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## **BYPASSING REDUNDANCY: RESOLVING THE JURISDICTIONAL DILEMMA UNDER THE DEFENSE BASE ACT**

Claire Been

*Abstract:* In 1941, Congress passed the Defense Base Act (DBA) to provide workers' compensation coverage to civilian workers employed overseas under U.S. government contracts or on U.S. military bases. Congress modeled the DBA after the Longshore and Harbor Workers' Compensation Act (Longshore Act),<sup>1</sup> modifying certain provisions to provide for accidents that occur overseas. In 1972, Congress amended the procedures governing review of claims under the Longshore Act. The amendments required workers to appeal claim-related decisions to a new administrative board and then to a U.S. court of appeals. Before the amendments, a worker's first appeal under the Longshore Act was to federal district court. Because the amendments failed to mention the DBA, the U.S. courts of appeals have disagreed over whether judicial review of administrative decisions under the DBA should take place in district courts, as it previously did, or in the courts of appeals, mirroring the changes to the Longshore Act. The resulting uncertainty has led to inconsistency in administration of the DBA and to difficulty for this growing class of workers. This Comment argues that context, statutory canons, legislative history, construction of other Longshore Act extensions, and policy considerations establish that review of final agency decisions in DBA cases must be in the courts of appeals.

### **INTRODUCTION**

It sounds like the opportunity of a lifetime.<sup>2</sup> You are a truck driver, and a recruiter calls to tell you about a new prospect: a truck-driving job that triples your current pay.<sup>3</sup> The catch? You will be working for a government contractor, living in a war zone, driving across the Iraqi desert to provide supplies to American service personnel. You take the offer. Just five weeks into your new job, your convoy is attacked, and you are seriously injured. Back in the United States, facing permanent

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1. Congress originally titled the Act "Longshoremen's and Harbor Workers' Compensation Act." See Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927). In 1984, Congress amended the Act, changing the name to the "Longshore and Harbor Workers' Compensation Act." See Pub. L. No. 98-426, § 27(d)(2), 98 Stat. 1654 (1984) (codified at 33 U.S.C. § 901 (2000)). This Comment cites versions of the Longshore Act both before and after the 1984 change in title. Thus, for consistency, this Comment will refer to the Act as the "Longshore Act."

2. This hypothetical was created by the author for illustrative purposes.

3. For an example of the significant increase in wages a civilian contractor might enjoy by working overseas, see *Proffitt v. Service Employers International, Inc.*, 40 B.R.B.S. 41 (2006) (noting the ability of an overseas contractor to earn three times what he could earn in the United States).

disability, you learn that a statute, the Defense Base Act (DBA),<sup>4</sup> requires your employer to compensate you for your injuries. Congress passed the DBA in 1941<sup>5</sup> to provide workers' compensation coverage to civilian workers employed overseas under U.S. government contracts or on U.S. military bases.<sup>6</sup> You diligently file a claim with the Office of Workers' Compensation Programs,<sup>7</sup> but your claim is plagued by difficulties. Your claim drags out for years as it winds its way through the administrative process, until it is finally denied and you are forced to appeal. You follow the agency's instructions and file in the correct court of appeals. When the opinion comes down, you are appalled to read that your claim has been dismissed for jurisdictional reasons. By now, the statute of limitations has run, and it is too late to re-file in the correct court.<sup>8</sup>

The number of civilian contract workers overseas has grown significantly in the past decade.<sup>9</sup> Contract workers have become a

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4. Defense Base Act, 42 U.S.C. §§ 1651–1654 (2000).

5. Defense Base Act, ch. 357, 55 Stat. 622 (1941) (codified as amended at 42 U.S.C. §§ 1651–1654 (2000)). The DBA, originally passed to protect workers on lend-lease military bases, was amended in 1942 to cover employees working under government contracts outside of the United States. *See* Amendment to Defense Base Act, ch. 668, 56 Stat. 1028 (1942) (codified as amended at 42 U.S.C. §§ 1651–1654 (2000)); *see also* *Univ. of Rochester v. Hartman*, 618 F.2d 170, 173 (2d Cir. 1980) (“The Act was originally intended to cover civilians employed at overseas military bases . . . and was finally extended to protect employees fulfilling service contracts . . .”).

6. *See* 42 U.S.C. § 1651(a) (applying the DBA to workers suffering injury or death while working on any overseas military, air, or naval base acquired after 1940; any public work in any Territory or possession outside the United States if the employee is engaged in employment under the contract of a contractor; under a contract or subcontract entered into with the United States or any agency if the contract is to be performed outside the continental United States; or if employed by an American employer outside the United States providing services to the Armed Forces).

7. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 919(a) (2000) (“[A] claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary [of Labor] at any time after the first seven days of disability.”); *see* 20 C.F.R. § 702.201 (2000) (establishing in the Employment Standards Administration an Office of Workers' Compensation Programs (OWCP)); *id.* § 702.202 (vesting the OWCP with authority to administer the Longshore Act and DBA).

8. For a discussion of the consequences of dismissing a DBA case, *see Pearce v. Director, Office of Workers' Compensation Programs*, 603 F.2d 763, 771 (9th Cir. 1979) (“[W]ere we to dismiss . . . [the claimant] would probably be held to be time barred by [33 U.S.C. § 921(b)]. And if he were to seek a new hearing under [33 U.S.C. § 919], he might well be met with an argument that his application should be denied on the ground of administrative res judicata, or the doctrine of finality of administrative action.”). There are two cases by the name of *Pearce v. Dir., Office of Workers' Comp. Programs* that will be cited in this Comment, one from the Ninth Circuit and one from the Seventh Circuit.

9. Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D1–2 (“[One hundred thousand] is also 10 times the estimated number of contractors that deployed during

critical part of U.S. military operations overseas because of costs, executive limitations on personnel, and the military's need for workers with highly technical skills.<sup>10</sup> There were more than 100,000 civilian contract workers in Iraq at the end of 2006,<sup>11</sup> and U.S. employers who are awarded government contracts must secure DBA insurance to cover all of their overseas workers, regardless of the worker's nationality.<sup>12</sup> So far, no court of appeals has dismissed a DBA claim for jurisdictional reasons, but this scenario is not farfetched.<sup>13</sup> Nothing protects an injured claimant from having his or her case dismissed in this fashion.<sup>14</sup>

The DBA is an extension of the Longshore and Harbor Workers' Compensation Act (Longshore Act),<sup>15</sup> and takes most of its operative and procedural provisions from the Longshore Act.<sup>16</sup> In 1972, Congress amended the procedural provisions of the Longshore Act but did not state whether these amendments affected the DBA.<sup>17</sup> These amendments created a new administrative review board that took the place of review

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the Persian Gulf War in 1991, reflecting the Pentagon's growing post-Cold War reliance on contractors . . .").

10. See Marc Lindemann, *Civilian Contractors under Military Law*, PARAMETERS: U.S. ARMY WAR C. Q., Autumn 2007, at 83–84 (“[A] combination of technology, budget constraints, and personnel shortages forced the military to rely heavily on contractors.”); see also THE JUDGE ADVOC. GEN.'S LEGAL CENTER & SCH., OPERATIONAL L. HANDBOOK 137 (Maj. Derek I. Grimes et al. eds., 2006) (“[I]n some deployed areas, such as Bosnia and Kosovo, the executive branch has limited the number of U.S. military personnel who can be deployed to those countries at any one time. When these limits, known as “force caps” are in place, contractors replace Soldiers . . .”).

11. See Merle, *supra* note 9. This estimate includes contractors of all nationalities.

12. See DEP'T OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEFENSE BASE ACT: WORKERS' COMPENSATION FOR EMPLOYEES OF U.S. GOVERNMENT CONTRACTORS WORKING OVERSEAS 1 (2003), <http://www.dol.gov/esa/owcp/dlhwc/ExplainingDBA.pdf> [hereinafter OWCP WORKERS' COMPENSATION] (explaining that all employees working in covered employment positions must be covered by the DBA, regardless of nationality).

13. In one case the worker was saved from this result only by a discretionary judicial transfer. See *Lee v. Boeing Co.*, 123 F.3d 801, 807–08 (4th Cir. 1997) (transferring the worker's case to the United States District Court for the District of Maryland as the proper forum to hear the appeal).

14. See *Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 771 (9th Cir. 1979) (“We transfer this case, rather than dismissing it, because we see no reason to require Pearce to start all over again . . . Transfer keeps the case before us alive . . .”).

15. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (2000).

16. Defense Base Act, 42 U.S.C. § 1651(a)(1) (2000) (“Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act . . . shall apply in respect to the injury or death of any employee . . .”); see also OWCP WORKERS' COMPENSATION, *supra* note 12, at 2 (explaining that the DBA adopts the Longshore Act with only a few exceptions).

17. See *Pearce*, 603 F.2d at 767 (“The 1972 Amendments to the [Longshore] Act did not explicitly amend the Defense Base Act.”).

formerly performed by federal district courts, and provided for further review in the U.S. courts of appeals.<sup>18</sup>

The U.S. courts of appeals have disagreed over the impact of these amendments on the correct judicial forum for appeals under the DBA.<sup>19</sup> Some courts have determined that proper jurisdiction after exhaustion of administrative proceedings is in the district court,<sup>20</sup> as it has always been under the DBA. Other courts have found that the DBA incorporated the 1972 Longshore Act amendments and that judicial review should begin in the courts of appeals.<sup>21</sup> Requiring review in the federal district court is erroneous and has several negative policy implications. First, initial review in district court is duplicative because district court review receives no deference when the case is reviewed on appeal.<sup>22</sup> Second, the uncertainty created by the circuit split may force parties to file in multiple courts.<sup>23</sup> Third, and most importantly, this jurisdictional debate tends to prolong DBA cases, which is harmful and costly to all parties involved.<sup>24</sup> This Comment applies traditional tools of statutory construction to the DBA and the Longshore Act and concludes that judicial review of final agency decisions should take place in the U.S. courts of appeals.

