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# Defense Base Act Insurance: Allocating Wartime Contracting Risks Between Government and Private Industry

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DEFENSE BASE ACT INSURANCE: ALLOCATING  
WARTIME CONTRACTING RISKS BETWEEN  
GOVERNMENT AND PRIVATE INDUSTRY

*Hugh Barrett McClean*

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*Major Hugh Barrett McClean serves in the U.S. Air Force Judge Advocate General's Corps. This paper was submitted in partial satisfaction of the requirements for the degree of Master of Laws in Government Procurement at The George Washington University Law School. The views expressed in this paper are solely those of the author and do not reflect the official policy or position of the U.S. Air Force, Department of Defense, or U.S. Government. The author wishes to thank Professors Steven L. Schooner and Karen D. Thornton for their insight, guidance, and encouragement on this paper; Colin Swan for his assistance with grammar; and Melissa McClean for her infinite support and patience.*

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## I. CONTRACTOR CASUALTIES—THE HIDDEN COST OF WAR

### A. Introduction

Osama Bin Laden's death gave the United States leverage in the war against Al Qaeda, and some members of Congress are now calling for a troop withdrawal and an end to military operations in Afghanistan.<sup>1</sup> However, the U.S. invasion of Iraq offers sound evidence that even if such an order was given, the U.S. military, along with thousands of civilian contractors, would remain in Afghanistan for some time.<sup>2</sup> Long after the toppling of Saddam Hussein's regime in 2003, U.S. troops and civilian contractors remained in Iraq to begin rebuilding infrastructure decimated by years of war.<sup>3</sup> Now, twelve years later, the rebuilding of Iraq continues.<sup>4</sup> Similar rebuilding efforts in Afghanistan are already underway and will likely continue well into the future.<sup>5</sup>

Regardless of when U.S. soldiers withdraw from the Middle East, senior military officials have pledged their support to these veterans.<sup>6</sup> Many injured soldiers have been kept alive by improvements in Kevlar vests and other life-saving equipment but are returning to the United States with permanent disabling injuries.<sup>7</sup> Other returning soldiers are suffering from mental health disorders and pose a higher suicide risk, a problem that has plagued the military during times of lengthy and repeated troop deployments.<sup>8</sup> Fortunately, universal, government-provided health care for military members allows wounded warriors to be treated by world-class physicians and health care

1. See Siobhan Hughes, *27 Senators Call for Sizable Troop Withdrawal from Afghanistan*, WALL ST. J. (June 15, 2011), <http://online.wsj.com/article/BT-CO-20110615-712044.html>.

2. See *Iraq at War*, N.Y. TIMES (Jan. 16, 2012), <http://topics.nytimes.com/top/news/international/countriesandterritories/iraq/index.html>.

3. See *id.*

4. See *id.*

5. See *Afghanistan at War*, N.Y. TIMES (Jan. 12, 2012), <http://topics.nytimes.com/top/news/international/countriesandterritories/afghanistan/index.html>.

6. See Barack Obama, President of the United States of America, Remarks at the 93rd Annual Conference of the American Legion (Aug. 30, 2011).

7. See, e.g., Dan Froomkin, *How Many U.S. Soldiers Were Wounded in Iraq? Guess Again*, HUFFINGTON POST (Dec. 30, 2011, 10:20 AM), [http://www.huffingtonpost.com/dan-froomkin/iraq-soldiers-wounded\\_b\\_1176276.html](http://www.huffingtonpost.com/dan-froomkin/iraq-soldiers-wounded_b_1176276.html); Jon Schwartz & Edward Iwata, *Invented to Save Gas, Kevlar Saves Lives*, USA TODAY (Apr. 17, 2003), [http://www.usatoday.com/money/world/iraq/2003-04-15-kevlar\\_x.htm#](http://www.usatoday.com/money/world/iraq/2003-04-15-kevlar_x.htm#).

8. Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENGL. J. MED. 13, 14 (2004); see generally Jeffrey Hyman et al., *Suicide Incidence and Risk Factors in an Active Duty United States Military Population*, AM. J. PUB. HEALTH (forthcoming Mar. 2012).

practitioners.<sup>9</sup> There is, however, a much lesser-known contingent of men and women working overseas in support of their military brethren who are not as celebrated or as fortunate. They are America's contractor veterans, and they too have suffered injuries of war.

Deployed contractors are returning home in record numbers with many of the same injuries and health issues facing soldiers. Working alongside the military, often in dangerous security roles, contractor veterans are showing signs of post-traumatic stress and other mental health disorders commonly found only in soldiers exposed to combat.<sup>10</sup> While a number of government agencies are tasked with treating both active-duty and veteran soldiers, those same support networks are largely absent for contractors.<sup>11</sup> Regrettably, this issue has largely been ignored, even as contractors and military members increasingly share the same battle space. This ignorance is partly due to an insolent group of Americans who believe contractors are essentially expendable.<sup>12</sup> They believe that the greatest benefit contractors provide to the Government is the expiration of their contract.<sup>13</sup> Injured contractors, however, have recently been able to voice their concerns to members of Congress, and government officials are now beginning to debate the potentially broad and long-term consequences of discounting these contractor veterans.<sup>14</sup>

The issue parallels the national health care debate. The cost of treating the uninsured or underinsured in emergency rooms has caused health care costs to skyrocket, but solutions for increased coverage are costly and politically contentious.<sup>15</sup> Healthy Americans are arguably more productive, consume less health care resources, and are less burdensome on the economy, but opponents of universal health care argue that the Government cannot afford health care for all Americans.<sup>16</sup> The debate touches on the fundamental question of whether the Government has some kind of moral obligation to care for those who cannot care for themselves. One might expect less of a debate on the issue of whether the Government has an obligation to help contractor veterans returning from war, as these Americans certainly draw more sympathy from politicians. Much like the national health care debate,

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9. See *About the VHA*, U.S. DEP'T OF VETERANS AFF., <http://www.va.gov/health/aboutVHA.asp> (last visited Mar. 1, 2012).

10. See James Risén, *Back from Iraq, Contractors Face Combat Related Stress*, N.Y. TIMES, July 4, 2007, at A1.

11. *Id.*

12. David Ivanovich, *Moneymakers: Contracting Expert Zeros in on Iraq: Five Questions with Steven Schooner*, HOUS. CHRONICLE (Feb. 29, 2008), <http://www.chron.com/default/article/Moneymakers-Contracting-expert-zeroes-in-on-Iraq-1650455.php>.

13. *Id.*

14. See *After Injury, the Battle Begins: Evaluating Workers' Compensation for Civilian Contractors in War Zones: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 9 (2009) [hereinafter *2009 House Hearing*].

15. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

16. Joe Messerli, *Should the Government Provide Free Universal Health Care for All Americans?*, BALANCEDPOLITICS, [http://www.balancedpolitics.org/universal\\_health\\_care.htm](http://www.balancedpolitics.org/universal_health_care.htm) (last visited Mar. 1, 2012).

however, Congress has been steadfastly focused on the rising cost of the insurance that contractors use to protect their employees.<sup>17</sup>

Rather than limiting reform efforts to fiscal matters, this Article calls upon Congress to capitalize on the opportunity to correct substantive issues plaguing the Defense Base Act (DBA)<sup>18</sup> insurance system. Congress recently passed legislation requiring the secretary of defense to adopt a new acquisition strategy for insurance required by the DBA.<sup>19</sup> While cost should be a consideration of any new strategy for securing DBA insurance, Congress must consider salient noncost-related benefits when weighing the merits of various strategies. Injured contractors returning from Iraq and Afghanistan are being denied reimbursement for medical treatment by their DBA insurance carriers.<sup>20</sup> The problem is occurring with even more frequency when claims are filed by contractors who suffer from mental illness related to combat stress.<sup>21</sup> Members of Congress have a duty and an obligation to support contractor veterans and their families, and they must fulfill that obligation when they choose a new DBA acquisition strategy.

This Article is divided into four parts. Part I describes the problems encountered by injured contractors as they return from war. Part II discusses how the regulatory scheme for insuring contractors contributes to the problems experienced by contractors. Part III offers practical suggestions for Congress and the Department of Defense (DoD) as they prepare to adopt a new DBA acquisition strategy. Finally, Part IV asserts that the current open-market insurance strategy is inadequate and argues that Congress should implement a multiple-provider system for DBA insurance. In the short term, a multiple-provider strategy best addresses DBA insurance costs and claims processing concerns and can be implemented swiftly and without extensive changes to the law. In addition, Congress should begin taking steps to implement government self-insurance, which offers even greater savings and benefits for injured contractors.

#### B. *Contractor Death Toll Exceeds That of U.S. Military in Iraq and Afghanistan*

While the efforts of the men and women in uniform are often publicly lauded, contractor contributions are frequently overlooked. Americans are well aware of the service members whose lives have been lost in Iraq and Afghanistan but are well insulated from the contractor death toll. Contracting is the primary means by which the U.S. military is able to complete its mission without exceeding the personnel limitations imposed by Congress.<sup>22</sup> The current wars would not be sustainable relying on the military alone.

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17. See 2009 House Hearing, *supra* note 14, at 10.

18. Defense Base Act, 42 U.S.C. §§ 1651–54 (2006).

19. See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 843, 122 Stat. 4502, 4540 (2008).

20. 2009 House Hearing, *supra* note 14, at 2.

21. See *id.* at 183.

22. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 401, 124 Stat. 4137, 4202.

The military's increased reliance on contractors in recent wars has raised new issues regarding the treatment of injured contractors returning from overseas. Contractors have historically been used to supplement the military by performing tasks that are not "inherently governmental."<sup>23</sup> The line between what is and is not inherently governmental, however, is becoming increasingly blurred. Examples of not "inherently governmental" functions include providing support services to a military base, such as maintaining the grounds, operating the dining facilities, and performing laundry services.<sup>24</sup> In addition to these traditional "not inherently governmental services," however, DoD contractors also provide security detail services, such as those provided by Xe Services, formerly Blackwater Worldwide.<sup>25</sup> As of March 2011, base support and security services made up about eighty percent of the work performed by DoD contractors in Iraq.<sup>26</sup> Consequently, as military resources are stretched thin by lengthy military operations on two fronts, the distinction between what is and is not inherently governmental has become rather opaque. Further, due to the number of contractors working in hazardous duty locations,<sup>27</sup> the risk to these contractors has increased dramatically. Now, the issue for the Government is how to manage the returning contractor workforce, which often suffers from many of the same physical and mental maladies as military veterans.

Professor Steven L. Schooner has written extensively on the topic of contractor fatalities.<sup>28</sup> His articles have unveiled shocking statistics and brought much-needed attention to the dangers contractors face as they risk their lives to support the military. Between January and June 2010, more military contractors than uniformed service members were killed in Afghanistan and Iraq.<sup>29</sup> There were reportedly 250 contractor deaths and 235 military deaths

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23. See FAR 7.5. Inherently governmental refers to employment functions that are typically performed by military or federal civilian employees rather than contract or employees.

24. See MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40764, DO D CONTRACTORS IN IRAQ & AFGHANISTAN: BACKGROUND AND ANALYSIS 15 (2011).

25. See generally Mark Mazzetti & Emily B. Hager, *Secret Desert Force Setup by Blackwater's Founder*, N.Y. TIMES (May 14, 2011), <http://www.nytimes.com/2011/05/15/world/middleeast/15prince.html?ref=blackwaterusa>.

26. See SCHWARTZ, *supra* note 24, at 15.

27. See Steven L. Schooner, *Why Contractor Fatalities Matter*, 38(3) PARAMETERS 78, 78 (2008).

28. Steven L. Schooner is co-director of the Government Procurement Law Program at The George Washington University Law School and the Nash & Cibinic Professor of Government Contract Law. His most recent publications on government contractor fatalities include the following: *id.*; Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERV. CONTRACTOR., Sept. 2010, at 16 [hereinafter Schooner & Swan, *Contractors & the Ultimate Sacrifice*]; Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-examined Effect of Surrogates on the Public's Casualty Sensitivity*, J. NAT'L SEC. LAW & POL'Y (forthcoming 2012) [hereinafter Schooner & Swan, *Dead Contractors*].

29. See Rogene Fisher Jacquette, *Contractor Deaths in Iraq and Afghanistan Outnumber Service Member Deaths*, N.Y. TIMES BLOG: AT WAR: NOTES FROM THE FRONT LINES (Sept. 23, 2010, 2:27 PM), <http://atwar.blogs.nytimes.com/2010/09/23/contractor-deaths-in-iraq-and-afghanistan-out-number-service-member-deaths/?scp=1&sq=contractor%20deaths%20outnumber&st=cse>.

during the six-month period.<sup>30</sup> Even more startling is that three times as many contractor injuries have been reported than military injuries since the beginning of operations in Iraq in 2001.<sup>31</sup> These statistics reflect an upward trend in contingency contracting casualties, and the contractor death toll is increasing exponentially compared to military fatalities. Between 2003 and 2010, contractor deaths rose from five percent of the annual death toll to more than fifty percent.<sup>32</sup> As of March 2011, there were approximately 155,000 private contractors employed by the DoD in Iraq and Afghanistan compared to approximately 145,000 uniformed personnel.<sup>33</sup> Most surprisingly, contractors currently account for approximately fifty-two percent of the workforce in Iraq and Afghanistan<sup>34</sup> and on average have outnumbered military personnel in Afghanistan for the last two years.<sup>35</sup> This support has undoubtedly contributed to the success of the military, but the reliance on contractors has come at a cost.

Professor Schooner's articles have brought much-needed transparency to a quiet corner of government contracting. Policymakers and legislatures, as well as the general public, have ignored the risks to contractors and have hardly raised an eyebrow at the staggering trend in contractor fatalities.<sup>36</sup> But perhaps equally as troubling is the trend in contractor injuries, which may have even further-reaching consequences. Few organizations have tracked injuries sustained by contractor veterans, and even fewer have advocated for contractors or provided support for their injuries.<sup>37</sup> Insurance companies have predominantly been responsible for employee injuries, but this has only resulted in increased profits for carriers and excessive denial of claims for injured workers.<sup>38</sup> Given the limited number of remedies under the current regulatory scheme, the Government has not been able to limit costs or provide greater care for contractors. Thus, while contractors are dying in record numbers, insurance carriers are seeing unprecedented increases in revenue and profit.<sup>39</sup>

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30. *Id.*

31. See Schooner & Swan, *Contractors & the Ultimate Sacrifice*, *supra* note 28, at 16, 17.

32. *Id.* at 17.

33. SCHWARTZ, *supra* note 24, at 6. The number of contractor and military personnel in Iraq and Afghanistan has decreased from approximately 207,600 contractors and 175,000 military in March 2010. MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40764, DO D CONTRACTORS IN IRAQ & AFGHANISTAN: BACKGROUND & ANALYSIS 5 (2010).

34. SCHWARTZ, *supra* note 24, at Summary.

35. See James Glanz, *Contractors Outnumber U.S. Troops in Afghanistan*, N.Y. TIMES (Sept. 1, 2009), <http://www.nytimes.com/2009/09/02/world/asia/02contractors.html>.

36. See Schooner & Swan, *Contractors & the Ultimate Sacrifice*, *supra* note 28, at 18.

37. *Id.*

38. See *infra* Part III.A.

39. See Schooner, *supra* note 27, at 78; OFFICE OF THE DEPUTY UNDER SEC'Y OF DEF. ACQUISITION & TECH., DEP'T OF DEF., ACQUISITION STRATEGY FOR DEF. BASE ACT INSURANCE, REPORT TO CONGRESS 1, available at [http://www.acq.osd.mil/dpap/cpf/docs/acq\\_strategy\\_defense\\_base\\_act\\_insurance.pdf](http://www.acq.osd.mil/dpap/cpf/docs/acq_strategy_defense_base_act_insurance.pdf) [hereinafter DOD REPORT TO CONGRESS].

### C. Contractor Veterans Encounter Difficulties After Overseas Employment

The miracle of Kevlar has helped keep many contractors alive.<sup>40</sup> But, after sustaining traumatic injuries overseas, injured contractors are faced with new challenges at home.<sup>41</sup> In most cases, family members are able to help manage their loved ones' illnesses, but filing claims for medical expenses and dealing with insurance carriers can be a herculean task.<sup>42</sup> Due to the complex nature of mental health claims, such as those related to post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI), the claims process for these cases can be quite contentious.<sup>43</sup> In fact, insurance carriers deny close to half of all PTSD claims.<sup>44</sup> For contractors and their families, the process of appealing the denial of their claims, in addition to managing the symptoms of their illnesses, is overwhelming.

Even more disturbing is that these illnesses are not well-documented. The DoD did not even begin tracking data on contractors in Iraq and Afghanistan until the latter half of 2007.<sup>45</sup> It was not until 2008 that the DoD signed an agreement to use the Synchronized Predeployment and Operational Tracker (SPOT) system, a system designed to track contractor casualties.<sup>46</sup> Before 2007, the most accurate tally of contractor casualties was tracked by the Department of Labor's (DOL) Division of Longshore and Harbor Worker Compensation, which tracks insurance claims submitted by the family or employer of an injured or dead contractor.<sup>47</sup> These statistics provide critical quantitative data, which can be used to estimate the *actual* cost of DoD operations, since the DoD has historically failed to account for contractor operations.<sup>48</sup> While the implementation of SPOT has assisted the Government in tracking contractor casualties, the Government Accountability Office (GAO) and the DoD concede that SPOT is still an inadequate source of data.<sup>49</sup>

Current research tracking the mental health of contractors employed in war zones is even scarcer. Studies conducted on military populations suggest that contractors working in war zones are probably suffering from the same mental health disorders as military soldiers.<sup>50</sup> According to Dr. Matthew Friedman, a Veterans Affairs official who heads the National Center for

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40. Schooner & Swan, *Dead Contractors*, *supra* note 28, at 14 (citing Atul Gawande, *Casualties of War—Military Care for the Wounded from Iraq and Afghanistan*, 351 *NEW ENGL. J. MED.* 2471, 2474 (2004), available at <http://www.nejm.org/doi/full/10.1056/NEJMp048317>).

