

America's War on Tribal Economies: Federal Attacks on Native Contracting in the SBA 8(A) Business Development Program

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I. INTRODUCTION

History has taught us that once something is identified as being valuable to Native Americans, the federal government tries to take it away. Congress and the executive branch have enacted laws, adopted policies, and declared war on America's Native Peoples to accomplish such deprivations. The United States broke numerous treaties and diplomatic agreements with Native Nations and engaged in various acts of war to achieve the forced taking of land and other natural resources. During this effort, U.S. military campaigns massacred thousands of Native men, women, and children, displacing the survivors of their homelands and confining them to predetermined, federally controlled areas deemed otherwise worthless to the rest of Americans.¹

The federal government passed laws condemning the traditions and beliefs of Native people, denied Indians religious freedom, and forced the removal of Native children from their families, all in an effort to compel assimilation and abolish the existence of Native culture and language.² Such actions by the federal government left Native people in a decimated state of poverty and suffering. In many ways the treatment and extermination of the Jews during Hitler's reign in Nazi Germany parallels what occurred in this country, except here, our government's actions were acceptable because those being dragged from their homes and slaughtered were not white.

The federal government's wrongs against the people of America's

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1. Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830) (codified at 25 U.S.C. § 174 (2006)); *see also* S.J. Res. 14, 111th Cong. (2009) (noting that the "Federal Government condemned the traditions, beliefs, and customs of Native Peoples and endeavored to assimilate them by such policies as the redistribution of land . . . and the forcible removal of Native children . . . to faraway boarding schools where their Native practices and languages were degraded and forbidden").

2. *See, e.g.*, Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830); Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (General Allotment Act) (repealed 2000).

first nations did not end in the nineteenth century and, albeit more subtly, the wrongs continue today. America has waged yet another war on the Indians, this time one aimed at destroying their fledgling economies by attacking the native-specific benefits of the Small Business Administration's (SBA) 8(a) Business Development Program. The 8(a) program has allowed Native American Tribes and Alaska Native Villages to establish self-sustaining economies that provide unprecedented levels of jobs, revitalization, and hope to thousands of native communities in some of the most impoverished areas of this country. Although less than 1% of all federal contracting dollars are spent with native 8(a) businesses,³ Congress and the executive branch have mounted a full-scale attack on this program, attempting to eradicate the very provisions that provide the foundation upon which many successful native economies depend.

In Part II of this Article, a history and overview of the SBA's 8(a) program will be discussed. Part III provides a detailed explanation of the various attacks on the 8(a) program in recent years, including the passage of Section 811 of the National Defense Authorization Act of 2010.⁴ Part IV discusses recommendations and remedial strategies for combating Section 811 and the other federal attacks and encompasses prescriptions for the native 8(a) community proactively to expand, preserve, and protect the 8(a) program. Part IV concludes with the premise that in order to win the war that America has waged on native economies, the native 8(a) community must unify, fight back, and do much more.

II. THE SMALL BUSINESS ADMINISTRATION 8(A) BUSINESS DEVELOPMENT PROGRAM

The financial crises brought about by the Great Depression and World War II caused the President of the United States and Congress to create federal programs to assist American businesses with survival in such turbulent economic times.⁵ In 1953, President Dwight D. Eisenhower's proposal to create the SBA to continue important functions of previous business assistance programs was accepted by Congress and codified in the Small Business Act of 1953 (Act).⁶ The Act declared that it was the continuing policy of the federal government to foster the economic interests of small businesses by establishing incentives to

3. NATIVE AMERICAN CONTRACTORS ASSOCIATION: ADVOCACY PACKET 2 (2009), available at <http://www.nativecontractors.org/media/pdf/NACA-Advocacy-Packet-2009.pdf>.

4. Pub. L. No. 111-84, 123 Stat. 2190 (2009).

5. SBA.gov, Overview & History, <http://www.sba.gov/aboutsba/history/index.html> (last visited Apr. 4, 2010).

6. Pub. L. No. 83-163, § 204, 67 Stat. 232, 233 (1953) (codified as amended at 15 U.S.C. §§ 631-657g (2006)).

promote growth and expansion and reduce the concentration of economic resources.⁷ Pursuant to the Act, the Administrator of the SBA created sections 8(a) and 7(j), which authorized the Small Business and Capital Ownership Development program and which are collectively designated as the 8(a) Business Development program and commonly referred to as simply the “8(a) program.”⁸

The mission of the 8(a) “program is to assist eligible small disadvantaged business[es]” to compete in the American economy by providing unique opportunities to access the federal procurement market.⁹ In order to be eligible for admission to the 8(a) program, an applicant must be “a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals . . . and which demonstrates potential for success.”¹⁰

Generally, a business is considered “small” for purposes of the 8(a) program if it remains under the applicable size standard for its primary industry classification as defined by the North American Industry Classification System (NAICS).¹¹ Individuals who have been subjected to racial or ethnic prejudice or cultural bias are presumed to be “socially disadvantaged,” which includes Indian tribes and Alaska Native Corporation(s) (ANC(s)).¹² ANCs were created by the Alaska Native Claims Settlement Act of 1971 (ANCSA)¹³ as the mechanism for distributing monetary benefits and land to Alaska Natives.¹⁴ With the passage of the ANCSA, Alaska Natives relinquished their land claims for the return promise of establishing ANCs, which are state-chartered for-profit corporations with the ability and infrastructure to advance the true economic and social needs of Alaska Natives.¹⁵

The “economically disadvantaged” component of the 8(a) program is defined as socially disadvantaged individuals and Indian Tribes whose ability to compete in the market has been impaired by reduced capital and credit opportunities.¹⁶ The burden of proving economic disadvantage must be established by all individuals and Indian Tribes but is not required for ANCs.¹⁷ Under the ANCSA, an ANC is considered to be owned and controlled by Alaska Natives and to be a minority and eco-

7. 15 U.S.C. § 631a(a).

8. 15 U.S.C. § 634(b)(6); 13 C.F.R § 124.1 (2009).

9. 13 C.F.R § 124.1.

10. 13 C.F.R § 124.101 (2009).

11. 13 C.F.R §§ 121.101, 124.102 (2009).

12. 13 C.F.R §§ 124.103, 124.109(a), (b)(1) (2009).

13. Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601-1629h (2006)).

14. Memorandum from Debra S. Ritt, Assistant Inspector Gen. for Auditing, to Joseph G. Jordan, Assoc. Adm'r, Gov't Contracting & Bus. Dev. and Jess B. Knox, Assoc. Adm'r, Office of Field Operations 3 (2009), available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/oig_reptbydate_july9-15.pdf.

15. *Id.*

16. 13 C.F.R § 124.104(a) (2009).

17. 13 C.F.R § 124.109(a), (a)(4), (b)(2).

nominally disadvantaged business enterprise as long as the stock that is held by Natives and their descendants represents a majority of the total equity and voting power of the corporation.¹⁸

The final basic requirement for an applicant firm to qualify for certification into the 8(a) program is to “demonstrate[] a potential for success.”¹⁹ This condition can be fulfilled if the applicant firm has been “in business in its primary industry classification for at least two full years” or obtains a waiver for such requirement.²⁰

The application for admission into the program is quite onerous, and it can take several months and sometimes years to receive final SBA approval of a firm’s 8(a) certification. Once certified in the 8(a) program, a firm may participate for a period of nine years, unless otherwise truncated by termination or graduation.²¹ Participants can receive 8(a) contract awards from the federal government through competition against other 8(a) concerns and non-competitively by being awarded an 8(a) contract on a sole-source basis.²²

Indian Tribally-owned or ANC-owned businesses certified in the 8(a) program (Native 8(a)) are afforded certain exemptions to select program limitations. Generally, Native 8(a) firms are not subject to the same dollar limitation on the amount of an 8(a) contract award that applies to individually-owned 8(a) concerns.²³ Indian Tribes and ANCs are also unique in that they can certify more than one business in the 8(a) program, and Native 8(a) concerns are not subject to the same affiliation rules in determining size as other participants.²⁴ The net effect of such provisions provides federal procurement authorities with a legal contracting option that is extremely efficient and cost effective while allowing the government to fulfill its policy of supporting small, disadvantaged businesses and providing significant benefits to some of the most impoverished communities in the country.²⁵

The operation of Native 8(a) businesses under these congressionally-approved guidelines, however, has drawn a significant amount of negative attention. Opponents assert claims of unfairness and some argue that the Native 8(a) access to the federal procurement market undermines the policy of competition, creates higher costs to taxpayers, and fosters a culture of dependency that circumvents true business development.²⁶ However, the rationale for the exemptions afforded to

18. Memorandum from Debra S. Ritt, *supra* note 14, at 3.

19. 13 C.F.R. § 124.101 (2009).