Part I of this Comment explains the history and purpose behind the DBA and the Longshore Act, including amendments altering the jurisdictional scheme. Part II explores the reasoning that courts have used when reconciling the textual provisions of the DBA and Longshore Act. Part III examines relevant tools of statutory construction, explains how courts have interpreted Longshore Act extensions other than the DBA, and explores policy concerns. Finally, Part IV argues that examination of the DBA using traditional tools of statutory construction supports the finding that the U.S. courts of appeals are the proper forum for judicial review of cases under the DBA.

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18. See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1251, 1261 (1972) (codified at 33 U.S.C. § 919 (2000)).

19. See *infra* Parts II.A and II.B.

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 477 (5th Cir. 2000) (according no deference to the district court's decision).

23. See, e.g., Docket at 1, *Serv. Employers Int'l, Inc. v. Zimmerman*, No. 06-3903-ag (2d Cir. Jan. 17, 2007) (filing in two district courts and one court of appeals).

24. See *infra* notes 160–163 and accompanying text.

## I. THE DBA IS AN EXTENSION OF THE LONGSHORE ACT WITH UNIQUE MODIFICATIONS

The DBA provides workers' compensation coverage to civilian contract workers employed overseas by private contractors under U.S. government contracts or on U.S. military bases outside the United States.<sup>25</sup> Congress modeled the DBA after the Longshore Act, which provides workers' compensation coverage to waterway workers.<sup>26</sup> The procedures governing the review of claims under the two acts were nearly identical when the DBA was first enacted, providing for appeal of final administrative decisions in federal district court.<sup>27</sup> When Congress amended the Longshore Act's procedural scheme in 1972, it did not amend the DBA and did not indicate whether the Longshore Act's amendments should apply to the DBA.<sup>28</sup>

### A. *The Original Versions of the DBA and the Longshore Act Both Provided for Appeal of Final Administrative Decisions in Federal District Court*

The Longshore Act, originally enacted in 1927,<sup>29</sup> provides workers' compensation coverage<sup>30</sup> for workers injured on navigable waterways or adjoining areas.<sup>31</sup> Historically, the procedures of the Longshore Act

25. See Defense Base Act, 42 U.S.C. § 1651(a) (2000).

26. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as Longshore and Harbor Workers' Compensation Act at 33 U.S.C. § 901 (2000)).

27. 42 U.S.C. § 1653(b) ("Judicial proceedings . . . shall be instituted in the United States district court of the judicial district *wherein is located the office of the deputy commissioner whose compensation order is involved . . .*") (emphasis added); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b) (1970) (amended 1972) ("If not in accordance with the law, a compensation order may be suspended or set aside . . . through injunction proceedings . . . instituted in the Federal district court for the *judicial district in which the injury occurred.*") (emphasis added).

28. See *infra* Part I.C.

29. ch. 509, 44 Stat. at 1446.

30. Workers' compensation coverage provides benefits such as salary compensation, medical benefits, or death benefits for injuries or deaths occurring on the job. For a summary of benefits provided by and the operation of the Longshore Act, see Gerald Bober & Michael Wible, *Compensable Injury or Death Arising Under the Longshore & Harbor Workers' Compensation Act*, 35 LOY. L. REV. 1129 (1990).

31. 33 U.S.C. § 903(a) (2000) ("[C]ompensation shall be payable . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area . . .)"). Certain exceptions to Longshore Act coverage exist. See, e.g., *Chesapeake & Ohio R. Co. v. Schwalb*, 493 U.S. 40, 47 (1989) (excluding employees whose job functions are not integral

provided informal review through the Office of Workers' Compensation Programs.<sup>32</sup> If informal procedures were unsuccessful, the deputy commissioner of the Office of Workers Compensation Programs<sup>33</sup> then decided the merits of the worker's case.<sup>34</sup> The worker could appeal the deputy commissioner's final determination<sup>35</sup> under section 21 of the original Longshore Act, which provided that "[i]f not in accordance with the law, a compensation order may be suspended or set aside . . . through injunction proceedings . . . instituted in the Federal district court for the *judicial district in which the injury occurred*."<sup>36</sup>

Congress passed the DBA in 1941 as an extension of the Longshore Act.<sup>37</sup> The DBA states: "[e]xcept as herein modified, the provisions of the [Longshore] Act . . . as amended . . . shall apply."<sup>38</sup> Through this language, Congress provided that procedures governing review of claims under the DBA mirrored those of the Longshore Act.<sup>39</sup> The choice to use parallel procedures is understandable in light of one of the purposes of the DBA: "to provide substantially the same relief for injuries or death

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to the loading or unloading of ships); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 83 (1979) (excluding truck drivers delivering supplies to maritime locations); *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 304 (5th Cir. 2002) (excluding workers on floating casinos under a "recreational operation" exception). See generally Thomas Fitzhugh, III, *Who is Covered? Recent Cases Regarding Longshore Situs and Status*, 16 U.S.F. MAR. L. J. 265 (2004).

32. See Thomas C. Fitzhugh III, *Administrative Claims Handling at the District Director's Office*, in THE LONGSHORE TEXTBOOK 1, 1–5 (Steven M. Birnbaum, et al. eds., 4th ed. 1999) (discussing the informal procedures provided through the Office of Workers' Compensation Programs).

33. The deputy commissioner was the administrator of claims through Office of Workers' Compensation Programs, which is part of the Department of Labor. *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 137 (1995) ("Before the 1972 amendments to the [Longshore Act], the OWCP Director's predecessors as administrators of the Act, officials called OWCP deputy commissioners, adjudicated [Longshore Act] claims in the first instance."). The Secretary of Labor substituted the title "district director" for "deputy commissioner." 20 C.F.R. § 702.301 (2000) ("The substitution is for administrative purposes only and in no way affects the power or authority of the position as established by statute"). The title "district director" is now used, but for purposes of this Comment, the terms are interchangeable. See FITZHUGH, *supra* note 32, at 1 ("Since 1972 their title has changed: deputy commissioners are now district directors.").

34. See FITZHUGH, *supra* note 32, at 1.

35. See Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b) (1970) (amended 1972).

36. *Id.* (emphasis added).

37. See S. REP. NO. 77-540, at 1 (1941) ("Section 1 of the bill extends the provisions of the [Longshore] Act.").

38. Defense Base Act, 42 U.S.C. § 1651(a) (2000).

39. See H.R. REP. NO. 77-1070, at 1–2 (1941).

of employees at bases . . . as existing law affords similar employees in the United States . . . .”<sup>40</sup>

*B. The DBA Included a Specific Provision Governing Appeals from Agency Decisions in DBA Cases, Which Differed from the Analogous Longshore Act Provision*

A blanket adoption of the jurisdictional provisions of the Longshore Act would have left injured workers with claims arising under the DBA without a forum for judicial review<sup>41</sup> because most, if not all injuries sustained under the DBA occur overseas in *no* American judicial district.<sup>42</sup> To avoid this undesirable outcome, the drafters of the DBA inserted a provision in the DBA that reads: “[j]udicial proceedings . . . shall be instituted in the United States district court of the district *wherein is located the office of the deputy commissioner whose compensation order is involved.*”<sup>43</sup> This alteration is the only difference between judicial review provisions in the DBA and the original Longshore Act.<sup>44</sup>

*C. Amendments to the Longshore Act Altered the Statutory Scheme for Judicial Review of Claims Arising Under the Longshore Act, While Leaving the DBA Untouched*

A little more than thirty years after Congress enacted the DBA, it amended the Longshore Act to change the structure of administrative

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40. *Id.* at 2.

41. *See* S. REP. NO. 77-540, at 1 (making provision for “extension of existing compensation districts . . . to include the [overseas] bases” this statute will cover).

42. *Pearce v. Dir., Office of Workers’ Comp. Programs*, 603 F.2d 763, 766 (9th Cir. 1979) (“[I]n most, if not all, Defense Base Act cases, the injury or death would not occur within any federal judicial district . . .”).

43. 42 U.S.C. § 1653(b) (emphasis added). The location of the deputy commissioner’s office is determined based on where the injury occurred. *See Longshore and Harbor Workers’ Compensation Act*, 33 U.S.C. § 913(a) (2000) (“Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred.”). Congress gave the Secretary of Labor the authority to extend Longshore Act compensation districts to include overseas areas, and the Secretary accomplished this by promulgating a regulation, 20 C.F.R. § 704.101 (2000). Currently, overseas injuries under the DBA are reported to five different offices based on geographical area. *See FITZHUGH, supra* note 32, at 2.

44. *See AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1113 (5th Cir. 1991) (“[T]he procedures applicable to file a claim under the DBA and to obtain an initial determination of the claim are the very procedures set forth in the [Longshore Act] for a claim arising under that Act.”).

proceedings and judicial review under that Act.<sup>45</sup> The amendments, passed in 1972, made three main procedural changes.<sup>46</sup> First, the amendments assigned an administrative law judge (ALJ) to review disputed claims, replacing the function previously performed by the deputy commissioner.<sup>47</sup> Second, they created an administrative board, the Benefits Review Board (Board), to review ALJ determinations.<sup>48</sup> Third, they provided judicial review of Board decisions in the U.S. courts of appeals.<sup>49</sup> The courts and agencies that have interpreted these amendments have taken the view that Congress intended to directly substitute Board review for the review process formerly performed by federal district courts,<sup>50</sup> completely writing the district courts out of the statutory scheme.<sup>51</sup> A modern day claimant under the Longshore Act who disagrees with the determination of an ALJ first appeals to the Board.<sup>52</sup> The claimant then has the option to petition for review “in the United States court of appeals for the circuit in which the injury occurred.”<sup>53</sup>

The 1972 amendments significantly streamlined and clarified the Longshore Act’s procedural scheme,<sup>54</sup> but the legislative history of the

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45. See Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, §§ 14–15, 86 Stat. 1251, 1261–62 (1972) (codified at 33 U.S.C. §§ 919, 921 (2000)).

