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Double-Dipping: How the Federal Circuit's Decisions in *Sanford Health Plan* and *Community Health Choice, Inc.,* Improperly Permitted Insurers to Profit Twice

Jeremy Glick*

Introduction

In the mid-to-late 2000s, many Americans—nearly fifty million people in 2010—were unable to attain health insurance coverage.[1] For some households the cost of health insurance was a prohibitive factor, especially for those individuals and families already struggling to make ends meet.[2] The significant rates of uninsured Americans who could not afford health coverage created a problem for leaders in Washington: how could they ensure that these individuals would be adequately covered without plans costing more than people could afford?[3] The ensuing debates in Congress, the White House, and the nation's courts have been, and will continue to be, some of the most vital to

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* J.D., May 2023, The George Washington University Law School; LL.M., expected May 2024, Georgetown University Law Center; B.A., 2018, University of Michigan. Thank you to the *Federal Circuit Bar Journal* staff for editing this note, and to the scholarly writing program faculty for their guidance in its completion.

[1] *See* Kenneth Finegold et al., U.S. Dep't. Health & Hum. Servs., Trends in the U.S. Uninsured Population, 2010-2020 3 (2021), https://aspe.hhs.gov/sites/default/files/private/pdf/265041/trends-in-the-us-uninsured.pdf. [https://perma.cc/8TSA-58QP]. The figures relating to uninsured individuals during this time frame are specifically in relation to non-elderly (those persons under sixty-five years old) persons because of the ability for individuals above this age to access health insurance coverage through the federal Medicare program. *See id.* at 1; *Who's Eligible for Medicare?*, U.S. Dep't Health & Hum. Servs., https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicare/index.html (last visited Jan. 15, 2023) [https://perma.cc/UV9D-PAEL].

[2] *See* Jennifer Tolbert et al., *Key Facts About the Uninsured Population*, KFF (Dec. 19, 2022), https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/ [https://perma.cc/5T87-KHV8].

[3] *See* Nicole Rapfogel et al., *10 Ways the ACA Has Improved Health Care in the Past Decade*, Ctr. for Am. Progress (Mar. 23, 2020), https://www.americanprogress.org/article/10-ways-aca-improved-health-care-past-decade/ [https://perma.cc/R6ZM-M4RA].

health care in America.[4] One ongoing legal challenge relates to health insurance companies that have challenged the Department of Health and Human Services' ("DHHS") discontinuation of a cost-sharing reimbursement payment for companies that provide low-cost insurance plans to those in need.[5] Specifically, the challenges pertained to the ability of these companies to also collect cost-sharing savings through an additional provision of the Internal Revenue Code ("Tax Code").[6] Reliance on this provision leads to increased premiums for low-income Americans, which is contrary to the purpose of the Patient Protection and Affordable Care Act ("ACA"), and double-dips into taxpayer funds for health insurance companies.[7]

The ACA was passed in 2010, requiring that each state create a method for individuals to purchase health insurance plans in an open forum, often referred to as a "marketplace," with the primary purpose of helping people who are uninsured, or underinsured, gain access to adequate levels of health insurance coverage.[8] The ACA specifically requires insurers to make reductions in co-payments and deductibles for certain persons covered by said insurers and for individuals who meet necessary household income criteria.[9] Namely, these persons are low-income, high-need individuals or families

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[4] *See* Abbe R. Gluck et al., *The Affordable Care Act's Litigation Decade*, 108 Geo. L.J. 1471, 1473–74 (2020); *see also* Sandro Galea, *The ACA Debate Shows We Need to Change How We Talk About Health*, B.U. Sch. Pub. Health (Apr. 12, 2019), https://www.bu.edu/sph/news/articles/2019/the-aca-debate-shows-we-need-to-change-how-we-talk-about-health/ [https://perma.cc/7D2X-6GQQ].

[5] *See* Sanford Health Plan v. United States, 969 F.3d 1370, 1372 (Fed. Cir. 2020).

[6] *See id.* at 1374–75; 26 U.S.C. § 36B (2018).

[7] *See* Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.); *see also* President Barack Obama, Remarks by the President on the Affordable Care Act at Miami Dade College (Oct. 20, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/20/remarks-president-affordable-care-act [https://perma.cc/VEK2-ENA3]; discussion *infra* Part II.

[8] *See Sanford Health Plan*, 969 F.3d at 1372, 1375; President Barack Obama, *supra* note 7 (transcript of a speech given by President Obama on the reasons for the Affordable Care Act and in support of its performance thus far).

[9] *See* 42 U.S.C. §§ 18022(c)(3)(A), 18071(b) (2018); *Sanford Health Plan*, 969 F.3d at 1372–73; *Cost Sharing Reduction (CSR)*, HealthCare.gov, https://www.healthcare.gov/glossary/cost-sharing-reduction/ (last visited Jan. 15, 2023) [https://perma.cc/7G6U-SFAQ]. There are multiple types of plans offered on the marketplace which are referred to commonly by their categorical names: bronze, silver, gold, and platinum. *See* 42 U.S.C. § 18022(a) (2018); *see also The Health Plan Categories: Bronze, Silver, Gold & Platinum*, HealthCare.gov, https://www.healthcare.gov/choose-a-plan/plans-categories/ (last visited Jan. 15, 2023) [https://perma.cc/B9JF-AJYN]. The problem addressed in this Note specifically relates to cost-sharing burden reductions surrounding silver plans as defined in the ACA. *See* 42 U.S.C. § 18071(a)(2), (b) (2018); discussion *infra* Part II.

"whose household income exceeds 100 percent but does not exceed 400 percent of the poverty line"; eligible individuals make approximately $58,000 or less per year, pre-tax in 2023 dollars.[10]

The cost-sharing burden reductions for low income households function through a system of reimbursements made to insurers for meeting these cost-sharing requirements.[11] But despite the requirement under the ACA that insurers offer this cost-sharing burden reduction option to eligible individuals, Congress did not appropriate any permanent funds to meet the obligation of reimbursements.[12] In 2017, the Trump Administration discontinued the practice of using general permanent appropriations that fund the ACA to make these cost-sharing burden reduction reimbursement payments, having deemed the reimbursements unlawful.[13] But, insurance companies had a secondary statutory safeguard because the ACA provides an alternative mechanism through which health insurers are able to recover for cost-sharing burden reductions via tax credit, which is codified in the Tax Code.[14] The process by which insurers claim this tax credit is referred to as "silver loading."[15] Despite the duplicative protections ensured to insurance providers by the ACA, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") incorrectly determined that health insurers were entitled to Tucker Act protections.[16] The Federal Circuit reasoned that section 1402(c)(3)(A) of

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[10] 42 U.S.C. § 18071(b)(2) (2018); *see also 2023 Federal Poverty Levels / Guidelines & How They Determine Medicaid Eligibility*, Am. Council on Aging (Jan. 16, 2023), https://www.medicaidplanningassistance.org/federal-poverty-guidelines/ [https://perma.cc/6U2E-VB98].