20. 13 C.F.R. § 124.107 (2009).

21. 13 C.F.R. § 124.2 (2009).

22. 13 C.F.R. § 124.501(b) (2009).

23. 13 C.F.R. § 124.519(a) (2009).

24. 13 C.F.R. § 124.109(c)(2)(iii), (c)(3)(ii) (2009).

25. See ADVOCACY PACKET, *supra* note 3, at 1.

26. Jenny J. Yang, *Small Business, Rising Giant: Policies and Costs of Section 8(a) Contracting Preferences for Alaska Native Corporations*, 23 ALASKA L. REV. 315, 316 (2006).

Native 8(a) contracting is clear and well-founded.

Unlike most 8(a) businesses owned by one or a very limited number of shareholders, Native 8(a) firms are owned by Tribal Governments and ANCs that often have hundreds and even thousands of shareholders.²⁷ In addition to any dividends distributed to shareholders and the tens of thousands of jobs provided by Native 8(a) enterprises, profits from Native 8(a) businesses are used to fund Tribal Government programs, educational scholarships, and other community and culturally-based initiatives.²⁸ More importantly, the benefits afforded to Native 8(a) businesses “fulfill[] the Federal government’s unique [trust responsibility] to Native Americans.”²⁹

The federal trust responsibility to Native Americans, much like a fiduciary duty, derives from the millions of acres of tribal lands and resources that were ceded to the United States in exchange for promises of sovereignty and other essential protections.³⁰ In order to fulfill the terms of this responsibility, the federal government is obligated to protect tribal assets and resources and promote self-determination, which involves fostering the self-sufficiency of native economies.³¹

The United States Supreme Court has upheld legislation that singles out Native Americans for special treatment due to the unique history and role of dealings with Indians and has held that legislation regulating commerce with Indian Tribes will not be disturbed so “long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”³² The United States has argued in court that the Native 8(a) program “further[s] the federal policy of Indian self-determination, the United States’s trust responsibility, and the promotion of economic self-sufficiency among Native American communities.”³³ Native leaders agree that Native 8(a) access to the largest consumer of goods and services in the world—the U.S. government—fulfills this federal trust responsibility and promotes tribal economic self-sufficiency.³⁴

Advocates for Native 8(a) maintain that the 8(a) program in its current state is one of the rare federal economic programs that actually

27. See ADVOCACY PACKET, *supra* note 3, at 1.

28. See Margaret Bauman, *Report on Native Corporations Shows Revenue Growth*, ALASKA J. OF COM., Nov. 20, 2005, available at http://www.alaskajournal.com/stories/112005/loc_20051120031.shtml; Yang, *supra* note 26, at 317.

29. See ADVOCACY PACKET, *supra* note 3, at 1.

30. See National Congress of American Indians, Answers to Frequently Asked Questions About Indians, <http://www.ncai.org/ncai/resource/documents/faq.pdf> (last visited Apr. 4, 2010).

31. Coeur d’Alene Tribe, *Facts About Indian Country* (2009) (on file with author).

32. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

33. *Am. Fed’n of Gov’t Employees v. United States*, 195 F. Supp. 2d 4, 18 (D.D.C. 2002), *aff’d* 330 F.3d 513 (D.C. Cir. 2003).

34. *Diversifying Native Economies: Hearing Before the H. Comm. on Natural Resources* 110th Cong. (2007) (testimony of Joe Garcia, President, National Congress of American Indians), available at http://resourcescommittee.house.gov/images/Documents/20070919/testimony_garcia.pdf.

works.³⁵ Native 8(a) businesses that have the capacity and capability to handle large-scale federal contracts have a distinctive ability to expand and grow their business at prolific rates.³⁶ The Coeur d'Alene Tribe of Idaho, the Salish & Kootenai Tribes of Montana, the Chickasaw Nation of Oklahoma, the Winnebago Tribe of Nebraska, and numerous ANCs representing thousands of Alaska Natives are all examples of how Native 8(a) contracting has brought economic revitalization to some of the most impoverished communities in the nation.³⁷ Chairman Chief J. Allan of the Coeur d'Alene Tribe stated that the success of its 8(a) company had “breathed a new life of excitement and hope into our reservation community” and the jobs created by 8(a) “are revitalizing one of the most economically-depressed areas in the Northwest, proof positive that the 8(a) program is producing the results for which it was intended.”³⁸

In short, the positive impacts of the 8(a) program on native economies are tremendous. Native 8(a) businesses put thousands of people to work and millions of dollars into the nation's most destitute economies, which is precisely what the program was created to accomplish. However, now that it has been identified as valuable to Natives, the federal government is doing its best to take it away.

III. FEDERAL ATTACKS ON NATIVE 8(A)

A. *The 2006 GAO Report on ANC-Owned 8(A) Firms*

One of the federal government's first and most palpable attacks on Native 8(a) came in the form of a Government Accountability Office (GAO) report issued in the spring of 2006. The report is ostensibly aimed at ferreting out impropriety and abuse of ANC-owned 8(a) businesses in the program.³⁹ However, the 2006 GAO report failed to cite even one example of wrongdoing or non-compliance by any 8(a) participant, ANC, or otherwise.⁴⁰ Although the 2006 GAO report did not recommend legislative change to the program, it urged the SBA to tailor its regulations and policies to provide greater oversight in practice to ac-

35. ADVOCACY PACKET, *supra* note 3, at 1.

36. Angelique A. EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383, 413 (2008).

37. *Id.*

38. *Tribal Consultation Meeting Before the Small Business Administration* (Nov. 11, 2007) (testimony of Chief J. Allan, Chairman, The Coeur d'Alene Tribe) (on file with author); *see also* 8(a) Business Development Program Regulation Changes; Tribal Consultation, 72 Fed. Reg. 60,702 (Oct. 25, 2007).

39. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CONTRACT MANAGEMENT: INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT (2006), available at <http://www.gao.gov/new.items/d06399.pdf>.

40. *Id.* at 53.

count for ANCs' unique status and growth in the 8(a) program.⁴¹ The report provided extensive detail regarding the increased use of ANC-owned 8(a) firms, the commensurate increase in dollars contracted to such firms, and identified legal trends and business practices used by ANC-owned 8(a) businesses to attain such growth.⁴² The report takes issue with other legally-authorized Native 8(a) benefits and practices such as the ability for agencies to “quickly, easily, and legally” award a contract and simultaneously help agencies meet their small business goals.⁴³ Despite the many positive attributes of the program that surfaced in the report and the absence of any instance in which a Native 8(a) firm had violated the program, the GAO deemed it necessary to implore the SBA and other agencies to work to improve oversight to avoid unintended consequences or abuse.⁴⁴

Arguably, the most significant aspect of the 2006 GAO report was the information that was not included in its contents. Much of the statistical information provided therein was limited, superficial, and not fairly contextualized.⁴⁵ Although the GAO report focused on the increase in ANC-8(a) contracting, it omitted readily available data showing that all government contracting increased proportionately to all government contractors, in small business or otherwise, a trend due partially to wartime procurement efforts.⁴⁶ The GAO also failed to mention that despite the “dramatic” increase in the use of ANCs, the amount of federal contracting dollars spent on Native 8(a) was still less than 1% of all federal procurement.⁴⁷ The GAO's inference in the report that ANC-owned 8(a) firms are the major beneficiaries of sole-source contract awards is misguided and simply not true. In fact, more than 33% of all Department of Defense (DOD) contracts were awarded sole-source from 1998 to 2003.⁴⁸ This percentage dwarfs the comparatively insignificant amount that ANC-owned 8(a) firms received in sole-source contracts during the same period, which is far less than the 1% total for Native 8(a) awards.⁴⁹

The GAO expressly disagreed with the SBA's contention that the tone of the report was “unsettling” and could lead a reader to believe that the legal practices of Native 8(a) firms are unfairly characterized in the report and are of concern to the GAO.⁵⁰ However, it is difficult to argue that many readers of the report, including its congressional re-

41. *Id.* at 39.

42. *Id.* at 11-15.

43. *Id.* at 16-19.

44. *Id.* at 40-41.

45. *Id.* at 70-71.

46. *Id.* at 53-54.

47. *See id.* at 53.

48. *Id.* at 76.

