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

William Burke
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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.

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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. The four contractors got lost in the city of Fallujah where local insurgents ambushed, beat, and killed all four, then hanged two. Pictures of the contractors’ desecrated bodies went viral, depicting “scenes reminiscent of Mogadishu circa 1993.” 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.

When private security contractors are injured, they fall under the Defense Base Act’s workers’ compensation scheme. 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. 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. A convoy of private security contractors

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1 In re Blackwater Sec. Consulting, LLC, 460 F.3d 576, 581 (4th Cir. 2006).
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.”
7 See infra Part II.B.
working for Blackwater, 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. 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. For the most part, PMC critics’ calls for more post hoc accountability have been answered.

One of the Coalition Provisional Authority’s many blunders was the decision to exempt PMCs from criminal liability for their actions in Iraq. 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. 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. Finally, the new Status of Forces Agreement between the United States and Iraq subjects PMCs operating there to Iraqi criminal law.

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.


12 Finer, supra note 11, at 259–65.


But despite this progress on PMC accountability, there has yet to be any significant action on PMC competence. The Department of State (DoS) has introduced a more rigorous credentialing process that has eliminated some of the most egregious problems. 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. The only competency requirement in the MoA is that armed contractors must pass the Army’s basic marksmanship test. If contractors cannot clear this very low hurdle, however, the embassy’s regional security officer is permitted to waive it. 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.

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. 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. 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.” 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.” As a result, these under-qualified

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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.
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.\footnote{Id., at 20, 41; see infra Part IV.} 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.\footnote{ENGRECHT, supra note 16, at 111–12 (explaining that by the end of 2004, there were over 100 PMCs operating in Iraq.).} Regardless of any new post hoc accountability measures, the reality of the market is that demand for private security services still well exceeds supply,\footnote{Avant, supra note 23 (“The market pressures, technology, and social change of a globalized world create multiple demands that national militaries have difficulty meeting.”).} so even the least qualified candidates and companies can find employment.\footnote{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).} 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.\footnote{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).} But this is too drastic: PMCs provide real fiscal and strategic benefits that make a ban inadvisable.\footnote{This conclusion is bolstered by the fact that few countries have seriously considered imposing such a ban. See LINDSEY CAMERON & VINCENT CHETAIL, PRIVATIZING WAR 676 (2013). The only example the authors cite is a draft bill being considered by pacifist Switzerland. Id.}

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...
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

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33 See Goins, Fowler, & Annum, supra note 17, at *4.
34 See infra Parts II.A and III.C.
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 industry and their use expanded rapidly throughout the 1990s.

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. 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. 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.

At the same time, DoD became aware of potential savings PMCs could offer in logistics support. 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, freeing DoD to shift more of its resources from logistics and support functions to those more directly related to war-fighting. Brown & Root went on to support forward-deployed American

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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.

45 Id. at 78–79.

46 Id. at 73–75.

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

48 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.


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

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57 42 U.S.C.A. §§ 1651–54 (West, 2013) [hereinafter DBA or the Act].
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/.
62 Id. at 4.
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. Insurers and self-insuring employers have fourteen days from notification of an injury to begin paying benefits. 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.

DBA compensation is an injured contractor’s exclusive remedy against his employer. 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. 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.

Criticisms of the DBA/WHCA regime generally fall into three lines of argument. 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. The second critique argues that even if it were functioning properly, the DBA workers’ compensation schedule provides inherently insufficient compensation to injured contractors. 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

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).
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. Part II addresses
the first two critiques, that insurance is an ineffective mechanism for man-
aging 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. The uninsurability critique points to high
premiums and low payout rates for DBA insurance as evidence that the gov-
ernment should not rely on private insurance markets to compensate injured
contractors. 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. Insurance companies have stayed in
the DBA insurance market and premiums are falling.

The insufficiency critique, on the other hand, argues that, even if function-
ing 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). The response is a fairly simple analysis
of the transactional decision-making underlying the critique’s comparison
of VA benefits to DBA benefits. 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.

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 evi-
denced 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.
94 Id.
more likely due to their own lower than average risk exposure than to the absolute price of DBA insurance premiums. 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.

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. 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.

For DoS contracts early in the Iraq war, DBA insurance premiums ranged from 2 to 5 percent of total contract costs. 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. 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. In each succeeding year, DBA premiums have declined and should continue to do so.

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. There is no

96 See generally Grasso, Webel, & Szymbendera, supra note 95.
98 Milligan, supra note 72, at 426; Grasso, Webel, & Szymbendera, supra note 95, at 19.
99 Milligan, supra note 72, at 424–25.
100 Id.
101 Id.
102 Grasso, Webel, & Szymbendera, supra note 95, at 19.
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

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. However applicable these arguments may be to maritime workers, 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. While they may not have as robust an injury compensation system as regular military service members have, their salaries are much higher. 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. Critics like Kestian and McClean instead focus narrowly on the number of DBA claims that are denied—thirty percent to fifty percent. Complaints like Kulkarni’s about the cap on compensation have a similarly narrow focus. This glass-half-empty analysis ignores the fact that most claims under the DBA are promptly paid in full.

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

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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.”).


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.”

Kulkarni’s argument that a “lay jury” is superior to an ALJ misses the point of the no-fault bargain. 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. 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.

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. 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. 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. Some of those who see PMCs as insufficiently

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. 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. 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. 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. 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. 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.

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, if 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.” 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. This analysis assumes away the massive overhead costs associated with military service members. 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.

PMCs, 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. 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].” 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.

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.

131 Schmitt, supra note 3, at 517–18.
132 See supra note 130.
133 See generally id.
135 Schmitt, supra note 3, at 518.
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. 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

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, 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. 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. 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. 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

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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).