41. See *Wounded Civilian Workers Fight for Care*, CBSNEWS.COM (Jul. 27, 2009, 1:17 PM), <http://www.cbsnews.com/stories/2009/04/17/national/main4951906.shtml?tag=contentMain;contentBody>.

42. See *id.*

43. See *id.*

44. *Id.*

45. SCHWARTZ, *supra* note 33, at 4.

46. *Id.* at 5.

47. See Schooner, *supra* note 27, at 86.

48. See Schooner & Swan, *Dead Contractors*, *supra* note 28, at 19–20.

49. See *id.* at 17; SCHWARTZ, *supra* note 33, at 5.

50. See Risen, *supra* note 10.



Post-Traumatic Stress Disorder, the issue of mental illness in contractors has never been reviewed by the Government.<sup>51</sup> Only recently have significant mental health studies on military soldiers in Iraq and Afghanistan been undertaken. These studies have found that psychological disorders may be disproportionately high when compared with physical injuries from the two wars.<sup>52</sup> The studies also show that psychological disorders in the military community are often left untreated.<sup>53</sup> In its 2008 study, the RAND Corporation found that between five and fifteen percent of deployed service members are affected by PTSD.<sup>54</sup> Another two to fourteen percent meet the diagnostic criteria for major depression.<sup>55</sup> Of the soldiers who screened positive for a mental health condition, the study found that only one-third sought mental health support while deployed.<sup>56</sup> About the same number of soldiers who met screening criteria for a mental health illness received mental health support upon their return from deployment.<sup>57</sup>

The application of these findings to the contractor community reveals a disturbing picture. Contractor fatalities recently surpassed military fatalities,<sup>58</sup> suggesting contractors are being exposed to many of the same hazards as military members. Given this statistic, it is reasonable to conclude that there may be a large number of U.S. contractors who are in need of mental health treatment. This exposure likely includes many second- and third-tier subcontractors who are not as savvy or sophisticated as prime contractors and are even less likely to utilize DBA benefits.

One contractor found that a significant percentage of his employees were not receiving needed mental health care.<sup>59</sup> Paul Brand, a psychologist and chief executive officer of the firm Mission Critical Psychological Services (MCPS), L.L.C.,<sup>60</sup> independently conducted a study on contractors' mental health while working at DynCorp, the Department of State's (DOS) largest

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51. *See id.*

52. RAND CORP., *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* iii (Terri Tanielian & Lisa H. Jaycox, eds., 2008), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND\\_MG720.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf).

53. *Id.* at 251.

54. *Id.* at 250.

55. *Id.*

56. *Id.* at 251.

57. *Id.*

58. *See* Jacquette, *supra* note 29.

59. *See* T. Christian Miller, *The Other Victims of Battlefield Stress; Defense Contractors' Mental Health Neglected*, PROPUBLICA.ORG (Feb. 26, 2010, 2:48 AM), <http://www.propublica.org/article/injured-contractors-the-other-victims-of-battlefield-stress-224>.

60. Paul Brand, Ph.D., founded MCPS to offer psychological screening and services for people working in war-torn areas. *About Us*, MISSION CRITICAL PSYCHOLOGICAL SERVS., LLC, [http://www.missioncriticalpsych.com/site/epage/64926\\_765.htm](http://www.missioncriticalpsych.com/site/epage/64926_765.htm) (last visited Mar. 3, 2011). Before starting MCPS, as the president of Medina & Thompson, Inc., Dr. Brand developed psychological fitness programs to support police officers sent to Haiti, Bosnia, Kosovo, Israel, Liberia, and East Timor as part of peacekeeping initiatives. *Id.* Dr. Brand also helped DynCorp International, the Department of State's largest contractor, become the first company with comprehensive psychological support for its employees serving in Iraq and Afghanistan. *Id.* Dr. Brand holds his

contractor. He found that twenty-four percent of contract employees from DynCorp had symptoms of PTSD or depression after their overseas employment.<sup>61</sup> He also found that many of the contractors had never received mental health screening and were not receiving treatment for their symptoms.<sup>62</sup> Based on his study, he estimated that thousands more contractors employed by other firms were probably not being screened or receiving treatment of any type.<sup>63</sup>

The importance of these findings lies in the relationship between mental health and suicide. Researchers have long believed that mental health and suicide are closely related.<sup>64</sup> As senior military officials struggle to balance troop deployments with fluctuating financial constraints, they remain highly cognizant of the long-standing concern about suicide among military personnel.<sup>65</sup> Studies show that the majority of persons who have committed suicide suffered from at least one mental disorder.<sup>66</sup> Reducing suicide incidents, which is experiencing renewed importance in the military, is therefore dependent upon obtaining treatment for soldiers and contractors who are in need of mental health care.

The fast-paced operations tempo and the duration of recent wars have caused a rise in suicide among military personnel, a situation that has caught the DoD by surprise.<sup>67</sup> Between 2005 and 2009, 1,100 military members took their lives—the equivalent of one member every thirty-six hours.<sup>68</sup> The suicide rate in all services has increased since 2001, but the rate in the Army has more than doubled.<sup>69</sup> Among Army personnel, the suicide rate has exceeded that of the civilian population since 2005.<sup>70</sup> The rising suicide rates shocked military leaders and congressional leaders to such an extent that when Congress passed the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA for 2009), they directed the secretary of defense to establish a task force to examine matters related to suicide prevention in the armed forces.<sup>71</sup> The secretary of defense submitted the task force's detailed suicide report to the Committees on

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Ph.D. in psychology from the Illinois Institute of Technology and has lived and worked in Kosovo, Afghanistan, and Iraq, as well as the United States. *Id.*

61. Miller, *supra* note 59. As previously mentioned, RAND Corp. reported that five to fifteen percent of military members reported symptoms of PTSD and two to fourteen percent met the criteria for major depression. See RAND CORP., *supra* note 52, at 250. These statistics suggest that perhaps a higher percentage of contractors are suffering from mental health problems than military members.

62. Miller, *supra* note 59.

63. *Id.*

64. See RAND CORP., *supra* note 52, at 128.

65. See *id.*

66. *Id.*

67. DoD TASK FORCE ON THE PREVENTION OF SUICIDE BY MEMBERS OF THE ARMED FORCES, THE CHALLENGE AND THE PROMISE: STRENGTHENING THE FORCE, PREVENTING SUICIDE AND SAVING LIVES 107 (Aug. 2010), available at [http://www.health.mil/dhb/downloads/Suicide%20Prevention%20Task%20Force%20report%2008-21-10\\_V4\\_RLN.pdf](http://www.health.mil/dhb/downloads/Suicide%20Prevention%20Task%20Force%20report%2008-21-10_V4_RLN.pdf).

68. *Id.* at ES-1.

69. *Id.* at ES-1–ES-2.

70. *Id.* at 17.

71. See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 733, 122 Stat. 4502, 4540 (2008).

Armed Services of the Senate and House of Representatives in August 2010.<sup>72</sup> They made forty-nine findings and seventy-six recommendations across four focus areas.<sup>73</sup> While the task force found that military policy on the delivery of mental health care to the armed forces is well-intended, it concluded that the system is unorganized and lacking in mental health professionals and other necessary resources.<sup>74</sup>

The renewed focus on mental health in the military is a positive sign that the DoD is finally addressing this critical need of its warfighters. The focus will undoubtedly improve the overall effectiveness of the U.S. military.

*None of the strategies cited in the DoD study and almost none of the DoD's resources, however, will be dedicated to helping U.S. contractors in their fight against mental illness.* Contractors working alongside the U.S. military are experiencing combat stress and battle fatigue but are off the radar and out of the scope of DoD officials.<sup>75</sup> Unlike for the military, there is no official support network in place to help injured contractors cope with the stress of their injuries or navigate the medical claims process.<sup>76</sup> Without the necessary support and resources, contractors are left to fight the symptoms of their illnesses on their own.<sup>77</sup>

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72. DoD TASK FORCE ON THE PREVENTION OF SUICIDE BY MEMBERS OF THE ARMED FORCES, *supra* note 67, at A-3.

73. *Id.* at v.

74. *Id.* at ES-2, ES-6.

75. See Miller, *supra* note 59.

76. Advocacy or support for wounded contractors has been limited to volunteer providers. Jana Crowder, who operates a website, Civilian Contractors in Iraq and Afghanistan, <http://www.americancontractorsiniraq.com/>, dedicated to injured contractors, is one such provider. She is the organizer of a Tennessee support group for injured contractors and, though not a health professional, has helped injured contractor veterans returning from Iraq. See *Day to Day: Iraq Contractors Convene in Tennessee*, NAT'L PUB. RADIO (Feb. 12, 2007), <http://www.npr.org/templates/story/story.php?storyId=7364190>.

77. Beginning in 2007, three media outlets, *The Los Angeles Times*, ABC News, and ProPublica, began reporting on the tribulations of injured contractors returning from Iraq and Afghanistan. See *Day to Day: Iraq Contractors Convene in Tennessee*, *supra* note 76. The stories of these injured contractors are disturbing. One contractor, Preston Wheeler, was a truck driver employed by Kellogg, Brown, and Root (KBR) in Iraq who witnessed the murder of his co-worker in 2005. *Id.* It took Mr. Preston two years to find a support group in which he could begin to confront his emotional problems. *Id.* Another KBR employee, Robert Rho, was also injured in Iraq and fought with his insurance carrier over benefits for years after his return. *Id.* A third KBR contractor had to bring his case to the attention of Tennessee Senator Lamar Alexander before receiving his DBA entitlements. See *id.* However, the most horrific example of exploiting contractor veterans and their families is the case of Wade Dill. See T. Christian Miller, *The War's Quiet Scandal*, DAILY BEAST (Feb. 25, 2010), <http://www.thedailybeast.com/blogs-and-stories/2010-02-25/the-wars-quiet-scandal/full>. Mr. Dill accepted a job in Afghanistan performing pest extermination services to help pay for his daughter's college education. *Id.* On one occasion, Mr. Dill was called to clean up the remains of a young soldier who had shot himself in the head. *Id.* The task had such a profound and disabling effect on Mr. Dill that eventually Mr. Dill quit his job and separated from his wife. *Id.* On July 16, 2006, Mr. Dill was found dead in a local hotel room a few miles from their home. *Id.* He left a note that read, "I did exist and I loved you." *Id.* His wife, Barbara Dill, filed a claim with KBR's insurance provider, AIG, claiming her husband's death was a result of PTSD brought on by his employment in Iraq. *Id.* Her expert witness, Dr. Seaman, who specialized in PTSD, concluded that "[t]he bottom line is that the combination of physical separation and work-related stress resulted in

## II. PROBLEMS WITH THE CURRENT REGULATORY SCHEME

### A. *The Longshore and Harbor Workers' Compensation Act, the Defense Base Act, and the War Hazard Compensation Act*

Congress is now debating alternatives to the regulatory scheme that protects contractors overseas,<sup>78</sup> but the merits of these alternatives must be weighed against current regulations. The Government provides workers' compensation benefits to various categories of employees who perform work for the Government.<sup>79</sup> In some cases, the Government provides these benefits directly, with funds appropriated by Congress.<sup>80</sup> In other cases, the Government mandates that contractors provide these benefits to their employees.<sup>81</sup> Benefits are generally distributed based on one of four employee types: military, civil service, nonappropriated fund instrumentality (NFI), and contractor employees.<sup>82</sup>

All members of the U.S. military are eligible to receive pay and benefits, including pay and benefits for injuries, medical expenses, and life insurance coverage.<sup>83</sup> Almost any injury or death of a military member while in active status entitles the member to benefits, regardless of whether the member was performing military duties when he or she was injured or killed.<sup>84</sup> Funding for military benefits is provided through congressional appropriations to the DoD, which oversees the Military Health System (MHS).<sup>85</sup>

Civilian employees, or "civil servants," are directly employed by the Government and receive compensation for work-related injuries under Title 5, Chapter 81, of the United States Code.<sup>86</sup> The Federal Employees' Compensation Act (FECA) provides funding for the benefits received by civil servants

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increasingly emotional distance, greater distortion of the relationship, increasing emotional intensity, and a pattern of increasing erratic behaviors that culminated in suicide. . . ." *Id.* However, the expert for AIG believed the illness was caused by marital and family problems and believed it was unrelated to the stresses of his employment in Iraq. *Id.* The DOL recommended that AIG pay the claim, but AIG refused. *Id.* Ms. Dill's only recourse was to file an appeal through DOL's dispute resolution system, a process that took months to complete. *Id.* She eventually won her appeal in 2011, five years after her husband's death. See *Dill v. Serv. Emps. Int'l, Inc.*, Case No. 2008-LDA-00259, at 43-44 (Dep't of Labor Jan. 21, 2011), available at [http://www.oalj.dol.gov/Decisions/ALJ/LDA/2008/DILL\\_BarbaraWID\\_v\\_SERVICE\\_EM\\_PLOYEES\\_IN\\_2008LDA00259\\_%28JAN\\_21\\_2011%29\\_134436\\_CADEC\\_SD.pdf](http://www.oalj.dol.gov/Decisions/ALJ/LDA/2008/DILL_BarbaraWID_v_SERVICE_EM_PLOYEES_IN_2008LDA00259_%28JAN_21_2011%29_134436_CADEC_SD.pdf).

78. See 2009 House Hearing, *supra* note 14, at 19 (2009) (statement of Seth D. Harris, Deputy Sec'y, Dep't of Labor).

79. See *History of OWCP*, U.S. DEP'T OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, <http://www.dol.gov/owcp/owcphist.htm> (last visited Jan. 14, 2012) (discussing various workers' compensation programs administered by the Federal Government).

80. See, e.g., Federal Employees Workers' Compensation Act, 5 U.S.C. § 8102(a) (2006).

81. See, e.g., Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 904 (2006).

82. See 5 U.S.C. § 8101 (2006) (civil service); 5 U.S.C. § 8171(a) (2006) (NFI); 42 U.S.C. § 1651(a) (2006) (military and contractor employees).

83. See 10 U.S.C. § 1074(a)(1) (2006).

84. See *id.* § 1074(a)(2).

85. See RICHARD A. BEST JR., CONG. RESEARCH SERV., IB93103, MILITARY MEDICAL CARE SERVICES: QUESTIONS AND ANSWERS CRS-2 (2005), available at <http://www.fas.org/spp/crs/misc/IB93103.pdf>.

86. See Compensation for Work Injuries, 5 U.S.C. §§ 8101-8152 (2006).

covered by the statute.<sup>87</sup> The benefits are comprehensive and cover compensation for disability and death of employees,<sup>88</sup> death gratuities for injuries in connection with an employee's service with an armed force,<sup>89</sup> and medical services.

Compensation for injuries or death for NFI employees and contractors is not directly paid for by appropriated funds. Rather, through various amendments, Congress has directed that NFIs and contractors provide benefits granted under the Longshore and Harbor Workers' Compensation Act (LHWCA) to their employees.<sup>90</sup> The LHWCA was enacted in 1927 and is administered by the Office of Workers' Compensation Programs (OWCP), under the DOL.<sup>91</sup> As the title of the statute suggests, the LHWCA was originally intended to provide compensation for the disability or death of a maritime employee if the disability or death arose from an injury occurring upon the navigable waters of the United States.<sup>92</sup> Through various amendments, however, Congress has expanded the LHWCA to provide coverage to workers engaged in a wide range of public works projects.<sup>93</sup> The statute requires employers to provide coverage for qualifying employees who are performing work for the Government in certain areas.<sup>94</sup>

The LHWCA contains benefits for many specific contingencies. Benefits include medical services, supplies, and even choice of physician.<sup>95</sup> The statute also provides for disability and death benefits, depending on whether an injury is permanent or temporary and whether the worker is partially or totally disabled.<sup>96</sup> Typically, injured workers receive two-thirds of their average weekly wages for the duration of their disability.<sup>97</sup> Congress has used the LHWCA as the basic framework for providing workers' compensation benefits to government workers who are not directly employed by the Government, such as NFI employees.<sup>98</sup>

87. This U.S. Treasury fund is a collection point for appropriations made by Congress for the purpose of paying compensation and other benefits and expenses to eligible federal employees. See *Division of Federal Employee's Compensation (DFEC): Procedure Manual*, U.S. DEP'T OF LABOR, <http://www.dol.gov/owcp/dfec/procedure-manual.htm> (last visited Mar. 3, 2012).

88. 5 U.S.C. § 8102 (2006).

89. 5 U.S.C. § 8102(a) (Supp. II 2009).

90. See Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2006).

91. *Division of Longshore and Harbor Workers' Compensation (DLHWC): Pamphlet LS-560*, U.S. DEP'T OF LABOR, <http://www.dol.gov/owcp/dlhwc/LS-560pam.htm> (last visited Mar. 3, 2012).

92. 33 U.S.C. § 903(a).

93. 42 U.S.C. §§ 1651(a)(3), 1701(a) (2006).

94. See 33 U.S.C. § 904(a).

95. *Id.* § 907(a)-(b).