[11] *See* 42 U.S.C. § 18071(c)(3)(A) (2018).

[12] *See* U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 174 (D.D.C. 2016). The U.S. House of Representatives sued the Secretaries of Health and Human Services and Treasury for utilizing the appropriation in 31 U.S.C. § 1324, which funds the entire ACA, a practice which the district court enjoined. *See id.* at 165. However, the district court stayed its own injunction *sua sponte* pending appeal. *See Sanford Health Plan*, 969 F.3d at 1377.

[13] *See Sanford Health Plan*, 969 F.3d at 1377 (citing Memorandum from Eric Hargan, Acting Sec'y, U.S. Dep't Health & Hum. Servs., to Seema Verma, Adm'r, Ctrs. for Medicare & Medicaid Servs. (Oct. 12, 2017), https://bit.ly/36Zqzh6 [https://perma.cc/4HFC-K68J] [hereinafter DHHS Memorandum]).

[14] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 119, 213 (2010) (codified at 26 U.S.C. § 36B (2018)).

[15] *See* Matthew Fiedler, *The Case for Replacing "Silver Loading"*, Brookings Inst. (May 20, 2021), https://www.brookings.edu/essay/the-case-for-replacing-silver-loading/ [https://perma.cc/NMA6-LQCN].

[16] *See* 42 U.S.C. §§ 18022(c)(3)(A), 18071(c)(3)(A) (2018); *see also Sanford Health Plan*, 969 F.3d. at 1378–81 (holding that the lack of appropriation meant the government was not fulfilling a money mandate as required by the Tucker Act, without finding the tax incentives

the ACA mandated the government be responsible for payments in exchange for cost-sharing burden reductions for certain needy individuals.[17]

This Note argues that the Federal Circuit incorrectly held that insurance companies were entitled to damages under the Tucker Act and should have considered the duplicative methods for compensation provided to insurers under the ACA. The Federal Circuit's decisions in *Sanford Health Plan v. United States*[18] and *Community Choice Health, Inc. v. United States*,[19] will have the unintended consequences of permitting insurance companies to expand the current practice of silver loading while raising premiums for needy individuals and families who require health insurance.[20] Part I of this Note discusses the legal landscape surrounding the recent Federal Circuit decisions and the statutory provisions at issue. Part II of this Note analyzes the unintended consequences that stem from the court's decisions in *Sanford Health Plan* and *Community Choice Health, Inc.*, and assesses how the decisions are not in line with Tucker Act jurisprudence. Finally, Part III of this Note proposes a new standard by which the Federal Circuit can decide ACA-related appeals from the United States Court of Federal Claims ("Court of Federal Claims") to rectify these flaws and further suggests alternative legislative solutions through which Congress can clarify ambiguities in the relevant provisions of the ACA and the Tax Code.

I. Background

In August 2020, the Federal Circuit decided a set of health care cases on appeal from the Court of Federal Claims. The first two cases—*Sanford*

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to qualify as a secondary source of the government's satisfaction of this requirement). For a more detailed discussion on the Tucker Act see *infra* Part I.B.

[17] *See* U.S.C. § 18071(c)(3)(A); *see also Sanford Health Plan*, 969 F.3d at 1383.

[18] 969 F.3d 1370 (Fed. Cir. 2020).

[19] 970 F.3d 1364 (Fed. Cir. 2020).

[20] *See* Simone Hussussian, *How Ending an ACA Subsidy Was Worth Its Weight in Silver*, Regul. Rev. (Dec. 11, 2019), https://www.theregreview.org/2019/12/11/hussussian-how-ending-aca-subsidy-worth-weight-silver/ [https://perma.cc/5L4C-AX2E] (describing the practice of "silver loading" by which health insurance companies raise the premiums for silver-level plans to reduce or completely offset, via the tax credit provision of the ACA, the uncompensated costs of associated with their cost-sharing burden reduction obligations post-2017 when the practice of reimbursements was halted). In 2022, Congress extended COVID-19 protections which eliminated the income cutoff for access to marketplace premium tax credit eligibility. *See Congress Extends Expanded Eligibility for Health Insurance Premium Tax Credit until 2025*, Wolters Kluwer (Nov. 11, 2022), https://www.wolterskluwer.com/en/expert-insights/congress-extends-expanded-eligibility-for-health-insurance-premium-tax-credit-until-2025 [https://perma.cc/KQ3V-B7X6].

Health Plan and *Montana Health Co-Op v. United States*[21]—were consolidated into one opinion because they raised similar questions of substantive law.[22] The other cases, *Community Health Choice, Inc.* and *Maine Community Health Options v. United States*,[23] were similarly consolidated.[24] The decisions in these cases have significant consequences for the nation's insurance scheme. Specifically, these consequences relate to health insurer practices and the pertinent sections of the ACA, the Tucker Act, and the Supreme Court's decision in *Maine Community Health*. Additionally, the consequences of these cases have exacerbated the silver loading practice.

A. American Health Insurance Post-ACA

While there are various types of insurance plans offered by the government for individuals who are impoverished, as well as for individuals who are over sixty-five years of age or who have permanent disabilities, many Americans still struggle to afford health insurance when they are ineligible for a government benefit-style plan.[25] When a person seeks private insurance in the post-ACA scheme, they have two options: obtain insurance through their employer or purchase insurance on the marketplace.[26]

Adding to the difficulty of selecting the correct insurance plan, persons must understand various terms that are applicable to all insurance plans including premiums, deductibles, and cost-sharing reductions ("CSR"). A premium is the amount a person or family pays every month for their insurance

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[21] 139 Fed. Cl. 213 (2018).

[22] *See Sanford Health Plan*, 969 F.3d 1372.

[23] 143 Fed. Cl. 381 (2019).

[24] *See* Cmty. Health Choice, Inc. v. United States, 970 F.3d 1364, 1370 (Fed. Cir. 2020) (ruling simultaneously on appeals of Cmty. Health Choice, Inc. v. United States, 141 Fed. Cl. 744, 750 (2019), and Me. Cmty. Health Options v. United States, 143 Fed. Cl. 381, 390 (2019)). The Supreme Court decided an appeal in *Maine Community Health* on a separate, but related, ACA provision also being challenged under the Tucker Act. *See* Me. Cmty. Health Options v. United States, 140 S. Ct. 1308 (2020). Though the Federal Circuit consolidated these cases, it did so incorrectly. The Federal Circuit improperly relies on similarities in the structure of these challenges without differentiating how these cases are distinguishable. *See* discussion *infra* Section II.B.

[25] *See, e.g.*, *Who's Eligible for Medicaid?*, U.S. Dep't Health & Hum. Servs., https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicaid/index.html (last visited Jan. 15, 2023) [https://perma.cc/8DQW-W8Z5]; *see also* U.S. Dep't Health & Hum. Servs., *supra* note 1; Tolbert et al., *supra* note 2.