49. ADVOCACY PACKET, *supra* note 3, at 2.

50. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 43.

questers, interpreted the GAO's information exactly as such. Subsequent to the report, two bills were introduced: the Accountability in Contracting Act (H.R. 1362)⁵¹ by U.S. Representative Henry Waxman (D-CA) and the Small Business Fairness in Contracting Act (H.R. 1873)⁵² by U.S. Representative Bruce Braley (D-IA), both aimed at thwarting the fledgling success of Native 8(a) businesses.⁵³ The bills passed the House of Representatives with the requisite vote count in the spring of 2007, but the Senate did not vote on either bill.⁵⁴

Once indisputable evidence was presented to the federal government showing that the 2006 GAO report was misleading and unnecessary, many in the native community questioned the true motivation behind the subsequent congressional action.⁵⁵ Some argued the real reason behind the charge levied against Native 8(a) may have been a tactic employed by large government contractors in their attempt to deflect public scrutiny of scandals surrounding their own federal contracting impropriety.⁵⁶ This strategy to divert public attention from giant corporate, government contractors with politically motivated contracting practices proved effective to an extent, but after the smoke cleared, irrefutable facts and figures still show that less than 1% of all federal contracting dollars is spent with Native 8(a) businesses.⁵⁷ This disproportionate amount of scrutiny on Native 8(a) enterprises is truly unsettling.

B. The GAO Decision Interpreting the HUBZone Statute

The next attack on Native 8(a) came again from the GAO in the form of a legal decision rendered in May 2009, involving participants of Native 8(a) and the SBA's Historically Underutilized Business Zone (HUBZone) program.⁵⁸ The protest challenged whether the HUBZone organic statute should be interpreted to require government-contracting officials to offer a contract in the HUBZone program first before exploring other SBA contracting mechanisms, such as 8(a).⁵⁹ Ignoring decades of precedent and practical implementation by the SBA, the GAO found that the plain language of the HUBZone statute requires an agency first to make reasonable efforts to ascertain whether it will receive offers from at least two HUBZone firms before utilizing 8(a) or

51. H.R. 1362, 110th Cong. (2007).

52. H.R. 1873, 110th Cong. (2007).

53. EagleWoman, *supra* note 36, at 415.

54. H.R. 1362, 110th Cong.; H.R. 1873, 110th Cong.

55. EagleWoman, *supra* note 36, at 416.

56. *Id.*

57. *Id.*

58. See *In re Mission Critical Solutions*, Decision No. B-401057 (Gov't Accountability Office May 4, 2009), available at <http://www.gao.gov/decisions/bidpro/401057.htm>.

59. *Id.* at 1.

other SBA “discretionary” programs.⁶⁰ The GAO recommended further that the contract awarded to the Native 8(a) firm in the case at hand should be terminated and re-solicited to strictly HUBZone small, business participants.⁶¹

News of the decision spread quickly throughout the media, eliciting prompt reaction from both government-contracting officials and federal contractors.⁶² There was an immediate understanding that based on this GAO decision, “a greater percentage of procurements [would] be set aside for competition limited to HUBZone [participants].”⁶³ This decision was particularly damaging to Native 8(a) businesses because HUBZone certification is primarily geographically-based with lower costs of doing business and does not require personal net-worth limitations or minority ownership.⁶⁴ As such, there are far more HUBZone than 8(a) businesses that are “likely to have the resources [necessary] to perform Federal contracts.”⁶⁵

In response, the Native 8(a) community fought back, enlisting assistance from anyone who would listen, including the SBA and the Office of Management and Budget (OMB). On July 10, 2009, OMB Director Peter R. Orzag issued a “Memorandum for the Heads of Executive Departments and Agencies” that breathed rationality into the situation and attempted to bring the GAO back to legal reality.⁶⁶ The memorandum reminded executive departments and agencies that “the GAO’s decisions are not binding on federal agencies” and that the decision in question was contrary to the “regulations promulgated by the [SBA] that provide for parity’ among [SBA] programs.”⁶⁷ Director Orzag further stated that “[i]f agencies were to follow the GAO decision, the federal government’s efforts to procure goods and services from 8(a) small businesses and from [Service Disabled, Veteran Disabled, and other SBA programs] would be negatively impacted.”⁶⁸ The memorandum indicated that “an executive branch review of the legal basis underlying the GAO’s decisions [had] been initiated” and that pending the results of such review, the applicable “parity” regulations would stay intact and

60. *Id.* at 6-7.

61. *Id.* at 8.

62. MARY S. UREY, U.S. AIR FORCE, OVERVIEW OF ALL MAJOR SMALL BUSINESS PROGRAMS 38-39 (2009), available at <http://www.same-satx.org/briefs/sbc2009/090728-urey.pdf>; see also HUBZone Language Mandatory, <http://www.delta-21.com/index.php/news/42-blog/88-hubzone-language-mandatory> (May 11, 2009, 13:48 EST).

63. GAO Rules that HUBZone Set-Aside Procedures Take Precedence Over 8(a) Set-Asides, <http://blogs.cbh.com/govcon/?p=300> (July 21, 2009, 14:35 EST).

64. Press Release, U.S. Rep. Nydia Velázquez, Comments Regarding Hubzone Changes (Mar. 28, 2002), available at <http://www.house.gov/smbiz/democrats/PressReleases/Pr032802.htm>.

65. *Id.*

66. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. and Budget, to Heads of Executive Dep’ts & Agencies 1 (July 10, 2009), available at [http://www.acq.osd.mil/osbp/resources/HubZone-8\(a\)WHGuidance.pdf](http://www.acq.osd.mil/osbp/resources/HubZone-8(a)WHGuidance.pdf).

67. *Id.*

68. *Id.*

remain binding.⁶⁹

On August 21, 2009, the Department of Justice (DOJ) issued a memorandum opinion to address the matter at hand.⁷⁰ The DOJ concluded that the HUBZone statute “does not compel [the] SBA to prioritize the HUBZone Program in the manner [the] GAO determined [was] required.”⁷¹ The DOJ ruled further that SBA regulations permissibly authorize contracting officers to exercise their discretion in choosing among the various SBA programs in setting aside contracts to be awarded to qualified small businesses.⁷² The memorandum also reminds the GAO that while “GAO decisions are not binding on executive branch agencies,” the legal opinions of the Attorney General and the DOJ are controlling.⁷³ Since the DOJ memorandum opinion, the GAO has conceded, citing the controlling nature of the DOJ finding and applying its ruling accordingly in a recent subsequent decision.⁷⁴

The GAO declares that its “commitment to good government is reflected in its core values of accountability, integrity, and reliability.”⁷⁵ Given the GAO’s accusatory tone in the 2006 report, coupled with its conscious effort to undermine Native 8(a) in its questionable research and interpretation of statutes in the HUBZone decision,⁷⁶ the Native 8(a) community is left to wonder whether the GAO’s commitments to good government and integrity are being fulfilled.

C. The 2009 SBA Office of Inspector General Report

On July 10, 2009, a memorandum was prepared by the SBA’s own Office of Inspector General (OIG) entitled “Participation in the 8(a) Program by Firms Owned by Alaska Native Corporations.”⁷⁷ The OIG memorandum focused on a small cross-section of Native 8(a) contractors, auditing only the largest eleven ANC-owned 8(a) firms in the pro-

69. *Id.*

70. Memorandum from Jeannie S. Rhee, Deputy Assistant Att’y Gen., Dep’t of Justice, to Sara D. Lipscomb, Gen. Counsel, Small Bus. Admin. (Aug. 21, 2009), *available at* <http://www.pubklaw.com/papers/dojsba082109ocr.pdf>.

71. *Id.* at 2.

72. *Id.*

73. *Id.* at 13.

74. *See In re All Seasons Apparel Inc.*, Decision Nos. B-401805, B-401805.2 (Gov’t Accountability Office Nov. 4, 2009), *available at* <http://www.gao.gov/decisions/bidpro/401805.pdf>.

75. Recently, a decision has been rendered in the United States Court of Federal Claims that contradicts and effectively reverses the Department of Justice memorandum opinion, thus, resurrecting the issue over the prioritization of the HUBZone statute. *See Mission Critical Solutions v. United States*, No. 09-864C (Fed. Cl. Feb. 26, 2010), *available at* <http://www.cofc.uscourts.gov/sites/default/files/PUBLISHED%20MCS%20Opinion.pdf>. Consequently, Senator Mary Landrieu (D-LA) has introduced the Small Business Programs Parity Act of 2010 (S. 3190) to provide a legislative fix aimed at restoring the intent and implementation of the SBA programs. *See* S. 3190, 111th Cong. (2010), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-3190>.

76. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 39, at 87.

77. *See* Memorandum, *supra* note 70, at 7 (noting that the 8(a) program statute has virtually the same language as the HUBZone statute which the GAO failed to point out).

78. Memorandum from Debra S. Ritt, *supra* note 14, at 1.

gram and resurrecting many of the identical recommendations and updating much of the same statistical information set forth in the 2006 GAO report mentioned above.⁷⁸

The OIG concluded in its memorandum that “[l]ong-term 8(a) contracting trends show a continued and significant increase in obligations to ANC-owned participants, many of which were made through sole-source contracts.”⁷⁹ This conclusion prompted the OIG to assert that “it is questionable whether ANC contracting advantages under the 8(a) program are the most cost-effective way of assisting Alaska Natives.”⁸⁰ The memorandum also “suggests that the special advantages afforded ANC participants may be limiting the number of non-ANC disadvantaged firms that secure 8(a) contracts.”⁸¹ The OIG crowned the memorandum with prescriptive “Matters for Congressional Consideration” and “Recommendations” to the SBA Administrator for Government Contracting and Business Development that represent OIG’s primary concerns and suggested courses of redress.⁸²

In a similar GAO-like manner, the OIG memorandum cited dramatic increases in the use of ANC-owned 8(a) firms, but again failed to mention significant increases in contract awards that other SBA programs also experienced in the same period.⁸³ The OIG memorandum echoes the 2006 GAO report’s inferences that sole-source contracts awarded to ANC-owned 8(a) companies is a major concern that needs to be resolved.⁸⁴ In this contention, the OIG, like the GAO, ignores the congressional policy and intent of small business programs, the well-founded rationale behind preferences for small businesses owned by socially and economically disadvantaged owners, and the obvious fact that sole-source awards to Native 8(a) firms are an entirely legal way to help some of the poorest members of this nation compete in the marketplace and gain access to federal and private procurement opportunities.⁸⁵

The OIG memorandum also disregards other important, but related, trends in government contracting. It is, in fact, large businesses, not small businesses, that have steadily increased in market share in the overall federal contracting pie.⁸⁶ The OIG assertion that ANCs’ ability to obtain unlimited sole-source contracts has diminished opportunities

78. *Id.* at 5.

79. *Id.* at 22.

80. *Id.* at 23.

81. *Id.* at 22.

82. *Id.* at 23-24.

83. *Id.* at 4.

84. *Id.* at 23.

85. *Id.* at 2, 35.

86. See CTR. FOR STRATEGIC & INT’L STUDIES, STRUCTURE AND DYNAMICS OF THE U.S. FEDERAL PROFESSIONAL SERVICES INDUSTRIAL BASE: 1995-2007, at 25-31 (2009), available at http://csis.org/files/media/csis/pubs/090212_fps_report_2009.pdf (noting that the report covers professional services contracting, which comprises a large portion of the total federal procurement market).

for other SBA participants is also unfounded, as the percentage of small business set-asides (non-8(a)) grew during the same time period studied.⁸⁷

SBA management officials argued again that not one contract awarded to an ANC was cited in the report for not meeting governmental expectations, and expressed concern with the OIG's repeated reliance on the 2006 GAO report despite the fact that the SBA "had questioned the subjective nature and conjecture of the concerns cited in that 2006 report," and asserted that, like the 2006 report, the tone of the OIG memorandum was "unsettling."⁸⁸ However, the SBA did agree with one aspect of the memorandum, stating:

The report is accurate in that "ANCs fulfill a mission that is broader than the bottom line of the corporations—namely, to help Alaska Natives achieve economic self-sufficiency. Unlike other 8(a) businesses whose profits generally go to one or two disadvantaged individuals, the profits from ANCs are shared by hundreds, and sometimes even thousands of tribal members or Native shareholders." We believe that this is exactly what Congress intended.⁸⁹

Like the 2006 GAO report, the OIG memorandum omitted significant and relevant information from its contents necessary to contextualize the findings and recommendations set forth in the report. Among the litany of dollar signs and percentage increases, the OIG failed to disclose that despite its steady growth in the federal procurement market, Native 8(a) contracting was merely 0.7% of all federal contracting dollars awarded in the same period studied.⁹⁰ Leaders of the Native 8(a) community appeared justified in their assertion that their businesses get a disproportionate percentage of negative attention.⁹¹

D. U.S. Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Contracting Oversight Hearings

Similar to the congressional retaliation spawned by the 2006 GAO report, the OIG memorandum instigated an assault on Native 8(a)—this time spearheaded by Senator Claire McCaskill (D-MO), Chairman of the Senate Homeland Security and Governmental Affairs Subcommittee on Contracting Oversight.⁹² Senator McCaskill took issue with the

87. *Id.* at 28 (figure 3.15).

88. Memorandum from Debra S. Ritt, *supra* note 14, at 34.

89. *Id.*

90. ADVOCACY PACKET, *supra* note 3, at 2.

91. *Hearing on Contracting Preferences for Alaska Native Corporations: Before the S. Subcomm. on Contracting Oversight, Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2009) (statement of Sarah Lukin, Executive Director, Native American Contractors Association), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=b181d787-3563-4050-b1dd-1503adf47733.

92. See U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, SUBCOMMITTEE ON CONTRACTING OVERSIGHT, NEW INFORMATION ABOUT CONTRACTING PREFERENCES FOR ALASKA NATIVE CORPORATIONS (PART 1) 1 (2009), available at <http://mccaskill>.

fact that many ANC contractors perform work outside of Alaska and that ANCs are exempt from sole-source contract limits applicable to individually-owned 8(a) firms, and she criticized the increased governmental spending with ANCs over the last nine years.⁹³ One group claimed that Senator McCaskill was on a “21st century witch hunt” when she was quoted as being “surprised by the heat and interest this hearing has drawn” and stating: “I think we are on to something here.”⁹⁴

With the OIG memorandum fresh in hand, Senator McCaskill conducted a hearing on July 16, 2009, in which she embarked on her attack of the Native 8(a) program.⁹⁵ The junior Senator from Missouri proclaimed in the hearing that “it’s hard to see why the Alaska native corporations should be able to receive enormous contracts without any competition at all.”⁹⁶ Senator McCaskill further stated that “by taking a hard look at contracting loopholes like those for the Alaska Native Corporations, we can take the first step towards ensuring that our contracting system provides the best possible value for the taxpayer.”⁹⁷ Senator Susan M. Collins (R-ME) referred to the statistics provided in the OIG report demonstrating the growth rate of ANC-8(a) contracting as “disturbing.”⁹⁸

These are insightfully ignorant comments from the U.S. Senate’s highest contracting oversight officials, especially when one considers that 32% of all government-contracting dollars are awarded non-competitively.⁹⁹ It seems reckless to claim that ANC “contracting loopholes” are the first step toward ensuring the viability of the government contracting system when, in 2007, the five largest corporations received almost 24% of the total federal contract dollars awarded, of which 70% was awarded non-competitively.¹⁰⁰ Senator McCaskill failed to acknowledge the fact that all of the ANC-owned 8(a) contracting mechanisms with which she is concerned are perfectly legal and congressionally authorized.¹⁰¹

senate.gov/pdf/ANCdataAnalysis.pdf.

93. *Id.* at 1-2.

94. Robert Brodsky, *Senator Vows Closer Look at Alaska Native Contracts*, GOVERNMENT EXECUTIVE, July 15, 2009, available at <http://www.govexec.com/dailyfed/0709/071509rb1.htm>.

95. Press Release, U.S. Sen. Claire McCaskill, Contracting Preferences for Alaska Native Corporations Examined for Waste (July 17, 2009), available at <http://mccaskill.senate.gov/newsroom/record.cfm?id=316085>.

96. Robert Brodsky, *Fate of Alaska Native Contracting Program Is Unclear*, GOVERNMENT EXECUTIVE, July 17, 2009, available at <http://www.govexec.com/dailyfed/0709/071709rb1.htm?oref=relink>.

97. *Hearing on Contracting Preferences for Alaska Native Corporations*, *supra* note 91 (statement of Sen. Claire McCaskill), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&&FileStore_id=1b55fcc4-f08b-43a4-8091-8ab82a7a7369.

98. *Id.* (statement of Sen. Susan Collins).

99. *Id.* (statement of Sarah Lukin).