96. *Id.* § 908. Specific injuries are listed with particularity in the statute, such as "Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit." *Id.*

97. *Id.*

98. See Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 (2006) (applying LHWCA to NFI employees); 5 U.S.C. § 2105(c) (2006) (describing NFI employees). DoD uses NFIs to maintain morale, welfare, and recreation (MWR) programs and facilities for the armed forces. *Who Are NAF Employees?*, CPMS.OSD.MIL, <http://www.cpms.osd.mil/ASSETS/>

Workers' compensation for contractors operates much the same way. The DBA extends coverage under the LHWCA by requiring government contractors to provide their employees with LHWCA benefits.<sup>99</sup> The DBA was enacted in 1941 as a result of an almost tenfold increase in the use of civilian contractors between World War I and World War II.<sup>100</sup> The purpose of the law was to clarify and limit the liability of the Government and defense contractors while ensuring the protection of civilian laborers.<sup>101</sup> Originally intended to cover only contractors working on military bases, the DBA has been amended a number of times to provide expanded coverage for contractors engaged in public work projects regardless of whether they work on a military base.<sup>102</sup> The law requires businesses to provide compensation in the event of injury or death to their employees working "at any military, air, or naval base . . . or upon lands occupied or used by the United States . . . or upon any public work . . . outside the continental United States. . . ."<sup>103</sup> The term "public work" is broadly defined in the statute and includes "any project . . . involving construction, alteration, removal or repair for the public use of the United States or its allies . . . including service contracts . . . and ancillary work in connection therewith. . . ."<sup>104</sup> Today, almost all U.S. contractors working on building projects outside the continental United States—such as dams, harbor improvements, roadways, and housing—are covered under the DBA.<sup>105</sup>

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87993068876A450DA03A6C76F6737D28/Who%20are%20NAF%20employees-Item%20of%20Interest.pdf (last visited Mar. 3, 2012). NFIs are generally operated by civilians who are employed by the armed forces "services" sector and include operating post exchanges, child day-care centers, and indoor and outdoor recreation facilities under the jurisdiction of the armed forces. *Id.* Due to their support role, NFI employees are often co-located with deployed forces. *Id.* However, regardless of whether they are located inside or outside the continental United States, NFI employees are covered by the LHWCA for work-related injuries. See 5 U.S.C. § 8171. The law that extends coverage under the LHWCA to NFI employees is the Nonappropriated Fund Instrumentalities Act (NFIA). *Id.* Under NFIA, benefits are paid for with revenues generated by the NFIs rather than appropriated funds. See *Johnson v. United States*, 600 F.2d 1218, 1221 (6th Cir. 1979); *Who Are NAF Employees?*, *supra*; James M. Mesnard, *Exclusivity Under the Act*, 6 LOY. MAR. L.J. 59, 59 (2008).

99. See Defense Base Act, 42 U.S.C. § 1651.

100. Greta S. Milligan, *The Defense Base Act: An Outdated Law and Its Current Implications*, 86 U. DET. MERCY L. REV. 407, 411 (2009) (85,000 civilians accompanied the military during World War I, as compared to 734,000 in World War II).

101. 42 U.S.C. § 1651(a), (c) (2006). See generally Kerry J. Anzalone, *The Defense Base Act—A Growth Industry?*, Benefits Rev. Bd. Serv., Longshore Rptr. (MB) (2004), available at [http://www.oalj.dol.gov/PUBLIC/LONGSHORE/REFERENCES/REFERENCE\\_WORKS/THE\\_DEFENSE\\_BASE\\_ACT\(2004\).HTM](http://www.oalj.dol.gov/PUBLIC/LONGSHORE/REFERENCES/REFERENCE_WORKS/THE_DEFENSE_BASE_ACT(2004).HTM).

102. See, e.g., War Hazards Compensation Act, 42 U.S.C. § 1701(a)(1)–(2) (2006).

103. Defense Base Act, 42 U.S.C. § 1651(a)(3).

104. *Id.* § 1651(b)(1). In *Casey v. Chapman College*, 23 Ben. Rev. Bd. Serv. (MB) 7, at 8, 10–11 (1989), the Board held that a professor of Asian Studies who was injured on a U.S. naval base in Japan was covered under the DBA. The Board found that his employment teaching Asian studies in the Pacific to Navy personnel was related to national defense and therefore constituted the "public work" required for coverage. *Id.*

105. See Anzalone, *supra* note 101, at 1.

Coverage under the DBA is monitored by the DOL, but the DOL does not secure insurance for contractors.<sup>106</sup> The DBA requires contractors to self-insure or purchase insurance with a provider of their choice.<sup>107</sup> The DOL generates a list of prequalified DBA providers from which contractors can choose.<sup>108</sup> The cost of this insurance is allowable and allocable under cost-type contracts.<sup>109</sup>

A unique aspect of DBA insurance is coverage for injuries caused by acts of war. The War Hazard Compensation Act (WHCA),<sup>110</sup> enacted in 1942, provides compensation directly from the coffers of the Government in cases of injury or death to employees resulting from a “war-risk hazard.”<sup>111</sup> Essentially, the Government self-insures when a contractor is injured by an act of war. A war-risk hazard is defined in the statute and includes hazards caused by the discharging of weapons or explosives by a hostile force,<sup>112</sup> the operation of vessels or aircraft in a zone of hostilities or engaged in wartime activities,<sup>113</sup> or any action of a hostile force or person,<sup>114</sup> including the detention of contractors by hostile forces.<sup>115</sup> By relieving insurance carriers from the risk of insuring against injuries or death caused by war, the Government intended to help contractors obtain DBA insurance at fair premiums.<sup>116</sup>

In summary, three basic insurance laws are implicated when contractors employed by the Government are injured or killed overseas: (1) the LHWCA, (2) the DBA, and (3) the WHCA.<sup>117</sup> Two other laws, the Mutual Security Act of 1954 and the Dayton Peace Accords of 1995, are also impli-

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106. See *Defense Base Act: Workers' Compensation for Employees of U.S. Government Contractors Working Overseas*, U.S. DEPT OF LABOR, <http://www.dol.gov/owcp/dllhwc/ExplainingDBA.htm> (last visited Mar. 3, 2012).

107. 42 U.S.C. § 1651(a)(4); see also Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 932(a)(1)–(2) (2006).

108. *Defense Base Act: Workers' Compensation for Employees of U.S. Government Contractors Working Overseas*, *supra* note 106, at 2.

109. FAR 31.205-19(c), (e)(2)(ii), (e)(2)(v) (2011).

110. War Hazard Compensation Act, 42 U.S.C. § 1701 (2006).

111. 20 C.F.R. § 61.100–101 (2010). Reimbursement for injury or death is paid for with appropriated funds, similar to the payment of claims under the Federal Employees Compensation Act (FECA). See Federal Employees' Compensation Act, 5 U.S.C. § 8147(a) (2006). An important caveat here is that, in most cases, insurance companies must pay WHCA claims up-front, and may only be fully reimbursed if it is later shown that the injury or death was caused by a war-risk hazard. *Id.* (For the limited circumstances in which WHCA claims can be paid directly, see 20 C.F.R. § 61.105.) This system can create an incentive for carriers to initially deny claims. *Id.*

112. 42 U.S.C. § 1711(b)(1).

113. *Id.* § 1711(b)(5).

114. *Id.* § 1711(b)(2).

115. *Id.* § 1701.

116. Jeffrey L. Robb, *Workers' Compensation for Defense Contractor Employees Accompanying the Armed Forces*, 33 PUB. CONT. L.J. 423, 431 (2004) (citing S. REP. NO. 77-1448, at 5 (1942)).

117. Much like FECA, an exclusivity clause in the DBA limits employer liability to that of the statute and excludes all other workers' compensation liability imposed by any state or other federal entity. See 5 U.S.C. § 8173 (2006). Thus, the DBA and accompanying laws provide the only recourse for injured contractors. See *id.* (“This liability is exclusive and instead of all other liability of the United States . . . in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.”); Defense Base Act, 42 U.S.C. § 1651(c) (2006).

cated, but less frequently, as they apply to U.S. contractors under contract with foreign governments.<sup>118</sup> Though these statutes have provided a satisfactory framework for protecting injured contractors in the past, the cost of DBA insurance has become unacceptably high, as illustrated by the complaints congressional leaders have recently begun examining.

### B. DBA Insurance Concerns: Rising Costs and Denial of Claims

The above compensation scheme was originally intended to provide workers' compensation-type benefits to contractor employees and to limit the liability of both the Government and defense contractors. Not surprisingly, Congress's concerns with the scheme today are still economically driven, exacerbated by the unprecedented number of claims in the last decade.<sup>119</sup> Congress simply never envisioned contractors working so closely with military personnel for such protracted periods. It is anachronistic, however, to think the problems with DBA insurance are limited to issues of cost. The denial and delayed processing of medical claims by insurance companies have left many contractors without critical care.<sup>120</sup> Sadly, treatment for mental health care has been particularly susceptible to insurance carriers' heavy-handed denial of claims.<sup>121</sup>

The Government has done a commendable job of creating an insurance regulatory scheme for government contractors. The coverage, however, comes at a high price. The rise in DBA insurance premiums is the primary catalyst for recent congressional action.<sup>122</sup> The NDAA for 2009 included a section in which Congress directed the DoD to address escalating costs of DBA insurance.<sup>123</sup> The DoD undertook a nearly year-long study and found that Congress's cost concerns were not unwarranted.<sup>124</sup> The DoD found that between 2002 and 2008, the DBA insurance market grew from about \$18 million to more than \$400 million in government premiums.<sup>125</sup> Comparing war zone and non-war zone premiums, the DoD found that war zone premiums were ninety percent higher than non-war zone premiums. The DoD also found that eighty-eight percent of all premiums

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118. See Mutual Security Act of 1954, Pub. L. No. 83-665, 62 Stat. 850 (codified as amended in scattered sections of 22 U.S.C.); Dayton Peace Accords, Nov. 21, 1995, 35 I.L.M. 75.

119. VALERIE BAILEY GRASSO ET AL., CONG. RESEARCH SERV., RL34670, THE DEFENSE BASE ACT (DBA): THE FEDERALLY MANDATED WORKERS' COMPENSATION SYSTEM FOR OVERSEAS GOVERNMENT CONTRACTORS 3 (2010).

120. T. Christian Miller & Doug Smith, *Injured War Zone Contractors Fight to Get Care*, L.A. TIMES (Apr. 16, 2009, 10:25 PM), <http://articles.latimes.com/2009/apr/17/nation/na-contractors17>.

121. *Id.*

122. *Defense Base Act Insurance: Are Taxpayers Paying Too Much?: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 30 (2008) (statement of Rep. Diane E. Watson) [hereinafter *2008 House Hearing*].

123. See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 843, 122 Stat. 4502, 4540 (2008).

124. DoD REPORT TO CONGRESS, *supra* note 39, at ii.

125. *Id.* at i.



were for prime or subcontracts that had their primary place of performance in Iraq and Afghanistan.<sup>126</sup> Perhaps not surprisingly, the high insurance premiums in war zones are a result of four major factors: (1) logistical challenges; (2) volatility in the workplace; (3) the volume of claims, including controverted claims and subsequent litigation; and (4) a lack of competition in the DBA insurance business.<sup>127</sup>

The logistical challenges of providing DBA insurance are tremendous. Iraq and Afghanistan lack adequate medical facilities, infrastructure, and medical resources.<sup>128</sup> Routine injuries may require medical evacuation simply because the proper facilities or experts are not available.<sup>129</sup> Insurance carriers are often required to make reimbursements in different currencies, and claims can involve parties or witnesses who speak different languages, have different cultural norms, and are thousands of miles apart.<sup>130</sup> Such variables result in increased costs, especially when a significant number of overseas contractors have absolutely no presence in the United States.<sup>131</sup>

Volatility in the workplace is another factor that creates high premiums. DBA insurance involves more than paying benefits to injured workers; it is the transferring of risk from employees to employers and insurance carriers. Actuaries, employed by insurance carriers, analyze statistical data and use mathematical formulas to derive risk probabilities for a multitude of loss scenarios.<sup>132</sup> Carriers then use these calculations to set premiums to cover the risk and to calculate what assets must be kept in reserve to pay for potential losses.<sup>133</sup> Generally, actuaries must know (1) the chance that an event will take place, (2) the amount of loss from the event, (3) the premium for each category of policyholder, and (4) the amount that must be kept in reserve to pay for the loss when the event occurs.<sup>134</sup> If these data are accurate, insurance carriers can spread their risk across insureds in similar risk "pools"<sup>135</sup> so that losses can be shared over time.

The volatility of workplaces like Iraq and Afghanistan, with unstable governments, weak economies, and poor infrastructure, make actuarial calculations exceptionally difficult. Unlike the domestic workplace, employees remain in-country for many months and do not leave their work environment except when taking leave.<sup>136</sup> When employees do take leave, it often

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126. *Id.* at 34.

127. *See id.* at 4–6; *supra* Part II.B.

128. *See* DoD REPORT TO CONGRESS, *supra* note 39, at 4.

129. *See id.*

130. *Id.* at 5.

131. *See* 2009 House Hearing, *supra* note 14, at 22 (statement of Seth Harris, Deputy Sec'y, Dep't of Labor).

132. *See* Michelle E. Boardman, *Known Unknowns: The Illusion of Terrorism Insurance*, 93 GEO. L.J. 783, 810 (2005).

133. *See id.* at 809.

134. *See id.* at 813.

135. *See id.* at 809.

136. *See generally* DEP'T OF THE ARMY, ARMY FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (Jan. 3, 2003).

involves a precarious exit from the country.<sup>137</sup> This unpredictability makes estimating the costs associated with providing DBA insurance extremely problematic.<sup>138</sup> Actuaries lack the extensive historical data on losses in Iraq and Afghanistan that they do for losses in the domestic insurance market,<sup>139</sup> as efforts to track injuries have only recently begun.<sup>140</sup> Thus, insurance carriers are likely to either underestimate or overestimate insurance premiums. As a result, insurance carriers continue to front-load these risks into premiums and insurance rates.<sup>141</sup>

The DoD addressed the issue of excessive industry profits in its 2009 report to Congress.<sup>142</sup> The report stated plainly that DBA insurers were achieving significant underwriting gains.<sup>143</sup> Relying on a 2008 memorandum, the DoD reported that the House Oversight and Government Reform Committee had conducted a study and found that AIG had collected more than \$1.3 billion in premiums but had paid only \$500 million in benefits, a thirty-eight percent profit margin.<sup>144</sup> Likewise, an Army Audit Agency report found that during the period from 2003 to 2005, Kellogg, Brown, and Root (KBR) paid \$284 million in premiums to AIG, but AIG was predicted to pay only \$73 million for the care of KBR employees.<sup>145</sup> It seems providers of DBA insurance have protected themselves from volatility by keeping premiums high and denying costly claims.<sup>146</sup>

If there is any certainty concerning Iraq and Afghanistan, it is that troop movements and rebuilding projects will remain volatile. As rebuilding projects wane, the civilian workforce will be withdrawn and DBA insurance premiums available to pay claims will decline.<sup>147</sup> Injured contractors, however, are often younger than their domestic counterparts and may be entitled to

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137. See generally *id.*

138. See generally SCHWARTZ, *supra* note 24.

139. See DOD REPORT TO CONGRESS, *supra* note 39, at 4.

140. SCHWARTZ, *supra* note 24, at 4.

141. Rebecca U. Weiner, *The Hidden Costs of Contracting: Private Law, Commercial Imperatives and the Privatized Military Industry* 22 (Dec. 2008) (unpublished paper), available at [http://belfercenter.ksg.harvard.edu/files/Hidden%20Costs%20of%20Contracting\\_Dec%202008.pdf](http://belfercenter.ksg.harvard.edu/files/Hidden%20Costs%20of%20Contracting_Dec%202008.pdf).

142. DOD REPORT TO CONGRESS, *supra* note 39, at 6.

143. *Id.*

144. Memorandum from the Majority Staff, H. Comm. on Oversight & Gov't Reform, 110th Cong., to Members of the H. Comm. on Oversight and Gov't Reform, 110th Cong. 6 (May 15, 2008), available at [http://abcnews.go.com/images/Blotter/DBA%20hearing%20\\_%2020080515102024.pdf](http://abcnews.go.com/images/Blotter/DBA%20hearing%20_%2020080515102024.pdf) [hereinafter Memorandum from the Majority Staff].