46. *Id.*

47. *Id.* at § 14, 86 Stat. at 1261; see also *Hice v. Dir., Office of Workers’ Comp. Programs*, 156 F.3d 214, 216 (D.C. Cir. 1998) (discussing how the amendments gave “hearing functions” of the deputy commissioner to ALJs).

48. See *Hice*, 156 F.3d at 216 (discussing creation of the Benefits Review Board (Board)).

49. See § 15(a), 86 Stat. at 1261 (“Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred.”).

50. See *In re Comp. under the Longshore & Harbor Workers’ Comp. Act*, 889 F.2d 626, 629 (5th Cir. 1989) (“[I]n 1972 Congress created the [Board] to hear all direct appeals of compensation orders. This replaced the district court’s exercise of that function.”); U.S. Dep’t of Labor Benefits Review Board Mission Statement, <http://www.dol.gov/brb/mission.htm> (last visited Mar. 8, 2008) (“The Board exercises the appellate review authority formerly exercised by the United States District Courts. Board decisions may be appealed to the U.S. Courts of Appeals and to the U.S. Supreme Court.”).

51. Congress eliminated the district court’s role in reviewing Longshore Act compensation orders. See Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 15(a), 86 Stat. 1251, 1261–62.

52. See Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(b) (2000) (“The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact . . .”).

53. *Id.* § 921(c).

54. See *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 649 (N.D. Cal. 1974) (“The main reason

amendments does not indicate whether Congress intended the changes to apply to the DBA.<sup>55</sup> Because Congress did not expressly refer to the DBA in the 1972 Longshore Act amendments or in the relevant legislative history, it is impossible to conclude that Congress considered any potential impact on the DBA.<sup>56</sup> It is unclear whether congressional silence reflected a desire to maintain the status quo, or a belief that the 1972 amendments would be automatically incorporated into the DBA.<sup>57</sup>

*D. The 1972 Amendments Created an Inconsistency Between the DBA and the Longshore Act that Can Be Reconciled in Two Different Ways*

The changes to the Longshore Act could have altered the DBA in two ways. Under one interpretation, the plain “district court” language of the DBA’s jurisdictional provision mandates that review of agency determinations take place in district courts.<sup>58</sup> The alternate interpretation requires review to take place in courts of appeals, as dictated by the text of the amended Longshore Act.<sup>59</sup>

An interpretation of the complex relationship between the DBA and Longshore Act must begin with the text of the DBA. The opening clause of the DBA states: “[e]xcept as *herein modified*, the Provisions of the Longshore and Harbor Workers’ Compensation Act . . . as amended, shall apply.”<sup>60</sup> According to this language, subsequent amendments to

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for the amendments was to obviate the increased litigation costs and the unwarranted expenditure of court time under the old system.”).

55. See Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972) (failing to refer to the DBA); see also *Home Indem. Co. v. Stillwell*, 597 F.2d 87, 90 (6th Cir. 1979) (“Congress did not, however, whether through legislative oversight or intent, amend the judicial review provisions of the Defense Base Act.”).

56. See *Home Indem. Co.*, 597 F.2d at 90.

57. See *Liquist v. Bowen*, 813 F.2d 884, 889–90 (8th Cir. 1987) (“To draw a negative inference of congressional intent from vague or missing legislative history would be hazardous at best . . . Furthermore, congressional inaction . . . is not sufficient to demonstrate approval for the practice.”). The only change Congress has made to the DBA subsequent to the 1972 amendments was to substitute the title “Longshore and Harbor Workers’ Compensation Act” for “Longshoremen’s and Harbor Workers’ Compensation Act” in 42 U.S.C. § 1653(a). See Pub. L. No. 98-426, § 27(d)(2), 98 Stat. 1639, 1654 (1984) (codified at 33 U.S.C. § 901 (2000)).

58. Defense Base Act, 42 U.S.C. § 1653(b) (2000) (“Judicial proceedings . . . shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved.”).

59. Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(c) (2000) (“in the United States court of appeals for the circuit in which the injury occurred”) (emphasis added).

60. 42 U.S.C. § 1651(a) (emphasis added).

the Longshore Act apply to the DBA,<sup>61</sup> unless a specific DBA provision modifies the Longshore Act's text.<sup>62</sup> Where the DBA's text departs from traditional Longshore Act provisions, the DBA controls.<sup>63</sup>

Section 21 of the Longshore Act, before Congress amended it, read: "a compensation order may be suspended or set aside . . . in the Federal district court for the judicial district in which the injury occurred."<sup>64</sup> The DBA provides: "[j]udicial proceedings . . . shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved."<sup>65</sup> The post-1972 Longshore Act now requires judicial review of final agency determinations to take place "in the United States *court of appeals* for the circuit in which the injury occurred."<sup>66</sup>

Because the DBA section governing judicial review specifically departs from the normal procedures of the Longshore Act, the section is a modification, which supersedes the Longshore Act's now-inconsistent language.<sup>67</sup> While it is clear a modification exists, there are two equally

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61. While an interesting issue, incorporation of the 1972 Longshore Act amendments is not disputed between the circuits. All the courts have determined that the Longshore Act amendments were incorporated into the DBA. *See, e.g.*, *ITT Base Servs. v. Hickson*, 155 F.3d 1272, 1274–75 (11th Cir. 1998) (finding that the DBA incorporates provisions of the Longshore Act as long as they are consistent with the DBA); *Hice v. Dir., Office of Workers' Comp. Programs*, 156 F.3d 214, 217–18 (D.C. Cir. 1998) (acknowledging that the 1972 amendments transferred the deputy commissioner's hearing authority to the ALJ, and applying this change to the DBA); *Lee v. Boeing Co.*, 123 F.3d 801, 804 (4th Cir. 1997) ("Congress amended section [9]21(b) of the [Longshore Act] to its current form and provided an initial level of administrative review to the newly created Board . . . those procedures also apply to the DBA claims . . ."); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1113 n.3 (5th Cir. 1991) ("The DBA is a general reference statute that incorporates not only the version of the [Longshore Act] in force at the time the DBA was enacted, but all subsequent [Longshore Act] amendments as well."); *Pearce v. Dir., Office of Workers' Comp. Programs*, 647 F.2d 716, 724–25 (7th Cir. 1981) (remanding the case to the administrative law judge for a hearing, because the procedure had not complied with the requirements of the amended Longshore Act); *Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 769 (9th Cir. 1979) (finding the DBA incorporates the 1972 Longshore Act amendments, including the new Board procedures); *Home Indem. Co. v. Stillwell*, 597 F.2d 87, 88, 90 (6th Cir. 1979) (holding that the Board's decision needed to be first appealed to the District Court).

62. *See ITT Base Servs.*, 155 F.3d at 1274 ("[T]he DBA's general incorporation provision also states that when the provisions of the DBA modify those of the [Longshore Act], the DBA controls.").

63. *Id.*

64. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b) (1970) (amended 1972).

65. Defense Base Act, 42 U.S.C. § 1653(b) (2000).

66. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c) (2000) (emphasis added).

67. *See ITT Base Servs.*, 155 F.3d at 1275 n.5.

plausible interpretations regarding the scope of the DBA's modification.<sup>68</sup> If Congress intended every word of the DBA's jurisdictional provision, section 3(b),<sup>69</sup> to modify the incorporated Longshore Act language, then the “district court” language in the DBA would prevail, completely replacing the new “court of appeals” language in the Longshore Act.<sup>70</sup> The Longshore Act provision—“in the United States *court of appeals* for the circuit in which the injury occurred”<sup>71</sup>—would be inapplicable to DBA cases. Instead, the DBA provision—“[j]udicial proceedings . . . shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved . . .”<sup>72</sup>—would replace the contradictory Longshore Act language. Based on this view of the modification, judicial review under DBA cases must begin in the district courts, as dictated by the plain language of section 3(b).<sup>73</sup>

Alternatively, Congress might have intended a more limited modification in the DBA—one that simply substituted the clause “wherein is located the office of the deputy commissioner whose compensation order is involved” for the clause “in which the injury occurred.”<sup>74</sup> It could be argued that the choice to include section 3(b) in the DBA was not to ensure review in district courts, but to guarantee that jurisdiction would be available for injuries overseas.<sup>75</sup> Therefore, the modification was only of this later phrase, a limited change necessary to reflect the differences in the statutes' geographical reaches.<sup>76</sup> If this narrow view of the modification is accurate, the words “district court” in the DBA are not meaningful departures from the Longshore Act, and the DBA should incorporate the 1972 Longshore Act amendments that

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68. *See id.* at 1275 (holding that judicial review of compensation orders under the DBA commences in district courts). *Contra* *Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 770 (9th Cir. 1979) (“[F]or Defense Base Act cases, the proper court of appeals is in the circuit ‘wherein is located the office of the deputy commissioner.’”).

69. 42 U.S.C. § 1653(b).

70. 33 U.S.C. § 921(c).

71. *Id.*

72. 42 U.S.C. § 1653(b).

73. *Id.*; *see infra* Part II.A.

74. 42 U.S.C. § 1653(b); 33 U.S.C. § 921(c).

75. *See Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 766 (9th Cir. 1979) (“[I]n most, if not all, Defense Base Act cases, the injury or death would not occur within any federal judicial district . . .”).

76. *Id.* at 770.

require review in the “court of appeals.”<sup>77</sup> If this interpretation is followed, the review must begin in the courts of appeals, as required by the amended Longshore Act.<sup>78</sup> The provisions together would read, in effect: “may obtain review of that order in the United States court of appeals for the circuit *wherein is located the office of the deputy commissioner whose compensation order is involved.*”<sup>79</sup>

In sum, Congress modeled the DBA after the Longshore Act, borrowing most of its procedures, with the exception of the DBA provision governing judicial review of agency decisions. When first enacted, procedures for reviewing claims under the two Acts were nearly identical, providing for appeal of administrative decisions in federal district court. When Congress amended the Longshore Act in 1972, it failed to amend the DBA or to indicate whether the amendments should apply. These changes left room for two possible interpretations of the DBA jurisdictional provision and of the proper forum for review under the Act.