[26] *See* Louise Norris, *How to Buy Health Insurance Today*, healthinsurance.org (Jan. 20, 2022), https://www.healthinsurance.org/how-to-buy-health-insurance-today/ [https://perma.cc/R5Q7-NNF7].

coverage.[27] A deductible is the amount paid out of pocket by insured persons before the insurance plan begins to pay.[28] A CSR reduces the amount that must be spent on deductibles or premiums and is accomplished through a variety of methods.[29]

B. The Tucker Act and the Standard Set Out in *Maine Community Health*

The Tucker Act, passed in 1887, serves as a waiver of sovereign immunity by the United States for certain actions brought against the government.[30] The Court of Federal Claims has jurisdiction over Tucker Act claims.[31] But, to bring a claim under the Tucker Act, a plaintiff must ground their allegations in a legal source, such as the ACA, since the Tucker Act does not create substantive rights.[32] The plaintiffs in these cases rely on the Tucker Act as their primary source of relief under money-mandating statutory schemes.[33]

In April of 2020, a few months before the Federal Circuit's decision in *Sanford Health Plan*, the Supreme Court ruled in a similar, but not identical, ACA-related case. In *Maine Community Health*, the Court consolidated a few pending cases with identical issues where health insurers brought suit, through the Tucker Act, for repayment under the ACA's Risk Corridors program.[34] The Court in *Maine Community Health* held that the government

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[27] *See Premium*, HealthCare.gov, https://www.healthcare.gov/glossary/premium/ (last visited Jan. 15, 2023) [https://perma.cc/JTD3-P8L8].

[28] *See Deductible*, HealthCare.gov, https://www.healthcare.gov/glossary/deductible/ (last visited Jan. 16, 2023) [https://perma.cc/QXX4-RWJG]. For example, if you have a $2,000 deductible, you pay the first $2,000 of covered services annually before your insurance begins to cover continuing expenses. *See id.*

[29] *See Cost Sharing Reduction (CSR)*, *supra* note 9.

[30] *See Tucker Act*, Legal Info. Inst., https://www.law.cornell.edu/wex/tucker_act (last visited Jan. 16, 2023) [https://perma.cc/P5LG-HSET].

[31] *See* 28 U.S.C. § 1491(a)(1) (2018).

[32] *See id.*; *see also* Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1327 (2020).

[33] *See, e.g.*, Sanford Health Plan v. United States, 969 F.3d 1370, 1379 (Fed. Cir. 2020); *see also* Cmty. Health Choice, Inc. v. United States, 970 F.3d 1364, 1371 (Fed. Cir. 2020).

[34] *See Me. Cmty. Health Options*, 140 S. Ct. at 1318. The Risk Corridor program of the ACA (and other insurance schemes) effectively serves to take percentages of profits from highly performing health insurers who participate in the marketplace and redistribute them to insurers incurring large losses to ensure survivability of the plans. *See* Timothy J. Layton et al., *Risk Corridors and Reinsurance in Health Insurance Marketplaces*, 2 Am. J. Health Econ. 66, 71 (2016).

created an obligation to pay under the language of the statute, and that this obligation fell within the Tucker Act's waiver-of-immunity exception.[35]

C. Relevant Sections of the ACA and Tax Code and Procedural History of *Sanford Health Plan* and *Community Health Choice, Inc.*

The Federal Circuit's decisions in *Sanford Health Plan* and *Community Health Choice, Inc.* are rooted in the analysis of multiple lower court decisions, as well as the relevant provisions of the ACA and the Tax Code, all of which are necessary to explore before analyzing the Court's decisions. The procedural history of the issues raised in *Sanford Health Plan* and *Community Health Choice, Inc.* help to illustrate the series of regulatory decisions which led to the elimination of subsidy payments to marketplace insurers offering silver-level plans.[36] Section 1302(c)(3)(A) of the ACA provides for the subsidies, while section 36B of the Tax Code permits insurers to claim a tax credit as well.[37] When insurance companies increase premiums for silver-level plans to increase the tax credit claimable under this section of the Tax Code, they are participating in silver loading.[38] Each of these complex transactions relating to the governance of, and practices employed by, health insurance companies are necessarily relevant to give context to the Federal Circuit's decisions in *Sanford Health Plan* and *Community Health Choice, Inc.*

1. Provisions of the ACA and Tax Code

The ACA requires every state to establish an "American Health Benefit Exchange" designed to help streamline the process of purchasing "qualified health plans."[39] Per *Sanford Health Plan*:

> A "qualified health plan" must provide certain "essential health benefits" and, based on the . . . "value of the benefits provided" . . . is designated as providing one of four "levels of coverage": bronze, silver, gold or platinum, which differ in the percent of the plan benefits that the insurer pays.[40]

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[35] *See Me. Cmty. Health Options*, 140 S. Ct. at 1319, 1330.

[36] *See* discussion *infra* Section I.C.2–3.

[37] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1302(c)(3)(A), 124 Stat. 119, 166 (2010) (codified as amended at 42 U.S.C. § 18022(c)(3)(A) (2018)); 26 U.S.C. § 36B (2018).

[38] *See* Fiedler, *supra* note 15; *see also Cmty. Health Choice, Inc.*, 970 F.3d at 1369–70.

[39] 42 U.S.C. § 18031(b)(1) (2018).

[40] Sanford Health Plan v. United States, 969 F.3d 1370, 1373 (Fed. Cir. 2020) (quoting 42 U.S.C. § 18022(a), (d) (2018)); *see generally The Health Plan Categories: Bronze, Silver, Gold & Platinum*, *supra* note 9.

Insurers must offer at least one plan at the silver-level and gold-level to participate as a seller on the exchange.[41] The relevant portion of the ACA, which provides for cost-sharing reimbursement payments to insurers for low-income plans, is specifically concerned with silver-level plans.[42] The ACA requires reductions in cost-sharing for certain "eligible insured" individuals for qualified medical expenses made in the form of "deductibles, coinsurance, [or] copayments," as subsidies to insurers.[43]

In addition to providing reimbursements to insurers via subsidies, a separate provision of the ACA, codified in the Tax Code, prescribes a secondary method for reimbursement to insurers.[44] The Tax Code's reimbursement provision details the process by which a taxpayer is entitled to a tax credit as an alternative means to offset cost-sharing expenses.[45] To meet this goal, the ACA allows for direct payments of these credits to insurers.[46] The Federal Circuit recognizes the similar natures of the reimbursement payment scheme found in Title 42 of the United States Code and the tax credit scheme found in the Tax Code.[47] However, the court also notes a specific, and extremely relevant, difference between the two schemes: unlike reimbursements, Congress has funded the tax credits through a permanent appropriation.[48]

2. Sanford Health Plan v. United States

Upon taking office, former President Trump attempted to fulfill his campaign promise to repeal the ACA.[49] Though President Trump failed to do so, the Secretary of the DHHS nevertheless requested an opinion from the Attorney General as to the legality of the ongoing reimbursement subsidies

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[41] *See* 42 U.S.C. § 18021(a)(1)(C)(ii) (2018).