100. *Id.*

101. See generally 13 C.F.R. §§ 124.1-1014 (2009). ANCs do not have to refrain from doing business in other states. ANCs can receive sole-source contracts under the regulations as Congress intended, and the purpose of the program is business development—a key component of which is

A select few from the Native 8(a) community were able to provide testimony at the hearing.¹⁰² Sarah Lukin, Executive Director of the Native American Contractors Association, took issue with McCaskill's use of the term "federal loophole" to describe the Native 8(a) benefits of the program.¹⁰³ Ms. Lukin reminded the subcommittee that the Native 8(a) benefits were intentionally provided by Congress for a reason—that Native 8(a) enterprises "are responsible for combating historical disadvantage, rural isolation, and the depressed economies that have resulted from a multi-generational dearth of opportunity."¹⁰⁴ Similarly, Julie Kitka, President of the Alaska Federation of Natives, submitted to the members of the Subcommittee the following advisory:

I believe that it may be tempting to look at some of the recent greatest successes of Alaska Native corporations and see only success. From where we started, with small, new start-up corporations, beginning with a people that had not operated corporations before, our corporations have come a long way. But please don't skip over what we started with. We live and work in what is to most businesspeople the most remote corner of America, in one of the harshest climates in the world: with a history of extreme prejudice and discrimination; a history of wariness toward a people who, in a great many cases, literally spoke a different language than most business people in America; a history of exclusion from genuine business opportunity; and a history of no business history with "mainstream" large economies in America. Is that not a case study of an economically disadvantaged minority business?¹⁰⁵

Senator Lisa Murkowski (R-AK) stated at the hearing that:

[W]e are moving down the road to breaking yet another promise to the Indians. . . . If we are not careful, policy changes prompted by this subcommittee's inquiry will go down in history as another of the ill-conceived policies that we in the Congress are later forced to apologize for.¹⁰⁶

Unfortunately, for the Native 8(a) community, Senator Murkowski's prophetic admonition fell on deaf subcommittee ears.

E. McCaskill-Collins Amendment to NDAA

The Native 8(a) community was left awaiting McCaskill's next move, but it did not have to wait long. On July 22, 2009, Senator McCaskill and Senator Collins proposed Amendment 1762 to Senate Bill 1390 to amend the fiscal year 2010 National Defense Authorization Act (NDAA) to preclude all Native 8(a) contractors, not just ANC-

growth in the federal procurement market.

102. See generally *Hearing on Contracting Preferences for Alaska Native Corporations*, *supra* note 91 (statements of Sarah Lukin; Julie Kitka, President, Alaska Federation of Natives; Jacqueline Johnson Pata, Executive Director, National Congress of American Indians; Mark Lumer, Senior Vice President of Federal Programs, Cirrus Technology, Incorporated; Christina Schneider, Chief Financial Officer, Purcell Construction Corporation).

103. *Id.* (statement of Sarah Lukin).

104. *Id.*

105. *Id.* (statement of Julie Kitka).

106. Brodsky, *supra* note 96.

owned 8(a) firms, from being awarded contracts without dollar limits and competition.¹⁰⁷ The amendment, as proposed, would effectively require DOD contracting officials to use competitive-contracting procedures with Native 8(a) businesses for any contract amount exceeding \$5.5 million in the case of manufacturing contracts and \$3.5 million for all other contract opportunities.¹⁰⁸

This time, however, the Native 8(a) community was prepared. Met with fierce opposition from senators able to see through the ill-conceived proposal, Senator McCaskill withdrew her amendment just one day after its introduction.¹⁰⁹ Senator Mark Begich (D-AK) confirmed his role in the amendment's withdrawal.¹¹⁰ Senator Begich stated that he "approached Sen. McCaskill and told her that this was premature and not the right process" and that he had "argued aggressively with Sen. McCaskill why this item should be pulled and not offered."¹¹¹ Begich also stated that "the idea of just throwing in an amendment the night before and trying to muscle it through was not appropriate."¹¹²

Other leaders in the Native 8(a) community outside of Alaska weighed in on the McCaskill-Collins amendment, including representatives of the Chickasaw Nation of Oklahoma.¹¹³ The Chickasaw Nation's Ambassador to the United States, H.E. Charles W. Blackwell, argued that the amendment would directly and negatively impact the Chickasaw Nation-owned 8(a) company and any other 8(a) company owned by a federally recognized Indian tribe.¹¹⁴ The Chickasaw Nation urged the amendment be withdrawn until a complete, open, and appropriate consultation with Tribal Governments could be conducted, because anything less, they argued, would be contrary to and in violation of the government-to-government relationship and the Native American self-determination policy of the last four decades.¹¹⁵ Chairman Chief J. Allan of the Coeur d'Alene Tribe of Idaho, advocating on behalf of its Tribally-owned 8(a) business, contended that the ad hoc subcommittee's action lacked jurisdiction over the matter and requested that this issue be considered by the U.S. Senate Committee on Small Business and Entrepreneurship and the U.S. Senate Committee on Indian Affairs in

107. Robert Brodsky, *McCaskill Will Wait on Alaska Native Contracting Reform*, GOVERNMENT EXECUTIVE, July 29, 2009, available at <http://www.govexec.com/dailyfed/0709/072909rb1.htm>.

108. 155 Cong. Rec. S7932 (daily ed. July 22, 2009) (statement of Sen. Claire McCaskill).

109. See Brodsky, *supra* note 107.

110. *Id.*

111. *Id.*

112. *Id.*

113. Letter from Charles Blackwell, Ambassador, Chickasaw Nation of Oklahoma, to Susan Collins, U.S. Senator, Maine, and Claire McCaskill, U.S. Senator, Missouri (July 23, 2009) (on file with author).

114. *Id.*

115. *Id.*

which jurisdiction is proper.¹¹⁶ Chairman Allan further stated:

Tribally-owned 8(a) companies operate largely as not-for-profit enterprises with proceeds being used to fund social welfare programs. This practice is consistent with established federal policy of Tribes developing an independent economic base to provide for the social and economic wellbeing of the individual members of the Tribe. The passage of this amendment would devastate current opportunities and put a cap on potential growth for one of the few companies in our region that continues to grow and provide new jobs in this difficult economy. This amendment has been done unilaterally, arbitrarily and quite frankly, its approval would constitute a disappointing step backwards in the federal government's relationship with Indian Country.¹¹⁷

McCaskill's attempt at Native 8(a) reform had failed for the time being, but it would ultimately prove to be the calm before the storm. She left a lightly-disguised threat with the Native 8(a) community upon the withdrawal of her amendment, proclaiming: "Reform in this area is going to happen. . . . It's not a matter of if, but a matter of when. The process caused this slowdown, but has not impacted the determination to restore competitiveness in government contracts."¹¹⁸

F. Section 811 of the National Defense Authorization Act of 2010

The same day the McCaskill-Collins amendment to the NDAA was withdrawn, July 23, 2009, the Senate voted on and passed its version of the NDAA.¹¹⁹ The U.S. House of Representatives had previously passed its version, and a committee to resolve differences in the two versions of the bill commenced discussions on October 8, 2009.¹²⁰

On October 28, 2009, President Obama signed into law the conference committee's version of the NDAA for Fiscal Year 2010, which included a provision not contained in either prior version of the bill passed by the House or Senate.¹²¹ Unlike Section 802 of the Senate version it was drafted to replace, the "new" Section 811 targets only Native 8(a) firms and imposes a requirement for justifications and approvals by the head of an agency for any sole-source contract award to Native 8(a) firms in excess of \$20 million.¹²² The quiet inclusion and retaliatory tone

116. Letter from Chief J. Allan, Chairman, The Coeur d' Alene Tribe, to Susan Collins, U.S. Senator, Maine, and Claire McCaskill, U.S. Senator, Missouri (July 23, 2009) (on file with author).

117. *Id.*

118. See Brodsky, *supra* note 107.

119. S. 1390, 111th Cong. (2009).

120. Govtrack.us, H.R. 2647: National Defense Authorization Act for Fiscal Year 2010, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2647> (last visited Apr. 4, 2010); see also National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, 111th Cong. (2009).

121. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-48, 123 Stat. 2190 (2009).

122. Compare National Defense Authorization Act for Fiscal Year 2010, S. 1390, 111th Cong. § 802 (2009), with National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-48, § 811, 123 Stat. 2190, 2405-06 (2009). Both the Senate and House versions of the bill contained a Section 811, but were not directly applicable to Native 8(a) firms, and were supplanted with the conference committee's language in the final version of the NDAA that was signed into law.

of this new language was reminiscent of McCaskill's earlier attempts at Native 8(a) reform.

