injured contractor's exclusive remedy against his employer.⁶⁹ The Act incorporates the LHWCA's exclusion of all tort actions against the employer unless the employer has failed to comply with its obligations under the Act.⁷⁰ Because exclusivity is central to the Act's purposes, courts are generally reluctant to set it aside, even in the face of apparently inequitable behavior by an employer.⁷¹

Criticisms of the DBA/WHCA regime generally fall into three lines of argument.⁷² The first critique contends that the insurance-based scheme is flawed because rapidly rising premiums have made it too expensive and private insurers too often deny or delay coverage to injured contractors.⁷³ The second critique argues that even if it were functioning properly, the DBA workers' compensation schedule provides inherently insufficient compensation to injured contractors.⁷⁴ Finally, the third critique avers that the DBA and WHCA create a circular mechanism that essentially has the government paying premiums on insurance policies and then, when claims are

⁶⁶ *Benefits Under the Defense Base Act*, DLHWC (Oct. 2008), <http://www.dol.gov/owcp/dlhwc/BenefitsundertheDBA.pdf> (last visited Nov. 19, 2014).

⁶⁷ McClean, *supra* note 52, at 652.

⁶⁸ Robb, *supra* note 59, at 431.

⁶⁹ Fisher v. Halliburton, 667 F.3d 602, 610 (5th Cir. 2012).

⁷⁰ LHWCA § 905(a).

⁷¹ See, e.g., Munns v. Clinton, 863 F. Supp. 2d 1001, 1020 (E.D. Cal. 2012) (holding that employer's and insurer's alleged failure to pay benefits due was immaterial: the DBA barred the plaintiffs' wrongful death suit because they failed to exhaust administrative processes).

⁷² See, e.g., McLean, *supra* note 52; Jimmie I. Wise, MBA Professional Report, *Outsourcing Wars: Comparing Risk, Benefits and Motivation of Contractors and Military Personnel in Iraq and Afghanistan (2009–2011)*, NAVAL POSTGRADUATE SCHOOL, distributed by Defense Technical Information Center, <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA563459>; Greta S. Milligan, Note, *The Defense Base Act: An Outdated Law and Its Current Implications*, 86 U. DET. MERCY L. REV. 407 (2009).

⁷³ McClean, *supra* note 52, at 649. See also *House Oversight Committee Inquires Into DOD DBA Insurance*, INTERNATIONAL GOVERNMENT CONTRACTOR, ¶ 41 at 10 (May 2008) ("In 2003, contractors operating in Iraq complained to DoD about sharp increases in DBA insurance premiums and the inability to secure insurance at all.").

⁷⁴ E.g., Wise, *supra* note 72.

made against these policies, also funding the pay-outs.⁷⁵ Part II addresses the first two critiques, that insurance is an ineffective mechanism for managing combat risk and that the DBA does not sufficiently compensate injured contractors.

II. THE DBA INSURANCE MARKET IS FUNCTIONING AND PROVIDES SUFFICIENT COMPENSATION TO INJURED CONTRACTORS

The first two critiques of the DBA are related in that they each argue that the Act is conceptually flawed.⁷⁶ The uninsurability critique points to high premiums and low payout rates for DBA insurance as evidence that the government should not rely on private insurance markets to compensate injured contractors.⁷⁷ While DBA insurance premiums did rapidly increase in the early 2000s, and at the same time DBA insurance policies often included exclusions that prevented military provider contractors from receiving compensation, the most recent data show improvement.⁷⁸ Insurance companies have stayed in the DBA insurance market and premiums are falling.⁷⁹

The insufficiency critique, on the other hand, argues that, even if functioning properly, the DBA/LHWCA compensation schedule is insufficient to make injured contractors whole, especially when compared with the much more generous benefits available to regular military service members through the Veterans Administration (VA).⁸⁰ The response is a fairly simple analysis of the transactional decision-making underlying the critique's comparison of VA benefits to DBA benefits.⁸¹ Military service members and private security contractors are volunteers who presumably take their benefits into account when choosing to enter the service or sign on to a contract.⁸²

A. *The Uninsurability Critique*

The uninsurability critique is based on the idea that the risk of injury or death in a combat zone is too high for an insurance model to work, as evidenced by the sharp rise in DBA insurance premiums after the start of the

⁷⁵ Milligan, *supra* note 72, at 427.

⁷⁶ McClean, *supra* note 52, at 648–49 (exemplifying the uninsurability critique); *see generally* Wise, *supra* note 72, at 41–44 (exemplifying the insufficiency critique).

⁷⁷ *E.g.*, Milligan, *supra* note 72, at 423 (“[T]he unpredictability of risks and liabilities in the DBA insurance market may impede the ability of insurers to calculate accurate premiums”).

⁷⁸ *See infra* note 102 and accompanying text.

⁷⁹ *Id.*

⁸⁰ *See infra* Part II.B (examining the insufficiency critique).

⁸¹ *Id.*

⁸² *Id.*

insurgency in Iraq.⁸³ “[B]etween 2002 and 2008, the DBA insurance market grew from about \$18 million to more than \$400 million in government premiums.”⁸⁴ Insurance premiums are especially high for combat-zone DoD contracts, which carry the greatest risk of injury or death.⁸⁵

High insurance premiums also reflect non-risk attributes of the combat environment.⁸⁶ Distant unstable theaters of conflict present significant logistical challenges for rendering care to injured contractors and for paying out benefits,⁸⁷ especially when proving claims that “[involve] parties or witnesses who speak different languages, have different cultural norms, and are thousands of miles apart.”⁸⁸ Uncertainty is also a major non-risk driver of high DBA insurance rates.⁸⁹

The environment in countries like Iraq and Afghanistan and the work that PMCs do are resistant to actuarial analysis, which depends on a sufficient body of reliable data for its predictions.⁹⁰ Particularly at the start of the Iraq and Afghanistan wars, insurance providers had little data on which to base their risk assessments and had little understanding of the circumstances under which they would have to pay DBA claims.⁹¹ Because many DBA insurance policies exclude coverage when the insured is injured in combat, from a terrorist attack, while carrying a weapon, or while riding in military transport, there is often serious uncertainty over whether injured contractors will be compensated by their insurer under the DBA or directly by the government under the WHCA.⁹²

Despite these obstacles, insurance companies have stayed in the DBA insurance market.⁹³ While the top four carriers do have a substantial share of the total number of policies, there are eighty-eight different carriers operating in the marketplace.⁹⁴ Some PMCs have opted for self-insurance, but this is

⁸³ See McClean, *supra* note 52, at 649; *House Oversight Committee Inquires Into DOD DBA Insurance*, INTERNATIONAL GOVERNMENT CONTRACTOR, ¶ 41 at 10 (May 2008).

⁸⁴ McClean, *supra* note 52, at 649.

⁸⁵ See Goins, Fowler, & Annus, *supra* note 17, at 17; McClean, *supra* note 52, at 649.

⁸⁶ McClean, *supra* note 52, at 650.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 652.

⁹⁰ *Id.* at 650–51.

⁹¹ See Milligan, *supra* note 72, at 425–26.

⁹² Goins, Fowler, & Annus, *supra* note 17, at 17.

⁹³ See U.S. DEP'T OF LABOR, OFF. OF WORKERS' COMPENSATION PROGRAM, DIVISION OF LONGSHORE AND HARBOR WORKERS, COMPENSATION, DEFENSE BASE ACT CASE SUMMARY BY CARRIER (2014), available at <http://www.dol.gov/owcp/dlhwc/dbaallcarrier.htm> (last visited Nov. 19, 2014) (showing the insurance companies in the DBA insurance market through June 30, 2014).

⁹⁴ *Id.*

more likely due to their own lower than average risk exposure than to the absolute price of DBA insurance premiums.⁹⁵ Furthermore, the most recent data indicate that many of the non-risk factors contributing to high DBA premiums have been mitigated through reforms and experience.⁹⁶

First, DoL's Division of Longshore and Harbor Workers' Compensation (DLHWC), which administers DBA compensation claims, reformed the process by which it processes claims to handle the greater than expected volume, thereby reducing delays in payouts and thus insurers' uncertainty over their eligibility for WHCA reimbursement.⁹⁷ Second, now that the DBA/WHCA mechanism has been in heavy use for well over a decade, DBA insurance premiums, which were never the most important contributor to PMC contract costs, are on their way down.⁹⁸

For DoS contracts early in the Iraq war, DBA insurance premiums ranged from 2 to 5 percent of total contract costs.⁹⁹ This figure was substantially higher for DoD contracts, but still only accounted for between 10 and 21 percent of PMC contract costs of performance at its highest.¹⁰⁰ However, these data are from the 2005 GAO report that touched off the Congressional controversy over the differential between DoS and DoD DBA insurance premiums, and represent the peak of the DBA insurance premium spike coming after the start of the Iraq insurgency.¹⁰¹ In each succeeding year, DBA premiums have declined and should continue to do so.¹⁰²

B. The Insufficiency Critique

The Act's critics further contend, however, that even if the insurance mechanism is operating effectively, workers' compensation is inherently insufficient compensation for the injury or death of a contractor when viewed in relation to the substantial benefits afforded to military service members and their families injured or killed in similar circumstances.¹⁰³ There is no

⁹⁵ Valerie Bailey Grasso, Baird Webel, & Scott Szymendera, CONG. RESEARCH SERV., RL34670, THE DEFENSE BASE ACT (DBA): THE FEDERALLY MANDATED WORKERS' COMPENSATION SYSTEM FOR OVERSEAS GOVERNMENT CONTRACTORS 7–9 (2010), available at <http://fas.org/sgp/crs/natsec/RL34670.pdf>.