[42] *See id.* § 18071(a)–(c).

[43] *Id.* §§ 18022(c)(3)(A), 18071(c)(3)(A). The ACA defines "eligible insured" as someone who is enrolled in a silver-level plan "whose household income exceeds 100 percent but does not exceed 400 percent of the poverty line." *Id.* § 18071(b).

[44] *See* 26 U.S.C. § 36B (2018).

[45] *See Sanford Health Plan*, 969 F.3d at 1374 (citing 26 U.S.C. § 36B(a)). A tax credit or deduction is an item claimed on tax returns which can either reduce the amount a taxpayer owes or give them an increased tax return. *See Credits and Deductions for Individuals*, Internal Revenue Serv., https://www.irs.gov/credits-deductions-for-individuals (last visited Jan. 16, 2023) [https://perma.cc/B98R-QA3C].

[46] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1412(a)(3), 124 Stat. 119, 231 (2010) (codified at 42 U.S.C. § 18082(a)(3) (2018)).

[47] *See Sanford Health Plan*, 969 F.3d at 1375–76.

[48] *See id.* at 1375 (citing 31 U.S.C. § 1324 (2018)).

[49] *See* Chris Donovan & Adam Kelsey, *Fact-Checking Trump's 'Repeal and Replace' Obamacare Timeline*, ABC News (Mar. 24, 2017), https://abcnews.go.com/Politics/fact-checking-trumps-repeal-replace-obamacare-timeline/story?id=46360908 [https://perma.cc/DJ9V-TUWQ].

for low-income health plans as required by the ACA.[50] Following the Attorney General's advisory letter deeming reimbursement payments from generalized appropriations unlawful, the Secretary of the DHHS ended the program.[51] In early 2018, two previously reimbursed health insurers, Sanford Health Plan and Montana Health Co-Op, brought a lawsuit against the government in the Court of Federal Claims.[52] The court granted summary judgement for the two health insurers finding "in materially identical opinions . . . that the ACA provision on the reimbursement of cost-sharing reductions is 'money mandating' and that the government is liable for . . . its failure to make reimbursements."[53] Here, the Court of Federal Claims concluded that despite Congress's failure to appropriate funds to the DHHS for the purpose of providing the reimbursements required under the ACA, the government was still required to meet its statutory obligation.[54] Specifically, the court reasoned that the relevant section of the ACA "imposed an obligation on the government to make payments to insurers," and was money mandating within the scope of the Tucker Act regardless of whether Congress funded the DHHS reimbursements with annual, permanent, or any appropriations whatsoever.[55] The government appealed.[56]

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[50] *See* U.S. Dep't of Just., Opinion Letter on Availability of 31 U.S.C. § 1324 to Fund Cost-Sharing Reduction Payments Under the ACA 2–3 (Oct. 11, 2017) [hereinafter DOJ Opinion Letter], https://bit.ly/36Zqzh6 [https://perma.cc/4HFC-K68J]; *see also* Dylan Scott & Sarah Kliff, *Why Obamacare Repeal Failed*, Vox (July 31, 2017), https://www.vox.com/policy-and-politics/2017/7/31/16055960/why-obamacare-repeal-failed [https://perma.cc/QR4K-SHCK]. In a widely anticipated, now-viral vote, now-deceased Senator John McCain of Arizona, a member of the President's own party, dealt the deciding blow against President Trump's plan to completely repeal the Affordable Care Act. *See* Scott & Kliff, *supra*.

[51] *See* DOJ Opinion Letter, *supra* note 50, at 1; DHHS Memorandum, *supra* note 13 at cover page (stating that payments are currently "prohibited unless and until a valid appropriation exists").

[52] *See Sanford Health Plan*, 969 F.3d at 1372 (citing Sanford Health Plan v. United States, 139 Fed. Cl. 701 (2018); Montana Health CO-OP v. United States, 139 Fed. Cl. 213 (2018)). Originally filed as two, separate lawsuits, *Sanford Health Plan* and *Montana Health CO-OP* were consolidated on appeal to the Federal Circuit due to their similarity. *See id.*

[53] *Id.* (citing *Sanford Health Plan*, 139 Fed. Cl. at 702, 706–09; *Montana Health CO-OP*, 139 Fed. Cl. at 214, 218–21).

[54] *See Sanford Health Plan*, 139 Fed. Cl. at 702.

[55] *Id.* at 707–08. Here the Court of Federal Claims also analogized to a recent similar case dealing with a separate money-mandating provision of the ACA where the "Federal Circuit concluded that the language in Section 1342 [of the ACA, codified at 42 U.S.C. § 18062] stating that the Secretary 'shall pay' certain amounts in accordance with a statutory formula initially created an obligation to make full risk-corridors payments without regard to appropriations or budget authority." *Id.* at 707 (citation omitted).

[56] *See Sanford Health Plan*, 969 F.3d at 1372.

3. Community Choice Health, Inc. v. United States

After the conclusion of the 2017 health insurance marketplace rate period, Community Health Choice, Inc. and Maine Community Health Options brought lawsuits against the government for failure to pay CSR reimbursements under the ACA.[57] The two lawsuits were joined as materially identical and the trial court granted judgment in favor of the health insurers for the full amount of reimbursement payments withheld by the government in 2017 and 2018.[58] The Court of Federal Claims reasoned that the government's failure to pay insurers the CSR reimbursements violated its statutory obligations under the ACA.[59] The court reiterated the long-held standard that the Tucker Act is broadly construed to waive sovereign immunity for statutes that can "fairly be interpreted" as conferring a money-mandating implied contract between the government and a private entity.[60] Because of the vast jurisprudence that broadly construes the Tucker Act, the Court of Federal Claims found that the cost-sharing payments from the DHHS to marketplace insurers codified in the ACA were money mandating, and the discontinuation of these payments resulted in insurers' entitlement to damages.[61]

Furthermore, the court reasoned that because the insurers had a valid implied-in-fact contract with the government via the insurers' provision of these services in reliance of these statutorily required payments, the government's failure to make these payments constituted a breach of contract.[62] The action in *Community Health Choice, Inc.*, similar to *Sanford Health Plan*, stems directly from the halting of reimbursement payments deemed illegal due to their funding source.[63] Unlike *Sanford Health Plan*, however, the claims in *Community Choice Health, Inc.* arose after the conclusion of the 2018 rate year, after the plaintiffs had already increased their premiums to account for the lack of reimbursement payments and taken advantage of the tax credit permitted under 26 U.S.C. § 36B.[64] Because Community Choice Health already received some payment from the government in the form of tax credits, the court applied damages principles from the Restatement of Contracts

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[57] *See* Cmty. Health Choice, Inc. v. United States, 970 F.3d 1364, 1364 (Fed. Cir. 2020).

[58] *See id.* at 1367, 1370–71.