145. *Id.*

146. Despite these findings, the DoD does not place blame for the high cost of DBA insurance on rising profits. See generally SCHWARTZ, *supra* note 24. Rather, their report lists a number of other factors, including broker commissions, sales and marketing, and other administrative costs, as contributing factors. See *id.* Congress, on the other hand, has expressed greater concern over the exorbitant profits. See generally *id.* This tension is partly what has framed the debate between the DoD and Congress on how DBA insurance should be secured in the future. See generally *id.*

147. Miller & Smith, *supra* note 120.

reimbursements for injuries well into the future.<sup>148</sup> For this reason, insurance companies are extremely cognizant of the number and type of claims they will pay and the effect of such payments on their revenue after their premium streams decline.<sup>149</sup>

The rising number of claims has also contributed to higher premiums. In 2008, the escalating number of claims forced the Division of Longshore and Harbors Workers' Compensation (DLHWC), which oversees the processing of all DBA claims, to restructure its claims processing.<sup>150</sup> DLHWC divided all Middle East DBA claims, previously processed through its New York City office, among its ninety-seven employees located in eleven different district offices.<sup>151</sup> The increase in the volume of claims has raised costs for both industry and the Government.<sup>152</sup>

While the volume of claims has driven premium rates higher, controverted claims and claims in litigation also have contributed to rising rates. Under the LHWCA, an insurance carrier (or employer, if the employer is self-insured) has fourteen days from the date of notification of the injury to make payment to the employee.<sup>153</sup> Given this short period of time, costly claims or those involving more complex issues, such as PTSD, are often "controverted."<sup>154</sup> Insurance carriers will typically hire their own experts to examine records and documents, even though an employee's physician has already made a diagnosis and recommendation for treatment.<sup>155</sup> This situation usually results in conflicting expert testimony, causing lengthy delays in claims processing.<sup>156</sup>

Controverted claims involving WHCA reimbursements also have contributed to inefficiencies in the claims processing system resulting in tremendous economic waste. Under the WHCA, insurance carriers are not reimbursed for war-risk hazards until the insurance carrier pays the insured's DBA claim.<sup>157</sup> The DOL issued a bulletin to insurance carriers strongly

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148. *Id.*

149. *See id.*

150. *See* OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEP'T OF LABOR, ANNUAL REPORT TO CONGRESS FY 2008, at 2-3 (2008), available at <http://www.dol.gov/owcp/08owcpmx.pdf>.

151. *Id.* at 31.

152. *See id.* at 33.

153. *See* 33 U.S.C. § 914(b) (2006).

154. 20 C.F.R. § 702.251 (2011).

155. *See* 2009 House Hearing, *supra* note 14, at 182.

156. Uncertainty in the U.S. courts of appeals regarding the correct judicial forum for appeals under the DBA has only extended the litigation of these claims. The Fourth, Fifth, Sixth, and Eleventh Circuits have concluded that appeals should begin in the district courts, while the Ninth Circuit has held that appeals from the DOL's administrative process should be heard by courts of appeals. *See* Claire Been, *Bypassing Redundancy: Resolving the Jurisdictional Dilemma Under the Defense Base Act*, 83 WASH. L. REV. 219 (2008); *see also* Heather Ruhlman, *Service Employees International v. Director, Office of Workers' Compensation Programs: Increasing the Uncertainty Regarding the Proper Courts for Jurisdictional Review of Claims Under the Defense Base Act*, 44 CREIGHTON L. REV. 769 (2011).

157. 20 C.F.R. § 61.101 (2011).

recommending that carriers obtain a compensation order delineating the insured's entitlement to benefits, the rate of compensation, and the period of payment, even before submitting a WHCA reimbursement request.<sup>158</sup> An insurance carrier, therefore, must pay or dispute a claim well before a reimbursement determination is ever made. This creates an incentive for insurance carriers to deny potential WHCA claims until they can obtain an administrative law judge order expressly finding that the injury resulted from a war-risk hazard. Once an insurance carrier obtains an ALJ order, it can better support its WHCA reimbursement claim.<sup>159</sup> This method of disputing claims wastes government and industry resources and inflates the cost of the dispute process.

Lack of competition also has contributed to increased premiums. In the NDAA for 2009, Congress asked the secretary of defense to develop an acquisition strategy for DBA insurance that would minimize costs to the DoD and defense contractors and "provide for a competitive marketplace . . . to the maximum extent practicable."<sup>160</sup> Competition, however, has not been a hallmark of procuring DBA insurance. In fact, on August 8, 2003, shortly after the invasion of Iraq, the DoD solicited proposals to provide DBA insurance under a "single-provider" DoD-wide program.<sup>161</sup> The solicitation was left open for almost a month, but not a single insurance carrier submitted a proposal.<sup>162</sup>

Two other agencies, however, have had more success soliciting single-provider insurance for their agencies. The DOS and the U.S. Agency for International Development (USAID) have used single-provider programs for some time.<sup>163</sup> Under this system, rather than securing their own insurance, contractors are required to use an insurance carrier selected through competitive procurement procedures.<sup>164</sup> While this strategy has been successful in the past, the DOS and USAID have recently struggled to generate competition for DBA insurance contracts.<sup>165</sup> When the DOS and USAID most recently issued DBA insurance proposals for their respective agencies, only one insurance carrier, CNA, offered a proposal.<sup>166</sup> Single-provider competition for DBA insurance for the U.S. Army Corps of Engineers

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158. OFFICE OF WORKERS' COMP. PROGRAMS, OWCP BULLETIN NO. 05-01, WAR HAZARD COMPENSATION ACT—CLAIMS FOR REIMBURSEMENT & DETENTION BENEFIT PROCEDURES (2005), available at <http://www.dol.gov/owcp/dfec/regs/compliance/DFECFolio/OWCPBulletin05-01.pdf>.

159. 20 C.F.R. § 61.101(c) (2011) lists items that must be provided to receive reimbursement.

160. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 843(b)(5), 122 Stat. 4502, 4540 (2008).

161. Vernon Silver, Bloomberg, *Bechtel Benefits as Iraq Contractors Struggle to Get Insurance*, SAN DIEGO SOURCE (Nov. 25, 2003), <http://www.sddt.com/News/article.cfm?SourceCode=20031125faj>.

162. *Id.*

163. DoD REPORT TO CONGRESS, *supra* note 39, at 7.

164. *Id.*

165. *Id.*

166. *Id.*

(USACE) met the same result, receiving only one proposal from CNA in a recent competition.<sup>167</sup>

Even when contractors secure their own DBA insurance on the open market, three major carriers dominate the marketplace. Out of the thirty-two carriers that provide DBA insurance, AIG, CNA, and ACE account for ninety-seven percent of all the premiums collected.<sup>168</sup> Twenty-nine carriers make up the additional three percent.<sup>169</sup> AIG alone accounts for seventy-five percent of the total DBA insurance policy premiums.<sup>170</sup> Due to lack of competition, a business in which a single company controls the lion's share of the market can be very costly. Further, when claims processing problems arise, claimants and contracting agencies have a much harder time lobbying for changes because of the money and influence on the other side of the debate.

A second major concern, almost completely overlooked by the Government and industry, is that claimants are too often being denied reimbursement for medical treatment. A problem that existed early in the days of the Iraq invasion, which unbelievably is still a problem today, is that employers simply fail to secure DBA insurance.<sup>171</sup> When the Iraq war began in March 2003, contractors were woefully ignorant of the DBA's requirements.<sup>172</sup> Employees were often sent to work in war zones without workers' compensation insurance.<sup>173</sup> The chronicles of contractors' missteps in this area in the early days of the Iraq war are ghastly.<sup>174</sup>

The Army was aware that contracts were being awarded without the required DBA clause because the Defense Acquisition Excellence Council briefed the issue at a March 18, 2003, council meeting.<sup>175</sup> One of the presenters, Alan Chvotkin, specifically informed the council that DBA coverage was

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167. *Id.*

168. *Id.* at 28.

169. *Id.*

170. *Id.* at 29.

171. See Susie Dow, *Iraq, Contingency Contracting, and the Defense Base Act*, EPLURIBUSMEDIA.ORG, [http://www.epluribusmedia.org/features/2007/20070304\\_contingency\\_contracting.html](http://www.epluribusmedia.org/features/2007/20070304_contingency_contracting.html) (last visited Mar. 4, 2012).

172. *See id.*

173. *See id.*

174. Susie Dow, a contributor for ePluribus Media, maintains a blog documenting the tragedy of Kirk Von Ackerman and Ryan Manelick, two former U.S. Air Force officers who were killed in Iraq. Susie Dow & Steven Reich, *One Missing, One Dead: An Iraq Contractor in the Fog of War*, EPLURIBUSMEDIA.ORG (May 12, 2006), [http://www.epluribusmedia.org/features/2006/20060512\\_missingman\\_p1.html](http://www.epluribusmedia.org/features/2006/20060512_missingman_p1.html). The two men were hired to work for Ultra Services, an Army contractor in Istanbul, Turkey. *Id.* On October 9, 2003, Von Ackerman left Forward Operating Base (FOB) Pacesetter near Balad, Iraq, and was never seen again. *Id.* Two months later, Ryan Manelick, his co-worker, was shot to death in his vehicle after leaving a meeting at Camp Anaconda at Balad Air Base. *Id.* The Army was not able to determine whether the deaths were related. *Id.* Von Ackerman left behind a wife and three children. *Id.* After his disappearance, his wife filed a claim for compensation under the DBA. *Id.* However, Ultra Services had not secured DBA insurance for Von Ackerman or Manelick. *Id.* In fact, company executives said they had never heard of DBA insurance even though they had collected revenues of more than \$12 million in government contracts. *Id.*; see also Dow, *supra* note 171.

175. Michael J. Dudley, *Contractors on the Battlefield: Part III*, DCMA COMMUNICATOR, Fall 2004–Winter 2005, at 28, 33.

being overlooked and contracts were being awarded without DBA coverage.<sup>176</sup> Mr. Chvotkin stated that due to some Contracting Officers' (COs) lack of familiarity with DBA requirements, the urgency with which the DoD was awarding contracts in Iraq, and confusion over the scope of DBA clauses, the DBA clauses were often omitted from many overseas contracts.<sup>177</sup> Even after the Army recognized the problem, accurate information was still not reaching COs and defense contractors. For example, two years later, in November 2005, contractor Wolfpack Security, Inc. denied that it was responsible for securing DBA insurance after an injured employee incurred \$700,000 in medical expenses.<sup>178</sup>

It is difficult to believe that the DoD simply needs more time to communicate DBA requirements to the field. These requirements have been in effect since 1941.<sup>179</sup> While contractors' roles have changed since that time, contractors have been intimately involved in the war effort since Gulf War I in 1991.<sup>180</sup> During a June 18, 2009, House Committee hearing, the former deputy secretary of the Department of Labor flatly stated that "the DOL is limited in its ability to guarantee that all employers have the necessary insurance as there is no comprehensive system for tracking overseas contracts, contractors, and subcontractors, and workers under each contract."<sup>181</sup> He went on to say that *it is sometimes difficult for the DOL to even identify the employer, the prime contractor, and the responsible insurance carrier with overseas contracts, and that some contractors simply go without insurance to lower their costs.*<sup>182</sup> In other words, keeping track of contractors has simply confounded the Government.

Contractors' failure to secure DBA insurance has been further complicated by ambiguities in the DBA and associated statutes. Generally, the language in the DBA is broad, covering "any employee engaged in any employment . . . upon any public work in any Territory or possession outside the continental United States . . . if such employee is engaged in employment at such place under the contract of a contractor . . . with the United

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176. Dow, *supra* note 171.

177. *See id.*

178. *See* T. Christian Miller, *Forgotten Warriors: Russell Skoug's Story*, PROPUBLICA (Apr. 16, 2009, 10:25 PM), <http://www.propublica.org/article/forgotten-warriors-russell-skougs-story-416>. On September 11, 2006, Mr. Skoug was traveling with an Army Special Forces unit when their convoy ran over an anti-tank mine. *Id.* Mr. Skoug survived, due in part to his bullet-proof vest and the armor-plated truck. *Id.* The president of Wolfpack, Mark Atwood, acknowledged that a number of mistakes had been made with respect to Mr. Skoug's injuries but denied his company was required to secure DBA insurance for its employees. *Id.* Mr. Atwood claimed that Wolfpack's contract with the Army did not require DBA insurance and that the Army should never have allowed Mr. Skoug to travel with an Army Special Forces convoy. *Id.*

179. DoD REPORT TO CONGRESS, *supra* note 39.

180. *See* Stephen Lendman, *Outsourcing War—Rise of Private Military Contractors (PMCs)*, RENSE.COM (Jan. 19, 2010), <http://www.rense.com/general89/outs.htm>.

181. 2009 House Hearing, *supra* note 14, at 23 (statement of Seth Harris, Deputy Sec'y, Dep't of Labor).

182. *Id.*

States.”<sup>183</sup> Another clause in particular, however, excludes coverage to any contractor or subcontractor “who is engaged exclusively in furnishing materials or supplies under his contract.”<sup>184</sup> This limitation serves multiple purposes. First, it excludes manufacturers of goods used overseas.<sup>185</sup> Second, it removes some of the insurance risk by excluding contractors who move in and out of the area of responsibility (AOR).<sup>186</sup> Risk for these workers may be difficult to determine since the amount of time these contractors spend in the AOR, and the areas in which they travel, might vary greatly depending on the contract. Further, depending on where they work, many of these manufacturers or suppliers may not require DBA insurance. The exclusion therefore reduces the overall cost of insurance for the Government.

This exclusion of supply contractors, however, has created a great deal of ambiguity. For example, a contractor might manufacture materials or supplies in the United States but also deliver the supplies to the AOR. Delivery of supplies to the AOR might require employees to perform onsite services. The contractor would seem to be exempt from DBA requirements as he is “exclusively engaged in furnishing material and supplies,”<sup>187</sup> but employees making deliveries to the AOR or performing onsite services might bring the contractor within the scope of the statute. The nuances in the law are difficult enough for U.S. contractors to comprehend, let alone less sophisticated second- and third-tier contractors who may have no familiarity with U.S. law.

Further complicating the matter, DoD agencies seem to disagree on when DBA insurance is required.<sup>188</sup> In an effort to explain the exception to the clause, former Director for Defense Procurement and Acquisition Policy Deidre A. Lee issued a memorandum to the directors of the defense agencies, explicitly stating that the DBA clause should be included in all DoD service contracts performed (either entirely or in part) outside of the

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183. Defense Base Act, 42 U.S.C. § 1651(a)(3) (2006).

184. *Id.*

185. See *Alan-Howard v. Todd Logistics, Inc.*, 21 Ben. Rev. Bd. Serv. (MB) 70, 72–73 (1988). In this case, the Board held that the administrative assistant’s claim for injury was cognizable under the DBA since the U.S. undertaking to aid in the construction of a military facility for Saudi Arabia qualified as the “public work” required for coverage under the DBA. *Id.* Furthermore, the DBA exclusion from coverage of “any employee of . . . [a] contractor . . . who is engaged exclusively in furnishing materials or supplies under his contract” was held not to apply since the claimant’s work as a facilitator under his employer’s contract to provide “logistics management and support services” constituted a “service.” *Id.* Specifically, the Board viewed the pertinent exclusionary language as excluding manufacturers of goods used overseas from DBA coverage, rather than individuals who work onsite to facilitate the utilization of such goods. *Id.*

186. See Defense Base Act, 42 U.S.C. § 1651.

187. *Id.* § 1651(a)(3).

188. See *USACE Defense Base Act Insurance Program, Workers Comp. Ins. Program Rules & Regulations*, U.S. ARMY CORPS OF ENG’RS, <http://www.tam.usace.army.mil/Documents/IndustryDayDocs/Defense-Base-Act-Insurance.pdf> (last visited Mar. 4, 2012) (U.S. Army Corps of Engineers explicitly requires DBA insurance unless a waiver is obtained). *But see* OFFICE OF THE ASSISTANT SEC’Y OF THE ARMY, ARMY CONTRACTORS ACCOMPANYING THE FORCE GUIDEBOOK 18 (2003), available at [http://www.alt.army.mil/portal/page/portal/oasaalt/documents/caf\\_guidebook.doc](http://www.alt.army.mil/portal/page/portal/oasaalt/documents/caf_guidebook.doc) (stating that DBA insurance “is available” in some instances).

United States, as well as in all supply contracts that also require the performance of employee services overseas.<sup>189</sup> The authority Ms. Lee cited for this expansive reading of the DBA rests on the broad definition of the term “public-work contract” in FAR 28.305.<sup>190</sup> The memorandum essentially dispenses with the “service” versus “supply” distinction that the exemption language in the statute seems to impose.<sup>191</sup>

A 2005 GAO report was critical of the DoD’s confusing guidance related to the applicability of DBA insurance.<sup>192</sup> The GAO found that some agencies believed DBA insurance waivers issued by the DOL exempted contractors working in Iraq from carrying DBA insurance.<sup>193</sup> DOL officials, however, confirmed that waivers do not apply to contractors in Iraq because the country lacks its own local workers’ compensation system.<sup>194</sup> The report also raised questions about what benefits would be provided when grant workers purchase DBA insurance, since the DOL position is that DBA requirements do not cover work performed under grants.<sup>195</sup> Lastly, the report raised concerns over whether DBA insurance would be required for mixed-funding contracts involving appropriated funds of the United States and funds from foreign governments.<sup>196</sup>

The DBA clause’s lack of clarity may have reduced the Government’s willingness to impose sanctions on contractors failing to secure DBA insurance. The DOL and the Department of Justice’s (DOJ) refusal to enforce DBA laws has done nothing to raise awareness of the importance of DBA insurance. Criminal and civil penalties are available to the Government when contractors either fail to obtain DBA insurance or fail to comply with the DOL’s administrative processing regulations.<sup>197</sup> The Government, however, has no incentive to impose these sanctions and has only rarely elected to do so. The DOL may impose civil fines in the amount of \$10,000 against an employer, insurance carrier, or self-insured employer who knowingly and willfully fails to notify the DOL when an employee is injured and the injury causes the employee to miss one or more shifts from work.<sup>198</sup> Likewise, the DOL may impose civil penalties on contractors who make false statements in their DOL reports.<sup>199</sup> Between 2001 and 2009,

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189. Memorandum from Deidre A. Lee, Director, Def. Procurement & Acquisition Policy, Office of the Under Sec’y of Def., to the Directors of the Def. Agencies (Dec. 8, 2003), available at [https://www.alt.army.mil/portal/page/portal/oasaalt/documents/dpap\\_memo\\_08dec03.pdf](https://www.alt.army.mil/portal/page/portal/oasaalt/documents/dpap_memo_08dec03.pdf) (emphasis added).