⁹⁶ See generally Grasso, Webel, & Szymendera, *supra* note 95.

⁹⁷ McClean, *supra* note 52, at 652; OFFICE OF WORKERS' COMPENSATION PROGRAMS, ANNUAL REPORT TO CONGRESS FY 2009 (2011), at 33, 36, available at <http://www.dol.gov/owcp/09owcpmx.pdf>.

⁹⁸ Milligan, *supra* note 72, at 426; Grasso, Webel, & Szymendera, *supra* note 95, at 19.

⁹⁹ Milligan, *supra* note 72, at 424–25.

¹⁰⁰ *Id.*

¹⁰¹ Grasso, Webel, & Szymendera, *supra* note 95, at 19.

¹⁰² *Id.* For example, in 2005, premiums were down 14.8 percent, and by 2006, they had dropped nearly 50 percent from their 2004 peak. *Id.*

¹⁰³ See, e.g., Joshua Schmand, *Helping More Patriots for Less Money: Amending The Defense Base Act to Insure Defense Contractors in War Zones Under The Servicemembers'*

substantial evidence to support this proposition. One author, for example, citing three anecdotal cases among the more than 100,000 reported DBA claims since 2001, contends that the three contractors' stories are sufficient evidence to conclude that the DBA cannot adequately compensate injured PMC contractors.¹⁰⁴

But even assuming, arguendo, that three data points among so many are significant, the three cases Kestian cites are examples of a functioning, if overburdened, system. While the injured contractor in each cited case had to pursue reimbursement, he received full reimbursement of medical expenses, back disability pay with interest, and a further ten percent award to compensate him for the delay.¹⁰⁵ In each case, the injured contractor was made whole through the faster, more efficient process of an administrative hearing and did not have to endure the likely much greater delays and expense of protracted litigation to receive due compensation.¹⁰⁶

Other authors are highly skeptical of the ability of workers' compensation to play any part in a viable scheme.¹⁰⁷ For example, Shailendra Kulkarni compares the LHWCA's no-fault system for compensating injured non-seaman maritime workers to the tort system under which seamen fall.¹⁰⁸

Group Life Insurance Plan, 42 PUB. CONT. L.J. 827, 835–38 (2013); see also Shailendra U. Kulkarni, Comment, *The Seaman Status Situation: Historical Perspectives and Modern Movements in the U.S. Remedial Regime*, 31 TUL. MAR. L.J. 121, 124 (2006) (arguing that the LHWCA is insufficient to compensate injured workers because their potential recoveries are not unlimited).

¹⁰⁴ Matthew R. Kestian, Comment, *Civilian Contractors: Forgotten Veterans of the War on Terror*, 39 U. TOL. L. REV. 887, 900–05 (2008). Kestian's example cases are those of Samuel Walker, William Manning, and "V.G." *Id.* Walker was an on-base contractor employed to run recreation facilities for soldiers in Iraq when he was wounded by a suicide bomber. *Id.* at 901. His injuries were serious, but not life-threatening, and the crux of his case became his difficulty obtaining coverage for post-traumatic stress disorder treatment. *Id.* at 902. He had to complain to DoL, but was eventually compensated in full starting nineteen months after his injury and his employer had to pay a 10 percent penalty for not compensating him promptly. *Id.* Manning was employed in Iraq as a foreman for Iraqi laborers and was wounded by a mortar attack. *Id.* at 903. Like Walker's employer, Manning's did not provide him with prompt compensation for his injuries or reimbursement for his medical expenses. *Id.* Like Walker, a DoL administrative law judge (ALJ) eventually ordered that Manning be fully compensated and reimbursed and imposed a ten percent penalty on his employer. *Id.* at 904. Finally, V.G. was a contract laborer in Afghanistan who was injured when a rocket propelled grenade struck the tent in which he was sleeping. *Id.* at 904. Like the others, he received treatment and was evacuated to the United States, but his employer refused to pay for some care and delayed payment of his disability compensation. *Id.* at 905. As in the other cases, an ALJ eventually awarded him full compensation and imposed a penalty on his employer for its delay. *Id.*

¹⁰⁵ *Id.* at 902, 904–05.

¹⁰⁶ *Id.*

¹⁰⁷ E.g., Kulkarni, *supra* note 103, at 124–25.

¹⁰⁸ *Id.*

She argues that the LHWCA is insufficient because it (1) limits a worker's compensation to 200 percent of the average national wage; (2) forces workers to bring their claims through DoL's administrative adjudication process; and (3) prevents workers from bringing negligence suits against their employers.¹⁰⁹ However applicable these arguments may be to maritime workers,¹¹⁰ none of Kulkarni's complaints about the LHWCA hold water in the context of private security contractors.

First, critics like Kulkarni and Kestian tend to ignore the total compensation arrangement that private security contractors enjoy.¹¹¹ While they may not have as robust an injury compensation system as regular military service members have,¹¹² their salaries are much higher.¹¹³ In that light, the insufficiency critique is inconsistent with the larger PMC criticism that argues that PMC use is a threat to the all-volunteer military system because PMCs offer more attractive overall compensation packages.¹¹⁴ Critics like Kestian and McClean instead focus narrowly on the number of DBA claims that are denied—thirty percent to fifty percent.¹¹⁵ Complaints like Kulkarni's about the cap on compensation have a similarly narrow focus.¹¹⁶ This glass-half-empty analysis ignores the fact that most claims under the DBA are promptly paid in full.¹¹⁷

These arguments also ignore or discount the fundamental *quid pro quo* that is the basis for this type of no-fault regime: “Employers relinquish[] their defenses to tort actions in exchange for limited and predictable liability,” and “[e]mployees accept the limited recovery because they receive prompt

¹⁰⁹ *Id.*

¹¹⁰ See discussion *infra* Part III.C (regarding the zone of uncertainty between the LHWCA and maritime tort law).

¹¹¹ See *infra* note 113 and accompanying text.

¹¹² The DBA does provide substantial benefits that are not an insignificant part of this total package. See *infra* Part III.A.

¹¹³ See Schmitt, *supra* note 3, at 515 (arguing that high-paying PMC jobs are causing a “brain drain” in western military special forces units); DUNIGAN, *supra* note 14, at 65 (noting that high contractor salaries may have a deleterious effect on regular military morale, recruitment, and retention).

¹¹⁴ *Id.*

¹¹⁵ See Kestian, *supra* note 104, at 902; McClean, *supra* note 52, at 659 (“[I]nsurance carriers also paid claims in only about half the cases.”).

¹¹⁶ See Kulkarni, *supra* 103, at 124.

¹¹⁷ See *infra* Part III.B. (explaining that claim payment rates have been rapidly increasing). Furthermore, backlogs in DBA compensation claims are not dissimilar from the substantial backlogs in VA disability claims. Both injured contractors and disabled veterans have had to wait in long lines due to the very large number of casualties suffered in the Iraq and Afghanistan Wars. See, e.g., Josh Hicks, *House Panel to Examine VA's Progress With Backlog of Disability Claims*, THE WASH. POST FED. EYE BLOG (July 14, 2014), <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/07/14/house-panel-to-examine-vas-progress-with-backlog-of-disability-claims/>.

relief without the expense, uncertainty, and delay that tort actions entail.”¹¹⁸ Kulkarni’s argument that a “lay jury” is superior to an ALJ misses the point of the no-fault bargain.¹¹⁹ By trading away workers’ right to sue in tort for negligence, Congress made a policy judgment to pursue the greater economic benefit of a more efficient system for society as a whole, rather than to subordinate the interests of all taxpayers to the narrow personal interests of a few individuals.¹²⁰ Furthermore, a switch to a fault-based system would likely have the opposite effect of what commentators like Kulkarni hope. While some injured contractors could get more from a jury than they receive under the DBA, contractors like the three Kestian cites would likely have to wait even longer and, for the reasons detailed in Part III, run a substantial risk of receiving no compensation at all if left to fend for themselves in the courts.¹²¹

III. THE DBA IS THE MOST EFFICIENT ALTERNATIVE FOR FULFILLING ITS POLICY OBJECTIVES

The inefficiency critique attacks the Act on practical grounds: it alleges that, because DoL is so actively involved in administering claims under the DBA/LHWCA insurance scheme, any costs saved by outsourcing to private insurers are undercut by duplicated efforts.¹²² However, this critique of the DBA/WHCA regime ignores the cost savings to the industry, because by not forcing PMCs to litigate every injury or death to one of their employees, the DBA prevents the substantial financial and operational costs of such litigation from being passed through to the government.¹²³ Indeed, in a fault-based compensation system, one wonders whether the United States would be able to employ PMCs at all.