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].\textsuperscript{145}

Contrary to the DBA’s critics’ assertions, a switch to tort-based liability would actually make using PMCs more expensive, not less.\textsuperscript{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).”\textsuperscript{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.\textsuperscript{148} Tort liability, for example, would advantage under-capitalized (i.e. judgment-proof) companies that employ the cheapest contractors, regardless of their competence.\textsuperscript{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.\textsuperscript{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.\textsuperscript{151} The very same sources of uncertainty that critics cite for not being able to insure private security presents serious obstacles to fact-finding.\textsuperscript{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.\textsuperscript{153} These obstacles can only hurt the interests of plaintiffs.

\textsuperscript{146} Id. at 512.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{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).
\textsuperscript{151} Flying Tiger Lines, 370 F.2d at 52.
\textsuperscript{152} Boyle, 487 U.S. at 511–12.
A landmark Federal Tort Claims Act (FTCA) case, *Feres v. United States*, expresses this problem well. 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. Ordinarily, these types of claims would be barred under the doctrine of sovereign immunity, but the plaintiffs contended that the government consented to be sued through the FTCA. 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. 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.

The most notable part of the decision in the context of the DBA, however, is the Court’s policy justification for its holding. 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.” 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.” 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. Even absent the

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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”).
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.
Act’s exclusivity, PMCs have a variety of defenses available to them to escape liability for their tortious actions. Depending on the circumstances, suits may be entirely barred by the FTCA, its attendant government contractor defense, or the constitutional Political Question Doctrine. In addition, because elite military provider firms work in an almost exclusively classified environment, 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. 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. 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.

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. 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. 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.” Thus, “during wartime,” all claims by private security

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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.
169 Id. at 511.
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.”\textsuperscript{174}

Courts have also extended Boyle’s government contractor defense itself to PMCs where they were clearly under government direction and control.\textsuperscript{175} In addition, PMCs operating under government supervision are also likely to be able to avoid liability under the political question doctrine.\textsuperscript{176} That doctrine bars suits as non-justiciable where the subject matter poses a significant threat to the separation of powers.\textsuperscript{177} In the PMC context, this means that courts will dismiss suits that involve “judicial examination of military policy or military decision making.”\textsuperscript{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.\textsuperscript{179} This is especially likely in the case of military provider PMCs, which frequently operate alongside the military in highly-classified settings.\textsuperscript{180} Such circumstances are “so pervaded by state secrets as to be incapable of judicial resolution once the [state secrets]

\textsuperscript{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).

\textsuperscript{175} See Carter, supra note 149, at 121.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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., Bentzin 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).

\textsuperscript{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)).


\(^{183}\) 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).


\(^{187}\) *Id.*


\(^{189}\) 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 vessel\(^ {198}\) 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, ADMIRALTIES 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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{203} This is a good thing for DBA-covered contractors, who would face greater barriers to fact-finding\textsuperscript{204} and steeper legal barriers to tort suits\textsuperscript{205} 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.

\textbf{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.\textsuperscript{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.\textsuperscript{207} Shawn Engbrecht’s thesis in \textit{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:

\begin{quote}
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
\end{quote}

\textsuperscript{201} \textit{Id.} at 346–47.
\textsuperscript{202} \textit{Flying Tiger Lines, Inc. v. Landy,} 370 F.2d 46, 52 (9th Cir. 1966) (rejecting the “twilight zone” in the context of the DBA).
\textsuperscript{203} \textit{SCHOENBAUM, supra} note 195.
\textsuperscript{204} \textit{See supra} Part III.B.
\textsuperscript{205} \textit{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. \textit{Id.} Some may benefit from the government contractor defense, but probably no more so than PMCs. \textit{Id.}
\textsuperscript{206} \textit{McClean, supra} note 52, at 654–55.
\textsuperscript{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.” \textit{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 requisite 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).
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. 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. 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.

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. 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.

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

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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.


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

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.
240 ENGBRECHT, supra note 16, at 1–25.
241 ENGBRECHT, supra note 16, at 19.
governance, transparency, and performance.” Under Prince, Blackwater’s contractors engaged in violent behavior with management’s “implied endorsement,” and were involved in more shooting incidents in Iraq from 2005 to 2007 than larger PMCs DynCorp International and Triple Canopy combined.

Now, as Academi, the company boasts an experienced board of directors of the sort that Engbrecht credits with keeping companies like MPRI and DynCorp International ethical. 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.

Established PMCs formed organizations like ISOA because they understood that a lack of legitimacy threatened their business model. In order to address this legitimacy concern, ISOA limits its membership to PMCs that have appropriate ethical standards. 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. 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. The company did not rejoin ISOA until after Prince’s departure.

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

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243 BUSINESSWIRE, supra note 242.
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).
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.
variety of statistics regarding DBA claims on its website. 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.

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. 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.

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. 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. 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.


255 Id.


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). 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).

258 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.
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. 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. The regulation does not, however, provide any specific guidance to commanders and diplomats on what these standards ought to be. 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, they would create pressure on existing firms to either professionalize or exit the market. Using existing certification sources like ISOA would allow the government to capture this benefit with minimal additional resources or regulation.

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.

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260 See, e.g., McClean, supra note 52, at 675–77 (discussing the ongoing debate and resulting reform efforts in detail).
262 See id., § 159.6.
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. A mandatory certification provision in Part 159 would bolster such investigations, and would have a strong standardizing effect on the industry. 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.

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. Because the current members of groups like ISOA and BAPSC joined in response to existing market pressure for PMCs to be more responsible, 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. Thus, after a transition period, the supply of

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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.

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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.