Although many were led to believe that McCaskill decided to wait on pursuing Native 8(a) reform until she could better coordinate efforts with the Senate Committee on Small Business and Entrepreneurship, which has jurisdiction over SBA 8(a) program matters, they were mistaken.¹²³ Just days after the President signed the NDAA into law, McCaskill announced her involvement in advocating for the inclusion of Section 811 in the bill.¹²⁴ The Missouri Senator took credit for championing a provision that “partially closes a loophole in government contracting rules” for Alaska Native Corporations and charged that “[t]he measures to reign in abusive actors and empower investigators in this bill are important steps forward in fighting against contract abuses.”¹²⁵

The newly-enacted Section 811 of the NDAA changes the status quo of Native 8(a) contracting by abolishing the long-standing exemption to limits on sole-source awards in 10 U.S.C. § 2304(f)(2)(D)(ii) for SBA Section 8(a) contracts.¹²⁶ In contrast to the general applicability of “former” Section 802, the narrow scope of Section 811 singles out Native 8(a) as the only applicable target for the major revisions to the 8(a) contracting process. The surprising and seemingly deceitful inclusion of Section 811 was done without consultation with affected Native American communities and without members of Congress who serve on committees with proper jurisdiction.¹²⁷

Congressional members of the Committees on Armed Services, Indian Affairs, Small Business, and Appropriations who may have been justifiably concerned about this abrupt change in policy and procurement procedures were not afforded the opportunity to weigh in on the potential impacts this provision would likely have.¹²⁸ In a letter sent on December 10, 2009, to Senators Daniel Inouye (D-HI), Chairman, and Thad Cochran (R-MS), Ranking Member, of the Senate Appropriations Committee, some eight U.S. senators collectively expressed their concern that Section 811 could adversely impact economic development opportunities provided by the Native 8(a)-contracting program.¹²⁹

123. See *McCaskill Applauds Passage of Annual Defense Authorization Bill*, ROLLA DAILY NEWS, Nov 13, 2009, available at <http://www.therolladailynews.com/opinions/x870214181/McCaskill-Appraises-Passage-of-annual-defense-authorization-bill>.

124. *Id.*

125. *Id.*

126. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-48, § 811(c)(1), 123 Stat. 2190, 2406 (2009) (defining a “covered procurement” as a procurement described in 10 U.S.C. § 2304(f)(2)(D)(ii)).

127. Native American Contractors Ass'n, D.C. Representatives Whitepaper, *Negative Impacts of Native American Contracting: Section 811 of the National Defense Authorization Act* (2009) (on file with author).

128. *Id.*

129. Letter from Lisa Murkowski et al., U.S. Senators, to Daniel Inouye, U.S. Senator, Hawaii, and Thad Cochran, U.S. Senator, Mississippi (Dec. 10, 2009) (on file with author). The eight Sena-

The letter to leadership of the Senate Committee on Appropriations warned that Section 811 could “be interpreted to reach beyond the contracts administered by the Department of Defense to require that all federal agencies adopt [similar] justification and approval procedures for sole-source contract awards [in excess of \$20 million].”¹³⁰ The senators further cautioned that:

Section 811’s requirement that “approval” must be provided by the head of the relevant agency raises concern about the effect such a process will have on all federal agency contracting officers. Under these new requirements, contracting officers could be reluctant to make 8(a) sole-source awards to Native 8(a) contractors because, even if the award is fully justifiable, the new justification requirement will add paperwork burdens and time delays in seeking and obtaining the requisite agency head approval. The 8(a) provisions applicable to Native 8(a) companies have proven successful in implementing the federal Indian policy of promoting Indian self-determination, self-sufficiency and economic development. Removing such provision without consultation with Indian Tribes and relevant agencies could potentially have unintended consequences.¹³¹

The senators authoring the letter petitioned Senator Inouye and Senator Cochran to include a provision in the NDAA for Fiscal Year 2010, which would provide funding for the NDAA and:

delay the implementation of section 811 until the Administrator of the [SBA] in conjunction with the Office of Small Business Programs in the Department of Defense [had the opportunity to conduct] an assessment and prepare a report on the impacts of section 811 on the contracting procedures of each Federal agency and the affected program participants.¹³²

On December 16, 2009, a Manager’s Statement from the House of Representatives was included in that day’s Congressional Record partially granting the wishes of the eight senators authoring the letter to the Committee on Appropriations leadership.¹³³ The statement acknowledges that the effects that the additional requirements in Section 811 of “Justification and Approval” will have on the efficiency of the contracting process and the competitiveness of Native American companies is unknown.¹³⁴ The statement requires the secretary of defense to submit a report ninety days after the implementation of the new contracting procedures, detailing the impact of the provision on the selection of Native American companies for large dollar contracts and discussing how the provision affects the contracting process.¹³⁵ The secretary of defense must also identify whether an excessive administrative burden has been

tors that signed the letter were Senators Lisa Murkowski (D-AK), Mike Crapo (R-ID), James E. Risch (R-ID), Mark Begich (D-AK), Byron L. Dorgan (D-ND), James M. Inhofe (R-OK), Max Baucus (D-MT), and John Tester (D-MT).

130. *Id.*

131. *Id.*

132. *Id.*

133. *See* 155 Cong. Rec. H15073 (daily ed. Dec. 16, 2009).

134. *Id.*

135. *Id.*

placed on contracting personnel and must provide recommendations for how the provision can be amended to mitigate any unintended negative consequences.¹³⁶ Although the compulsory language included in the Congressional Record does not delay the implementation of section 811 as requested by the Senators, a small victory for Native 8(a) was secured in the statement's remaining directives.

IV. RECOMMENDATIONS FOR FIGHTING BACK

A. Combating Section 811

The DOD study required to be conducted within ninety days after implementation of Section 811 may provide an opportunity for Native 8(a) businesses to weigh in on the process. Native 8(a) must prepare for and combat the logical "chilling effect" among governmental contracting officials caused by Section 811, which will likely cause them to shy away from utilizing Native 8(a) contractors in order to avoid additional time and administrative burdens mandated in the section.¹³⁷ The Native 8(a) community should request and seize the ability to participate in the study and play as large a role as permissible in providing details on the impacts Section 811 has or will have on the Native 8(a) companies and the contracts they pursue.

The Native 8(a) community should also provide comments and suggestions to DOD officials to assist them in providing recommendations for how Section 811 can be amended to mitigate unintended negative consequences. The key to this challenge is overcoming the operative word "unintended" in this directive. As the lessons of 2009 show, Senator McCaskill and others fully intended to cripple Native 8(a) contracting, ignoring facts, policies, and the lopsided amount of positive evidence sustaining the need to continue the program unmolested. In the event Native 8(a) involvement in the study is not afforded or the results do not produce an acceptable outcome for Section 811, there may be other more forceful remedies to which the Native 8(a) community can turn.

Certain procedural remedies may be available to the Native 8(a) community through the revision process set forth in the Federal Acquisition Regulations (FAR).¹³⁸ Upon its amendment by Section 811, the Native 8(a) community could consider pursuing one of two forms of FAR revisions called "deviations."¹³⁹ The first possible case for a devia-

136. *Id.*

137. *See supra* notes 122-27 and accompanying text.

138. *See* 48 C.F.R. §§ 1.400-405 (2009).

139. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-48, § 811(a), 123 Stat. 2190, 2405 (2009); 48 C.F.R. §§ 1.404-405.

tion could be made based on “class”—as unique participants in the 8(a) program owned by Indian Tribal Governments and Alaska Native Corporations.¹⁴⁰ This process allows individual agencies (such as the DOD, Department of Interior (DOI), and the Environmental Protection Agency (EPA)) to authorize permanent class deviations from the FAR based on approval by agency and procurement officials.¹⁴¹ This remedy may allow the Native 8(a) community to obtain a deviation from any negative consequences imposed by Section 811 in the FAR.