This may in fact be one reason why so many commentators favor a tort-based system and is a major way in which the two main types of PMC criticisms are related.¹²⁴ Some of those who see PMCs as insufficiently

¹¹⁸ *Fisher v. Halliburton*, 667 F.3d 602, 610 (5th Cir. 2012) (quoting *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers’ Comp. Programs*, 103 S.Ct. 2045, 2052 (1983)) (alterations in original).

¹¹⁹ See Kulkarni, *supra* note 103, at 124.

¹²⁰ See, e.g., *Fisher*, 667 F.3d 602, 610.

¹²¹ See *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000) (“The purpose of the Defense Base Act is to provide *uniformity and certainty* in availability of compensation for injured employees on military bases outside the United States.”) (emphasis added).

¹²² Milligan, *supra* note 72, at 427.

¹²³ See *infra* Part III.A (discussing costs of litigating tort liability for security contractors’ injuries incurred overseas).

¹²⁴ The two main criticisms are (1) that PMCs are insufficiently accountable for their actions and (2) that the contractors they employ are insufficiently compensated for their injuries. See DUNIGAN, *supra* note 14 and accompanying text.

accountable for their actions see a fault-based tort regime as one way of holding PMCs more accountable.¹²⁵ There appears to be an overall dissatisfaction with PMCs underlying this argument, but as discussed below, PMCs' practical strategic benefits outweigh any additional costs associated with their use.¹²⁶ Thus, the inefficiency critique requires a response in two parts: one to address whether PMCs are an inherently inefficient alternative to regular military forces and examine the DBA's contribution to that relative efficiency, and another to examine whether the no-fault system is the most efficient available mechanism for compensating injured private security contractors.

A. DBA Insurance Premiums Do Not Make PMCs Too Expensive

In some respects, the inefficiency critique is a sub-part of an overall cost-effectiveness argument against the use of PMCs.¹²⁷ That argument compares the marginal short-term cost of an individual private security contractor with that of a regular military service member, concluding that PMCs are not a cost-effective alternative to the regular military because the contractors are paid a much higher salary and require the payment of costly DBA insurance premiums and WHCA indemnities.¹²⁸ But even if this were true, it has little to do with the DBA and its associated costs because they are not the main driver of PMC contract costs.¹²⁹ Thus, to the extent that private security contractors may be marginally more expensive than regular soldiers, the DBA's contribution to that expense is small and shrinking.¹³⁰

¹²⁵ E.g., Margaret Z. Johns, *Should Blackwater and Halliburton Pay for the People They've Killed? Or Are Government Contractors Entitled to a Common-Law, Combatant-Activities Defense?*, 80 TENN. L. REV. 347, 349 (2013) ("Victims of contractor misconduct have turned to tort law as a vehicle for receiving compensation and demanding accountability.").

¹²⁶ *Infra* Part III.A (weighing the financial costs and benefits of utilizing PMCs).

¹²⁷ Tiefer, *supra* note 31, at 21–35. Tiefer argues that the entire LOGCAP logistics contract for Iraq could have been replaced with 41,000 additional support troops deployed there "without added wartime costs." *Id.* at 28. Tiefer argues that military provider PMCs, even when hired to provide security for other PMCs in a combat zone, are inherently too expensive and less effective than regular military forces. *Id.* at 30–31. Tiefer's argument, however, is in the context of an overall criticism of unilateralism in favor of multilateralism. *Id.* at 31. Thus, this comparison assumes, *a priori*, military action in the presence of large military coalitions that ensure regular military forces are in fact available. Of course, it was the contracting chaos of a military action of this sort, the 1991 Gulf War, that led DoD to seek more efficient means of delivering logistic support via the LOGCAP contracts.

¹²⁸ *Id.*

¹²⁹ See *supra* Part II.A. While a fuller discussion of the cost-effectiveness and strategic value of PMCs is warranted, it is beyond the scope of this Note.

¹³⁰ See *supra* note 98 and accompanying text.

Additionally, even if DBA premiums remain high enough to keep marginal PMC contract costs higher than the marginal cost of using a regular soldier in the short term, PMCs are still significantly cheaper in the long term: “[a]lthough salaries may exceed those of uniformed personnel, overhead pales by comparison.”¹³¹ Critiques like those leveled by Tiefer typically rely on short-term analyses of the form: in *this* mission, at *this* time, troops would be cheaper than PMC contractors.¹³² This analysis assumes away the massive overhead costs associated with military service members.¹³³ Military service members are long-term employees for whom the government must pay food, lodging, training, medical care, and other costs regardless of whether the service members are actively employed.¹³⁴

PMC contractors, on the other hand, “perform discrete tasks” allowing the government to tailor personnel to needs and completely avoid the massive downtime and development costs associated with military service members.¹³⁵ The marginal cost argument also ignores the fact that in a wide range of specialty areas, private contractors often do a significantly better job than the regular military—especially those requiring “knowledge of the terrain, culture, and language of the region.”¹³⁶ Finally, Tiefer’s analysis ignores the common situation in which PMC contractors are the only personnel capable of deploying, operating, or maintaining certain high technology systems.¹³⁷

PMCs’ ability to tailor personnel to specific tasks also improves their responsiveness to security demands:

Since contractors can be hired faster than DoD can develop an internal capability, contractors can be quickly deployed to provide critical support capabilities when necessary. Contractors also provide expertise in specialized fields that DoD may not possess, such as linguistics.... Contractors can be hired when a particular need arises and be let go when their services are no longer needed.¹³⁸

¹³¹ Schmitt, *supra* note 3, at 517–18.

¹³² See *supra* note 130.

¹³³ See generally *id.*

¹³⁴ DEP’T OF DEF., MILITARY COMPENSATION: BASIC PAY AND ALLOWANCES CHARTS (2014), available at <http://militarypay.defense.gov/PAY/>.

¹³⁵ Schmitt, *supra* note 3, at 518.

¹³⁶ Moshe Schwartz, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 5–6 (2011), available at <http://fas.org/sgp/crs/natsec/R40764.pdf>.

¹³⁷ See Brief for National Defense Industrial Association as Amicus Curiae Supporting Defendants-Appellants, *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012) (Nos. 10-20202, 20371), 2010 WL 4619490 at *3 [hereinafter *NDIA Amicus Brief*] (citing Schwartz, *supra* note 136 at 2); Avant, *supra* note 23, at 21.

¹³⁸ *NDIA Amicus Brief* (quoting Schwartz, *supra* note 136, at 2).

In other words, even if the DBA/WHCA system makes it less cost-effective to use PMCs than to use regular military forces, PMCs possess unique attributes that make their services worth the extra cost.¹³⁹ Accordingly, if PMCs are going to be used even if more expensive than the military, they will keep getting injured, so we must determine what system is best suited to compensate them.

*B. The No-Fault System Is More Efficient than Litigation*¹⁴⁰

In many ways, PMC contractors injured overseas provide the ideal case for a no-fault injury compensation system. The DBA preempts state law tort claims,¹⁴¹ and for good reason: fact-intensive inquiries into whether an individual incident was accidental or not would fly in the face of the purposes of the Act and, in light of the distances and dangers involved, is supremely impractical.¹⁴² Without the Act's exclusivity, courts would have to review in minute detail the interactions of parties and witnesses that took place in a combat zone thousands of miles away.¹⁴³ If the DBA were replaced or opened up to penetration by personal injury and wrongful death suits in tort, the perverse effect for plaintiffs would actually most likely be less compensation, not more.

The original impetus for the DBA bears repeating: the Secretary of War asked Congress to create a no-fault system of compensating injured contractors in order to save the government money.¹⁴⁴ In *Boyle v. United Technologies Corp.*, the Court invoked this same logic in its justification for the government contractor defense: “[t]he financial burden of judgments against

¹³⁹ See DUNIGAN, *supra* note 14, at 90. Dunigan argues that in smaller, more complex security and stability missions like the one MPRI undertook in Croatia, highly professional PMCs are more effective than the military because of their “skill, responsiveness, and quality.” *Id.*

¹⁴⁰ Some authors have also suggested a third alternative: bringing private security contractors into the military's benefit system, allowing them to avail themselves of DoD health insurance, VA disability compensation, and Service Members' Group Life Insurance (SGLI). Schmand, *supra* note 103, at 840. That alternative may be worth further exploration, but state law tort suits are the chief alternative to DBA compensation actually advocated and employed by injured contractors. Huskey & Sullivan, *supra* note 13, at 368; see also Kulkarni, *supra* note 103, at 125. Therefore, the VA/SGLI alternative will not be dealt with further in this Note.