[59] *See* Cmty. Health Choice, Inc. v. United States, 141 Fed. Cl. 744, 762 (2019).

[60] *Id.* (citation omitted).

[61] *See id.* Furthermore, the court held that the lack of appropriation by Congress for the payments does not alleviate the government of liability for non-compliance with a money-mandating provision. *See id.* at 763.

[62] *See id.* at 769.

[63] *See Cmty. Health Choice, Inc.*, 970 F.3d at 1369 (citing DHHS Memorandum, *supra* note 13).

[64] *See id.* at 1377, 1379.

and reduced the damages awarded under the plaintiff's Tucker Act claims by the amount it had claimed in increased tax credits.[65]

4. Silver Loading

The ACA tax credit permits health insurers to engage in silver loading; this entails raising the premiums charged for silver-level plans on the marketplace to maximize the tax credit found in 26 U.S.C. § 36B.[66] Notably, the amount recouped via the tax credit is specifically tied to the premiums charged for silver-level insurance plans, the same level plan that is provided to low-income families per the ACA.[67] Insurance companies are able to recover a "premium assistance amount" which is either: (1) the lesser of "the monthly premiums for . . . [one] or more qualified health plans offered . . . through an Exchange established by the State under 1311 of the [ACA]"; or (2) the excess of "the adjusted monthly premium . . . [of the] second lowest cost silver[-level] plan" available to a person or family, divided by "1/12 of the product of the applicable [tax rate] and the [individual or family's] household income for the taxable year."[68] Unlike other tax credits, the silver-level plan premium credit available to insurance companies under section 36B is paid up-front pursuant to the theory that the insurance companies will then pass savings on the premiums to consumers (although this does not account for raising premiums to receive greater tax incentives).[69] This process is largely between the consumer and their insurer, with the consumer electing the tax credit be given to the insurance company, and thus has little oversight.[70]

The notion of offsetting damages sounds similar to a principle in contract law, whereby an aggrieved party's damages are reduced by amounts already recouped to make them whole rather than over-compensate plaintiffs in

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[65] *See id.* at 1375–77.

[66] *See* Fiedler, *supra* note 15; *Cmty. Health Choice, Inc.*, 970 F.3d at 1369–70.

[67] *See* Fiedler, *supra* note 15, fig. 1; *see also* 42 U.S.C. § 18071(a)(2), (b)(1) (2018).

[68] 26 U.S.C. § 36B(b)(2) (2018).

[69] *See What Is a Premium Tax Credit?*, healthinsurance.org, https://www.healthinsurance.org/glossary/premium-tax-credit/ (last visited Jan. 16, 2023) [https://perma.cc/Z52E-FNKC]. There is also an option for an insured person to claim the entire tax credit themselves and pay full price for their health insurance premium, assuming that a person who is covered by these plans would even be able to afford to do so. *See* Louise Norris, *Should I Take My ACA Premium Subsidy During the Plan Year – or Claim it at Tax Time*, healthinsurance.org (Oct. 11, 2021), https://www.healthinsurance.org/faqs/should-i-take-my-aca-premium-subsidy-during-the-plan-year-or-claim-it-at-tax-time/ [https://perma.cc/GPR9-RXVL]. Either way, the insurance company is compensated. *See id.*; *see also* 42 U.S.C. § 18082(c)(2)(A) (2018) (citing 26 U.S.C. § 36B).

[70] *See* Norris, supra note 69.

breach actions.[71] In *Community Health Choice, Inc.*, the Federal Circuit recognized that insurers had recouped some of their costs via silver loading and thus offset CSR reimbursement damages by the amount billed through this practice.[72] However, the actions discussed in the ACA money-mandating cases, while alleged under a theory similar to breach of contract, are specifically Tucker Act breach claims against the government.[73] In these claims, which are necessarily brought under the Tucker Act to break the government's shield of sovereign immunity, damages are the full amount mandated under the statute if the private entity was deprived of governmental payment.[74]

But health insurers are nevertheless incentivized to continue silver loading, despite the Federal Circuit's decisions in *Sanford Health Plan* and *Community Health Choice, Inc.*, because the tax credit is guaranteed to be appropriated.[75] This is bolstered by the court's award of full damages in *Sanford Health Plan*, without any reduction or order to mitigate future duplicative gains under the tax credit.[76] The idea that a health insurance company can recoup expenses via a tax credit, as well as a cost-sharing reimbursement payment (if these payments are funded by Congress) requires inquiry to determine how duplicative funding methods are couched within Tucker Act jurisprudence. Finally, a Brookings Institution article also considers that the ability to silver load reduces state incentives to expand Medicaid because such an expansion would move individuals between 100% and 138% of the federal poverty line from silver-level plans to Medicaid coverage in expansion states. This would reduce the potential financial benefits to insurers of keeping these individuals on silver-level plans and thereby disincentivize states from expanding Medicaid.[77]

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[71] *See* William H. Lawrence, *Cure After Breach of Contract*, 70 Minn. L. Rev. 713, 728–29 (1986).

[72] *See* Aviva Aron-Dine & Christen Linke Young, *Silver-Loading Likely to Continue Following Federal Circuit Decision on CSRs*, Health Affs. (Oct. 13, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201009.845192/full/ [https://perma.cc/UDQ5-DTZX].

[73] *See* Sanford Health Plan v. United States, 969 F.3d 1370, 1378, 1382–83 (Fed. Cir. 2020); Cmty. Health Choice, Inc. v. United States, 970 F.3d 1364, 1371 (Fed. Cir. 2020); Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1331 (2020).

[74] *See* 28 U.S.C. § 1491(a)(1) (2018). The Tucker Act serves as a waiver of sovereign immunity and a jurisdictional grant, but it does not create a substantive cause of action. *See* Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1306 (Fed. Cir. 2008). A plaintiff, therefore, must establish that "a separate source of substantive law . . . creates the right to money damages." *Id.* (quoting Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part)).

[75] *See* 31 U.S.C. § 1324(a)(2)(E) (2018); *see also* Aron-Dine & Young, *supra* note 72.

[76] *See* Sanford Health Plan v. United States, 139 Fed. Cl. 701, 709 (2018).

[77] *See* Fiedler, *supra* note 15.