190. *See id.*

191. *See id.*

192. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-280R, DEFENSE BASE ACT INSURANCE: REVIEW NEEDED OF COST AND IMPLEMENTATION ISSUES 5 (2005).

193. *See id.*

194. *Id.*

195. *Id.*

196. *See id.*

197. 20 C.F.R. § 702.204 (2011).

198. *Id.* § 702.201 (2011).

199. *Id.* § 702.204.



however, the DOL only fined five companies, even though DOL records showed at least 7,000 cases where companies had failed to report injuries.<sup>200</sup> As of June 2009, the DOL reported levying fines in only about 50 of the 36,000 cases processed by the two largest insurance companies.<sup>201</sup>

Criminal sanctions are also authorized under the LHWCA, yet no one has ever been prosecuted. When contractor conduct triggers the possibility of criminal penalties, the LHWCA requires the DOL to alert the DOJ as the DOJ maintains prosecutorial discretion.<sup>202</sup> The LHWCA's language is clear and expansive in terms of imposing criminal penalties on companies and individual company officers.<sup>203</sup> The section states that employers failing to obtain DBA insurance, when required, shall be guilty of a misdemeanor and may be fined up to \$10,000 and imprisoned for up to a year, or both.<sup>204</sup> Additionally, the section provides that in cases where such an employer is a corporation, the president, secretary, and treasurer shall be severally liable for the corporation's failure to secure DBA insurance.<sup>205</sup> In fact, the statute provides that the president, secretary, and treasurer shall be "severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injury which may occur to any employee of such corporation. . . ."<sup>206</sup> This broad language suggests that Congress wanted to ensure that contractor employees were adequately covered under the DBA. Given the severe consequences, one would expect that they would deter contractors from failing to provide DBA insurance. In the nearly eighty-five-year history of the LHWCA, however, no one has ever been prosecuted.<sup>207</sup>

Even when contractors do secure DBA insurance, carriers still deny liability for many claims related to PTSD and other serious injuries. There is no question that the regulatory scheme has been overburdened by a heightened reliance on contractors.<sup>208</sup> This excuse, however, fails to justify the delay and denial of mental health claims. Critics of the current DBA regulatory scheme argue that the DOL does not have the necessary authority to properly oversee the compensation system and, therefore, has limited ability to correct the delay and denial of mental health claims under DBA insurance.<sup>209</sup>

The statistics for mental health DBA claims are dismal. Three insurance carriers account for approximately ninety-seven percent of the DBA premiums paid by the DoD.<sup>210</sup> AIG accounts for approximately seventy-five

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200. See T. Christian Miller, *Injured Abroad, Neglected at Home: Labor Dept. Slow to Help War Zone Contractors*, PROPUBLICA (Dec. 17, 2009), <http://www.propublica.org/article/labor-dept-slow-to-enforce-defense-base-act-for-contractor-care-1217>.

201. *See id.*

202. *Id.*

203. *See* 33 U.S.C. § 938(a) (2006).

204. *Id.*

205. *Id.*

206. *Id.*

207. Miller, *supra* note 200.

208. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 3.

209. *See* Schooner & Swan, *Dead Contractors*, *supra* note 28, at 24–26.

210. DoD REPORT TO CONGRESS, *supra* note 39.

percent, while CNA and ACE Group account for approximately fourteen percent and seven percent, respectively.<sup>211</sup> However, these numbers are somewhat misleading. Chris Winans, a spokesman for AIG, said his company pays about half of the claims involving PTSD.<sup>212</sup> A joint investigation by the *Los Angeles Times*, ABC News, and ProPublica found that when injuries resulted in more than four days of lost work, insurance carriers also paid claims in only about half the cases.<sup>213</sup>

The media have helped raise awareness about the denial of mental health claims.<sup>214</sup> Because insurance carriers rarely confront significant consequences for such denials, however, an exorbitant number of injured contractors must challenge their carriers' refusal to pay their claims.<sup>215</sup> The hardship imposed on contractors when their claims are denied is an important part of the debate surrounding DBA insurance.<sup>216</sup> Any alternative for a new acquisition strategy must provide the DOL with more oversight authority; otherwise, insurance carriers will continue to exploit injured contractors.

### III. DEVELOPING A NEW ACQUISITION STRATEGY

#### A. Policy Changes Could Alleviate Existing Problems

The acquisition process must be reformed. But before making any statutory changes, Congress should consider whether policy changes would alleviate its cost concerns. Three particular policy considerations should be addressed. First, the DoD should consider the benefits associated with

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211. *Id.*

212. Risen, *supra* note 10.

213. See Miller & Smith, *supra* note 120.

214. See Russell Goldman, *How Iraq Contractors Deal with Trauma*, ABC NEWS (Oct. 3, 2007), <http://abcnews.go.com/US/story?id=3679866&page=1>; see also Miller, *supra* note 200; Max Pizarro, *One Widow's Drive to End the War*, CLATL.COM (Jan. 24, 2007), <http://clatl.com/atlanta/one-widows-drive-to-end-the-war/Content?oid=1265285> [hereinafter Pizarro, *Drive to End the War*]. The investigation by the *Los Angeles Times*, ABC News, and ProPublica highlighted the accounts of three contractors, Alice Davis, John Mancini, and Tim Eysselinck, who were denied reimbursement for mental health treatment. Alice Davis was hired by DynCorp International to train police officers in Iraq. Goldman, *supra*. As a result of her exposure to dead bodies, children without limbs, and life-threatening situations, Ms. Davis developed seizures. *Id.* DynCorp recommended she seek mental health treatment, but their insurance carrier refused to reimburse her treatment. *Id.* John Mancini was hit by an SUV on his way home from Kuwait City. His employer had failed to secure DBA insurance. Miller, *supra* note 200. Mr. Mancini sought reimbursement for his medical bills for two years through DOL, without success. *Id.* On October 6, 2006, Mr. Mancini was arrested after making several calls to the police and shooting a gun at officers when they arrived at his house. *Id.* He was sentenced to ten years in an Arizona mental hospital, followed by treatment through the Arizona correctional system. *Id.* Lastly, Tim Eysselinck, a forty-four-year-old contractor employee for RONCO Consulting Corporation (RONCO), was hired to provide land mine and explosive ordnance removal services. Pizarro, *Drive to End the War*, *supra*. On April 21, 2004, Tim Eysselinck shot himself while on leave with his wife and daughter in Africa after celebrating his forty-fourth birthday. *Id.* His employer denied the family's DBA claim, stating that Mr. Eysselinck's suicide was unrelated to his de-mining duties in Iraq. *Id.*

215. See Memorandum from the Majority Staff, *supra* note 144, at 15.

216. See Milligan, *supra* note 100, at 416-17.

paying a reasonable amount of money for DBA insurance. Second, if the cost associated with maintaining a healthy contractor workforce is too high, Congress should consider whether civilian contractors should be working in war zones at all. Third, if contractors are needed in war zones, the DoD should consider enforcing existing regulations to reduce the cost of DBA insurance.

Insuring contractors in war zones is costly.<sup>217</sup> Although Congress wants to reduce the cost of DBA insurance, it must consider that paying too little for insurance might circumvent a number of important goals. First, the quality of service provided by insurance carriers is already reaching unacceptable levels for mental health claims.<sup>218</sup> Reducing costs before these issues are resolved will only exacerbate the problems. Second, the law requires contractors to provide for the health and safety of their employees at the work site.<sup>219</sup> Since the Government reimburses contractors for insurance premiums, it is reasonable that the Government should be concerned with benefits distribution. If insurance companies are denying claims and reaping excessive profits, then the Government is complicit in circumventing the DBA. Third, the Government must provide for a safe working environment to keep contractors from straying from the Government's objectives. Like insurance carriers, contractor employees are agents of the Government. If employees are not receiving reimbursement for care, their families' financial security is at risk.<sup>220</sup> A contractor in this position will always put his or her own objectives over the objectives of the Government. Thus, before any cheaper means of securing DBA benefits is implemented, Congress must realize that DBA insurance is costly and that paying less for insurance is not necessarily in the best interest of the Government.

If cost is Congress's primary concern—as the NDAA for 2009 seems to suggest—then the Government should consider relying less on civilians in war zones. Simply stated, the Government should not send civilians to war zones if they are not willing to pay the costs associated with ensuring their safety. No matter what acquisition strategy is used, the cost of insuring against risk to contractors in war zones will be costly. If Congress has decided that the United States can no longer afford these costs, then perhaps the work should be left to the U.S. military. Ordinarily, the Government would use its military to perform hazardous tasks. Yet because of the personnel limits imposed by Congress, much of the risk of performing services and construction in war zones has been allocated to contractors.<sup>221</sup> It is simply not acceptable that Congress take any action that threatens the safety of

217. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 3–4.

218. See Goldman, *supra* note 214.

219. See Defense Base Act, 42 U.S.C. § 1651(a)(4) (2006).

220. See AGENCY FOR HEALTHCARE RESEARCH & QUALITY, DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 09-P011, MENTAL HEALTH: RESEARCH FINDINGS 5 (2009).

221. See CONG. BUDGET OFFICE, LOGISTICS SUPPORT FOR DEPLOYED MILITARY FORCES 2–5 (2005), available at <http://www.cbo.gov/ftpdocs/67xx/doc6794/10-20-MilitaryLogisticsSupport.pdf>.

contractors after they have borne the responsibilities the DoD has placed on them. *Ill-equipping the warfighter because of cost concerns should never be an acceptable solution, regardless of whether the warfighter is enlisted, commissioned, or under contract with the U.S. Government.*

Lastly, a new acquisition strategy will not necessarily alleviate existing problems or decrease costs unless current regulations are enforced. Better enforcement of existing regulations is a low-cost solution, which requires no implementation. Criminal penalties are already available under the LHWCA if contractors fail to secure DBA insurance.<sup>222</sup> Further, the DOL has the authority to levy fines when contractors fail to purchase DBA-required insurance<sup>223</sup> and the DOJ has the authority to prosecute and imprison delinquent contractors.<sup>224</sup> Although these remedies are available, few fines have ever been assessed and no one has ever been prosecuted for failing to carry DBA insurance.<sup>225</sup> If the Government used these remedies, it would at least improve contractor compliance with the law, and perhaps send a stronger message regarding the importance of DBA insurance.

Another mechanism already in place that could be used to monitor DBA compliance is the CO's responsibility determination. The FAR mandates that no contract shall be awarded unless the CO makes an affirmative determination of responsibility.<sup>226</sup> While these determinations typically involve a contractor's financial stability, the clause states that contractors must be "otherwise qualified and eligible to receive an award."<sup>227</sup> Since failing to secure DBA insurance carries criminal penalties, it would seem the clause is broad enough to allow COs to find contractors nonresponsible when they fail to secure DBA insurance.

Given the DBA clause's broad language, it also seems reasonable that the responsibility determination could be used to ensure that contractor employees are physically capable of performing contract requirements. The military imposes rigorous physical standards.<sup>228</sup> It makes sense that their civilian counterparts, who often work closely with the military, are also physically prepared for the operational hazards of their jobs.

Requiring contractors to maintain fitness standards could provide a number of advantages to insurance carriers and the Government. First, with a healthier pool of claimants, the number of claims, as well as the cost of each claim, might be reduced. Second, liability might be clearer with claimants who have fewer preexisting conditions, thus reducing litigation costs.

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222. 33 U.S.C. § 938(a) (2006).

223. 20 C.F.R. § 702.201 (2011).

224. 33 U.S.C. § 938(a).

225. Miller, *supra* note 200.

226. FAR 9.103(b).

227. FAR 9.104-1(g).

228. See, e.g., U.S. DEP'T OF THE ARMY, PHYSICAL FITNESS TRAINING FM 21-20 (1998), available at <http://www.apft.net/FM21-20.pdf>; U.S. DEP'T OF THE NAVY, GUIDE 5: PHYSICAL READINESS TEST (PRT), available at <http://www.public.navy.mil/bupers-npc/support/physical/documents/guide%205-physical%20readiness%20test.pdf>.

Overall, requiring contractors to provide employees that are physically capable of performing their jobs would likely make insuring these workers less risky and less costly.

Although enforcing existing regulations would improve efficiency, the breadth of available remedies is somewhat limited. The Government may only impose sanctions or penalties authorized under the DBA and associated statutes.<sup>229</sup> While the sanctions are significant, they are limited to compliance failures—situations in which the contractor failed to obtain insurance.<sup>230</sup> The sanctions do not directly address cost and performance concerns.<sup>231</sup> Further, because the Government has no privity of contract with insurance carriers, its remedies against carrier malfeasance are limited to those provided by the statute. Employers may seek remedies for breach of contract against insurance carriers when their employees' claims are denied, but they have no incentive to do so. Therefore, absent action from either the Government or their employers, contractor employees are left with only limited procedural remedies against insurance carriers.

In summary, the DoD must accept that there are costs associated with keeping contractors safe overseas. If the cost is too high, then perhaps civilians should be removed from the front lines. If contractors are needed in war zones, then the Government should make a more valiant effort to enforce current regulations. While the Government still needs to implement improved acquisition strategies for DBA insurance, enforcement of current regulations will improve efficiency, will provide better care for contractors, and may even slow the rising number of contractor casualties.

## B. *Single-Provider Insurance versus Open-Market Insurance:*

### *A Forty-Year Debate*

The Government has been pursuing DBA insurance reform since the 1970s, when the GAO released two reports expressing their concern over the cost and implementation of DBA insurance.<sup>232</sup> Since that time, the debate has mainly focused on whether the DoD would realize greater cost savings by implementing a single-insurer program, such as the DOS and the USAID programs,<sup>233</sup> or through improvements to the current open-

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229. See Jeffrey L. Robb, *The Future of Competitive Sourcing: Workers' Compensation for Defense Contractor Employees Accompanying the Armed Forces*, 33 PUB. CONT. L.J. 423, 425 n.18, 426 n.24 (2004) (noting that the DBA incorporates the Longshore and Harbor Workers' Compensation Act as a statute of general reference and that under the LHWCA, an employer who fails to secure the payment of compensation is guilty of a misdemeanor offense) (citing 33 U.S.C. § 938(a) (2000)).

230. See 33 U.S.C. § 938(a) (2006).

231. See *id.*

232. U.S. GOV'T ACCOUNTABILITY OFFICE, B-172699, OPPORTUNITY FOR SAVINGS IN PROVIDING WAR RISK INSURANCE FOR CONTRACTOR PROPERTY AND EMPLOYEES (1971), available at <http://archive.gao.gov/f0302/095484.pdf>; see also U.S. GOV'T ACCOUNTABILITY OFFICE, B-162408, AID NEEDS CLARIFICATION ON DEFENSE BASE ACT INSURANCE REQUIREMENTS (1980), available at <http://archive.gao.gov/f0202/113660.pdf>.

233. DOD REPORT TO CONGRESS, *supra* note 39, at 7.

market program. In 1996, the DoD completed a congressionally mandated study, similar to DoD's most recent DBA report to Congress, on the issue of implementing a single-provider program to provide DBA insurance for all DoD contracts.<sup>234</sup> At the time, the DoD concluded that a single-provider program would not yield greater cost savings.<sup>235</sup> The Government rested on those findings until 2005, when smaller federal agencies, such as the DOS and USAID, began realizing cost savings using single-provider programs. The debate between Congress and the DoD over DBA acquisition procedures subsequently intensified.

In 2005, the GAO performed a comprehensive study of DBA insurance and found that both the DOS and USAID were realizing cost savings through fixed insurance rates under single-provider contracts.<sup>236</sup> At the same time, the cost of DBA insurance on the open market was steadily rising and the DoD was experiencing unprecedented cost increases.<sup>237</sup> In April 2005, in response to requests from over 100 members of Congress, the GAO issued a report on rising costs and other problems associated with DBA insurance.<sup>238</sup> The crux of the report was whether greater savings could be obtained from a single-provider or an open-market provider system.<sup>239</sup> The GAO found that contractors working for the DOS and USAID paid insurance premiums ranging from \$2 to \$5 for DBA insurance for every \$100 of salary cost—regardless of where the contract was performed.<sup>240</sup> In contrast, DoD insurance premiums ranged from \$10 to \$21 per \$100 of salary cost for contracts performed in Iraq.<sup>241</sup> The GAO concluded that while single-provider programs appeared to be more cost-efficient, further information was needed to determine whether the DoD could achieve the same rates and savings as the DOS and USAID given the locations in which it operates.<sup>242</sup>

The GAO also cited multiple problems with the DoD's administration of DBA insurance, preventing a conclusion as to whether a single-provider strategy would result in costs similar to those experienced by the DOS and USAID.<sup>243</sup> The GAO found that the DoD experienced problems with (1) determining when DBA insurance applies, (2) providing adequate and accurate information to companies and workers, (3) monitoring contractor compliance with DBA requirements, (4) processing claims, and (5) handling the increased claims volume.<sup>244</sup> The GAO concluded that an informed deci-

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234. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 5.

235. See *id.*

236. See *id.*

237. DoD REPORT TO CONGRESS, *supra* note 39, at 3.

238. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 5.

239. See *id.* at 4.

240. DBA insurance costs are typically compared in terms of dollars per \$100 of payroll cost.

241. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 4. The GAO contacted eight prime contractors who reported these rates.