¹⁴¹ *Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 46, 52 (9th Cir. 1966) (holding that the DBA provides a covered contractor's sole remedy against his employer); see also *Fisher*, 667 F.3d at 620–21 (holding that all of plaintiff's state law tort claims against defendant PMC were barred by the DBA).

¹⁴² See DBA, 42 U.S.C.A. §§ 1651–54 (West 2013).

¹⁴³ See, e.g., *Fisher*, 667 F.3d at 602 (discussing the DBA's exclusivity rule).

¹⁴⁴ See *supra* Parts I & II.

[PMCs] would ultimately be passed through, substantially if not totally, to the United States itself, since [they] will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered [actions].”¹⁴⁵

Contrary to the DBA’s critics’ assertions, a switch to tort-based liability would actually make using PMCs more expensive, not less.¹⁴⁶ It could even undermine their use altogether: “the government will eventually end up paying for increased liability through higher contracting prices (or through an inability to find contractors willing to take on certain tasks).”¹⁴⁷ There is probably too much money at stake to expect that contractors would not bid to fill the government’s security needs in a high-litigation environment, but high competency and ethics standards would probably be the first casualty to the cost-cutting efforts such an environment would inspire, perpetuating the very problems that the DBA’s critics decry.¹⁴⁸ Tort liability, for example, would advantage under-capitalized (i.e. judgment-proof) companies that employ the cheapest contractors, regardless of their competence.¹⁴⁹

Even if the DBA persists, but is only softened by allowing injured contractors more and wider avenues for state tort suits, the Act would be less efficient at meeting its twin goals of limiting employer liability and compensating injured workers promptly and fairly for two reasons.¹⁵⁰ First, the above-referenced barriers to fact-finding in all of these cases would seriously hamper plaintiffs’ ability to meet their burden of proving PMCs’ liability.¹⁵¹ The very same sources of uncertainty that critics cite for not being able to insure private security presents serious obstacles to fact-finding.¹⁵² Witnesses are less likely to be available or willing to testify than in domestic civil suits, the events surrounding the harm complained of occur thousands of miles from the forum, and both are shrouded by uncertainty born of the fog of war.¹⁵³ These obstacles can only hurt the interests of plaintiffs.

¹⁴⁵ *Boyle v. United Tech. Corp.*, 487 U.S. 500, 511–12 (1988).

¹⁴⁶ *Id.* at 512.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Chad C. Carter, *Halliburton Hears A Who? Political Question Doctrine Developments in the Global War on Terror and Their Impact on Government Contingency Contracting*, 201 MIL. L. REV. 86, 128 (2009) (arguing that costs will increase some as litigation increases, but that the contractors themselves will bear much of the risk).

¹⁵⁰ See *Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 46, 52 (1996); *Boyle v. United States Tech. Corp.*, 487 U.S. 500, 511–12 (1988).

¹⁵¹ *Flying Tiger Lines*, 370 F.2d at 52.

¹⁵² *Boyle*, 487 U.S. at 511–12.

¹⁵³ Michael H. LeRoy, *The New Wages of War—Devaluing Death and Injury: Conceptualizing Duty and Employment in Combat Zones*, 22 STAN. L. & POL’Y REV. 217, 225–26 (2011).

A landmark Federal Tort Claims Act (FTCA) case, *Feres v. United States*,¹⁵⁴ expresses this problem well.¹⁵⁵ There, the Supreme Court reviewed appeals by three plaintiffs alleging injuries or deaths caused by the negligence of the United States while the victim was in active duty military service.¹⁵⁶ Ordinarily, these types of claims would be barred under the doctrine of sovereign immunity,¹⁵⁷ but the plaintiffs contended that the government consented to be sued through the FTCA.¹⁵⁸ While the Court agreed that the FTCA granted jurisdiction, it concluded that the statute did not create any new causes of action, but merely constituted the government's consent to be sued under those already existing.¹⁵⁹ Because there was no cause of action already existing that would allow a soldier to recover from the government for his superiors' negligence, the Court determined that the plaintiffs were not entitled to relief.¹⁶⁰

The most notable part of the decision in the context of the DBA, however, is the Court's policy justification for its holding.¹⁶¹ The Court determined that barring service member tort suits against the government for injuries incident to their service was justified by the existence of "enactments by Congress which provide systems of *simple, certain, and uniform compensation* for injuries or death of those in armed services."¹⁶² A no-fault compensation system was especially important in the case of military injuries overseas because "[a] soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage."¹⁶³ The *Feres* court might just as well have been referring to the wisdom of the DBA's no-fault compensation system in light of the challenges that private security contractors face in pursuing litigation.

Second, and more importantly, there are powerful legal impediments to a traditional tort law compensation system for PMCs.¹⁶⁴ Even absent the

¹⁵⁴ See *Feres v. United States*, 340 U.S. 135 (1950).

¹⁵⁵ See *id.* at 145.

¹⁵⁶ See *id.* at 136–38.

¹⁵⁷ See *United States v. McLemore*, 45 U.S. 286, 288 (1846) (explaining that "the government is not liable to be sued, except with its own consent, given by law").

¹⁵⁸ *Feres*, 340 U.S. at 138; see Federal Tort Claims Act, 28 U.S.C.A. § 1346(b)(1) (West 2013) (granting original jurisdiction to federal district courts for claims for money damages against the United States).

¹⁵⁹ *Feres*, 340 U.S. at 141–42.

¹⁶⁰ *Id.* at 144.

¹⁶¹ *Id.*

¹⁶² *Id.* (emphasis added) (the Court cites to a number of statutes that are no longer in force, but which have been replaced by the Modern Veterans' Disability System, Service Members' Group Life Insurance, and survivors' death benefits). *Id.* at n.12.

¹⁶³ *Id.* at 145.

¹⁶⁴ See, e.g., 3 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS §14A:6 (2d ed. 2014).

Act's exclusivity, PMCs have a variety of defenses available to them to escape liability for their tortious actions.¹⁶⁵ Depending on the circumstances, suits may be entirely barred by the FTCA, its attendant government contractor defense, or the constitutional Political Question Doctrine.¹⁶⁶ In addition, because elite military provider firms work in an almost exclusively classified environment,¹⁶⁷ if PMCs were opened up to a large number of state tort lawsuits the government would be likely to intervene and assert its state secrets privilege to prevent the disclosure of classified information through the civil discovery process.

Though the *Boyle* court eventually refused to extend the *Feres* doctrine explicitly to government contractors (including PMCs), it did so in part because the *Feres* doctrine would not have provided *enough* protection for contractors.¹⁶⁸ Instead, the *Boyle* court recognized a government contractor defense that brings contractors within the scope of the discretionary function exception to the FTCA's waiver of sovereign immunity when they are acting pursuant to government direction.¹⁶⁹ In 2009, the Circuit Court of Appeals for the D.C. Circuit expressly extended this defense to PMCs and held that their case for immunity was actually *stronger* than was the defendant's in *Boyle*.¹⁷⁰

In that case, *Saleh v. Titan Corp.*, a group of Iraqi citizens who were subject to torture in Abu Ghraib prison sued two PMCs on a variety of grounds, including several District of Columbia Tort Causes of Action.¹⁷¹ Because the detentions under which the plaintiffs' claims arose were "combatant activities," the court allowed the defendant PMCs to claim immunity through the FTCA's combatant activities exception.¹⁷² That clause excepts "any claim arising out of the combatant activities of the military or armed forces[.]" and the court accordingly found "an immunity net over any claim that *arises* out of combat activities."¹⁷³ Thus, "during wartime," all claims by private security

¹⁶⁵ *Id.*

¹⁶⁶ See LeRoy, *supra* note 153, at 222–23.

¹⁶⁷ Military provider firms' work by definition involves military operational and intelligence activities, nearly all of which are required to be classified. See generally Department of Defense Handbook for Writing Security Classification Guidance DoD 5200.1-H (1999) (directing in Chapter 5 that most details of military operations be classified at least at the "Confidential" level and in Chapter 6 that most information related to intelligence activities be classified either "Secret" or "Top Secret"), available at <http://www.dtic.mil/whs/directives/corres/pdf/520001h.pdf>.

¹⁶⁸ *Boyle v. United Tech. Corp.*, 487 U.S. 500, 510–11 (1988).

¹⁶⁹ *Id.* at 511.

¹⁷⁰ *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009) (emphasis added).

¹⁷¹ *Id.* at 1.

¹⁷² *Id.* at 6–7.