## II. COURTS OF APPEALS DISAGREE OVER WHETHER THE 1972 LONGSHORE ACT AMENDMENTS ALTERED THE FORUM FOR JUDICIAL REVIEW IN DBA CASES

In the absence of affirmative legislative guidance, circuit courts have split over whether the 1972 Longshore Act amendments changed the proper forum for judicial review in the DBA.<sup>80</sup> The DBA explicitly incorporates the procedural provisions of the Longshore Act, as amended,<sup>81</sup> but the 1972 Longshore Act amendments conflict with the DBA provision that mandates judicial review in district court.<sup>82</sup> The

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77. Based on this narrow view of modification, the only replacement necessary to effectuate the differences in the statute’s geographical reaches would be to substitute the words: “in which the injury occurred” with “wherein is located the office of the deputy commissioner whose compensation order is involved.” *Id.*

78. 33 U.S.C. § 921(c); *see infra* Part II.B.

79. The italicized section is the DBA provision.

80. *See infra* Parts II.A and II.B. The First and Second Circuit Courts of Appeals have decided cases after the 1972 Longshore Act amendments without questioning the appropriateness of jurisdiction. *See Univ. of Rochester v. Hartman*, 618 F.2d 170, 176 (2d Cir. 1980) (deciding that a university professor doing research was not covered by the DBA); *Puig v. Standard Dredging Co.*, 599 F.2d 467, 471 (1st Cir. 1979) (affirming a decision of the Board arising from a DBA case).

81. *See* Defense Base Act, 42 U.S.C. § 1651(a) (2000) (“Except as herein modified, the provisions of the [Longshore] Act . . . as amended . . . shall apply . . .”).

82. *Id.* § 1653(b) (“Judicial proceedings . . . shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation

Fourth, Fifth, Sixth, and Eleventh Circuits have held that judicial review in DBA cases should remain in the district courts,<sup>83</sup> noting the clarity of the “district court” provision in the DBA.<sup>84</sup> The Ninth Circuit has held that judicial review should take place in the courts of appeals,<sup>85</sup> concluding that the 1972 Longshore Act amendments effectively repealed the “district court” provision in the DBA.<sup>86</sup>

A. *Four Circuit Courts Have Held that the DBA’s Plain Text Requires Judicial Review to Begin in the District Court*

Four circuits have concluded that appeals should begin in district court.<sup>87</sup> In reaching this conclusion, the Eleventh Circuit first pointed to the opening clause of the DBA, which begins: “[e]xcept as herein modified, the provisions of the [Longshore Act] . . . as amended . . . shall apply . . . .”<sup>88</sup> Based on this language, the court determined that subsequent amendments to the Longshore Act should apply to the DBA, unless a specific DBA provision modifies the incorporated Longshore Act text.<sup>89</sup> The Eleventh Circuit thus held<sup>90</sup> that the DBA review provision,<sup>91</sup> with its “district court” language, completely modified and replaced the corresponding Longshore Act provision.<sup>92</sup> Under this view,

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order is involved . . . .”); Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(c) (“in the United States court of appeals for the circuit in which the injury occurred . . . .”).

83. *ITT Base Servs. v. Hickson*, 155 F.3d 1272, 1275 (11th Cir. 1998) (holding that the district court has jurisdiction over DBA appeals from the Board); *Lee v. Boeing Co.*, 123 F.3d 801, 805 (4th Cir. 1997) (holding that jurisdiction in DBA cases must be in the district court); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1116 (5th Cir. 1991) (holding that appeals still go to district courts); *Home Indem. Co. v. Stillwell*, 597 F.2d 87, 90 (6th Cir. 1979) (holding that district courts are the proper forum for appeals in DBA cases); *see also Hice v. Dir., Office of Workers’ Comp. Programs*, 156 F.3d 214, 218 (D.C. Cir. 1998) (leaving the precise issue undecided but transferring the case to the U.S. District Court for the District of Maryland, as the Fourth Circuit has found review must be in district courts).

84. *See infra* Part II.A.

85. *Pearce v. Dir., Office of Workers’ Comp. Programs*, 603 F.2d 763, 770 (9th Cir. 1979).

86. *Id.*; *see infra* Part II.B.

87. *See* cases cited *supra* note 83.

88. *See ITT Base Servs.*, 155 F.3d at 1274; Defense Base Act, 42 U.S.C. § 1651(a) (2000).

89. *ITT Base Servs.*, 155 F.3d at 1274 (“[T]he DBA’s general incorporation provision also states that when the provisions of the DBA modify those of the [Longshore Act], the DBA controls.”).

90. *Id.* at 1275.

91. 42 U.S.C. § 1653(b).

92. Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(c) (2000).

the express “district court” language prevailed,<sup>93</sup> and the Eleventh Circuit transferred the case to the district court.<sup>94</sup>

The Fourth, Fifth, and Sixth Circuits have similarly held, based on this plain text rationale, that federal district courts have jurisdiction over DBA cases.<sup>95</sup> The District of Columbia Circuit also expressed approval of the plain-text rationale of these other circuits, although the issue was not squarely before that court.<sup>96</sup> In deciding a DBA case, the Fifth Circuit noted that the language of the DBA is unambiguous, and concluded that any modification of the plain text would be tantamount to judicial legislation.<sup>97</sup> While not explicitly addressing the issue of modification, these courts seemed to agree implicitly with the Eleventh Circuit’s view.<sup>98</sup> In the Fourth Circuit case, however, Judge Hall

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93. See *ITT Base Servs.*, 155 F.3d at 1275 (“Our conclusion is dictated by the unambiguous language of the DBA . . . . The mandate of this provision does not allow us to apply the flatly inconsistent language of the [Longshore Act] . . . .”).

94. *Id.* at 1276 (transferring the case to the United States District Court for the Middle District of Florida).

95. See *Lee v. Boeing Co.*, 123 F.3d 801, 805 (4th Cir. 1997); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1116 (5th Cir. 1991); *Home Indem. Co. v. Stillwell*, 597 F.2d 87, 90 (6th Cir. 1979).

96. See *Hice v. Dir., Office of Workers’ Comp. Programs*, 156 F.3d 214, 218 (D.C. Cir. 1998) (“While Congress’s use of the phrase ‘in the United States court of appeals for the circuit in which the injury occurred’ leaves us inclined to agree with the Fourth, Fifth, and Sixth Circuits, we need not decide that issue for ourselves.”). *Hice* was decided based on whether the appeal should be brought in the circuit where the compensation order at issue originated or the circuit where the office of the ALJ who tried the case is located. *Id.* at 217–18. For a more in-depth discussion of this aspect of DBA cases, see *infra* note 158. The D.C. Circuit found that proper jurisdiction was in the Fourth Circuit, and therefore transferred the case to the U.S. District Court for the District of Maryland. *Id.* at 218. As the Fourth Circuit in *Lee* had already found jurisdiction was proper at the district court level, the *Hice* court did not need to reach this issue. See *Lee*, 123 F.3d at 805; *Hice*, 156 F.3d at 218 (“Because we have held that under the Defense Base Act the location of the district director—here, Baltimore—identifies the location of judicial review . . . and because the Fourth Circuit has plainly held that cases arising within its jurisdiction should be heard first by U.S. District Courts, we transfer this case to the U.S. District Court for the District of Maryland.”).

97. *AFIA/CIGNA Worldwide*, 930 F.2d at 1116 (“As the language of the DBA is free from ambiguity, jurisprudential modification of its plain statutory language would amount to judicial legislation.”); see also *Home Indem. Co.*, 597 F.2d at 90 (“Congress did not, however, whether through legislative oversight or intent, amend the judicial review provisions of the Defense Base Act. Accordingly, we are bound to apply the current statutory scheme until Congress dictates otherwise.”); *Lee*, 123 F.3d at 806 (holding that the DBA “unambiguously provides that initial judicial review . . . lies in the district court”).

98. These circuits explained that they must wholly apply either the DBA provision or the Longshore Act provision. If the Longshore Act clause governed, there would be no forum for review at all because jurisdiction is vested in “the circuit in which the injury occurred” and injuries under the DBA occur overseas. See *Lee*, 123 F.3d at 805 n.7 (“[I]f we adopted *Lee*’s argument and concluded that section 21(c) of the [Longshore Act] applies in DBA cases despite the express

dissented, finding no congressional intent to force those who were injured overseas to “be compelled to rehearse their arguments before the district court prior to the inevitable appeal.”<sup>99</sup>

*B. The Ninth Circuit Held that the 1972 Longshore Act Amendments Changed the Forum for Judicial Review in DBA Cases to the Courts of Appeals*

The Ninth Circuit held that DBA appeals from final agency decisions should take place in the courts of appeals.<sup>100</sup> The Ninth Circuit reasoned that although Congress modified the jurisdictional provision of the DBA to make it distinct from jurisdictional provisions of the Longshore Act, the words “United States district court” in the DBA were not a meaningful part of the modification.<sup>101</sup> The court concluded that Congress’s mention of the “district court” in the DBA did not preclude incorporation of the 1972 Longshore Act amendment that required review in the courts of appeals.<sup>102</sup> The court looked to the fact that the original Longshore Act text differed from the DBA jurisdictional provision, section 3(b), in only one respect.<sup>103</sup> The DBA replaced “in which the injury occurred”<sup>104</sup> with “wherein is located the office of the

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mandate to the contrary . . . we would essentially foreclose any judicial review . . .”); *Home Indem. Co.*, 597 F.2d at 90 (applying the Longshore Act provision would foreclose judicial review); *AFIA/CIGNA Worldwide*, 930 F.2d at 1116 n.7 (explaining that under the Longshore Act scheme no circuit court would have jurisdiction to hear the appeal).

99. *Lee*, 123 F.3d at 808 (Hall, J., dissenting).