Ample information evinces Congress's intent in passing the ACA—to provide affordable health insurance options to low-income households.[78]

II. Analysis

The Federal Circuit's decisions in *Sanford Health Plan* and *Community Health Choice, Inc.* create a series of inadvertent results that permits insurance companies to double-dip in government dollars, while simultaneously underperforming on their statutory duties to adequately insure low-income individuals and families pursuant to the ACA. These consequences demand an immediate solution by specifically considering three issues: (1) how the Federal Circuit's decisions in *Sanford Health Plan* and *Community Health Choice, Inc.* created unintended consequences; (2) why the Federal Circuit misapplied the Supreme Court's precedent in *Maine Community Health* and other Tucker Act precedent; and (3) why the Government should have prevailed on the merits of their arguments on appeal to the Federal Circuit in *Sanford Health Plan* and *Community Health Choice, Inc.*

A. The Federal Circuit's Decisions in *Sanford Health Plan* and *Community Health Choice, Inc.* Have Unintended Consequences Which Run Contrary to the Purpose of the ACA

Following the Trump Administration's decision to end reimbursement payments to health insurers, post-2017 marketplace insurers responded by raising the premiums charged for their plans to offset the loss of governmental cost-sharing payments, effectively passing their costs onto the consumer.[79] Since this tax credit only applies to silver-level insurance plans, however, the premium increases that are being passed onto consumers are specifically being passed onto the low-income consumers who are eligible for silver-level plans.[80] As a result, silver loading has economic impacts on both insurance companies and low-income Americans.[81] Given that over 80% of current marketplace participants are eligible for the premium tax credit, millions of people are

[78] *See* 42 U.S.C. § 18071(c)(1)–(3) (2018).

[79] *See* DHHS Memorandum, *supra* note 13; Fiedler, *supra* note 15; *see also* DOJ Opinion Letter, *supra* note 50, at 1; Donovan & Kelsey, *supra* note 49.

[80] *See* Fiedler, *supra* note 15; *see also* 42 U.S.C. § 18071(a)(2), (b).

[81] *See* Fiedler, *supra* note 15. Fielder's article hypothesizes an administrative solution to silver loading whereby the government in a non-Trump administration could require the insurance companies to spread lost revenue from the absence of CSR payments across all metal tiers, known as broad loading. *See id.* While not addressed in this paper's solution, broad loading presents an alternative regulatory solution to the unintended consequences of the Federal Circuit's holdings.

impacted by silver loading.[82] Finally, silver loading reduces state incentives to expand Medicaid because such an expansion would move individuals who are between 100% and 138% of the federal poverty line from silver-level plans to Medicaid coverage in expansion states. This would potentially reduce profits seen by health insurance companies—major players in lobbying Congress and state legislatures—therefore disincentivizing Medicaid expansions.[83]

Given the carveout for CSRs to individuals who meet poverty thresholds, it is a reasonable inference that the ACA sections here were designed to reduce costs for low-income individuals and families to boost the number of people with health insurance in the United States.[84] To address this gap in health insurance coverage, Congress structured the ACA to provide health insurance and care to more Americans.[85] To this day, legislative challenges to the ACA are met with broad support for the quality, affordable health care that is guaranteed by this landmark legislation.[86] Taken in the context of more than thirty million Americans still lacking affordable health insurance, cognizable issues of affordability and access to health care still remain.[87] Public opinion surrounding the ACA favors expanding the benefits of low-cost plans to more families, rather than chipping away at the goals of the legislation.[88] It is contrary to congressional intent, therefore, for courts to apply the laws in

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[82] *See id.*; Louise Norris, *The ACA's Cost-Sharing Subsidies*, healthinsurance.org, https://www.healthinsurance.org/obamacare/the-acas-cost-sharing-subsidies/ (last visited Jan. 16, 2023) [https://perma.cc/DD5F-AQ5B].

[83] *See, e.g.*, Robert Pear, *Health Care and Insurance Industries Mobilize to Kill 'Medicare for All'*, N.Y. Times (Feb. 23, 2019), https://www.nytimes.com/2019/02/23/us/politics/medicare-for-all-lobbyists.html [https://perma.cc/C6F5-YQB9]; William L. Schpero et al., *Lobbying Expenditures in the U.S. Health Care Sector, 2000-2020*, JAMA Health Forum (Oct. 28, 2022), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2797734 [https://perma.cc/5DFS-3YXE]; *see also* Fiedler, *supra* note 15.

[84] *See* Elizabeth Davis, *What Is a Silver Plan Under the Affordable Care Act?*, Very Well Health (Apr. 17, 2021), https://www.verywellhealth.com/silver-plan-what-is-it-1738781 [https://perma.cc/6HGB-24BN].

[85] *See* Shanoor Seervai, *'A Monumental Effort': How Obamacare Was Passed*, Commonwealth Fund (Mar. 20, 2020), https://www.commonwealthfund.org/publications/podcast/2020/mar/monumental-effort [https://perma.cc/78Q8-NGWA].

[86] *See, e.g.*, Press Release, Representative Debbie Dingell, Dingell Statement on House Passage of ACA Repeal Bill, (May 4, 2017), https://debbiedingell.house.gov/news/documentsingle.aspx?DocumentID=1176 [https://perma.cc/RXQ2-7C6N].

[87] *See Health Insurance Coverage*, Ctrs. for Disease Control, https://www.cdc.gov/nchs/fastats/health-insurance.htm (last visited Jan. 16, 2023) [https://perma.cc/Y42J-RY2K].

[88] *See* Karlyn Bowman, *Public Opinion: the ACA at Year 10*, Forbes (Mar. 9, 2020), https://www.forbes.com/sites/bowmanmarsico/2020/03/09/public-opinion-the-aca-at-year-10/?sh=6a9a24f6745b [https://perma.cc/G5T4-DVZB].

a way that allows insurance companies to profit (and in reality, double-dip) while premiums and deductibles potentially rise.[89]

B. The Court Misapplied the Supreme Court's Precedent in *Maine Community Health* as it Relates to the Applicability of the Tucker Act

In *Maine Community Health*, the Supreme Court considered whether the Risk Corridor provision of the ACA created a payment obligation placing the program within the Tucker Act's waiver of sovereign immunity, thereby allowing the health insurance company to recover damages against the United States.[90] The Court emphasized that "[t]hese holdings reflect a principle as old as the Nation itself: The Government should honor its obligations. Soon after ratification [of the Constitution], Alexander Hamilton stressed this insight as a cornerstone of fiscal policy."[91] But there is a clear difference between *Maine Community Health* and the consolidated *Sanford Health Plan* and *Community Health Choice, Inc.* cases as the relevant provisions of the latter two provide insurance companies with two ways to collect the money they need to subsidize the ACA programs.[92] This is clearly distinguishable from the Risk Corridor program which is only funded by tax credits codified in section 1324, as CSRs have multiple avenues for payments to insurers participating in the program or marketplace.[93] The Risk Corridor program challenged in *Maine Community Health* intended to reimburse unprofitable plans in the first three years of the program via payments from the DHHS.[94] This isolated, short-term program was intended to serve as a transition period stop-gap against marketplace insurers folding due to unprofitability and was originally written with one funding mechanism which had expired.[95]

In comparing the Risk Corridor program to the affordable silver-level plans, which are both statutorily mandated by the ACA, there are immediately identifiable differences. First, the silver-level plans are intended to continue as an ongoing source of affordable insurance coverage.[96] Second, the reimbursement payments were funded for the first seven years of the program via

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[89] *See* Fiedler, *supra* note 15; *see also* Hussussian, *supra* note 20.

[90] *See* Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1318 (2020).

[91] *Id.* at 1331.