¹⁷³ *Id.* at 6.

contractors are preempted when their PMC employers are “integrated into combatant activities over which the military retain[s] command authority.”¹⁷⁴

Courts have also extended *Boyle*’s government contractor defense itself to PMCs where they were clearly under government direction and control.¹⁷⁵ In addition, PMCs operating under government supervision are also likely to be able to avoid liability under the political question doctrine.¹⁷⁶ That doctrine bars suits as non-justiciable where the subject matter poses a significant threat to the separation of powers.¹⁷⁷ In the PMC context, this means that courts will dismiss suits that involve “judicial examination of military policy or military decision making.”¹⁷⁸

Finally, where the federal government becomes concerned that discovery in a state tort suit may expose classified information, it sometimes intervenes in the suit and moves to either bar discovery or dismiss the suit altogether under its state secrets privilege.¹⁷⁹ This is especially likely in the case of military provider PMCs, which frequently operate alongside the military in highly-classified settings.¹⁸⁰ Such circumstances are “so pervaded by state secrets as to be incapable of judicial resolution once the [state secrets]

¹⁷⁴ *Id.* at 1; *see also* *Al Shimari v. CACI Int’l, Inc.*, 658 F.3d 413, 419 (4th Cir. 2011) (citing *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) and holding that the combatant activities exception preempted suits by Iraqi nationals allegedly abused by private security contractors in Abu Ghraib), *rev’d and remanded on reh’g en banc on procedural grounds*, 679 F.3d 205 (4th Cir. 2012); *Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992) (holding that the combatant activities exception applies to defense contractors); S. Yasir Latifi, Comment, *Bathrooms, Burn Pits, and Battlefield Torts: The Need for A Particularized, Contextual Approach to the Combatant Activities Exception After Saleh and Al Shimari*, 91 N.C. L. REV. 1357, 1358–59 (2013).

¹⁷⁵ *See* Carter, *supra* note 149, at 121.

¹⁷⁶ *Huskey & Sullivan, supra* note 13, at 368–70; *see also* *Fisher v. Halliburton*, 667 F.3d 602, 621 (5th Cir. 2012) (suggesting in dictum that, even if plaintiffs’ claims were not barred by the DBA, they might be non-justiciable under the political question doctrine).

¹⁷⁷ *Huskey & Sullivan, supra* note 13, at 369; *see also* *Saleh v. Titan Corp.*, 580 F.3d 1, 11–12 (D.C. Cir. 2009) (holding that state interests in enforcing their tort laws in overseas combat zones are *de minimis*).

¹⁷⁸ *Huskey & Sullivan, supra* note 13, at 370. PMCs have had more success asserting the Political Question defense than the government contractor or combatant activities defenses. However, because the D.C. Circuit in *Saleh* and the Fourth Circuit in *Al Shimari* make the combatant activities defense “immunity net” so expansive, it is likely to be much more useful to PMCs in the future and, accordingly, that defense receives greater treatment here.

¹⁷⁹ *See* *United States v. Reynolds*, 345 U.S. 1, 6 (1953) (recognizing the government’s privilege to prevent disclosure of classified information); *see also, e.g.,* *Bentzlin v. Hughes Aircraft Co.*, 833 F.Supp. 1486, 1494–97 (C.D. Cal. 1993) (dismissing suit by survivors of U.S. Marines killed in the first Iraq War on the basis of the government’s assertion, after intervention of the state secrets privilege, as well as on the grounds of the government contractor and combatant activities defenses).

¹⁸⁰ *See supra* note 167.

privilege has been invoked.”¹⁸¹ Critically, some courts have proactively asserted the State Secrets Privilege on behalf of the government, obviating the need for its intervention.¹⁸² Thus, even if they were not barred by the DBA, contractors hoping to sue their PMC employers in tort would be very unlikely to recover in most cases.

These obstacles to tort suits are even more imposing when compared to the improving certainty of an injured contractor’s recovery under the DBA.¹⁸³ Kestian cites three examples of delayed recovery for contractors under the DBA, but the fact that each *did* have to endure delays before receiving full compensation is more reasonably attributable to the excessive volume of claims than to an inherent flaw in the system.¹⁸⁴ To the extent that there is a structural problem with prompt payment, it is rapidly being remedied.¹⁸⁵

In 2009, before DLHWC implemented aggressive reforms in response to Congressional pressure, only forty-three percent of DBA claims were paid in the first thirty days after injury.¹⁸⁶ But in each succeeding year, the prompt payment rate has substantially improved so that by the end of fiscal year 2013, two-thirds of all DBA claims received first payment within thirty days.¹⁸⁷ A person who has been deprived of his livelihood or a family that has been deprived of a loved one is better served by such certainty and promptitude—no tort-based system can boast of approaching it and even a partial expansion of PMCs’ tort exposure would put it at risk.

C. The LHWCA’s Problematic Border Zones Demonstrate the Risks of Allowing Tort Suits to Penetrate the DBA’s Exclusivity

Congress passed the LHWCA in 1927 in an effort to protect longshore and harbor workers, who had previously been on the fringes of the maritime tort system.¹⁸⁸ In *Southern Pacific Co. v. Jensen*,¹⁸⁹ the Supreme Court held

¹⁸¹ *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007) (dismissing plaintiff’s claims regarding his alleged rendition by the CIA against the United States and three PMC defendants) (citing *Totten v. United States*, 92 U.S. 105, 106 (1875)).

¹⁸² *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 19 (D.D.C. 2005) (granting defendant PMC’s motion for summary judgment in part to avoid exposing state secrets through discovery).

¹⁸³ See Kestian, *supra* note 104, at 900–05.

¹⁸⁴ *Id.* By way of analogy: A slow drain does not show that indoor plumbing is not better than outdoor plumbing. It shows that there is too much material in the pipes.

¹⁸⁵ See, e.g., McClean, *supra* note 52, at 675–77 (discussing the ongoing debate and resulting reform efforts in detail).

¹⁸⁶ UNITED STATES DEP’T LABOR, DIVISION OF LONGSHORE AND HARBOR WORKERS’ COMPENSATION, LONGSHORE PERFORMANCE PAGE (2011), <http://www.dol.gov/owcp/dlhwc/LongshoreProgramPerformanceResults.htm>.

¹⁸⁷ *Id.*

¹⁸⁸ GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* 408 (2d ed., 1975).

¹⁸⁹ 244 U.S. 205 (1917).

that state workers' compensation laws could not apply to longshoremen injured or killed while working on a vessel in navigable waters.¹⁹⁰ Congress reacted by explicitly creating the LHWCA's Federal Workers' Compensation Scheme,¹⁹¹ moving longshore and harbor workers from the fault-based maritime tort system to a no-fault workers' compensation system. Congress appears to have acknowledged and attempted to avoid the problems of a tort system under conditions that make extensive fact-finding difficult, expensive, and uncertain.¹⁹²

However, the LHWCA's no-fault system is complicated by interactions on its borders with state workers' compensation laws and maritime tort law.¹⁹³ The state workers' compensation "twilight zone" has its genesis in the "maritime but local" exception to admiralty's uniformity principle: some incidents, though properly within admiralty otherwise, are of purely local concern such that state law applies.¹⁹⁴ In the context of the LHWCA, maritime but local means that, under certain circumstances, workers who fall within the "twilight zone" between the LHWCA and state workers' compensation may choose whichever no-fault remedy they prefer.¹⁹⁵

The LHWCA's border with maritime torts, especially a seaman's action for his employer's negligence under the Jones Act, is more problematic.¹⁹⁶ Injured seamen have a general maritime law entitlement to "Maintenance & Cure," a minimal workers' compensation-like system that requires their vessel's owner to provide them with medical care and bare-survival living expenses while they are being treated.¹⁹⁷ To gain any sort of compensation for their injuries, however, seamen must resort to the courts and bring an action for unseaworthiness of the vessel¹⁹⁸ or their employers' negligence under the Jones Act.¹⁹⁹ The "zone of uncertainty" between the mutually exclusive maritime tort and LHWCA systems arises from the fact that many workers perform tasks that "exhibit[] the characteristics of both traditional land and sea duties"²⁰⁰ The result is that, in almost total frustration of the LHWCA's intent to avoid the costs of litigation, many maritime workers file tort suits simply alleging that they are, in the alternative, harbor workers or

¹⁹⁰ GILMORE & BLACK, *supra* note 188, at 404–08.

¹⁹¹ *Id.*

¹⁹² *See id.* at 417.

¹⁹³ *See id.* at 418–19, 421–24.

¹⁹⁴ *Id.* at 418–19 (discussing *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921)).

¹⁹⁵ *Id.* at 421–24; *see also* THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 344 (4th ed., 2004).

¹⁹⁶ *See* text accompanying *infra* notes 200–04.

¹⁹⁷ SCHOENBAUM, *supra* note 195.

¹⁹⁸ *Id.* at 287–94.

¹⁹⁹ *Id.* at 262–84.

²⁰⁰ *Id.* at 347 (quoting *McDermott, Inc. v. Boudreaux*, 679 F.2d 452, 459 (5th Cir. 1982)).

Jones Act seamen, and let the fact-finder determine in each case which scheme applies.²⁰¹

The DBA is presently untroubled by the LHWCA's problematic border zones. Congress drafted it to avoid recreating the LHWCA's "twilight zone" interaction with state workers' compensation schemes,²⁰² and the geographical reality that injured private security contractors' claims under the DBA arise overseas adds further insulation. More importantly, the LHWCA's "zone of uncertainty" over the status of maritime workers does not touch the DBA, which has no alternative status comparable to the maritime worker's claim of seaman status.²⁰³ This is a good thing for DBA-covered contractors, who would face greater barriers to fact-finding²⁰⁴ and steeper legal barriers to tort suits²⁰⁵ than injured maritime workers. Thus, if the government keeps using PMCs, and they keep getting injured, the DBA is the best available alternative for compensating them for their injuries.