100. *Pearce v. Dir., Office of Workers’ Comp. Programs*, 603 F.2d 763, 770 (9th Cir. 1979) (“[F]or Defense Base Act cases, the proper court of appeals is in the circuit ‘wherein is located the office of the deputy commissioner whose compensation order is involved.’”). The Ninth Circuit has heard subsequent cases on appeal directly from the Board, adhering to *Pearce*. See *Kalama Servs., Inc. v. Dir., Office of Workers’ Comp. Programs*, 354 F.3d 1085, 1089–90 (9th Cir. 2004) (deciding a DBA case appealed directly from the Board); *Kaneshiro v. Holmes & Narver, Inc.*, 60 F. App’x 79, 80 (9th Cir. 2003) (stating it has jurisdiction in this DBA case appealed directly from the Board, but denying the petition for review); *Parsons Corp. of Cal. v. Dir., Office of Workers’ Comp. Programs*, 619 F.2d 38, 40 (9th Cir. 1980) (deciding a DBA case appealed directly from the Board).

101. *Pearce*, 603 F.2d at 770.

102. *See id.*

103. *See id.* (“The phrase ‘in the United States District Court’ is a specific reference to section 21 of the [Longshore] Act, and is lifted from it. If it stood alone in section 3(b) of the Defense Base Act, it would be redundant, having been adopted by section 1(a) of the Defense Base Act . . . The language immediately following: ‘of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved’ is the modifying language. It is the only reason for the enactment of § 3(b) of the Defense Base Act.”).

104. Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(b) (1970) (amended 1972).

deputy commissioner whose compensation order is involved.”<sup>105</sup> The Ninth Circuit found this difference to be the heart of the modification and suggested that “district court” was included in the DBA simply to mirror the Longshore Act.<sup>106</sup> Based on this more limited view of modification, the court concluded:

When the 1972 Amendments to the [Longshore] Act abolished the jurisdiction of the district courts . . . , that change was adopted by the Defense Base Act . . . , and the phrase ‘in the United States District Court’ in § 3(b) of the Defense Base Act became inoperative; in effect, it was repealed. The language immediately following [*i.e.*, wherein is located the office of the deputy commissioner whose compensation order is involved], however, still had a role to perform.<sup>107</sup>

Based on this construction, judicial review under both Acts takes place in the courts of appeals, as the Longshore Act amendments require,<sup>108</sup> and judicial review under the DBA still occurs in the vicinity of the appropriate “office of the deputy commissioner.”<sup>109</sup> The Ninth Circuit transferred the case to the Seventh Circuit as the proper circuit to hear the appeal.<sup>110</sup> The Seventh Circuit accepted the transfer and decided the case on the merits but did not discuss the jurisdictional issue.<sup>111</sup>

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105. Defense Base Act, 42 U.S.C. § 1653(b) (2000).

106. *See Pearce*, 603 F.2d at 770 (“The phrase ‘in the United States District Court’ is a specific reference to section 21 of the [Longshore] Act, and is lifted from it.”).

107. *Id.*

108. *Id.*

109. 42 U.S.C. § 1653(b).

110. *Pearce*, 603 F.2d at 771. The Ninth Circuit transferred *Pearce*’s claim to the Seventh Circuit because he incorrectly filed in the Ninth Circuit. *Id.* at 771. The DBA requires injured workers to appeal in the circuit “wherein is located the office of the deputy commissioner whose compensation order is involved.” 42 U.S.C. § 1653(b). *Pearce*, who was injured in Thailand, originally filed his claim with the compensation district in Hawaii. *See Pearce*, 603 F.2d at 765. He subsequently moved to Chicago, and the claim was transferred to the Chicago office for convenience. *Id.* Therefore, *Pearce* likely believed his appeal should be filed in the Ninth Circuit, as he had originally filed his claim there. The correct circuit was actually the Seventh, where the compensation order at issue had originated. *See Pearce v. Dir., Office of Workers’ Comp. Programs*, 647 F.2d 716, 717–20 (7th Cir. 1981).

111. *Pearce*, 647 F.2d at 721 (“We approve the holding of the Ninth Circuit that jurisdiction lies in the Seventh.”). It is unclear whether the Seventh Circuit approved of the Ninth Circuit’s determination that jurisdiction should take place in courts of appeals in all DBA cases, or whether it agreed that jurisdiction should be in the Seventh Circuit in this individual case. Therefore, it is unclear which position the Seventh Circuit will take in future DBA cases. While the Seventh Circuit has heard one DBA case since *Pearce*, it was appealed through a different Longshore Act provision, so it did not implicate the provisions at issue in *Pearce*. *See Schmit v. ITT Fed. Elec. Int’l*, 986 F.2d

In sum, courts have disagreed over whether the 1972 Longshore Act amendments changed the proper forum for judicial review in cases under the DBA. The Fourth, Fifth, Sixth, and Eleventh Circuits have held that judicial review in DBA cases should stay in the district courts, finding that the unambiguous “district court” provision in the DBA governs. The Ninth Circuit has held that judicial review should now begin in the court of appeals, taking the narrow view of modification to find that the 1972 Longshore Act amendments effectively repealed the “district court” provision in the DBA.

### III. TOOLS OF STATUTORY CONSTRUCTION AND POLICY CONSIDERATIONS ARE RELEVANT TO THIS JURISDICTIONAL DISPUTE

Statutory interpretation first involves an examination of the plain text, including the context of related acts.<sup>112</sup> If the plain text does not resolve the question, other canons of statutory construction, legislative history, and policy considerations aid in interpretation.<sup>113</sup> Judicial and congressional treatment of other statutes based on the Longshore Act are useful for courts to consider when interpreting the DBA.<sup>114</sup>

#### A. *Plain Text, Context, and the Canon of In Pari Materia Are All Relevant When Interpreting Related Statutes*

When interpreting statutes, courts must first ask whether the statutory text has a plain and unambiguous meaning that answers the particular question.<sup>115</sup> The Supreme Court has interpreted a plain text inquiry to include text *and* context.<sup>116</sup> “[The] inquiry must cease if the statutory language is unambiguous and *‘the statutory scheme is coherent and*

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1103, 1105 (7th Cir. 1993) (hearing a case appealed to the district court under the Longshore Act provision 33 U.S.C. § 918(a), further appealed to the court of appeals pursuant to 28 U.S.C. § 1291).

112. *See infra* Part III.A.

113. *See infra* Parts III.A and III.C.

114. *See infra* Part III.B.

115. *See* *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (explaining that in all cases of statutory construction, the starting point must be the plain meaning of the language used by Congress); *Zuni Pub. Sch. Dist. v. Dep’t of Educ.*, \_\_\_ U.S. \_\_\_ (Apr. 17, 2007), 127 S.Ct. 1534, 1552 (2007) (Scalia, J., dissenting) (“We must begin, as we always do, with the text.”).

116. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (discussing how ambiguity is determined through reference to the plain text and context); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”).

*consistent.*”<sup>117</sup> This type of interpretation involves a holistic inquiry:<sup>118</sup> “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>119</sup> The Supreme Court has defined context as the texts of the immediate and related acts.<sup>120</sup>

When an examination of statutory context requires interpreting multiple related acts, the canon of construction *in pari materia* is also useful.<sup>121</sup> When applying the doctrine of *in pari materia*, courts should construe statutes with similar language and which deal with the same subject matter together—as if they were one law.<sup>122</sup> Statutes that are part of the same legislative scheme or that aim to accomplish similar purposes are considered *in pari materia*.<sup>123</sup> When applying *in pari materia*, “[t]he proper comprehensive analysis reads the parts of the statutory scheme together, bearing in mind the congressional intent underlying the whole scheme.”<sup>124</sup>

An example of a court applying *in pari materia* is seen in *Linguist v. Bowen*,<sup>125</sup> where the Eight Circuit Court of Appeals grappled with the

117. *Robinson*, 519 U.S. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)) (emphasis added).

118. *O’Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (“[A] court engaged in the task of statutory interpretation must examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language.”).

119. *Robinson*, 519 U.S. at 341; see also Norman J. Singer, 2A STATUTES AND STATUTORY CONSTRUCTION § 48A:16, 919 (7th ed. 2007) (“Reference to a statute’s context to determine its plain meaning also includes examining closely related statutes . . .”).

120. See *Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 199 (1993).

121. *United States v. Freeman*, 44 U.S. (3 How.) 556, 564–65 (1845) (explaining that when a court interprets multiple statutes dealing with a related subject or object, the statutes are *in pari materia*, and applying it in the context of two statutes governing double rations provided to army soldiers and marines).

122. See *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972); see also Norman J. Singer, 2B STATUTES AND STATUTORY CONSTRUCTION § 51.01, 170–75 (6th ed. 2000).

123. See *United States v. Stewart*, 311 U.S. 60, 64 (1940) (stating it is “plain” that the Federal Farm Loan Act of 1916 and the Revenue Act of 1916 are *in pari materia*, as they were enacted by Congress in the same legislative session and deal with the same subject matter).

124. *Linguist v. Bowen*, 813 F.2d 884, 889 (8th Cir. 1987) (applying *in pari materia* because the Railroad Retirement Act provision incorporated the text of the Social Security Act, and considering “the congressional intent behind the entire worker retirement benefits scheme in determining how these Acts should be applied in tandem”).

125. *Id.*

interrelation of the Social Security Act and Railroad Retirement Act.<sup>126</sup> Both federal Acts provided for a reduction in benefits if a retired worker's outside income exceeded a certain level in a particular year.<sup>127</sup> Because of these provisions, individuals receiving benefits under both Acts were subject to a greater reduction than those receiving under one Act.<sup>128</sup> The Eighth Circuit, in construing the Acts *in pari materia*, considered that the language was identical and that the purpose behind each act was to encourage all beneficiaries to work.<sup>129</sup> The court noted that it would frustrate this congressional intent if a worker entitled to benefits under both Acts ended up receiving less than his or her counterpart receiving benefits under one Act.<sup>130</sup> Based on these factors, the court determined that the two Acts must be read together, so the total reduction in benefits for a worker receiving under both Acts was no greater than the statutory limit under one Act.<sup>131</sup>

*B. Judicial Treatment of Other Longshore Act Extensions Provides Guidance in Interpreting the DBA*

Congress has used the Longshore Act scheme to provide workers' compensation coverage for workers who are employed in a variety of situations.<sup>132</sup> Courts have consistently construed these other acts so they remain in accordance with the procedures of the Longshore Act.<sup>133</sup> Judicial interpretation of two extensions, the Black Lung Benefits Act (BLBA)<sup>134</sup> and the Nonappropriated Fund Instrumentalities Act

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126. *Id.* at 889.