[92] *See* Sanford Health Plan v. United States, 969 F.3d 1370, 1373–74 (Fed. Cir. 2020); Cmty. Health Choice v. United States, 970 F.3d 1364, 1368–69 (Fed. Cir. 2020) (citing 42 U.S.C. §§ 18022(c)(3)(A), 18071(c)(3)(A) (2018)); *see also* 31 U.S.C. § 1324(a)(2) (2018).

[93] *Compare* 31 U.S.C. § 1324, *with* 42 U.S.C. §§ 18022(c)(3)(A), 18071(c)(3)(A).

[94] *See Me. Cmty. Health Options*, 140 S. Ct. at 1316.

[95] *See id.*

[96] *See* 42 U.S.C. § 18071(b); Fiedler, *supra* note 15.

appropriations to the DHHS to fulfill their payment obligations.[97] But just in case these payments were not ongoing, Congress drafted, approved, and passed into law a secondary funding mechanism which would allow for the ongoing delivery of the affordable silver-level plans via a tax credit.[98] Third, further recognizing the critical need to meet the financial obligations to marketplace insurers providing these affordable plans, the tax credit was funded through a *permanent* appropriation.[99] The stark differences between the Risk Corridor program and affordable silver-level plans are unquestionable when taken in light of Congress's action to ensure it was appropriating funds to meet at least one of the funding mechanisms for the silver-level plans at all times.

While the Tucker Act is meant to hold the government accountable for its financial obligations, it seems contrary to the Supreme Court's decision in *Maine Community Health* that the government would be required to pay damages to the plaintiff-health insurers who sued for the discontinued subsidies while they were simultaneously passing the newly minted expenses onto consumers through increased premiums.[100] Unlike the Supreme Court's decision in *Maine Community Health*, where the government's discontinuation of the Risk Corridor program subsidy did not allow for alternate forms of payment under the program, in *Sanford Health Plan*, insurers were equipped with a secondary funding source that adequately compensated them for the same program.[101] The Federal Circuit decided the extent of government liability to insurance companies in these cases under the mandates of the Tucker Act.[102] The purpose of the Tucker Act is to waive the government's immunity from damages when the Constitution or other federal statute is money mandating, thus conferring a duty upon a party which causes financial deficit.[103]

> [A] statute creates a "right capable of grounding a claim within the waiver of sovereign immunity if, but only if, the statute 'can fairly be interpreted as mandating

[97] *See* DOJ Opinion Letter, *supra* note 50, at 1.

[98] *See* 26 U.S.C. § 36B (2018).

[99] *See* Sanford Health Plan v. United States, 969 F.3d 1370, 1375 (Fed. Cir. 2020) (citing 31 U.S.C. § 1324 (2018)).

[100] *See Me. Cmty. Health Options*, 140 S. Ct. at 1331.

[101] *Compare Me. Cmty. Health Options*, 140 S. Ct. at 1308, *with* Sanford Health Plan v. United States, 139 Fed. Cl. 701, 702–03 (2018).

[102] *See, eg.*, *Sanford Health Plan*, 969 F.3d at 1375.

[103] *See* Gregory C. Sisk, *Online Symposium: The Federal Circuit's 2020 Rulings Reviewing Decision of the Court of Federal Claims in Tucker Act Cases*, Fed. Cir. Blog (Mar. 31, 2021), https://fedcircuitblog.com/2021/03/31/online-symposium-the-federal-circuits-2020-rulings-reviewing-decisions-of-the-court-of-federal-claims-in-tucker-act-cases/ [https://perma.cc/KB2P-85UJ].

> compensation by the Federal Government for the damage sustained'" after courts apply a rule of fair interpretation to the statute in question.[104]

Here, the insurance companies were owed a duty to be subsidized, but the permanent appropriation given to the tax credit also accomplished this goal, leaving an educated reader of the Federal Circuit's application of the Tucker Act in *Sanford Health Plan* and *Community Health Choice, Inc.* to conclude the insurance companies were double-dipping instead of receiving rightfully owed damages.[105]

C. Even if *Sanford Health Plan* and *Community Health Choice, Inc.* Can Avail Themselves of Tucker Act Protections, the Legislative History and Statutory Interpretation of the ACA Ought to Prohibit the Federal Circuit's Decision

Irrespective of whether the Federal Circuit correctly applied the Supreme Court's Tucker Act jurisprudence in *Sanford Health Plan* and *Community Health Choice, Inc.*, there are competing principles of logic and statutory interpretation which call into question the decisions in these cases. The reimbursements, as well as many of the other ACA provisions, are specifically concerned with ensuring that persons who are uninsured, or underinsured, have access to adequate, affordable health insurance coverage.[106] By contrast, the Risk Corridor tax credits and deductions offered to health insurance companies, commensurate with premium rates, target failing insurance companies and plans to ensure that they are provided with support to remain solvent, and therefore remain in the marketplace as options for persons seeking coverage.[107]

The ACA intended one avenue for reimbursement under section 1402(c)(3)(A) of the ACA—payment from the Secretary of the DHHS.[108] Congress's failure to fund the reimbursement program, while permanently funding the tax credit program, does not mean the Federal Circuit should be able to permit multiple avenues for payment (reimbursements, silver loading, and judicial remedy) ultimately costing the taxpayer in multiple ways.[109] Instead, the court could recognize that the Tucker Act is satisfied by

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[104] *Me. Cmty. Health Options*, 140 S. Ct. at 1328 (citing United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003)).

[105] *See* 42 U.S.C. §§ 18022(c)(3)(A), 18071(c)(3)(A) (2018); 31 U.S.C. § 1324 (2018); 26 U.S.C. § 36B (2018).

[106] *See* Hussussian, *supra* note 20.

[107] *See Me. Cmty. Health Options*, 140 S. Ct. at 1315–18; Layton et al., *supra* note 34, at 67.

[108] *See* 42 U.S.C. § 18071(c)(3)(A) (2018).

[109] *See* 31 U.S.C. § 1324(a)(2)(E) (2018); DOJ Opinion Letter, *supra* note 50, at 1; John MacArthur Maguire, *Relief from Double Taxation of Personal Incomes*, 32 Yale L.J. 757, 757, 774 (1923) (acknowledging the public dislike for double taxation).

cost-sharing subsidy payments and the tax credits working in tandem as one money-mandating program. Viewing the related statutory provisions in light of their indivisible statutory purpose, the Tucker Act should only be applied as requiring remedies when both payment options have been discontinued. A more sensible interpretation, and one which seems more aligned with the intent behind the relevant ACA and Tax Code sections, is to recognize that the ACA provision cannot be seen as money mandating while insurance companies are simultaneously able to collect through tax incentives. Congress placed such importance on this program as to provide two funding sources, making certain that the government did not fail to meet its obligation under the statute—an element necessary for a successful Tucker Act claim.[110] This practical interpretation of the ACA and the relevant law would be more in line with what Congress intended for failing companies rather than for routine insurance suppliers.[111]