242. See *id.* at 5.

243. See *generally id.*

244. See *id.*

sion about a procurement strategy for DBA insurance could not be made until these shortcomings were corrected.<sup>245</sup> Further, the GAO recommended that the DoD, the Office of Management and Budget (OMB), the DOL, the DOS, and USAID conduct a joint study in order to gather as much data as possible on DBA insurance and to determine which acquisition strategy would be most effective across the agencies.<sup>246</sup>

Both the OMB and the DoD objected to the recommendation. The OMB believed that efforts to rectify the problems were already in place.<sup>247</sup> It cited the formation of an interagency working group, DOL seminars on DBA insurance, a proposed DOS rule regarding DBA insurance waivers, and an ongoing pilot program to test the efficiency of single-provider insurance for the DoD.<sup>248</sup> The OMB also stated that the GAO's recommendation was too broad and that a "targeted approach to DBA issues would be preferable. . . ."<sup>249</sup>

Likewise, the DoD stated that the cost of such a study would outweigh any potential benefits.<sup>250</sup> The DoD added that the cost of DBA data collection and reporting would be expensive and divert already limited resources, with no clear benefit for the procurement process.<sup>251</sup> The DoD recommended waiting to see if the working group, seminars, conferences, and pilot program could achieve their desired results before undertaking any further studies.<sup>252</sup>

Despite the DoD's reluctance, Congress directed the DoD to examine reform strategies for DBA insurance in its National Defense Authorization Act for Fiscal Year 2006.<sup>253</sup> Two years later, the DoD still had not acted on Congress's request.<sup>254</sup> During a May 2008 House Oversight and Government Reform Committee hearing, the Committee railed against Admiral Richard Ginman (Ret. U.S. Navy), Deputy Director for Contingency Contracting and Acquisition Policy, for not being able to provide answers to simple and germane questions.<sup>255</sup>

The Committee asked Admiral Ginman and other senior officials at DoD and DOL (1) how many contractors and subcontractors are in Iraq,<sup>256</sup> (2) how much the DoD pays to insure them,<sup>257</sup> (3) if all contractors in Iraq require DBA insurance,<sup>258</sup> (4) how insurance rates are determined,

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245. *See id.* at 6.

246. *See id.*

247. *See id.*

248. *Id.* at 9.

249. *Id.*

250. *Id.* at 11.

251. *Id.*

252. *Id.*

253. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (codified as amended in scattered sections of 10 U.S.C.).

254. GRASSO ET AL., *supra* note 119, at 18.

255. *See* 2008 House Hearing, *supra* note 122, at 92.

256. *Id.* at 100.

257. *Id.*

258. *Id.*

and (5) how much contractors pay for DBA insurance.<sup>259</sup> Surprisingly, none of the officials had responses to any of these questions.

The Committee also asked why the DoD had not reported on the success or failure of the USACE single-provider pilot program.<sup>260</sup> In 2005, the DoD implemented a single-provider pilot program for USACE to test the possibility of using a single DBA insurance provider for all DoD contracts.<sup>261</sup> After the first six months of the pilot, cost savings exceeded \$19 million.<sup>262</sup> In October 2008, the program was expanded to include contracts issued by the Joint Contracting Command–Iraq/Afghanistan (JCC-IA).<sup>263</sup> During the House Committee hearing, Congressman Jim Cooper<sup>264</sup> asked why the DoD had not reported on the success of the program.<sup>265</sup> Admiral Ginman stated that the DoD had incomplete data on the program because it had been expanded for use by the JCC-IA.<sup>266</sup> The Committee could not understand why, after preliminary data had shown a cost savings of \$19 million, the DoD had not reported on the program or moved to adopt the acquisition strategy for the DoD.<sup>267</sup>

In contrast to the success of the pilot program, the House Committee also addressed allegations regarding abuses under the DoD's open-market system.<sup>268</sup> The Committee focused its questioning on the Army's Logistics Civil Augmentation Program III (LOGCAP III).<sup>269</sup> LOGCAP III was an immense Army contract performed exclusively by KBR.<sup>270</sup> KBR had secured DBA insurance from AIG under the DoD's open-market system.<sup>271</sup> When the KBR contract came under the scrutiny of the U.S. Army Audit Agency (USAAA), USAAA found that KBR was paying "substantially more" in premiums than AIG was expected to pay in claims.<sup>272</sup> Like most contracts requiring DBA insurance, KBR's premiums were reimbursable under a cost-type contract.<sup>273</sup> Army auditors found that \$284.3 million in DBA premiums was paid under the LOGCAP III contract between 2003 and 2005, but only \$73.1 million was paid in DBA claims for that period.<sup>274</sup> Senator Waxman noted that between 2002 and 2007, the top four DBA insurers, who provided for ninety-nine percent of the DBA insurance at that time, collected \$1.5

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259. *Id.*

260. *Id.* at 99.

261. DoD REPORT TO CONGRESS, *supra* note 39, at 7.

262. GRASSO ET AL., *supra* note 119, at 13.

263. DoD REPORT TO CONGRESS, *supra* note 39, at 7.

264. Congressman Cooper (Democrat, Tennessee) has served from 2003 to the present.

265. 2008 House Hearing, *supra* note 122, at 99.

266. *Id.* at 92.

267. *Id.*

268. *Id.* at 88.

269. *Id.*

270. *Id.*

271. *Id.*

272. GRASSO ET AL., *supra* note 119, at 18.

273. See 2008 House Hearing, *supra* note 122, at 89.

274. *Id.*



billion in premiums and were expected to pay out an estimated \$928 million in claims and expenses.<sup>275</sup> Waxman noted that the thirty-nine percent profit margin yielded an expected underwriting gain of \$585 million for the four carriers.<sup>276</sup>

Weary of the DoD's inaction, Congress eventually mandated that the DoD adopt a new DBA acquisition strategy in 2008.<sup>277</sup> Section 843 of the NDAA for 2009 requires the DoD to adopt a strategy that would minimize costs to both the DoD and defense contractors.<sup>278</sup> Unfortunately, Congress did not begin to formally investigate claims-processing concerns and improper claims denial allegations until after the NDAA for 2009 passed.<sup>279</sup> Perhaps this explains why the NDAA for 2009 does not mention performance or claims-processing standards and focuses entirely on minimizing costs to the Government and defense contractors. In any case, the House Committee finally addressed allegations that insurance companies were improperly denying claims at the June 2009 hearing.<sup>280</sup> In addition to testimony from wounded contractor veterans, Vice President Major General George R. Fay (Ret. U.S. Army Reserve), a CNA executive, and Mr. Gary Pitts, an attorney representing thousands of injured contractors, also provided testimony.<sup>281</sup> Several of the witnesses' recommendations were included as possible acquisition strategies in the DoD's 2009 report to Congress; however, none of the recommendations were ultimately supported by the DoD.<sup>282</sup>

#### IV. ACQUISITION STRATEGIES

##### A. *Maintaining the Current Open-Market System*

In compliance with the NDAA for 2009 mandate, the DoD submitted a report to Congress in September 2009 on reform strategies for DBA insurance.<sup>283</sup> The purpose of the report was to propose to Congress an acquisition strategy that would minimize costs to the Government and defense contractors.<sup>284</sup> Since the 2008 House Committee hearings, Congress had been awaiting the DoD's recommendation regarding whether the USACE program could be implemented DoD-wide.<sup>285</sup> While the DoD had asked USAAA to conduct a formal audit of the USACE program prior to the

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275. *Id.* at 89.

276. *Id.*

277. See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 843, 122 Stat. 4502, 4540 (2008).

278. *Id.*

279. See generally 2009 House Hearing, *supra* note 14.

280. See generally *id.*

281. *Id.* at 129-30 (statement of General Fay) and 124-25 (statement of Mr. Pitts).

282. DoD REPORT TO CONGRESS, *supra* note 39, at 13.

283. *Id.* at 1.

284. See *id.*

285. *Id.* at i.

2008 House Committee hearings,<sup>286</sup> USAAA did not complete the audit until August 2010, after the DoD submitted its report.<sup>287</sup>

Without the Army audit, the DoD collected and presented its own data from industry and various government agencies.<sup>288</sup> They presented four basic alternative acquisition systems to Congress: (1) a single-provider system, (2) a multiple-provider system, (3) an open-market system with improvements, and (4) a government self-insurance system.<sup>289</sup> Private industry clearly favored the current open-market strategy.<sup>290</sup> Industry comments expressed the belief that a single-provider system would not achieve the cost savings experienced by USACE.<sup>291</sup> The DoD agreed, making its final recommendation to continue the current open-market strategy, with the addition of some improvements to the system.<sup>292</sup> While the DoD evaluated the government self-insurance option favorably, it concluded self-insurance was not a workable alternative because the DoD and the DOL lacked the statutory authority or resources to undertake its implementation.<sup>293</sup>

Unfortunately, making minor changes to the current open-market strategy will not reduce costs or result in more equitable claims processing. The current system, even with the modifications suggested by the DoD, will continue to result in excessive premiums for contractors and the Government and processing problems for injured contractors. Instead, the solution that offers the most cost savings and provides critical monitoring and bonding<sup>294</sup> of insurance carriers is a multiple-provider system. A brief analysis of each of the four alternatives is presented below, including a discussion of why a multiple-provider system is the optimum solution for all stakeholders, including insurance carriers.

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286. See 2008 House Hearing, *supra* note 122, at 40 (statement of Richard Ginman, Deputy Director of Contingency Contracting & Acquisition Policy).

287. Most USAAA audit reports are available on USAAA's website, <http://www.hqda.army.mil/aaaweb/>; however, the USACE pilot-program audit has not been made available as of the date of this article.

288. See DoD REPORT TO CONGRESS, *supra* note 39, at 11 (DoD collected data from private industry, including brokers, insurers, and government contractors, as well as government agencies).

289. *Id.* at 39.

290. *Id.* at 17.

291. *Id.*

292. *Id.* at 52.

293. *Id.* at 57.

294. See Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 PUB. CONT. L.J. 63 (2010). Professor Yukins uses the terms "monitoring" and "bonding" to describe principle-agent relationships in the context of government contracts. *Id.* at 65-66. Monitoring is essentially oversight by a principal used to eliminate an agent's diversions from the principal's objectives. *Id.* Bonding is the use of contractual self-constraints, such as internal policies, practices, or procedures, designed to reduce diversions. *Id.* at 66. In the context of DBA insurance, the Government's objective is to improve reimbursement services to injured contractors and decrease costs. See, e.g., DoD REPORT TO CONGRESS, *supra* note 39, at i-iii. Achieving this goal is dependent upon the Government's ability to effectively monitor and bond insurance carriers through its contractual relationship with insurance carriers.

### B. Single-Provider System: An Impracticable Alternative

A number of government agencies have had success with single-provider insurance in the last decade. The DOS, USAID, and USACE have all benefited from switching from an open-market system—which requires contractors to obtain DBA insurance independently—to a single-provider system, in which one insurance company contracts with a government agency to provide all DBA insurance.<sup>295</sup> In the early 1990s, an investigation by the DOS inspector general (IG) found that costs could be saved if the DOS transitioned to a single-provider system.<sup>296</sup> Since that time, DOS has competitively awarded DBA insurance contracts to a single carrier.<sup>297</sup> USAID and, to some extent, USACE have had similar success with this strategy.<sup>298</sup>

A single-payer system for the DoD, however, is an impracticable option for several reasons. First, single-provider insurance would not meet Congress's requirement to maintain a competitive DBA insurance market. In its mandate to the DoD, Congress listed a number of factors that it considered essential to the adoption of a new strategy, including providing a competitive marketplace for insurance to the maximum extent practicable.<sup>299</sup> Although single-provider insurance would be competitively awarded, all of the DoD's business would go to one provider. Thus, Congress would never seriously consider such a system.

Second, no one insurance carrier has the infrastructure to support an organization the size of the DoD. While carriers have insured large government agencies in the past, the DoD is unique. The DoD has approximately 2.1 million military and civilian employees,<sup>300</sup> compared to the DOS's 60,000 employees<sup>301</sup> and USAID's 2,200 employees.<sup>302</sup> In addition to the armed forces, the DoD includes the Defense Commissary Agency, the Defense Financing and Accounting Service, the Defense Logistics Agency, and the Defense Information Systems Agency, among other agencies.<sup>303</sup> Based on its enormity, it is unlikely that any one carrier has the administrative and financial resources to be the DoD's sole insurance provider.

Third, the risks associated with providing DBA insurance to an organization with the DoD's mission is not likely to be borne by one insurance carrier. While the DOS and USAID conduct missions all over the world,

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295. See *supra* Part IV.B.

296. See GRASSO ET AL., *supra* note 119, at 12.

297. DOD REPORT TO CONGRESS, *supra* note 39, at 7.

298. See *supra* Part IV.B.

299. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 843(b)(5), 122 Stat. 4502, 4540 (2008).

300. *About the Department of Defense (DOD)*, U.S. DEP'T OF DEF., <http://www.defense.gov/about> (last visited Mar. 5, 2012).

301. *Mission*, U.S. DEPARTMENT OF STATE, <http://careers.state.gov/learn/what-we-do/mission> (last visited Mar. 5, 2011).

302. Ken Dilanian, *Short-Staffed USAID Tries to Keep Pace*, USA TODAY (Feb. 1, 2009), [http://www.usatoday.com/news/washington/2009-02-01-aid-inside\\_N.htm](http://www.usatoday.com/news/washington/2009-02-01-aid-inside_N.htm).

303. *Department of Defense (DOD)*, USA.GOV, <http://www.usa.gov/Agencies/Federal/Executive/Defense.shtml> (last visited Mar. 5, 2012).

neither of those departments houses the armed forces. The risks associated with insuring military contractors are higher than those associated with supporting the DOS and USAID.<sup>304</sup> Although carriers have collected more claims data in the last decade, they remain wary of the DBA insurance market.<sup>305</sup> In the DoD's report to Congress, carriers were obviously reticent regarding whether they would compete for a single-provider contract.<sup>306</sup> The DoD reported that "one of the largest DBA carriers . . . would entertain the possibility of bidding on a single-provider contract."<sup>307</sup> Two other insurance carriers indicated that they would not compete.<sup>308</sup>

Recent competition for DBA contracts has attracted fewer insurance carriers than in the past. After initial success with an award to CIGNA Property and Casualty Insurance (CIGNA) in 1991, the DOS solicited a similar follow-on multiyear contract in 2000.<sup>309</sup> Four insurance carriers submitted proposals, including CIGNA, AIU, Ace International, and CNA.<sup>310</sup> CNA was eventually awarded the contract.<sup>311</sup> In 2008, however, when both the DOS and USAID issued solicitations for a single provider of DBA insurance, the only company to submit an offer was CNA.<sup>312</sup> Likewise, in 2005, the DoD-sponsored pilot program for USACE received only one offer, also from CNA.<sup>313</sup> Thus, it is seriously questionable whether competition for a single-provider contract would attract enough competition to satisfy Congress.

### C. Multiple-Provider System: Taking Control of DBA Insurance

During the House Committee hearings in June 2009, the Committee heard testimony from the executive vice president of CNA, General Fay.<sup>314</sup> CNA had been the sole insurance provider for DOS since 2001 and for USAID since 2005.<sup>315</sup> Based on his experience in public service and as vice president of CNA, General Fay recommended that the DoD adopt, with modifications, a single-provider program similar to those utilized by the DOS and USAID.<sup>316</sup> To compensate for the problems associated with insuring an organization of the DoD's size, he recommended separating the DoD into divisions, each with its own single provider of DBA insurance.<sup>317</sup> By dividing the DoD by department or agency groupings, divi-

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304. DoD REPORT TO CONGRESS, *supra* note 39, at 18.

305. *Id.* at 4–5 (listing problems related to the DBA insurance market in comparison with stateside workers' compensation).

306. *Id.* at 17.

307. *Id.*

308. *Id.*

309. GRASSO ET AL., *supra* note 119, at 12.

310. *Id.*

311. *Id.*

312. DoD REPORT TO CONGRESS, *supra* note 39, at 7.

313. See GRASSO ET AL., *supra* note 119, at 12.

314. 2009 House Hearing, *supra* note 14, at 129–30.

315. *Id.*

316. *Id.* (statement of General George Fay, Executive Vice President of CNA).

317. *Id.*

sions could be created that are small enough to be homogenous and supportable by a single provider, yet large enough to diversify the volatility of risks.<sup>318</sup> This network of multiple providers offers a number of advantages to industry and government.

### 1. Privity of Contract

A multiple-provider system would create privity of contract between insurance carriers and the Government, giving the Government greater control over the DBA insurance process. The current system can too easily be manipulated to the detriment of claimants and the Government. Because contractors secure DBA insurance on the open market, privity of contract exists only between contractors and insurance carriers. Contractors have little incentive to negotiate for more competitive rates because their costs are ultimately reimbursed by the Government.<sup>319</sup> Furthermore, the Government cannot effectively monitor claims processing due to its lack of authority over the claims process. While the DOL provides some monitoring function in the dispute process, they have no authority to override decisions of insurance carriers.<sup>320</sup> Thus, when disputes arise between claimants and carriers, the outcome is fortuitous. Claimants receive no assistance from their employers because their employer is either disputing the claim itself or is not interested in challenging the insurance carrier. Only after the case winds its way through the administrative dispute labyrinth can claimants obtain relief.<sup>321</sup> In other words, the current open-market system has a high potential for abuse and offers few remedies when cost or performance problems arise with insurance carriers.