127. Social Security Act, 42 U.S.C. § 403(b) (1982); Railroad Retirement Act of 1974, 45 U.S.C. § 231a(g)(2) (1982).

128. *See Linquist*, 813 F.2d at 885–86.

129. *Id.* at 889.

130. *Id.* at 890.

131. *Id.*

132. In addition to the DBA, the Longshore Act's provisions are referenced extensively in the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (2000), the War Risk Hazard Act, 42 U.S.C. §§ 1701–1717 (2000), the Nonappropriated Funds Instrumentalities Act, 5 U.S.C. §§ 8171–8173 (2000) [hereinafter NFIA], and the Black Lung Benefits Act, Title IV of the Coal Mine Health and Safety Act, 30 U.S.C. §§ 901–945 (2000).

133. *See, e.g., Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1351–52 (5th Cir. 1980) (finding subsequent Longshore Act amendments applied because Congress intended to place workers injured on the Outer Continental Shelf in the same position as longshore workers); *Clark v. Crown Const. Co.*, 887 F.2d 149, 153 (8th Cir. 1989) (finding subsequent Longshore Act amendments applied to the Black Lung Benefit Act).

134. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 153 (1972) (codified as

(NFIA),<sup>135</sup> provide a useful analogy to guide resolution of issues presented under the DBA.

An example of courts actively choosing to retain parallel procedures in a Longshore Act extension is seen in the BLBA, enacted in early 1972,<sup>136</sup> which amended the Federal Coal Mine Health and Safety Act of 1969.<sup>137</sup> The Coal Mine Act incorporated most major provisions of the Longshore Act,<sup>138</sup> similar to the DBA. When Congress amended the Longshore Act,<sup>139</sup> the Seventh Circuit Court of Appeals recognized that its jurisdiction to review cases under the BLBA depended on whether it adopted the 1972 Longshore Act amendments.<sup>140</sup> The Seventh Circuit, followed by other circuits who decided the issue, determined that subsequent amendments were incorporated automatically, ensuring that procedure for cases under the BLBA and Longshore Act would remain the same.<sup>141</sup>

Courts have determined that another Longshore Act extension, the NFIA, incorporates the 1972 Longshore Act amendments requiring review in the courts of appeals.<sup>142</sup> This extension, enacted prior to

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amended at 30 U.S.C. §901 (2000)).

135. NFIA, 5 U.S.C. §§ 8171–8173 (2000).

136. 86 Stat. 153.

137. Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173, 83 Stat. 742 (1969) (codified as amended at 30 U.S.C. § 901) [hereinafter Coal Mine Act].

138. Section 422(a) of the Coal Mine Act, codified at 30 U.S.C. § 932(a), incorporates the provisions of the [Longshore] Act as amended.

139. *See* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1251, 1261 (1972) (codified at 33 U.S.C. § 901 (2000)).

140. *See* Dir., Office of Workers' Comp. Programs v. Peabody Coal Co., 554 F.2d 310, 317 (7th Cir. 1977).

141. *See id.* at 323–31. All other circuit courts that dealt with the issue also determined subsequent amendments were automatically incorporated. *See* Clark v. Crown Const. Co., 887 F.2d 149, 155 (8th Cir. 1989) (“[T]his Court, and the Benefits Review Board, have jurisdiction to review black lung cases.”); Krolick Contracting Corp. v. Benefits Review Bd., 558 F.2d 685, 686, 688 (3d Cir. 1977) (emphasizing the importance of uniformity between the circuits in ending the “statutory muddle Congress created . . .”); Dir., Office of Workers' Comp. Programs v. Nat'l Mines Corp., 554 F.2d 1267, 1274 (4th Cir. 1977) (finding a legislative intent to adopt subsequent amendments); Dir., Office of Workers' Comp. Programs v. E. Coal Corp., 561 F.2d 632, 638–39 (6th Cir. 1977) (finding “express intent” to adopt subsequent amendments). In 1977, Congress passed the Black Lung Benefits Reform Act to clarify that the 1972 Longshore Act amendments did apply to the BLBA, essentially adopting the determinations of these courts of appeals. *See* Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified as amended at 30 U.S.C. §901) (1977).

142. NFIA, 5 U.S.C. §§ 8171–8173 (2000).

1972,<sup>143</sup> posed a problem similar to that faced by the original DBA drafters: most injuries claimed under the NFIA would occur overseas and would not fall within the plain text of the incorporated Longshore Act provisions.<sup>144</sup> To solve this problem, the NFIA drafters used a jurisdictional provision nearly identical to that in the DBA, providing district court jurisdiction over injuries that occurred “outside the continental limits of the United States.”<sup>145</sup> The Seventh Circuit accepted jurisdiction in a case appealed straight from the Board, a new procedure implemented by the 1972 Longshore Act amendments.<sup>146</sup> The court of appeals decided the overseas case on the merits without questioning the propriety of jurisdiction or reconciling the fact that the text of the NFIA itself dictates review in “district courts.”<sup>147</sup>

*C. Policy Considerations are Relevant to the Proper Scope of the DBA Modification*

The uncertainty regarding the proper jurisdiction for DBA cases has significant ramifications for the adjudication of claims for a growing class of workers.<sup>148</sup> Forcing appeals from administrative decisions to go through both the district courts and courts of appeals potentially wastes judicial resources.<sup>149</sup> First, each court reviewing a case under the DBA applies the same standard of review.<sup>150</sup> Therefore, the district court and the court of appeals engage in the same review and analysis.<sup>151</sup> The Fifth

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143. See Nonappropriated Funds Instrumentalities Act, Pub. L. No. 89-554, 80 Stat. 555 (1966).

144. See Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(c) (2000).

145. 5 U.S.C. § 8171(d) (2000).

146. See *Symanowicz v. Army & Air Force Exch. Serv.*, 672 F.2d 638, 643 (7th Cir. 1982) (deciding a workers’ compensation claim arising under the NFIA).

147. See *id.*

148. See *Merle*, *supra* note 9.

149. *Lee v. Boeing Co.*, 123 F.3d 801, 806 (4th Cir. 1997) (acknowledging that its decision will result in a review procedure which is cumbersome and duplicative); *cf.* *Howard v. Sec’y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991) (explaining that duplication of time and effort wastes judicial resources where the district court and magistrate perform identical tasks).

150. See *Dickinson v. Zurko*, 527 U.S. 150, 152–61 (1999) (explaining that the main standard when it comes to review of administrative agency determinations is substantial evidence); *Potomac Elec. Power Co. v. Dir., Office of Workers’ Comp. Programs*, 449 U.S. 268, 279 n.18 (1980) (explaining that courts review legal decisions of the Board *de novo*, as the Board is not a policy-making body which deserves deference); *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 557 (5th Cir. 1998) (“Our review of . . . Board decisions is limited to considering errors of law and ensuring that the . . . Board adhered to its statutory standard of review, that is, whether the ALJ’s findings of fact are supported by substantial evidence and are consistent with the law.”).

151. See *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 477 (5th Cir. 2000).

Circuit addressed what deference it should give to the judgment of the district court in one of the first DBA cases appealed from a district court to a court of appeals.<sup>152</sup> It accorded “no deference to the decision of the district court and proceeded as though reviewing the decision of the [Board] in the first instance.”<sup>153</sup>

The circuit split has also created uncertainty in the law.<sup>154</sup> For instance, *Service Employers International v. Zimmerman*<sup>155</sup> is a DBA case that was pending in the Second Circuit and has since recently settled.<sup>156</sup> In *Zimmerman*, the employer sought judicial review after Board proceedings, and filed in two district courts and a court of appeals.<sup>157</sup> The employer filed in these courts to ensure that the case would continue in the event one of the reviewing courts found it did not have jurisdiction.<sup>158</sup> Multiple filings are not only costly, but also create

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152. *See id.*

153. *Id.* (“In reviewing a district court’s decision on agency action in a different context . . . we have explained that ‘since an appellate court reviews the administrative decision on the identical basis as did the district court, appellate court review need accord no particular deference to the district court’s conclusion. . . .’ This reasoning applies equally in the case at hand, and we therefore accord no deference to the decision of the district court . . .” (quoting *La. Envtl. Soc’y, Inc. v. Dole*, 707 F.2d 116, 119 (5th Cir. 1983))).

154. *See, e.g.*, Docket at 1, *Serv. Employers Int’l, Inc. v. Zimmerman*, No. 06-3903-ag (2d Cir. Jan. 17, 2007).

155. *Id.*

156. *See* Order Approving Settlement Agreement, *J.Z. v. Serv. Employers Int’l, Inc.* (Office of Administrative Law Judges Dec. 21, 2007).

157. *See* Brief for the Petitioner at 23 n.1, *Serv. Employers Int’l, Inc. v. Zimmerman*, No. 06-3903-ag (2d Cir. Jan. 17, 2007).