The second alternative potentially available to Native 8(a) contractors is a deviation from the FAR based on treaties and executive agreements.¹⁴² Indian Tribes and Alaska Natives have a history of treaties and executive agreements with the United States and would constitute “government to government” agreements under the FAR.¹⁴³ At the Tribal Nations Summit on November 5, 2009, President Barack Obama “publicly signed a memorandum aimed at beefing up an [existing] executive order . . . intended to establish ‘regular and meaningful consultation and collaboration’ between Native nations and the federal government.”¹⁴⁴ The memorandum reminds executive departments and agencies that they are required to communicate and consult with tribal officials in the development of federal policies that have tribal implications and mandates a ninety-day period to produce a plan to implement such coordination with Native Nations.¹⁴⁵ The memorandum further reiterates to agency heads that “[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.”¹⁴⁶ With this unprecedented pledge to assist the Native community, there may be a chance to advocate successfully for an executive agreement with either President Obama or agency heads as another alternative fix to the Section 811 attack, if not otherwise resolved.

In light of the compulsory language of Executive Order 13,175 and Obama’s concomitant memorandum, an argument could also be made that the passage and implementation of Section 811 is in violation of Executive Order 13,175 as well as the federal trust responsibility to Tribal Governments.¹⁴⁷ The order requires agencies to respect tribal sovereignty, to grant Tribal Governments maximum administrative discretion, to encourage Tribes to develop their own policies, to defer to

140. 48 C.F.R. § 1.404.

141. *Id.* § 1.404(a).

142. 48 C.F.R. § 1.405.

143. *Id.* § 1.405(a).

144. Victor Merina, *Obama: Tribal Nations Conference Just a Start*, REZNET NEWS Nov. 5, 2009, available at <http://www.reznetnews.org/article/obama-tribal-nations-conference-just-start-40910>.

145. Indianz.com, *President Obama Signs Memo on Tribal Consultation*, <http://64.38.12.138/News/2009/017302.asp> (last visited Apr. 4, 2010).

146. *Id.*

147. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Indianz.com, *supra* note 145.

Tribes to establish their own standards, and the order forbids agencies from submitting legislation to Congress that would be inconsistent with such directives.¹⁴⁸ By avoiding the consultation process with Tribes and circumventing congressional committees in which jurisdiction over the matter is proper, the implementation of Section 811 by the DOD and other agencies arguably violates binding executive orders and would become ripe for legal review.¹⁴⁹

B. Aggressive Public Relations Efforts

In order to dispel the negative portrayals of Native 8(a) businesses that opponents in Congress, the executive branch, and the media have put forth, the Native 8(a) community must spend adequate resources on public-relations campaigns to avoid future conflicts.¹⁵⁰ The Native 8(a) community must also make extensive efforts to ensure that legislators and elected officials are informed about where and how the proceeds of Native 8(a) contracts are spent (often to fund social programs), the number of jobs they provide, and the direct and indirect economic impact they have on their respective regions.¹⁵¹ It is imperative to remind the public that the 8(a) contracts received are not grants or some other gratuitous award to Native 8(a) businesses—these are government contracts wherein successful awardees must complete specific contract deliverables with the goods and/or services agreed upon by the parties under the terms, conditions, and profit margins approved by the government. It is also important to remind opponents that neither the GAO report nor the OIG report found evidence of abuse of the 8(a) program by Native 8(a) companies. Rather, both reports demonstrated that “some government agencies do not always follow the rules, and absent improved oversight, there [may] be potential for abuse.”¹⁵²

1. The Truth About Governmental Contracting

The Native 8(a) community must do a better job at communicating contextualized facts about the program. The dollar figures and increases in Native 8(a) cited in the federal government's attacks on the Native 8(a) program were not disclosed in the appropriate context. For instance, in fiscal year 2007, the federal government spent a total of

148. Exec. Order No. 13,175, 65 Fed. Reg. 67,249.

149. Recently, the Native 8(a) community has formally requested government to government consultation regarding the drafting of regulations that will implement Section 811, which the Department of Defense has indicated it will agree to conduct.

150. Nicholas M. Jones, *America Cinches Its Purse Strings on Government Contracts: Navigating Section 8(a) of the Small Business Act Through a Recession Economy*, 33 AM. INDIAN L. REV. 491, 516-17 (2008).

151. *Id.*

152. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 67.

\$439.5 billion on procurement contracts, however, the amount of contracts awarded to Native 8(a) firms in the same year totaled \$3.2 billion—a mere 0.7% of federal contracting.¹⁵³ The government spent a total of \$12.4 billion on all 8(a) contracts in 2007 (including all Non-Native 8(a) firms)—which is equal to 2.8% of total federal contracting awards and, of that \$12.4 billion to the 8(a) program, only 26.2% was awarded to Native 8(a) firms.¹⁵⁴ Senator McCaskill and other opponents of the 8(a) program rely heavily on highlighting the increases in dollar amounts spent on Native 8(a) over the last nine years but conveniently exclude the fact that all federal spending has increased government-wide, in part because the United States has been at war for much of the last nine years.¹⁵⁵

Many of the federal government's attacks on Native 8(a) involve the ability of Native 8(a) firms to receive sole-source contracts without dollar limits.¹⁵⁶ Some lawmakers cite President Obama's policy to govern the appropriate use and oversight of sole-source and other non-competitive contracts as grounds for warranting this attack on Native 8(a).¹⁵⁷ This smokescreen tactic may work for some, but the Native 8(a) community cannot allow the facts to be omitted any longer from the discussion.

In 2007, 32% of all federal procurement dollars were awarded non-competitively.¹⁵⁸ Extrapolating this number further indicates that, of the one-third of total government contracting dollars that are awarded sole-source, some amount less than 0.7% of that was awarded non-competitively to Native 8(a) businesses. Furthermore, the government's increased use of Indefinite Delivery-Indefinite Quantity (IDIQ) contracts to Native 8(a) businesses may inflate the true dollar amounts because an IDIQ contract can effectively be terminated after the first-year order without ever reaching its maximum awarded value.¹⁵⁹ It should also be made known that nearly 25% of all federal contracting dollars is spent between five or six companies, and almost 70% of the huge chunk of the pie going to those select companies is awarded non-competitively.¹⁶⁰ In fact, only 12% of governmental contracts awarded to the top ten largest federal contractors were obtained through full and open competition.¹⁶¹

153. See ADVOCACY PACKET, *supra* note 3, at 2.

154. *Id.* at 3.

155. See U.S. SENATE COMMITTEE ON HOMELAND SECURITY MAJORITY, *supra* note 92, at 1.

156. See *id.*

157. Jones, *supra* note 150, at 519.

158. ADVOCACY PACKET, *supra* note 3, at 4.

159. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 75.

160. FedSpending.org, Top 100 Recipients of Federal Contract Awards for FY 2009 3Q, <http://www.fedspending.org/fpds/tables.php?tabtype=t2&subtype=t&year=2009> (last visited Apr. 4, 2010).

161. *Hearing on Contracting Preferences for Alaska Native Corporations*, *supra* note 91 (statement of Sarah Lukin).

The Native American Contractors Association brings to light another government-contracting reality:

The SBA's regulations and policies have not kept pace with changes in the Federal contracting market, such as increases in the average size of contracts often exceeding the capacity of small firms, the prevalence of teaming arrangements and joint ventures, the bundling and consolidation of contracts, and the consolidation of government contractors to perform larger contracts. These changes have made it harder for small businesses, particularly 8(a) firms, to compete for government contracts. Consequently, there have been steep declines in the total value of contracts awarded to 8(a) companies in particular and to all small businesses in general. The Federal government must take immediate actions to reverse these trends, including retaining some incentives and enhancing other incentives for contracting officers to award to 8(a) and other small business.

...¹⁶²

In light of the foregoing, it is hard to accept Senator McCaskill's notion that focusing on the unsubstantiated claims against Native 8(a) contracting is "the first step towards ensuring that our contracting system provides the best possible value for the taxpayer."¹⁶³

2. Legislative Education

The Native 8(a) community must be unified in the message and divided in the delivery. Because the majority of the 8(a) program's scrutiny involves ANCs, some in the Native 8(a) community, including some tribally-owned businesses in the lower forty-eight, have been hesitant to join forces with the ANCs to combat these attacks. However, because most of the same benefits apply to both tribally-owned and ANC-owned 8(a) firms, any detrimental changes to the program will also likely affect both groups. This proved to be true in the case of Section 811 and the proposed McCaskill-Collins Amendment.¹⁶⁴

Additionally, Alaska is merely one state, and however persuasive its congressional delegation may be, their efforts cannot be as successful without support from other states' delegations. The majority of the states in the Union have an Indian tribe residing within their boundaries, and personal visits by Native leaders from the many tribes to Senators and Representatives can be far more effective than a handful of lobbyists in advocating on Native 8(a) issues.