IV. UNPROFESSIONAL PMCS EXACERBATE THE DBA'S FLAWS

Despite its functionality, though, the DBA is far from perfect. Recent years have shown that it is vulnerable to delays from an overly high volume of claims and to short-circuiting by the malfeasance of unscrupulous employers.²⁰⁶ While both of these vulnerabilities doubtless have a number of sources, there is evidence that the less professional and formally organized a PMC is, the more it contributes to these problems.²⁰⁷ Shawn Engbrecht's thesis in *America's Covert Warriors* is that because military provider PMCs operate in a "regulatory vacuum," the largest, most experienced, and most formally organized PMCs fare best in terms of both safety for their contractors and their standards of conduct:

As a rule large companies that can eventually be held accountable to either a board of directors or shareholders have managed to avoid most of the

²⁰¹ *Id.* at 346–47.

²⁰² *Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 46, 52 (9th Cir. 1966) (rejecting the "twilight zone" in the context of the DBA).

²⁰³ SCHOENBAUM, *supra* note 195.

²⁰⁴ *See supra* Part III.B.

²⁰⁵ *See id.* Employers of LHWCA-covered employees are unlikely to benefit from the political question doctrine, combatant activities exception, or state secrets privilege in the way that many PMCs will. *Id.* Some may benefit from the government contractor defense, but probably no more so than PMCs. *Id.*

²⁰⁶ McClean, *supra* note 52, at 654–55.

²⁰⁷ These flaws are closely linked to one another: DoL reported that the volume of DBA claims increased in 2007 "due, in part, to greater compliance efforts that resulted in firms reporting a greater number of claims that involved only minor medical care and no lost work time." Grasso, Webel, & Szymendera, *supra* note 95, at 3.

fallout from egregious contractor conduct. These boards and shareholders have provided a modicum of deterrent ... [and] been able to partially self-regulate

With the exception of Blackwater, the gravest issues lay with smaller, amateur companies lacking experience, depth, and the prerequisite sets of checks and balances. They also do not have boards, shareholders, or a high concentration of career military.²⁰⁸

Engbrecht offers an anecdote that is illustrative of this point.²⁰⁹ Engbrecht's company, the Center for Advanced Security Studies (CASS), is a PMC that provides a personal security training course to contractors and then links graduates up with military provider PMCs.²¹⁰ During the Iraq War, CASS received an inquiry from a man Engbrecht calls "Joel": a twenty-three-year-old Canadian who wanted to hire a large number of CASS graduates.²¹¹ CASS had thirteen graduates available, but the company felt that only five were ready for security work in a combat environment.²¹² After further investigation, CASS discovered that Joel was only interested in the eight contractors it did *not* endorse—its representative came to the conclusion that this was because "while these individuals were trained, Joel felt he could control them and hide his lack of experience from them."²¹³ Joel, who claimed to have served with the Canadian Special Forces, had no military experience.²¹⁴ In fact, he formed his PMC by walking into the dining tent of the Kuwait military base where he was employed as a tent-mender and asking for volunteers.²¹⁵

Despite his company's utter lack of trained or experienced operators, tent-mender Joel had no trouble finding financial backing or contracts escorting logistics convoys from Kuwait into Iraq.²¹⁶ His company persisted in its practice of hiring incompetent but inexpensive contractors despite warnings that they were unqualified for combat.²¹⁷ One such contractor, who Engbrecht calls "Nader," came out of CASS's course with a "heavy endorsement that

²⁰⁸ ENGBRECHT, *supra* note 16, at 19–20. This is not to argue that established PMCs are immune from involvement in atrocities. For example, CACI and Titan International, two large, established, corporate PMCs, were implicated in the Abu Ghraib prisoner abuse scandal. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in A Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 557 (2005).

²⁰⁹ ENGBRECHT, *supra* note 16, at 99.

²¹⁰ *Id.*

²¹¹ *Id.* at 99–100.

²¹² *Id.* at 100–01.

²¹³ *Id.* at 101–02.

²¹⁴ *Id.* at 100.

²¹⁵ *Id.* at 101.

²¹⁶ *Id.* at 102.

²¹⁷ *Id.* at 102–03.

[he] not be allowed to possess firearms.”²¹⁸ After a brief firefight, which Nader spent “cowering on the floor,” he got up and shot an innocent thirteen-year-old girl in the head.²¹⁹ Nader and his team then drove off, leaving the girl lying in the street.²²⁰ The representative from Joel’s company who related the incident lamented: “I’m stuck with an inept killer on the payroll. My fear is, how many others are out there that I don’t know about?”²²¹

Engbrecht offers several other examples of the results of the rampant lack of preparation and vetting of candidates by informally organized PMCs.²²² One is the story of a contractor who arrived in Iraq with a special suitcase for his Stetson cowboy hat, “no neutral-colored clothing in tans and browns ... [and] a set of really expensive fishing tackle.”²²³ The contractor had planned, at the height of the Iraq insurgency’s violence, to spend his evenings fishing off bridges over the Euphrates River, which runs right through Baghdad’s most dangerous neighborhoods.²²⁴ “[H]e would have been killed in minutes[.]”²²⁵ Another describes the arrival in Baghdad of a contractor that the hiring PMC had worried might be “overly bloodthirsty”:

The individual in question, a young man in his early twenties, seemed very agitated. It was just then that a massive car bomb detonated several miles away.... The new kid was white as a sheet. He never said a word but just turned around and got right back on the plane.²²⁶

Unfortunately, many contractors like the one noted above did not get back on the plane, and the current market structure makes it difficult to exclude these incompetent individuals or the fly-by-night PMCs, like tent-mender Joel’s, that employ them.²²⁷ Demand for private security contractors in Iraq and Afghanistan was so high that even when a PMC dismissed an inept contractor, he “could always find work with a questionable firm whose operating standards matched [his.]”²²⁸ Engbrecht relates incident after incident in which a contractor like the ones described here “vented his fear on the innocent,”²²⁹ or got himself or others around him seriously hurt or killed.²³⁰

²¹⁸ *Id.* at 104.

²¹⁹ *Id.* at 104–05.

²²⁰ *Id.* at 105.

²²¹ *Id.*

²²² *Id.* at 36–37.

²²³ *Id.* at 37.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 41.

²²⁷ *Id.* at 125–30.

²²⁸ *Id.* at 121.

²²⁹ *Id.* at 118.

²³⁰ *Id.* at 232–33.

Professionalism is the best protection against such incidents. The more professional a PMC is, the better able it is to integrate with regular military forces, and the more it tends to respect local customs and traditions.²³¹ These attributes confer multiple benefits: a good relationship with the military allows a PMC to benefit from the military's intelligence, security, and logistics infrastructure. A good relationship with the local population allows a PMC to gain information critical to avoiding dangerous situations and makes its contractors significantly less likely to commit atrocities.²³² But Engbrecht argues that without the internal controls in the established PMCs that experienced senior executives and board members provide, market forces exert too much pressure on less-established PMCs to cut corners, and they cannot capture these benefits.²³³

Less-established PMCs are also at risk because of the difficulty of properly assessing the risks and requirements of private security contracts in a complex operational environment. This is especially so in fixed-price contracting, under which the contractor bears the risk, and is therefore entitled to the potential benefits, of performance price volatility.²³⁴ The danger to less-established PMCs here is that they are more likely than experienced PMCs to assess risks and costs poorly and accordingly underbid contracts. This leads to much greater pressure to employ inexpensive, but inexperienced contractors like Nader or to sub-contract work out to companies like tent-mender Joel's.²³⁵

Another way less-established PMCs sometimes cut corners is to short-circuit the DBA. In *Munns v. Clinton*, for example, beneficiaries of private

²³¹ DUNIGAN, *supra* note 14, at 86–88. These companies require their contractors to wear uniforms, issue them identifiable armored vehicles, impose and enforce operational regulations aimed at preventing misbehavior, and, critically, are most likely to be members of trade organizations like the International Stability Operations Association (ISOA). *Id.*

²³² See ENGBRECHT, *supra* note 16, at 29–31. Engbrecht relates the story of a private security contractor who was in Iraq shortly after the U.S. invasion there, when contractors there were “[s]mall in numbers and highly professional in quality.” *Id.* at 29. The contractor “did everything possible to integrate with the locals,” netting him “better and better inside info on whether or not an attack was going to happen.” *Id.* at 30. He claims that, as a result, his information about pending attacks was “usually more accurate and up to date than the military’s.” *Id.* at 31.

²³³ See ENGBRECHT, *supra* note 16, at 12–13.

²³⁴ See Goins, Fowler, & Annus, *supra* note 17, at 5–6.