158. *See id.* (“[C]ognizant of the prospect judicial review in this case might lie in the district court in which the office of the district director or the office of the ALJ is located, timely filed protective petitions for review in both the Southern District of New York and the Eastern District of Louisiana”). An additional conflict exists in DBA cases, which explains why the employer in *Zimmerman* filed in multiple district courts. Cases are typically heard by an ALJ, and the ALJ’s order is then filed with the district director where the case originated. 20 C.F.R. § 702.349 (2000) (“The administrative law judge shall . . . deliver by mail, or otherwise, to the office of the district director having original jurisdiction . . .”). The text of the DBA requires appeals to be filed in the “district wherein is located the office of the deputy commissioner whose compensation order is involved.” Defense Base Act, 42 U.S.C. § 1653(b) (2000). Because the 1972 Longshore Act amendments split the responsibilities of the deputy commissioner between the district director and the ALJ, it is unclear whether the relevant district is the office of the ALJ or district director. *See Hice v. Dir., Office of Workers’ Comp. Programs*, 156 F.3d 214, 217–18 (D.C. Cir. 1998) (holding that the case should be brought in the district containing the office of the district director who handled the claim). While this issue is beyond the scope of this article, it adds a further level of uncertainty for DBA workers. *Id.*

the potential for duplicative litigation, an obvious example of waste of judicial resources.<sup>159</sup>

Finally, forcing these claims through a lengthier process and additional level of review is potentially harmful to both claimants and employers.<sup>160</sup> If a worker's claim is denied at the administrative level, the claimant must forgo compensation for a longer period of time while his or her claim winds its way through the review process.<sup>161</sup> If a worker wins at the administrative level, the employer will be forced to pay benefits while an appeal is pending,<sup>162</sup> and the Longshore Act prevents the employer from recovering those payments from the worker directly.<sup>163</sup>

In sum, interpretation of the DBA involves an examination of its plain text and the text of related Acts—specifically the Longshore Act. If the plain text does not resolve the question, canons such as *in pari materia* and policy considerations aid interpretation. Judicial treatment of other statutes based on the Longshore Act, such as the BLBA and NFIA, can also provide guidance in resolving this question.

#### IV. PROPER CONSTRUCTION OF THE DBA AND POLICY CONSIDERATIONS SUPPORT JUDICIAL REVIEW IN THE COURTS OF APPEALS

The plain text of the DBA's jurisdictional provision is ambiguous,<sup>164</sup> and the potential for multiple interpretations necessitates a thorough

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159. *Cf.* *Tyrer v. City of S. Beloit*, 456 F.3d 744, 756 (7th Cir. 2006) (discussing how dual federal and state proceedings would “waste the parties’ resources, risk duplicative rulings and reward a strategic gamesmanship . . .”).

160. *See Mathews v. Eldridge*, 424 U.S. 319, 342, 349 (1976) (explaining that “hardship imposed upon the erroneously terminated disability recipient may be significant,” although holding that a post-deprivation hearing is not necessary to satisfy due process).

161. Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(c) (2000) (“The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.”).

162. If the ALJ has directed the employer to pay compensation benefits, it must do so. 33 U.S.C. § 914(f) (2000) (charging twenty percent interest penalty if a compensation award is not paid within ten days).

163. None of the three sections of the Longshore Act allowing for recovery of overpayments—§§ 14(f), 8(j), and 22—provide for the direct recovery of overpayment from the worker. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 1206 (5th Cir. 1992) (“[The Longshore Act] does not provide an employer with a right to recover advance payments wrongfully paid, such as through fraud, when no [Longshore Act] compensation is owed.”).

164. *See infra* Part IV.A.

statutory analysis.<sup>165</sup> The canon *in pari materia*, legislative history, and the judicial treatment of other Longshore Act amendments all weigh in favor of judicial review in the courts of appeals.<sup>166</sup> Public policy concerns also strongly indicate that the Ninth Circuit's decision represents the best solution to this judicial dilemma.<sup>167</sup> Judicial review of agency determinations under the DBA should occur in the court of appeals.<sup>168</sup>

A. *The Plain Meaning of Section 3(b) of the DBA, Taken in Context, is Unclear*

The plain text of section 3(b) is unclear, and the circuits that relied on plain text to interpret section 3(b) of the DBA did so erroneously.<sup>169</sup> The Supreme Court has interpreted a plain text inquiry to include text *and* context,<sup>170</sup> requiring a holistic inquiry that includes the texts of the immediate and related acts.<sup>171</sup> The language of the DBA's jurisdictional provision reads in part: “[j]udicial proceedings *provided under Section 18 and 21 of the [Longshore] Act* in respect to a compensation order . . . .”<sup>172</sup> The explicit reference to the Longshore Act mandates that the two provisions be viewed together.<sup>173</sup> When viewed together in context, the two provisions directly contradict each other: the DBA requires judicial review in “district court,”<sup>174</sup> whereas the Longshore Act requires review in the “court of appeals.”<sup>175</sup> While this textual inconsistency could perhaps be resolved by adopting the broad view of

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165. *See supra* Part I.D.

166. *See infra* Part IV.B and IV.C.

167. *See infra* Part IV.D.

168. *See infra* Parts IV.A–IV.D.

169. Defense Base Act, 42 U.S.C. § 1653(b) (2000) (“Judicial proceedings provided under Section 18 and 21 of the [Longshore] Act in respect to a compensation order . . . .”); *see supra* note 95.

170. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (discussing how ambiguity is determined through reference to the plain text and context).

171. *Rowland v. Cal. Mens Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 199 (1993).

172. *See* 42 U.S.C. § 1653(b) (emphasis added).

173. *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (“Where one statute adopts the particular provisions of another . . . the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute.”) (quoting J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* 787–88 (John Lewis, ed., 2d ed. 1904); *see also* *United States v. Griner*, 358 F.3d 979, 982 (8th Cir. 2004) (finding cross reference has been incorporated bodily)).

174. 42 U.S.C. § 1653(b).

175. Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(c) (2000).

modification, none of the circuit courts that relied on the plain text even addressed modification.<sup>176</sup> The direct conflict confounds the plain text meaning of the DBA and indicates that a more thorough inquiry is required.<sup>177</sup>

*B. Legislative Purpose Demonstrates that the DBA's Role is Best Served Through Procedures Parallel to the Longshore Act*

Legislative purpose indicates that judicial review of administrative decisions in DBA cases should occur in the court of appeals.<sup>178</sup> Congress enacted the DBA to provide overseas workers with compensation coverage that would be parallel to coverage provided to their domestic counterparts.<sup>179</sup> Congress decided that claimants proceeding under these Acts would follow the same procedural paths, incorporating the jurisdictional provisions of the Longshore Act into the DBA<sup>180</sup> and

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176. See *Hice v. Dir., Office of Workers' Comp. Programs*, 156 F.3d 214, 218 (D.C. Cir. 1998); *Lee v. Boeing Co.*, 123 F.3d 801, 805 (4th Cir. 1997); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1116 (5th Cir. 1991); *Home Indemn. Co. v. Stillwell*, 597 F.2d 87, 90 (6th Cir. 1979).

177. Where a statute is subject to multiple interpretations, courts often give deference to agency interpretation. See *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 US 837, 842–43 (1984) (explaining that if Congress has not unambiguously spoken to the question at issue, deference is given to the administering agency). The Office of Workers' Compensation Programs, seen through the opinion of the District Director, believes proper jurisdiction is in the court of appeals. See *ITT Base Servs. v. Hickson*, 155 F.3d 1272, 1275 (11th Cir. 1998) (explaining that the district director thinks “the reading we adopt today will create an unintended disparity between the judicial provisions of the [Longshore Act] and those of the DBA . . . . Congress intended the 1972 amendments to remove district court jurisdiction uniformly . . . .”). If the Agency did receive deference, it would likely receive discretionary deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), as the opinion of the agency has not promulgated a rule or regulation in this area which would entitle it to binding deference. See generally Jamie A. Yavelberg, Note, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. ARAMCO*, 42 DUKE L.J. 166, 171 (1992) (“[T]he level of judicial deference to an agency opinion depends on the persuasiveness of the agency’s position as measured by the thoroughness of its investigation in making the ruling, the validity of its reasoning, and the consistency of the present agency position with earlier rulings.”). Some might argue that agency interpretations of procedural provisions deserve no deference, as agencies do not have special expertise regarding procedure. See Melissa M. Berry, *Beyond Chevron’s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 587–89 (2007).

178. See S. REP. NO. 77-540, at 1 (1941) (“Section 1 of the bill extends the provisions of the [Longshore] Act.”).

179. See *supra* note 40 and accompanying text. Cf. *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1351 (5th Cir. 1980) (finding that Congress intended, by adopting provisions of the Longshore Act, for workers injured under the Outer Continental Shelf Lands Act to be “in the same position as longshoremen”).

180. Defense Base Act, 42 U.S.C. § 1651(a) (2000) (adopting the provisions of the Longshore Act for workers injured under the DBA).

modifying the language only slightly through section 3(b).<sup>181</sup> The portion of section 3(b) that performed a modifying function was that which substituted “wherein is located the office of deputy commissioner”<sup>182</sup> for “in which the injury occurred.”<sup>183</sup> This was the meaningful modification of the incorporated language.<sup>184</sup> The inclusion of the “district court” language simply mirrored the text of the Longshore Act.

While congressional history on the issue is sparse, the changes in the workers’ compensation scheme reveal a concern for more efficient proceedings, not a desire to alter the consistency with which the Acts had been reviewed.<sup>185</sup> As Judge Hall pointed out in his dissent in *Lee v. Boeing Co.*,<sup>186</sup> it is unlikely that Congress intended workers who suffered the misfortune of being injured abroad to have to wait longer than their domestic counterparts for final resolution of their claim.<sup>187</sup> To the contrary, there is evidence that Congress intended for the 1972 Longshore Act amendments to streamline the jurisdictional process and save judicial resources.<sup>188</sup> The interpretation that forces cases to wind

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181. 42 U.S.C. § 1653(b); see *Pearce v. Dir., Office of Workers’ Comp. Programs*, 603 F.2d 763, 770 (9th Cir. 1979) (“[F]or Defense Base Act cases, the proper court of appeals is in the circuit ‘wherein is located the office of the deputy commissioner whose compensation order is involved.’”).

182. 42 U.S.C. § 1653(b).

183. Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. § 921(b) (1970) (amended 1972).

184. *Pearce*, 603 F.2d at 770 (“The language immediately following: ‘of the judicial district wherein is located the office . . .’ is the modifying language.”).