On the other hand, if privity of contract existed between insurance carriers and government agencies, the Government would be afforded advantages in both contract formation and performance. During contract formation, competition among offerors would keep premium rates down, as would effective negotiating by government agencies.<sup>322</sup> But even more importantly, government agencies would have discretion to award contracts based on past performance and customer satisfaction metrics.<sup>323</sup> This could be a tremendous boon for claimants, whose fate has thus far been dependent on the sophistication and vigilance of their employers in securing quality insurance. Finally, by directly contracting with insurance carriers, COs could make responsibility determinations based on whether carriers

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318. *Id.*

319. See GRASSO ET AL., *supra* note 119, at 15 (2010).

320. *Id.* at 10.

321. See *id.* (describing the three-step formal appeals process as well as the optional informal resolution process).

322. See 2009 House Hearing, *supra* note 14, at 138 (statement of General George Fay, Executive Vice President of CNA).

323. See, e.g., FAR 9.2.

have in fact obtained DBA insurance—a potentially potent preventative mechanism.

While the contract formation process would allow the Government to achieve cost and quality assurance objectives, the monitoring and bonding inherent in the performance of government contracts would ensure fulfillment of carriers' obligations. For example, privity of contract would entitle the Government to all the remedy-granting clauses available under the FAR.<sup>324</sup> Thus, insurance carriers would always have an incentive to properly pay claims to avoid default.<sup>325</sup> If the insurance carrier was improperly denying claims, the CO could not only have the option of defaulting the contractor for failure to perform,<sup>326</sup> but could also document the carrier's poor performance in the Federal Awardee Performance and Integrity Information System (FAPIIS), a government database that tracks companies' past performance.<sup>327</sup> These negative performance reports could have serious consequences regarding a contractor's future opportunities with the U.S. Government. In summary, a multiple provider system would give the Government greater control over the claims process by providing remedies to keep insurance carriers aligned with government objectives. Unlike the DOL's dispute process, this system has the capability to correct inefficiencies and avoid abuses that exploit injured contractors.

## 2. Potential for Cost Savings

There is general disagreement among stakeholders, including the DoD, the insurance industry, and contractors, regarding the potential for cost savings under any of the alternatives. The DOS, USAID, and USACE have all adopted the single-provider system and have experienced cost savings.<sup>328</sup> While the DoD is too large for a single-provider system, the multiple-provider system offers many of the same features. There are two clear cost advantages if the DoD implements a multiple-provider system. First, a multiple-provider system would not require minimum premium payments that contractors are required to pay under an open-market system.<sup>329</sup> Under an open-market system, insurance premiums are paid as a percentage of total payroll, such as \$10 per \$100 of payroll.<sup>330</sup> Insurance carriers, however, sometimes require contractors with a small number of employees or limited payrolls to make minimum premium payments in addition to, or instead of, a percentage of their payroll.<sup>331</sup> While this may not sound like a significant amount of money, the House Oversight and Government Reform Committee

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324. FAR 49.402-2.

325. *Id.*; see also FAR 52.249-8.

326. FAR 52.249-8(a)(1)(i).

327. See FED. AWARDEE PERFORMANCE & INTEGRITY INFO. SYS., <https://fapiis.ppirs.gov/> (last visited Mar. 5, 2012).

328. See *supra* Part IV.B.

329. See Memorandum from the Majority Staff, *supra* note 144, at 14.

330. See *id.*

331. See *id.*

found forty-seven contractors that paid more in insurance premiums than they paid in salaries.<sup>332</sup>

Second, the Government would have some control over premium rates through the negotiated procurement process. Rates are currently negotiated between contractors and insurance carriers, usually with the assistance of a broker.<sup>333</sup> The Government reimburses contractors under cost-type contracts regardless of how much carriers charge, so there is no incentive for brokers to negotiate lower rates.<sup>334</sup> Overall, a multiple-provider system would allow the Government to curb excess costs in the system, such as eliminating minimum premium charges, and maintain control over the rates carriers charge through the use of more aggressive negotiating tactics.

### 3. Competition

One final advantage that is integral to the multiple-provider system is the guarantee of DBA insurance for all contractors. In the current open-market system, fledgling contractors are often unable to secure DBA insurance due to their risk.<sup>335</sup> Thus, they are not able to compete for government contracts, reducing overall competition in the procurement process. A multiple-provider system manages risky contractors through risk “pooling.”<sup>336</sup> Pooling allows an insurer to pool the risks of multiple contractors so that risks can be spread across all contractors in the pool.<sup>337</sup> This system results in lower premiums and allows all contractors to obtain DBA insurance regardless of their risk.<sup>338</sup> Under an open-market system, since contractors obtain insurance individually, the benefits of risk pooling are not as direct.

The multiple-provider solution therefore offers enhancements far superior to the current DBA strategy. Nevertheless, additional components, beyond monitoring and bonding, are necessary to crystallize protections for contractor veterans returning from war.

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332. *Id.* Since 2002, over 700 contractors have been required to make minimum premium payments amounting to about \$8.5 million.

333. *See id.* at 4–6.

334. *See, e.g., id.* at 8.

335. *See* SPECIAL INSPECTOR GEN. AFG. RECONSTRUCTION, SIGAR AUDIT 11-15, CONTRACT PERFORMANCE AND OVERSIGHT/DEFENSE BASE ACT INSURANCE: WEAKNESS IN THE USACE DEFENSE BASE ACT INSURANCE PROGRAM LED TO AS MUCH AS \$58.5 MILLION IN REFUNDS NOT RETURNED TO THE U.S. GOVERNMENT AND OTHER PROBLEMS 2, 23 (July 28, 2011), *available at* <http://www.sigar.mil/pdf/audits/SIGAR%20Audit-11-15.pdf>; GRASSO ET AL., *supra* note 119, at 12, 26; DoD REPORT TO CONGRESS, *supra* note 39, at 40, 55.

336. *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 1.3, at 12–13 (West 1988); Memorandum from the Majority Staff, *supra* note 144, at 8–9.

337. *See* KEETON & WIDISS, *supra* note 336; *see also, e.g.,* Memorandum from the Majority Staff, *supra* note 144, at 8–9.

338. *See* KEETON & WIDISS, *supra* note 336; GRASSO ET AL., *supra* note 119, at 26; Memorandum from the Majority Staff, *supra* note 144, at 8–9.

#### 4. Additional Protections for Contractors

The multiple-provider system allows the Government to properly monitor and bond insurance carriers during contract formation and contract performance. Such controls will result in reasonable premium rates and proper claims processing. Three additional components, however, must be implemented to specifically target the denial of complex claims—a problem that has scourged the system. First, DOL district directors should have the authority to issue binding decisions during the informal dispute resolution process. Second, the Government must self-insure against the risk of PTSD and TBI. Third, the fourteen-day rule for payment of claims should be extended to allow insurance carriers adequate time to investigate complex claims.

Many of the problems experienced by injured contractors are a result of financial hardships imposed on claimants when their claims are denied and delayed during the dispute process.<sup>339</sup> A subtle change in the allocation of risk between contractors and insurance carriers, however, would eliminate this problem. Presently, district directors can only make nonbinding recommendations to the parties.<sup>340</sup> Naturally, when carriers receive an adverse recommendation, they simply ignore it.<sup>341</sup> Thus, the process expends the time and resources of the Government, claimants, and insurance carriers without bringing any resolution to the case.

In contrast, allowing district directors to make binding decisions brings greater equity and efficiency to the process without sacrificing the rights of the parties to appeal their case to OWCP administrative law judges. Industry experts have admitted that carriers are denying claims simply to gain more time to investigate.<sup>342</sup> Binding decisions would help reduce the misuse of the system and eliminate prolonged appeals meant to delay the decision-making process.<sup>343</sup>

A second critical tool to protect contractors suffering from mental illness is government self-insurance for PTSD and TBI cases. On June 18, 2009, the House Oversight and Government Reform Committee held a hearing to address their concerns about PTSD and TBI.<sup>344</sup> Mr. Gary Pitts, an attorney for PTSD and TBI claimants, made four recommendations to the Committee: (1) increase funding and personnel in the Office of Administrative Law Judges, (2) allow contractors with PTSD to receive treatment from the Veterans Administration (VA), (3) require insurance carriers to notify

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339. See GRASSO ET AL., *supra* note 119, at 24; Memorandum from the Majority Staff, *supra* note 144, at 2, 14–15.

340. See DoD REPORT TO CONGRESS, *supra* note 39, at 54.

341. See *id.*

342. See 2009 House Hearing, *supra* note 14, at 25.

343. This particular recommendation was supported by DoD in its report to Congress. Strangely, the recommendation was not formally offered for adoption, as DoD considered improvements to the efficiency of the DBA program to be outside the scope of their charter pursuant to section 843 of the NDAA for 2009. DoD REPORT TO CONGRESS, *supra* note 39, at 54.

344. See generally 2009 House Hearing, *supra* note 14.



widows of their right to file claims on behalf of their spouses, and (4) give administrative law judges the power to assess a ten percent penalty for insurance carriers filing frivolous defenses to contractor claims.<sup>345</sup>

All of Mr. Pitts' recommendations would be valuable additions to the claims process. But his suggestion to have the VA treat civilians with PTSD is simply unattainable due to insurmountable political and administrative hurdles. The VA is so overwhelmed with military veterans from the wars of the last two decades<sup>346</sup> that putting such a strain on the system could be catastrophic. Nevertheless, Mr. Pitts' premise is quite perceptive. The cost of litigating PTSD can often surpass the cost of providing treatment.<sup>347</sup> The situation is ripe for a reallocation of risk. If carriers cannot accept liability for these claims, it is only reasonable for the Government to self-insure.

Government self-insurance offers a number of benefits to DBA stakeholders. First, the Government could ensure proper processing of PTSD claims. Second, insurance carriers, who lack critical data on contractor injuries related to PTSD, would be relieved of any liability for such claims. Third, lower premiums could be negotiated in exchange for the reduction of carrier risk. Lastly, business opportunities would abound, as carriers would still play a role in the administration of these claims for the Government. If insurance carriers cannot manage the risk associated with mental health claims, then it is clear that the risk should be reallocated. Government self-insurance would safeguard injured contractors from mistreatment and would save the Government valuable resources by removing the transactions costs associated with disputing liability.

A third and final component to address the problem of carriers denying complex claims is an extension of the fourteen-day period in which insurance carriers are expected to pay claims.<sup>348</sup> Although the rule was intended to speed the processing of claims, it has created an incentive for carriers to do the exact opposite. The current industry practice is to deny complex claims to buy time for carriers and employers to investigate.<sup>349</sup> The proposed time extension is a reasonable one, provided it does not prevent claimants from paying medical bills, rent, mortgage, and other monthly family obligations.

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345. *Id.* at 124–25.

346. See, e.g., DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, AUDIT OF VETERANS BENEFITS ADMINISTRATION TRANSITION ASSISTANCE FOR OPERATIONS ENDURING AND IRAQI FREEDOM SERVICE MEMBERS AND VETERANS, REPORT NO. 06-03552-169 (JULY 2008); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-473T, VETERANS' DISABILITY BENEFITS: VETERANS' DISABILITY BENEFITS CLAIMS PROCESSING CHALLENGES PERSIST, WHILE VA CONTINUES TO TAKE STEPS TO ADDRESS THEM (2008); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-901, VETERANS' DISABILITY BENEFITS: BETTER ACCOUNTABILITY AND ACCESS WOULD IMPROVE THE BENEFITS DELIVERY AT DISCHARGE PROGRAM (2008).

347. See 2009 House Hearing, *supra* note 14, at 127.

348. 20 C.F.R. § 702.232 (2011).

349. See 2009 House Hearing, *supra* note 14, at 25.

In summary, while a multiple-provider solution provides greater control over the processing of DBA claims, a reallocation of risk is crucial in order to protect the rights of contractor veterans in complex claims cases. District directors must be given the authority to issue binding decisions. Government self-insurance for PTSD and TBI cases is essential if Congress is at all interested in providing relief to claimants and their families. Finally, due to the complexity of certain DBA claims, the fourteen-day rule should be extended, when appropriate, to give insurance carriers adequate time to investigate claims. These changes should be paramount to the budget and fiscal concerns that have dominated the acquisition strategy discussions to date.

##### 5. Outcomes versus Costs

Government officials have been concerned about the costs associated with the open-market strategy since the 1970s,<sup>350</sup> yet the DoD has resisted any deviation from the current open-market system.<sup>351</sup> Between 2003 and 2005 as DBA insurance costs were escalating, USAAA audit reports found that the Army's LOGCAP contracts, which all secure DBA insurance on the open market, had "substantial" underwriting gains and multiple DBA compliance failures.<sup>352</sup> In 2007, an analysis by the Congressional Budget Office (CBO) concluded that the risk-pooling approach of the single- and multiple-provider systems could lower the DoD's DBA insurance costs by as much as \$362 million over a ten-year period.<sup>353</sup> And finally, USACE reportedly experienced cost savings in the first six months of the DoD-sponsored single-provider pilot program of \$19 million.<sup>354</sup> Yet, in its 2009 report to Congress, the DoD ignored these findings and insisted that the current strategy is the most inexpensive way to secure DBA insurance.<sup>355</sup>

The bottom line is that no stakeholder has been able to demonstrate with any certainty that one alternative would yield greater cost savings than another alternative. Congress argues that the rising cost of DBA insurance has been a concern for forty years.<sup>356</sup> They rely on GAO reports and USAAA audit reports to support their conclusion that reform is needed.<sup>357</sup> The DoD relies on data in its 2009 congressional report to tout the benefits of the current open-market strategy.<sup>358</sup> This difference in perspective is precisely why the debate must focus more on system outcomes rather than costs. Congress and the DoD should be engaged in a cost-benefit analysis rather

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350. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 4.

351. See, e.g., Memorandum from the Majority Staff, *supra* note 144, at 10. *But see, e.g.*, DoD REPORT TO CONGRESS, *supra* note 39, at 7 (DoD piloted a non-open-market program).

352. See GRASSO ET AL., *supra* note 119, at 18, 20.

353. Memorandum from the Majority Staff, *supra* note 144, at 12.

354. *Id.* at 11.

355. DoD REPORT TO CONGRESS, *supra* note 39, at ii.

356. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 192, at 4.

357. See Memorandum from the Majority Staff, *supra* note 144, at 9, 12.

358. DoD REPORT TO CONGRESS, *supra* note 39, at ii.

than limiting the debate to conflicting cost studies. The fact that there are so many uncertainties regarding whether any particular system would result in savings to the Government further bolsters the argument that outcomes must be given greater weight in the decision-making process.

Many of the benefits of a multiple-provider system have been discussed. Foremost on this list is the contractual remedies that would be available if carriers continued to exploit injured contractors. The Government has a moral and legal obligation to protect its contractor veterans.<sup>359</sup> It is unconscionable that contractors have been treated as collateral damage. By implementing a multiple-provider system, the Government could more closely monitor insurance carriers to make sure claims are processed appropriately. A multiple-provider system would also allow all contractors to compete on equal footing in the acquisition arena. Rather than being denied DBA coverage and foreclosed from competition, every contractor, regardless of size, would be able to obtain DBA insurance at comparable rates. Thus, the system fulfills Congress's requirement for maximizing competition. Congress has long sought to change the way DBA insurance is procured.<sup>360</sup> The discussion should be expanded, however, to include a cost-benefit analysis in addition to the current cost-saving discussion.

#### D. *Maintaining the Status Quo*

The DoD recommends keeping the current open-market strategy but makes four suggestions for improving the system.<sup>361</sup> These include (1) making loss data accessible to all DBA carriers, (2) creating contractor risk pools for contractors unable to obtain DBA insurance, (3) requiring carriers to separate DBA insurance pricing from other types of insurance, and (4) establishing a single DoD contact for country-specific DBA insurance waivers.<sup>362</sup> The DoD considered the cost savings of a government self-insurance approach in its report to Congress but dismissed the approach because of the time required for implementation.<sup>363</sup> While the DoD's suggestions seem to be aimed at bringing more transparency to the process, the impact of such changes would do little to resolve the cost and claims-processing problems under the current system.

The DoD has used the open-market strategy since the advent of DBA insurance in 1941.<sup>364</sup> Under this system, contractors secure their own DBA insurance from a list of approved carriers maintained by the DOL.<sup>365</sup> Con-

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359. See, e.g., Mutual Security Act of 1958, Pub. L. No. 85-477, § 502, 72 Stat. 261, 272 (amending the DBA (42 U.S.C. § 1651) to apply to service contracts by adding a new subparagraph (5) to subsection (1)(a)).

360. See, e.g., National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1041, 119 Stat. 3136, 3430 (2006) (Congress directed the Department of Defense to examine the best way to procure DBA insurance).

361. DoD REPORT TO CONGRESS, *supra* note 39, at 54.

362. See *id.*

363. See *id.*

364. See, e.g., Memorandum from the Majority Staff, *supra* note 144, at 4.

365. DoD REPORT TO CONGRESS, *supra* note 39, at 7.

tractors may also self-insure if they have the financial means to do so and have been approved by the DOL.<sup>366</sup> Proponents claim the free-market approach is the best means available to control costs.<sup>367</sup> Insurance carriers compete for DBA insurance business in the open market, which, in theory, allows contractors to obtain the best possible premium rates.<sup>368</sup>

There are, however, major drawbacks to an open-market strategy. The Government does not maintain privity of contract with insurance carriers, which leaves the Government with fewer remedies when carriers stray from the Government's objectives.<sup>369</sup> The DOL oversees but is not responsible for processing DBA claims and has little authority over insurance carriers.<sup>370</sup> Injured contractors disputing claims must await the final decision of OWCP administrative law judges before obtaining relief, which can take months or years.<sup>371</sup> Further, the Government has no authority over premiums negotiated between contractors and insurance carriers even though the Government pays the costs.<sup>372</sup> And, while premium rates may be lower in some cases, the open-market system has recently seen uncontrollable rises in cost, excessive profits by carriers, and unacceptably high denial rates for PTSD claims.<sup>373</sup> Due to these concerns, the current strategy falls short of stakeholders' moral and statutory obligations to contractor veterans, even with the improvements suggested by the DoD.