²³⁵ *Id.* at 6. Inexperience could also lead to overbidding as well, but in a competitive bid scenario, an overbidding contractor is unlikely to win the contract and thus will not be exposed to its dangers. *Id.* This also means that contractors are under market pressure to bid as low as possible, making underbids more likely than overbids. See also Schooner, *supra* note 208, at 557 (“CACI, in a rush to fill military demands for more personnel, failed to conduct adequate background investigations on prospective employees before hiring them.”).

security contractors who were abducted and killed in Iraq brought suit for, among other things, the failure of their decedents' employer to pay *any* of the DBA benefits it owed to the plaintiffs.²³⁶ The court dismissed their claims because they had not exhausted their remedies through DoL administrative processes, and even if they had, it held that the PMC defendant was covered by "numerous statutory exceptions to the FTCA."²³⁷

In their exposition of the insurance premium critique of the DBA, Goins, Fowler, and Annus make the point that the requirement to hold expensive DBA insurance policies is at odds with the procurement policy preference for small businesses, as these entities are least likely to be able to afford high premiums.²³⁸ This argument, however, is better expressed as a critique of the smaller, less-established PMCs themselves: small, closely held corporations are generally more likely to be undercapitalized than are large, established corporations that strictly observe corporate formalities.²³⁹

Indeed, Engbrecht assigns much of the blame for unprofessional PMCs' behavior on their informal structures.²⁴⁰ For example, in discussing Blackwater's troubles, he notes that "at the time, [Blackwater] was privately held."²⁴¹ The story of Blackwater's evolution demonstrates the distinction between formally organized, professional PMCs and informally organized, incompetent PMCs better than most.

Until 2010, Blackwater was a closely held corporation, entirely owned and operated by its founder, Erik Prince.²⁴² Prince sold all of his interest in the company to USTC, a consortium of investors that came in with the express intent of shifting the embattled PMC toward "the highest standards of

²³⁶ *Munns v. Clinton*, 863 F. Supp. 2d 1001, 1019 (E.D. Cal. 2012).

²³⁷ *Id.*; see also McClean, *supra* note 52, at 655 (discussing efforts by Wolfpack Security Inc. to avoid fulfilling its DBA obligation to its injured contractors).

²³⁸ Goins, Fowler, & Annus, *supra* note 17, at 17. An important note about the structure of government contracts is that under either the fixed-price or cost-reimbursement model, the contractor bears all initial costs subject to later payment. See *id.* at 5–6. Thus, a PMC must have enough operating capital to support complete performance or risk defaulting on obligations. *Id.*

²³⁹ See Jeffrey K. Vandervoort, Note, *Piercing the Veil of Limited Liability Companies: the Need for a Better Standard*, 3 DEPAUL BUS. & COM. L.J. 51, 72 (2004).

²⁴⁰ ENGBRECHT, *supra* note 16, at 1–25.

²⁴¹ ENGBRECHT, *supra* note 16, at 19.

²⁴² *Xe Services, LLC Acquired by USTC Holdings, LLC*, BUSINESSWIRE, (Dec. 17, 2010), <http://www.businesswire.com/news/home/20101217005249/en/Xe-Services-LLC-Acquired-USTC-Holdings-LLC#.VBXtpkuUBnI>. Blackwater changed its name to "Xe" in 2009. Jason Ukman, *Ex-Blackwater Firm Gets a Name Change, Again*, WASH. POST (Dec. 12, 2011, 9:26 AM), http://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO_blog.html.

governance, transparency, and performance.”²⁴³ Under Prince, Blackwater’s contractors engaged in violent behavior with management’s “implied endorsement,”²⁴⁴ and were involved in more shooting incidents in Iraq from 2005 to 2007 than larger PMCs DynCorp International and Triple Canopy combined.²⁴⁵

Now, as Academi, the company boasts an experienced board of directors²⁴⁶ of the sort that Engbrecht credits with keeping companies like MPRI and DynCorp International ethical.²⁴⁷ Whether this shift will eliminate the company’s past problems remains to be seen, but since its transition, Academi has not been involved in any major scandals. Perhaps most importantly, Academi is now a member in good standing of the International Stability Operations Association (ISOA), an ethics-based PMC trade association.²⁴⁸

Established PMCs formed organizations like ISOA because they understood that a lack of legitimacy threatened their business model.²⁴⁹ In order to address this legitimacy concern, ISOA limits its membership to PMCs that have appropriate ethical standards.²⁵⁰ ISOA’s Standards Committee investigates alleged misconduct by member companies, and if the violation is serious enough, it can expel the company from the Association.²⁵¹ When Blackwater came under investigation for the Nisoor Square massacre in 2007, it withdrew from ISOA, presumably in order to avoid an ISOA Standards Committee investigation.²⁵² The company did not rejoin ISOA until after Prince’s departure.²⁵³

There is some empirical support for the relationship among ISOA membership, professionalism, and PMC safety records. DLHWC provides a

²⁴³ BUSINESSWIRE, *supra* note 242.

²⁴⁴ ENGBRECHT, *supra* note 16, at 19–20.

²⁴⁵ *Id.* at 19.

²⁴⁶ All of Academi’s directors have distinguished resumes, but the most notable are former United States Attorney General John Ashcroft and former NSA Director Admiral (retired) Bobby Inman. *Board of Directors*, ACADEMI.COM, <http://academi.com/pages/about-us/board-of-directors> (last visited Nov. 19, 2014).

²⁴⁷ See ENGBRECHT, *supra* note 16, at 20.

²⁴⁸ *Affiliations*, ACADEMI.COM, <http://academi.com/pages/about-us/affiliations> (last visited Nov. 19, 2014).

²⁴⁹ HANNAH TONKIN, *STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 18* (Cambridge Univ. Press 2011). In addition to ISOA, many leading PMCs are members of the British Association of Private Security Companies (BAPSC), which has a similar code of conduct and member-credentialing process.

²⁵⁰ DUNIGAN, *supra* note 14, at 167.

²⁵¹ *Id.*

²⁵² *Id.* 14, at 167–68.

²⁵³ Press Release, Academi, ACADEMI Joins the International Stability Operations Association, ACADEMI.COM (Aug. 14, 2013), http://academi.com/news_room/press_releases/55.

variety of statistics regarding DBA claims on its website.²⁵⁴ These include a listing of the number of claims by employer, year, and general type of claim for any year since 2001 or comprehensively over the whole twelve-year span from September 2001 to September 2013.²⁵⁵

Ideally, one could simply compare the number of claims to the number of contractors in theater to arrive at a ratio that would enable direct comparison of each PMC's safety record. Because their complex contractual relationships and often classified employment make it difficult to determine the number of contractors a PMC had in a combat zone at any given time, however, this comparison is not readily available.²⁵⁶ But because combat is more likely than ordinary workplace accidents to result in deaths, a PMC's ratio of deaths to total claims can provide a very rough surrogate for how dangerous it was for a contractor to work for that company.²⁵⁷

For example, ISOA member DynCorp International, one of the military provider PMCs that Engbrecht frequently holds up as an example of a highly professional company, had death claims accounting for only 1.5 percent of its total, less than half the average for all PMCs.²⁵⁸ On the other hand, none of the thirty companies with the highest percentage of DBA death claims is a member of either ISOA or BAPSC.²⁵⁹ Thus, if private security contracts were only awarded to PMCs that are members of either BAPSC or ISOA, the PMCs that appear to be the most dangerous would have been excluded from the market, substantially reducing the volume of DBA claims.

²⁵⁴ *Defense Base Act Case Summary Reports—DBA Cumulative Report by Employer (9/1/2001-9/30/2013)*, DLHWC, <http://www.dol.gov/owcp/dlhwc/lldbareports.htm> (last visited Nov. 19, 2014) [hereinafter DLHWC DBA Reports].

²⁵⁵ *Id.*

²⁵⁶ See, e.g., James Risen and Mark Mazzetti, *30 False Fronts Won Contracts for Blackwater*, N.Y. TIMES (Sept. 3, 2010), <http://www.nytimes.com/2010/09/04/world/middleeast/04blackwater.html> (noting that security classification and contract complexity prevent certainty on the number and size of contracts awarded to Blackwater).

²⁵⁷ See U.S. DEP'T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES SUMMARY (2013) (showing a total of 4,405 fatal work injuries in 2013).

²⁵⁸ *Id.* The overall total for all employers during the period was 3,430 death claims and 102,190 total claims, yielding an overall death claim ratio of 3.3 percent, more than double DynCorp's figure. *Id.* DynCorp is not just a member of ISOA: William Imbrie, DynCorp's Senior Director for International Programs, is the Chair of ISOA's board of directors. *ISOA Leadership*, ISOA, <http://www.stability-operations.org/?page=Leadership> (last visited Nov. 19, 2014).

²⁵⁹ DLHWC DBA Reports, *supra* note 254. The average death claim rate for these companies is 57.6 percent, or nearly forty times DynCorp's. *Id.* It is worth reiterating that this is a very rough calculation, and it is especially so for very small PMCs. For example, a very small PMC would have 100 percent of its DBA claims be for contractor deaths if it only had a few contractors in theater and a substantial number were killed in a single incident. In aggregate, however, the disparity between DynCorp and similar PMCs' death rates and those of companies in the top thirty is striking enough to have some value.