185. See *Dir., Office of Workers’ Comp. Programs v. Nat’l Mines Corp.*, 554 F.2d 1267, 1273 (4th Cir. 1977) (“[N]o sound reason has been advanced why Congress should have wished to exclude any particular compensation program from utilizing the reformed procedures for adjudicating claims provided by these [1972 Longshore Act] amendments.”); *Lee v. Boeing Co.*, 123 F.3d 801, 808 (4th Cir. 1997) (Hall, J., dissenting) (“Prior to 1972, claims made pursuant to the DBA were reviewed in the same manner as those arising under the [Longshore Act] . . . why would Congress have suddenly decided to treat these similar types of claims in a radically different manner? The answer, of course, is that Congress did not so decide. It expected, and rightly so, that an amendment of the [Longshore Act] would be, in essence, an amendment of all the compensation statutes . . .”).

186. 123 F.3d 801 (4th Cir. 1997).

187. See *id.* at 808 (Hall, J., dissenting) (“I do not believe Congress intended that workers unfortunate enough to have been injured in a foreign land have the final resolution of their claims take months or years longer than those filed by workers in this country who suffer identical injuries.”).

188. S. REP. NO. 92-1125, at 4 (1972) (“The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers’ services have seldom resulted in a real increase in actual benefits for injured workers.”); H.R. REP. NO. 92-1441, at 5 (1972), *reprinted in* 1972

through a circuitous review path directly contravenes this congressional intent.<sup>189</sup>

This undesirable result can be avoided by accepting the Ninth Circuit's more limited view of the modification.<sup>190</sup> Under this interpretation, the provisions of the DBA and the Longshore Act work in tandem, with section 21(c) of the Longshore Act providing jurisdiction in the courts of appeals, and section 3(b) of the DBA making a limited substitution that determines the appropriate circuit.<sup>191</sup> In sum, the DBA, based on the amended Longshore Act, should effectively read: "may obtain review of that order in the United States court of appeals for the circuit *wherein is located the office of the deputy commissioner whose compensation order is involved.*"<sup>192</sup>

C. *In Pari Materia Indicates that the DBA Should be Interpreted in Light of Analogous Longshore Act Extensions*

The canon of statutory construction *in pari materia* counsels that statutes that are part of the same legislative scheme or aim to accomplish similar purposes should be read in tandem.<sup>193</sup> Congress, through the Longshore Act and its numerous extensions, has created a comprehensive scheme to provide uniform workers' compensation coverage to a variety of workers.<sup>194</sup> In light of the congressional attempt to guarantee uniformity in this area, courts have reconciled potential procedural differences under the other Longshore Act extensions in

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U.S.C.C.A.N. 4698, 4702 ("The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs."); *see also* *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 649 (N.D. Cal. 1974) ("The main reason for the [1972 Longshore Act] Amendments was to obviate the increased litigation costs and the unwarranted expenditure of court time under the old system.").

189. H.R. REP. NO. 92-1441, at 5.

190. *See* *Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 770 (9th Cir. 1979).

191. *Id.* ("When the 1972 amendment to the [Longshore] Act abolished the jurisdiction of the district courts . . . the phrase 'in the United States District Court' in § 3(b) of the Defense Base Act became inoperative; in effect, it was repealed. The language immediately following, however, still had a role to perform.").

192. Text in italics is the portion of the DBA that made the operative modification.

193. *See* *United States v. Stewart*, 311 U.S. 60, 64 (1940) (stating that it is "plain" that the Federal Farm Loan Act of 1916 and the Revenue Act of 1916 are *in pari materia*, as they were enacted by Congress in the same legislative session and deal with the same subject matter).

194. *See supra* note 132.

favor of retaining parallel procedures.<sup>195</sup> In the case of the procedural conundrum created by congressional cross-reference and amendments under the BLBA,<sup>196</sup> the Sixth Circuit used the doctrine of *in pari materia* to support its holding that the BLBA incorporated the new Longshore Act procedures.<sup>197</sup> The court found that the Longshore Act amendments evidenced a general congressional intent to replace “outmoded and unsatisfactory past methods of review” and used *in pari materia* to further that intent.<sup>198</sup>

*In pari materia* also requires courts to interpret the NFIA and the DBA similarly.<sup>199</sup> The NFIA jurisdictional provision is nearly identical to that in DBA.<sup>200</sup> When deciding a case which presented the jurisdictional inconsistency between the NFIA and the Longshore Act, the Seventh Circuit Court of Appeals assumed that the NFIA incorporated the 1972 Longshore Act amendments and decided the case on the merits.<sup>201</sup> Courts should interpret cases dealing with the nearly identical language of the DBA similarly. Such an interpretation would create a harmonious interpretation that guarantees parallel procedures under all Longshore Act extensions, furthering the legislative intent underlying this statutory scheme.<sup>202</sup> The application of *in pari materia* to cases under the BLBA and NFIA further supports the narrow view of modification in the DBA.<sup>203</sup>

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195. *See Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d 310, 315 (7th Cir. 1977) (quoting the Secretary of Labor who “observed that any substantial deviation from the adjudicatory scheme provided in the [Longshore Act] could seriously jeopardize the appellate procedures . . .”).

196. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 153 (1972) (codified as amended at 30 U.S.C. §901 (2000)).

197. *Dir., Office of Workers' Comp. Programs v. E. Coal Corp.*, 561 F.2d 632, 638–39 (6th Cir. 1977).

198. *Id.*

199. NFIA, 5 U.S.C. §§ 8171–8173 (2000).

200. *Id.* § 8171(d) (“Judicial proceedings . . . with respect to an injury or death occurring outside the continental United States shall be instituted in the district court within the territorial jurisdiction of which is located the office of the deputy commissioner . . .”).

201. *See Symanowicz v. Army & Air Force Exch. Serv.*, 672 F.2d 638, 643 (7th Cir. 1982) (deciding a workers' compensation claim arising under the NFIA).

202. *Cf. Linquist v. Bowen*, 813 F.2d 884, 889 (8th Cir. 1986) (applying *in pari materia* because the Railroad Retirement Act provision incorporated the text of the Social Security Act, and considering the congressional intent behind the entire worker retirement benefit scheme in determining how the acts should be applied in tandem).

203. *See Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 770 (9th Cir. 1979) (“The language immediately following: ‘of the judicial district wherein is located the office . . .’ is the modifying language.”).

*D. Policy Considerations Demonstrate that Judicial Review Must Take Place in the Courts of Appeals to Ensure Fair and Proper Adjudication Under the DBA*

The lack of uniformity between the circuits wastes judicial resources in numerous ways. First, the uncertainty in the law regarding where to file will likely increase litigation costs in DBA cases.<sup>204</sup> A concrete example of this uncertainty is seen in the recently filed case *Service Employers International v. Zimmerman*, where the employer filed protective suits in three different courts.<sup>205</sup> Second, the Office of Workers' Compensation Programs will have to promulgate different rules and literature for each circuit, depending on the favored forum in that circuit.<sup>206</sup>

Third, requiring jurisdiction in the district courts is cumbersome and duplicative; even the circuits that have required district court review have admitted this.<sup>207</sup> When reviewing cases under the DBA, both the district courts and courts of appeals apply the same standard of review, and the district court and Board serve the same function.<sup>208</sup> Because each court engages in the same review and analysis,<sup>209</sup> district court review adds little to the process. Finally, forcing these claims to go through an additional level of review will be more costly for both claimants and employers, regardless of who wins at the Board.<sup>210</sup> The effective outcome does not further congressional intent to provide workers injured overseas with the same protection afforded those injured in the United

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204. These litigation costs often have to be borne by the employer. *See Holliday v. Todd Shipyards, Corp.*, 654 F.2d 415, 419 (5th Cir. 1981) (“*When an employer contests its liability for compensation . . . and the claimant is ultimately successful, the employer and not the claimant must pay the claimant’s attorney’s fees.*”) (quoting *Hole v. Miami Shipyards, Co.*, 640 F.2d 769, 774 (5th Cir. 1981)) (emphasis in original).

205. Brief for the Petitioner at 23 n.1, *Service Employers Int’l, Inc. v. Zimmerman*, No. 06-3903-ag (2d Cir. 2007).

206. In *Lee v. Boeing Co.*, 123 F.3d 801, 807 (4th Cir. 1997), the Fourth Circuit quoted the paperwork the claimant had received from the Board. These documents stated: “Attached please find an outline of the *procedures for appealing to the courts of appeals.*” (emphasis in original).

207. *Id.* at 806 (acknowledging that its decision will result in a review procedure which is cumbersome and duplicative); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1117 (5th Cir. 1991) (discussing “redundant steps insinuated by the 1972 amendments to the [Longshore Act]”).

208. *See supra* notes 50–51 and accompanying text.

209. *See H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 477 (5th Cir. 2000).

210. *See supra* notes 161–163 and accompanying text.

States.<sup>211</sup> Instead, it subjects workers injured abroad to additional procedural complexities, delay, and expense.<sup>212</sup>

## CONCLUSION

The increase in the number of civilian contractors working overseas in connection with American military action has raised the profile of the once obscure DBA. The complex relationship between the Longshore Act and the DBA has caused significant confusion and uncertainty as claimants under the DBA seek judicial review. Although courts agree that the DBA adopted subsequent amendments to the Longshore Act, courts have split over the proper scope of the DBA jurisdictional provision and the proper forum for judicial review. Careful review of the statutory text, canons of construction, legislative history, and public policy supports the finding that judicial review under the DBA begins in the courts of appeals. This approach conserves judicial resources, furthers statutory purpose, and provides clarity in the resolution of claims brought by a critical, growing class of workers.

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211. See H.R. REP. NO. 77-1070 at 2 (1941) (“[T]o provide substantially the same relief for injuries or death of employees at bases . . . as existing law affords similar employees in the United States . . .”).

212. *Lee*, 123 F.3d at 808 (Hall, J., dissenting) (“I do not believe Congress intended that workers unfortunate enough to have been injured in a foreign land have the final resolution of their claims take months or years longer than those filed by workers in this country who suffer identical injuries.”).