The Native 8(a) community must also urge President Obama to increase agency-wide small business procurement goals, including augmented goals for Native 8(a), under his annual responsibility set forth in the Small Business Act.¹⁶⁵ The Act sets the minimum goal at 23%, and

162. ADVOCACY PACKET, *supra* note 3, at 5.

163. See *Hearing on Contracting Preferences for Alaska Native Corporations*, *supra* note 91 (statement of Senator McCaskill).

164. See *supra* Part III.E-F.

165. See 15 U.S.C. § 644(g)(1) (2006); Yang, *supra* note 26, at 321.

this goal is comparatively low considering the high percentage of Americans that rely on small business for their livelihood.¹⁶⁶ A recent SBA report showed that “small businesses create most of [America’s] new jobs, employ about [one-half] of the [country’s] private work force, and provide half of the [country’s] nonfarm, private real [GDP] as well as significant share of innovations.”¹⁶⁷ Armed with the above facts and information, the Native 8(a) community must do everything in its power to convince lawmakers and agencies that rather than being hesitant and reactionary in their treatment of Native 8(a), now is the time to expand and better utilize the program.

C. SBA Assistance and Native 8(A) Involvement

1. SBA Staffing Needs

One of the recommendations surfacing in both the 2006 GAO Report and the 2009 OIG memorandum was that the SBA was understaffed.¹⁶⁸ The OIG memorandum repeated the concern that staffing at the Alaska District Office was insufficient “to handle the volume of contract actions and complexity of annual reviews for the current level of ANC participants.”¹⁶⁹ “At the time [the OIG conducted its] audit, the [Alaska] office was staffed with only two full-time and one part-time [employees] to oversee over 200 [Native] 8(a) participants”¹⁷⁰ The SBA conceded the assertion that the Alaska office was understaffed and performed a workforce analysis to determine that each employee should manage a workload of no more than forty Native 8(a) participants.¹⁷¹ Generally, most organizations that do not effectively manage their employee numbers to account for an increase in business and the corresponding workload will soon see negative results, manifesting through reductions in performance, morale, and efficiency.

Interestingly, most of the alleged problems with the 8(a) program—its supposed potential for “unintended consequences” and other areas highlighted as “lacking adequate oversight”—stem from insufficient SBA manpower.¹⁷² Addressing the inadequate funding and staffing levels at the SBA may be Native 8(a)’s best answer to implementing the OIG recommendations and dispelling allegations of impropriety

166. 15 U.S.C. § 644(g)(1).

167. U.S. SMALL BUSINESS ADMINISTRATION, SMALL BUSINESS ECONOMY: A REPORT TO THE PRESIDENT 1 (2009), available at http://www.sba.gov/advo/research/sb_econ2009.pdf.

168. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 39, at 41; Memorandum from Debra S. Ritt, *supra* note 14, at 22.

169. Memorandum from Debra S. Ritt, *supra* note 14, at 22.

170. *Id.*

171. *Id.*

172. *Id.* at 15-23.

surrounding the program. Finding ways to assist the SBA in remedying this issue could prove to have an exponential return on investment.

2. SBA Proposed Rule Changes

The Native 8(a) community must also stay involved and work with the SBA to navigate through the regulatory changes currently facing the program. On October 28, 2009, the SBA promulgated its proposed rule changes to the 8(a) program.¹⁷³ The rule proposes to make a number of changes to the regulations involving both technical and substantive changes.¹⁷⁴ The proposal involves changes to the SBA's size regulations, mentor/protégé program, classification of procurements, reporting requirements, and several other areas of the 8(a) program.¹⁷⁵ In multiple instances, the SBA is seeking input and even asks for guidance from the 8(a) community on how best to address certain issues.¹⁷⁶

In its proposed rules, the SBA summarized comments from previous attempts at changing the 8(a) program.¹⁷⁷ The SBA acknowledged a general sentiment among comments from the 8(a) community “stress[ing] that the 8(a) [Business Development] program works, providing the government with a contracting option that is efficient and cost effective while permitting the government to achieve its policy of supporting disadvantaged small businesses and providing benefits to some of the most underemployed people in America.”¹⁷⁸ The language in the rules affirmed that the “SBA too believes that the 8(a) [Business Development] program is a much-needed and beneficial program, and that the tribal and ANC component of the program serves a valuable economic and community development purpose in addition to its business development purpose” and that “[i]t is not SBA's intent to shut down any component of the 8(a) program that truly assists the development of any small disadvantaged businesses.”¹⁷⁹

Although many of the proposed rule changes appear intrusive, the 8(a) community must be involved in the comment and consultation process to convey effectively concerns and suggestions. “There appears to be a meaningful opportunity to further shape and refine the final rule by submitting well-reasoned comments and developing support within the [8(a) community].”¹⁸⁰ It may also be advisable for affected contrac-

173. See Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 74 Fed. Reg. 55,694 (Oct. 28, 2009) (codified at 13 C.F.R. pts. 121, 124).

174. *Id.*

175. See generally *id.* at 55,707-10.

176. *Id.* at 55,702.

177. *Id.* at 55,712-13.

178. *Id.* at 55,712.

179. *Id.*

180. Bob Tompkins, *SBA's Proposed Changes to the 8(a) Business Development Program*,

tors to begin making adjustments in their business strategies and compliance efforts to account for the proposed changes, even though they are not yet final.¹⁸¹ Either way, a prudent Native 8(a) company would serve itself well to be as involved as possible in any rulemaking process involving the 8(a) program.

V. CONCLUSION

On December 19, 2009, the U.S. Senate and House of Representatives passed H.R. 3326, further amending the Defense Appropriations Act of 2010.¹⁸² The amended act includes a historic apology to Native American peoples.¹⁸³ It states, in part, that the United States, acting through Congress, “recognizes the special legal and political relationship Indian tribes have with the United States and . . . recognizes that there have been years of official depredations, ill-conceived policies, and the breaking of covenants by the Federal Government regarding Indian tribes.”¹⁸⁴ The Act further “apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States” and expresses “regret for the ramifications of former wrongs.”¹⁸⁵

Two days later, Senator Samuel Brownback (R-KS) referred to the amendment in his statement included in the Senate Congressional Record:

I am very pleased to report that with the addition of this language in the defense appropriations conference report, we—the United States of America—will officially apologize for the past ill-conceived policies and maltreatment by the United States toward the Native peoples of this land.

With the passage of this language, we, as a Nation, will reaffirm our commitment toward healing our Nation’s wounds rooted in a difficult past of Federal-tribal relations and work toward establishing better relationships rooted in reconciliation and forgiveness.¹⁸⁶

Although these heartfelt words of the senators will be heard, the contrary actions of their colleagues speak much louder.

The President, Congress, and federal agencies must be constantly reminded of the unique trust responsibility and the well-founded poli-

GOVERNMENT CONTRACTOR Vol. 51, No. 42, at 6 (2009).

181. *Id.*

182. See H.R. 3326, 111th Cong. (2009) (enacted); see also Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8113, 123 Stat. 3409 (2009).

183. H.R. 3326, 111th Cong. § 8113; see also Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8113, 123 Stat. 3409, 3453.

184. H.R. 3326, 111th Cong. § 8113(a)(1), (2); see also Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8113(a)(1), (2), 123 Stat. 3409, 3453.

185. H.R. 3326, 111th Cong. § 8113(a)(4), (5); see also Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8113(a)(4), (5), 123 Stat. 3409, 3453.

186. 155 Cong. Rec. S13,696 (daily ed. Dec. 21, 2009) (statement of Sen. Samuel Brownback).

cies that programs like Native 8(a) are created to fulfill. It is easy for legislators to forget or ignore this but certainly not easy to excuse. The Native 8(a) community cannot continue to allow uninformed and ignorant policymakers in Washington D.C. to make decisions that detrimentally affect tribal economies based primarily on misinformation and rhetoric. True facts and accurate information must be effectively communicated to the right decision-makers.

The federal attacks on the Native 8(a) program described in this Article are evidence of yet another war the federal government has initiated on the people of America's first nations. The federal government must honor its commitments, responsibilities, and apologies to Native America and cease advancing its assault on tribal economies by attacking the Native 8(a) program.

The Native 8(a) program truly fulfills a mission that is broader than a corporate bottom line. The Native 8(a) program has successfully provided a way out of severe economic distress for some of the poorest communities in this nation. Native 8(a) is one of the few federal programs that is working. The Native community must unify, fight back, and do much more in order effectively to preserve, protect, and expand this program and win the war the federal government has waged on tribal economies.