V. EXISTING CREDENTIALING STANDARDS OFFER AN EFFICIENT *PRO HOC*
MECHANISM FOR ENSURING PMC COMPETENCE

The DBA regime still requires serious improvements, but an ongoing dialog among the PMC industry, insurers, Congress, and the government agencies that use PMCs is yielding results that are rapidly addressing all of the critics' procedural and structural complaints.²⁶⁰ Then again, existing regulations only tiptoe to the edge of laying down competence standards for PMCs without ever stepping across. For example, 32 C.F.R. Part 159 (Part 159) requires DoD and DoS to coordinate in developing and promulgating minimum standards "for the regulation of the selection, accountability, training, equipping, and conduct" of PMCs in overseas contingency operations.²⁶¹ The regulation does not, however, provide any specific guidance to commanders and diplomats on what these standards ought to be.²⁶² Without an *a priori* set of standardized requirements, the market cannot respond, and demand for professional PMCs will continue to outstrip supply.

If DoD and DoS amend Part 159 to require PMCs to be certified,²⁶³ they would create pressure on existing firms to either professionalize or exit the market.²⁶⁴ Using existing certification sources like ISOA would allow the government to capture this benefit with minimal additional resources or regulation.²⁶⁵

If Part 159 required third-party competence certification, the effect of expulsion from an organization like ISOA would be a de facto debarment, but without the need for a costly and time-consuming government investigation.²⁶⁶

²⁶⁰ See, e.g., McClean, *supra* note 52, at 675–77 (discussing the ongoing debate and resulting reform efforts in detail).

²⁶¹ 32 C.F.R. § 159.1 (2013).

²⁶² See *id.* § 159.6.

²⁶³ The Departments have the authority to do this. National Defense Authorization Act of 2008 § 862(a), Pub. L. No. 110-181, 122 Stat. 3. Another alternative would be legislative or regulatory action to amend the International Traffic in Arms Regulation (ITAR). See Huskey & Sullivan, *supra* note 13, at 347 (discussing the Arms Export Control Act of 1968, Pub. L. No. 90-269, 82 Stat. 1320 (codified at 22 U.S.C. § 2751 et. seq.) and ITAR 22 C.F.R. §§ 120-30 (2010)). ITAR requires military provider PMCs to obtain and maintain an export license for "defense services". *Id.* Adding certification to ITAR's licensing requirements would accomplish the same goal as amending 32 C.F.R. Part 159 in the same way.

²⁶⁴ DUNIGAN, *supra* note 14, at 166.

²⁶⁵ The government already makes extensive use of third-party certifiers in government contracting. For example, third-party certifiers play a large role in the Economically Disadvantaged Woman Owned Small Business (EDWOSB) program. See 13 C.F.R. § 127.300 (2013) (providing procedures for third-party certification of EDWOSB status).

²⁶⁶ Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 236 (2005) ("[T]he moment of contracting is always a moment when oversight is possible.").

When Blackwater withdrew from ISOA in 2007, it showed that ISOA's investigations are effective enough to influence major PMC behavior.²⁶⁷ A mandatory certification provision in Part 159 would bolster such investigations, and would have a strong standardizing effect on the industry.²⁶⁸ Member PMCs would have to submit to certifier investigation or withdraw from the organization and, in so doing, lose their ability to win contracts with the United States government.²⁶⁹

Private security contract prices would undoubtedly go up in the absolute sense, as PMCs which do not meet certifier standards would be forced out of the market, thereby reducing available supply. However, the large external costs of employing such PMCs would also be avoided, not least of which being a reduction in casualties and non-compliance with the DBA. These initial savings would likely not be enough to overcome the supply reduction, but in the long run, the industry is likely to adapt.²⁷⁰ Because the current members of groups like ISOA and BAPSC joined in response to existing market pressure for PMCs to be more responsible,²⁷¹ it is not a far leap to conclude that non-member PMCs could quickly bring themselves into compliance with certification standards in the face of a demand that they do so from their largest potential customer.²⁷² Thus, after a transition period, the supply of

²⁶⁷ See DUNIGAN, *supra* note 14, at 167–68.

²⁶⁸ Matt Heibel, *Military Inc.: Regulating and Protecting the "A-Team(s)" of the Post-Modern Era*, 18 PACE INT'L L. REV. 531, 545 (2006) (arguing that ISOA cannot effectively regulate its members' conduct because it lacks the power of a government mandate).

²⁶⁹ To avoid the problems associated with a sole-source certifier, DoD and DoS should promulgate a simple standard of qualification for third-party certifier status and publish a list of approved certifiers to ensure PMCs are aware of their options. See 13 C.F.R. § 127.303 (providing procedures for designation of EDWOSB third-party certifiers).

²⁷⁰ See BUSINESSWIRE, *supra* note 242.

²⁷¹ *Id.* (“The future of this industry belongs to those companies with the highest standards of governance, transparency, and performance.”) (quoting Jason DeYonker, managing partner of Forte, a venture capital firm that formed part of USTC, the consortium that bought Academi).

²⁷² See ENGBRECHT, *supra* note 16, at 142 (“[W]ith the implementation of appropriate professional controls, [PMCs] can be made to voluntarily hold themselves accountable for their conduct.”). To the extent that PMCs joined these organizations in an effort to *avoid* the sort of regulation advocated here, they could more effectively do so by cutting out the government middle-man. The largest PMCs are also among the largest non-governmental consumers of private security services. See, e.g., *Appeals of F Kellogg Brown & Root Servs., Inc.*, ASBCA No. 56358, 14-1 B.C.A. (CCH) ¶ 35639 (finding that the average reconstruction contract in Iraq included 12.5 percent in subcontracted private security costs), ¶ 35639 (June 17, 2014) (finding that between 2003 and 2006, KBR spent \$99,678,695 on private security subcontracts while performing LOGCAP III). If they insisted that their subcontractors hold third-party competence certifications, their market power would exert standardizing pressure approaching that which government regulation would achieve, and this could be

competent and ethical military provider firms should actually increase, leaving the DBA under a decreased burden, and allowing the government to make use of PMCs with a reduced fear for the safety of the individual contractors or the civilians with whom they interact.

CONCLUSION

Since the Fallujah incident in 2004 and the Nisoor Square massacre in 2006, Congress, DoD, and DoS have made strides in improving PMC accountability and contract management. Nonetheless, there is still no competence-based requirement in PMC contracting that would prevent the worst PMCs from performing armed security functions in a combat zone.²⁷³ Because demand for private security services continues to outstrip the supply of competent providers, incompetent PMCs continue to win sensitive combat-zone security contracts. Their inexperience, corner-cutting, and unethical behavior puts their inept contractors and the civilians with whom they interact at risk. Their greater casualty rates and willingness to short-circuit the DBA exacerbate inherent flaws in the mechanism.

Regardless of these problems, however, the mechanism itself is worth keeping. After more than a decade of war in which PMCs have been extensively used, insurers have sufficient data to accurately set reasonable rates. DoL has implemented procedures to ensure better compliance and payment rates are improving.²⁷⁴ Notwithstanding its flaws, the DBA's no-fault system is vastly superior to an uncertain tort-based system for providing prompt payment to injured contractors, especially in light of the substantial legal and practical obstacles that tort suits would face.

Accordingly, maintaining the DBA in its current form is the best option for compensating injured contractors. To relieve the pressure on the Act's compensation mechanism, and to ensure the safety of the contractors it protects, as well as that of host nation civilians, the government should adopt a minimum competence-based certification requirement for private security contracts. This would bar unscrupulous and incompetent PMCs from the market, keeping their unqualified contractors off the battlefield.

enough to obviate the need for government action. Alternatively, insurers could condition their DBA policies on the holder's certification by ISOA, BAPSC, or a similar organization.

²⁷³ See DAVID ISENBERG, INTERNATIONAL PEACE RESEARCH INSTITUTE, PRIVATE MILITARY CONTRACTORS AND U.S. GRAND STRATEGY (2009) (discussing the contracting process and regulation of PMCs and arguing for better standards and controls).

²⁷⁴ See *supra* note 97 and accompanying text (discussing DoL's reforms); *supra* notes 186–87 and accompanying text (pointing out that DBA claim prompt payments have increased from 43 percent in 2009 to 67 percent in 2013).

While this would result in greater prices in the short term, the fact that the industry is already moving in this direction through organizations like ISOA and BAPSC indicates that they are responsive to economic pressure for higher ethical standards. The government can boost this trend and avail itself of an already-established self-enforcing credentialing process by simply requiring certification by organizations like ISOA or BAPSC as the benchmark of PMC competence. Over time, these organizations' standards would become the industry standard such that the supply of competent PMCs should actually increase, bring down total costs of their employment, and reduce the current difficulties faced by the DBA.