On the other hand, the DoD's recommendation to make loss data accessible to all DBA carriers in a nationwide database should be implemented, as it would help carriers better understand DBA risks and provide greater transparency in the acquisition process. Such an improvement, however, does not resolve Congress's immediate cost and claims-processing concerns. The DoD has increasingly relied on contractors since the beginning of the Persian Gulf War in 1991.<sup>374</sup> Three insurance carriers have provided ninety-seven percent of the DBA insurance to these contractors: (1) AIG, (2) CNA, and (3) ACE Group.<sup>375</sup> These carriers "contend that the early years [of war] in Iraq and Afghanistan were novel situations and that

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366. *See id.* A contractor may self-insure either by taking steps to financially prepare for losses on their own or by establishing a legally licensed insurance company, known as a "captive insurer." *Id.* Eight employers are listed by DOL as self-insured. *See Division of Longshore and Harbor Workers' Compensation (DLHWC)*, U.S. DEP'T OF LABOR, <http://www.dol.gov/owcp/dlhwc/lscarrrier.htm#authorized> self-insured employers (last visited Mar. 8, 2012) (listing eight employers as self-insured for DBA).

367. *See, e.g.*, DoD REPORT TO CONGRESS, *supra* note 39, at 19.

368. *See, e.g., id.* at 38.

369. *See supra* Part IV.C.1.

370. *See supra* Part II.B.

371. *See id.*

372. *See supra* Part IV.C.1.

373. *See supra* Part III.A.

374. James P. Terry, *Privatizing Defense Support Operations: The Need to Improve DoD's Oversight and Management*, ARMED FORCES & SOC'Y 660 (2010), available at <http://afs.sagepub.com/content/36/4/660.full.pdf+html>.

375. DoD REPORT TO CONGRESS, *supra* note 39, at 28.

premiums have declined because carriers now have a better understanding of the nature of the hazards in those regions.<sup>376</sup>

While it is true that these three carriers have been able to collect claims data for the last two decades, cost and claims-processing problems have not been reduced.<sup>377</sup> USAAA audit reports and GAO reports in the last five years have found rising DBA costs and wild fluctuations in insurance rates.<sup>378</sup> Thus, sharing claims data will not resolve the current problems. Perhaps it is the nature of wartime contracting that makes the risk so unpredictable: each conflict depends greatly on geographical, political, military, social, and economic factors. A national DBA claims database is surely an improvement over individual carriers tracking claims. Data collected by the major DBA insurers, however, have not yet resulted in decreased costs of DBA insurance.<sup>379</sup>

The DoD also suggests creating contractor risk pools that would require larger insurers to provide insurance to high-risk contractors who cannot otherwise obtain insurance on their own.<sup>380</sup> This improvement attempts to mirror a multiple-provider system that uses risk pools to provide coverage to all contractors. Under an open-market system, however, there is no way to guarantee that riskier contractors will be offered fair-market rates. Unlike a multiple-provider system, where government agencies would negotiate rates for all contractors in the risk pool, the Government could not control the premiums charged to high-risk contractors. This recommendation would therefore not result in the same type of leveling for high-risk contractors that would result under a multiple-provider system.

The DoD also suggests mandating that insurers do not bundle DBA coverage with other insurance coverage and identifying a single point of contact for the DBA waiver process.<sup>381</sup> Neither suggestion would correct current cost and claims-processing issues. Since the majority of insurers do not follow the practice of bundling DBA insurance with other coverage, such as accidental death or kidnap and ransom insurance, the recommendation does little to bring resolution to current acquisition problems.<sup>382</sup> Further, a single DoD point of contact for waivers would have little or no impact on the problems at hand. Waivers affect a small number of contractors, as they are only granted for foreign nationals and only if acceptable workers' compensation benefits are provided by applicable local law.<sup>383</sup> Thus, this recommendation would do little to solve current cost and claims-processing issues.

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376. *See id.* at 19.

377. *See* GRASSO ET AL., *supra* note 119, at 8.

378. *See id.* at 18.

379. *See id.*

380. *See* DoD REPORT TO CONGRESS, *supra* note 39, at 55.

381. *See id.* at 56.

382. *See id.* The DoD identified one insurer that bundled DBA insurance coverage with other insurance coverage. *See id.*

383. Defense Base Act, 42 U.S.C. § 1651(e) (2006).

In summary, the DoD's recommendation to keep the status quo, with the exception of four cosmetic changes to the system, is a paltry attempt to assist injured contractors or to address serious congressional concerns. Sharing claims loss data may bring more transparency to the process. The data collected by AIG, however, which provides seventy-five percent of DBA insurance business, certainly has not helped that company lower premiums. Risk pooling would resolve the problem of carriers refusing to insure risky contractors, but the Government has no way of guaranteeing reasonable rates for those contractors. Waivers and transparency in pricing would improve the acquisition system, but again these improvements do not address Congress's immediate concerns. Thus, adopting the DoD's recommendation does almost nothing to resolve cost and claims-processing issues.

#### E. *Government Self-Insurance: An Ideal Alternative*

A multiple-provider system would provide many advantages to both the Government and private industry and can be implemented using the existing statutory framework for DBA insurance. An ideal alternative, however, and one that has garnered at least moderate support from Congress and industry<sup>384</sup> is government self-insurance. Self-insurance offers perhaps the greatest system for distribution of benefits to injured contractors, as well as the highest potential for cost savings. One caveat is that this option would require significant changes to existing DBA statutes and would therefore take time to implement.<sup>385</sup> Thus, Congress should continue researching implementation of this alternative and, if the data are supportive, begin taking steps to execute transition.

Insurance companies are an essential component of risk management. In the volatile business of DBA insurance, however, carriers must often insure against risk with inadequate data and under unpredictable circumstances.<sup>386</sup> Given these conditions, carriers charge higher premiums to cover a broader range of potential liability, resulting in higher costs for the Government.<sup>387</sup> In government contracting, agencies avoid this situation by allocating risk to the Government.<sup>388</sup> This way, contractors are able to calculate their costs and submit offers to the Government without having to adjust for unknown risk.<sup>389</sup> Self-insurance achieves this goal by shifting the risk from insurance carriers—who have had trouble calculating their risk in Iraq and Afghanistan—to the Government.<sup>390</sup> Private industry supports this system because insurance carriers would be in the best position to offer

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384. DoD REPORT TO CONGRESS, *supra* note 39, at 52; *see also* 2008 House Hearing, *supra* note 122, at 97.

385. *See* DoD REPORT TO CONGRESS, *supra* note 39, at 54. DoD estimates it would take at least three years to implement government self-insurance.

386. *See supra* Part IV.D.

387. *See id.*

388. Weiner, *supra* note 141, at 23.

389. *See* Boardman, *supra* note 132, at 833.

390. *See* DoD REPORT TO CONGRESS, *supra* note 39, at 20.

third-party administration of the system by capitalizing on their unique infrastructure.<sup>391</sup> Thus, because of the uncertainty of risk involved in providing DBA insurance, self-insurance offers an appropriate allocation of risk for the parties while preserving business opportunities for private industry.

Many of Congress's claims-processing concerns can be alleviated through this shifting of risk. By employing a third-party administrator who is not liable for the claims they process, the Government removes any impartiality or business incentive to deny claims. Fees for administrators would be generated on a per-case basis irrespective of acceptance or denial of liability and would likely reduce problems associated with improper denial of claims. If the Government did encounter problems with denial of claims, it could address the issue directly with the administrator and realign processing with the Government's objectives. The administrator would be under contract with the Government and therefore would be monitored using all the contractual remedies provided to the Government under the FAR. Thus, even if the administrator strayed from the Government's objectives, government oversight inherent in the government acquisition system would allow for correction of any problems.

Another benefit to claimants and carriers alike would be the elimination of WHCA determinations. As mentioned above, carriers often deny claims until an administrative law judge finds that an employee's injury resulted from a war-risk hazard.<sup>392</sup> This bifurcation of claims processing for war-risk hazards and non-war-risk hazards claims has caused claimants immeasurable hardship.<sup>393</sup> Self-insurance would eliminate the bifurcation of claims and lessen the needless suffering of contractor veterans.

One final benefit of self-insurance is that it achieves a greater emphasis on contractor safety. Acting as the primary insurer for DBA benefits, the Government would be remiss to not place considerable weight on contractor safety. As both a past performance and an award fee evaluation factor, the Government would likely put a high premium on contractors' risk management performance and safety records.<sup>394</sup> Contractors would surely pay more attention to safety if they expected COs to closely scrutinize such data.

In addition to the benefits claimants would realize under self-insurance, Congress, the DoD, and private industry all agree that the system has a high potential for cost savings.<sup>395</sup> Under this system, the Government

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391. Private industry has shown support for third-party administration of a government self-insurance system, and obviously favors the option over government-run insurance, whereby the Government would act as its own administrator. *See id.* at 19. Still, some critics argue the system results in a net loss of private business. *See id.* However, companies previously unable to absorb the liability would now be able to participate as administrators. *See id.* Thus, the benefit of increasing industry participation is likely to offset any negative effect. *See id.*

392. *See* 20 C.F.R. § 61.101 (2011); OFFICE OF WORKERS' COMP. PROGRAMS, *supra* note 158.

393. *See* DoD REPORT TO CONGRESS, *supra* note 39, at 3.

394. *Id.* at 43.

395. *Id.* at 19.

pays workers' compensation claims much the same way it pays federal civilian employees' claims. Injured workers file claims with the Government, which then pays claims without relying on a third-party insurer.<sup>396</sup> Self-insurance eliminates the role of insurance carriers as agents of the Government, and thus avoids the excess monitoring and bonding costs of single- or multiple-provider systems.

Removing the "middle man" offers notable benefits to stakeholders. First, DBA premiums would be eliminated completely. Contractors would no longer include DBA insurance as a direct cost of their contracts. Second, the Government would not pay administrative or other indirect fees that are typically appended to insurance premiums. All fees other than those going to the claimant and the third-party administrator would be eliminated, including broker commissions, sales and marketing costs, and profit.<sup>397</sup> Thus, the difference between the cost to compensate injured workers and the cost of actual losses would be significantly less than under any other insurance system. Further, since costs incurred would predominantly come from the reimbursement of actual losses, the Government would not be affected by financial markets or other financial factors affecting the insurance industry. Overall, the Government would retain greater control over the cost of DBA insurance under this system.

Despite these benefits, there are a number of arguments against government self-insurance. The greatest of these concerns is the time it would take to implement the system. The threat of "bigger government" would unquestionably draw furious debate from political and industry opponents. Concerns over funding for Medicare, Medicaid, Social Security, and even the Postal Service raise questions about government management of reimbursement programs. Time, however, should hardly be considered an impediment. More discourse on the topic should be encouraged, as such democratic discussions would only bring more transparency to the process. Congress and the DoD, eminently concerned with costs, would benefit from public opinion on more important matters such as coverage for contractors suffering from PTSD and TBI. Moreover, as long as the DoD adopted a multiple-provider system during the interim period, there would be no harm in waiting for Congress to pass legislation making the Government more accountable for injured workers.

Other than time, opponents have struggled to articulate why self-insurance would not be an ideal system. Critics have argued that if contractors are no longer required to obtain their own insurance, they are less likely to provide a safe workplace.<sup>398</sup> Based on the discussion above, this argument lacks merit.<sup>399</sup> On the contrary, contractors would be much more safety-focused

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396. 5 U.S.C. § 8147(a) (2006).

397. DoD REPORT TO CONGRESS, *supra* note 39, at 43.

398. *Id.* at 19.

399. *See supra* Part IV.E.



if the Government was self-insuring, as contractor safety records would receive greater scrutiny.<sup>400</sup>

Opponents also argue that because of the unknown risks associated with DBA insurance, self-insurance might create Anti-Deficiency Act issues.<sup>401</sup> These concerns are warranted. Nevertheless, the Government should be able to accurately estimate the cost of DBA claims using DBA claims data from the DoL, as well as data from the recently implemented SPOT system.<sup>402</sup> Additionally, the Government has been in the business of insuring employees for some time, and the system has never created Anti-Deficiency Act problems. For example, the Government maintains the Federal Employees' Compensation Fund, which pays workers' compensation claims to federal civilian employees.<sup>403</sup> Each year, the secretary of labor provides the OMB with an estimated cost so that the necessary monies can be appropriated.<sup>404</sup> Each government agency employing injured civilians assists the secretary in collecting claims data by submitting the total cost of benefits paid from FECA during the preceding year.<sup>405</sup> Agencies then request funds equal to the estimated cost of claims to be paid for the following year.<sup>406</sup> Through this statutorily mandated process, the Government has avoided running afoul of the Anti-Deficiency Act.<sup>407</sup> A very similar process could be imposed and managed by a third-party administrator. The administrator would collect claims data from contractors and pass the information on to the Government. This is just one example of how the Government could avoid violating fiscal law.

Finally, critics argue that self-insurance goes against Congress's mandate for the DoD to adopt an acquisition strategy that promotes competition in the insurance marketplace.<sup>408</sup> Quite the contrary, Congress, the DoD, and the insurance industry, including some brokers,<sup>409</sup> are interested in self-insurance because it provides a unique business opportunity for insurance carriers. The DoD employs more than 718,000 civilian personnel.<sup>410</sup> Managing the claims of these employees would provide an incredible revenue stream for any insurance carrier. Carriers already have the infrastructure in place to perform claims processing for large government agencies. And, without being required to accept the risk of insuring contractors overseas, business would be relatively consistent and predictable. The House Over-

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400. *See id.*

401. DoD REPORT TO CONGRESS, *supra* note 39, at 19.

402. *See* BOOZ ALLEN HAMILTON, SPOT, SYNCHRONIZED PREDEPLOYMENT & OPERATIONAL TRACKER TRAINING WORKBOOK FOR GOVERNMENT ORGANIZATION USERS (Oct. 2009), available at [https://spot.altess.army.mil/Resources/Government\\_Organization\\_Workbook.pdf](https://spot.altess.army.mil/Resources/Government_Organization_Workbook.pdf).

403. 5 U.S.C. § 8147(a) (2006).

404. *Id.*

405. *Id.* § 8147(b).

406. *Id.*

407. *See id.* § 8147(a).

408. DoD REPORT TO CONGRESS, *supra* note 39, at 19.

409. *See id.* at 20.

410. *About the Department of Defense (DOD)*, *supra* note 300.

sight and Government Reform Committee noted that CNA experienced losses of about \$15 million between 2002 and 2007 on contracts with DOS, USAID, and USACE.<sup>411</sup> By removing the underwriting risk and capitalizing on the infrastructure and services that insurance carriers can provide to the Government, carriers could develop a very profitable industry. Congress's requirement for competition in the marketplace would certainly be met by awarding contracts for these services through the government contract process.

Overall, the arguments against self-insurance do not carry much weight. If, as stakeholders say, self-insurance is simply a matter of time, then the Government should begin taking immediate steps to move the proper legislation through Congress.

#### V. CONCLUSION: THE WAY AHEAD

All DBA stakeholders recognize the benefits of government self-insurance.<sup>412</sup> But until Congress has an opportunity to develop a strategy for implementing self-insurance, a multiple-provider acquisition strategy offers the best interim solution. Transitioning to a multiple-provider system would not require extensive statutory change and could be implemented in a relatively short period of time. Procuring the services of multiple carriers to provide insurance to agencies or divisions within the DoD is already achievable.

Furthermore, a multiple-provider system would offer several key benefits that would pave the way for government self-insurance. First, and most importantly, a multiple-provider system would provide privity of contract with insurance carriers. This contractual relationship would allow government agencies to retain control over the claims process and would infuse much-needed accountability into the DBA insurance system. Additionally, granting DOL district directors the authority to issue binding decisions would eliminate the financial strain on injured contractors and their families during the appeals process. Self-insuring against the risk of PTSD and TBI would save the Government and other stakeholders valuable resources currently wasted on needless litigation. It would put the risk of insuring against mental illness on the Government, and would restore accountability in a system that has—for the last decade—facilitated the profiteering of wounded Americans.

In summary, the way in which the United States fights wars has changed over the last two decades. If the United States wishes to continue its reliance on overseas contractors, then it must recognize its moral obligation to the men and women sacrificing their lives to support our armed forces. It is shameful that contractors seeking treatment for mental illness due to roadside bombs and improvised explosive devices are turned away by insurance carriers.

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411. See Memorandum from the Majority Staff, *supra* note 144, at 8–9.

412. See DOD REPORT TO CONGRESS, *supra* note 39, at 52; 2008 House Hearing, *supra* note 122, at 97.

Sending civilians into war has consequences, but those consequences should not be borne by the children and spouses of our contractor veterans. After nearly forty years, Congress has finally mandated adoption of a new acquisition strategy. It is astounding that the DoD has suggested maintaining the same open-market strategy that will continue to exploit wounded Americans serving in Iraq and Afghanistan. While keeping the status quo may be the simplest solution, it betrays the age-old military ethos that no American should ever be left behind.