There are additional policy arguments which support the notion that the Federal Circuit decided *Sanford Health Plan* and *Community Health Choice, Inc.* improperly. Most significant is the potential for insurance companies to not meet the goal envisioned by the ACA: to provide health care coverage for low-income families and individuals.[112] The increasing premium rates, meant to capitalize on the amount recovered from the tax incentives, leave low-income families unable to afford coverage.[113] For some insured persons, this has forced them to seek basic, bronze-level plans which often do not provide them with adequate coverage (resulting in underinsurance), but alleviate their concerns for increased premiums.[114] By ruling that the silver-level plan subsidy payments were money mandating, despite insurance companies providing these plans still collecting via tax credit, the Federal Circuit created great potential for a flood of litigation in the Court of Federal Claims.[115] Insurance companies will be incentivized to litigate these claims to maximize their profits by claiming the tax credit and seeking judgment for non-issued cost-sharing payments.[116] Companies which, since 2017, have been providing silver-level

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[110] *See* 42 U.S.C. §§ 18022(c)(3)(A), 18071(c)(3)(A) (2018); *Me. Cmty. Health Options*, 140 S. Ct. at 1319–23 (finding that the language of the statute provided for a money mandate); *see also* 26 U.S.C. § 36B(a) (2018).

[111] *See Me. Cmty. Health Options*, 140 S. Ct. at 1315–18; Layton et al., *supra* note 34, at 67.

[112] *See* President Barack Obama, *supra* note 7.

[113] *See* Fiedler, *supra* note 15.

[114] *See* Fiedler, *supra* note 15. Underinsurance occurs when a person's "insurance is inadequate for [their] healthcare needs." Devon Delfino, *Uninsured vs. Underinsured: What's the Difference?*, Good Rx Health (Dec. 1, 2021), https://www.goodrx.com/insurance/health-insurance/insured-vs-underinsured [https://perma.cc/8LCQ-PPAB].

[115] *See Me. Cmty. Health Options*, 140 S. Ct. at 1319; 26 U.S.C. § 36B (2018).

[116] *See* Aron-Dine & Young, *supra* note 72.

plans for low-income persons as required by the ACA would be financially incentivized to file lawsuits in an attempt to additionally recoup subsidy payments from the government based on the precedent set in *Sanford Health Plan* and *Community Health Choice, Inc.*

Since the proper method for piercing sovereign immunity and receiving compensation from a money-mandating statute claim is through the Tucker Act, companies are unlikely to raise traditional breach of contract claims as they would fail to meet the pleading threshold necessary to permit the waiver of immunity.[117] The Court of Federal Claims and the Federal Circuit, therefore, will be asked to decide whether the statute could "fairly be interpreted" to be money mandating on the government, thus requiring the payment of some amount to a regulated company that is providing a service.[118] This disallows the court from reducing damages based on the tax credits being received because the statute being challenged is either money mandating or it is not. In *Sanford Health Plan* and *Community Health Choice, Inc.* the Federal Circuit simply did not look at the full picture and improperly held that section 1402(c)(3)(A) of the ACA conferred an unmet money-mandating provision under the Tucker Act.

III. Solution

The courts and Congress have the ability to solve this silver loading problem. Specifically, the Supreme Court or the Federal Circuit could reconsider *Sanford Health Plan* and *Community Health Choice, Inc.* to prohibit silver loading. Alternatively, Congress could clarify its intention in creating two funding sources for low-cost silver-level plans under the ACA.

A. Judicial Remedies Aimed at Eliminating the Negative Consequences of the Federal Circuit's Decisions in *Sanford Health Plan* and *Community Health Choice, Inc.*

In the Supreme Court, the Justices could decide that one, or both, of the 2020 silver loading cases do not fall within the *Maine Community Health* precedent subjecting it to the Tucker Act's waiver of sovereign immunity and subsequent money damages. Should one of these cases—or even a different case on related or similar merits—appear before the Court, it is not a stretch to envision a standard which differentiates *Sanford Health Plan* and *Community Health Choice, Inc.* from *Maine Community Health*. The key fact

[117] *See Me. Cmty. Health Options*, 140 S. Ct. at 1327–29; 28 U.S.C. § 1491(a)(1) (2018).

[118] Sanford Health Plan v. United States, 139 Fed. Cl. 701, 705 (2018) (citation omitted); Sanford Health Plan v. United States, 969 F.3d 1370, 1378, 1380 (Fed. Cir. 2020) (citation omitted).

that could account for a different interpretation is centered around the Risk Corridor program only having *one* method for subsidy, whereas the silver-level plans for low-income persons have two statutory methods for subsidy.[119] Not only did Congress legislate a binary mechanism for payments, but it also permanently appropriated funds for one such source to ensure ongoing compliance with this program.[120] This distinguishes *Sanford Health Plan* and *Community Health Choice, Inc.* from *Maine Community Health*, as the government in the former two cases could still meet its statutory obligation to reimburse health insurers offering low-income silver-level plans via tax incentives because of the permanent and ongoing appropriation outlined in 26 U.S.C. § 36B.[121]

Since the Federal Circuit has opined that Tucker Act claims arising out of the government's failure to meet financial subsidy provisions under the ACA should first appear before the Court of Federal Claims, and then subsequently on appeal to the Federal Circuit, the Federal Circuit should create a new standard that does not fall under the Tucker Act's waiver.[122] Where no other avenue for government subsidy exists, the court should propose a three-factor test to properly distinguish between instances when companies have meritorious claims of denial of money-mandating provisions under the ACA and when they do not. This test should be: (1)(a) the existence of a money-mandating statute or provision, and (b) its exclusivity as a method for collection; (2) legislative or statutory interpretations of congressional intent behind the relevant provision which provides for payments to insurance companies (this factor gives deference to *why* Congress originally acted); and (3) public policy interests in not limiting individuals and families' access to health insurance coverage under ACA-funded programs.

The Federal Circuit should apply the aforementioned factors—first answering factor one, followed by factor two, and with subsequent consideration given to factor three when factors one and two are not dispositive. Meaning,

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[119] *Compare* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1342, 124 Stat. 119, 211 (2010) (codified at 42 U.S.C. § 18062 (2018)), *and Me. Cmty. Health Options*, 140 S. Ct. at 1315–17*, with* 42 U.S.C. §§ 18022(c)(3)(A), 18071(c)(3)(A) (2018), *and* 26 U.S.C. § 36B (2018).

[120] *See Sanford Health Plan*, 969 F.3d at 1375 (citing 31 U.S.C. § 1324 (2018)).

[121] *Compare Sanford Health Plan*, 139 Fed. Cl. at 702–03, *and* Cmty. Health Choice, Inc. v. United States, 970 F.3d 1364, 1369 (Fed. Cir. 2020) (identifying the tax credit for enrollees in silver plans outlined in 26 U.S.C. § 36B, which is funded by a permanent appropriation in 31 U.S.C. § 1324), *with Me. Cmty. Health Options*, 140 S. Ct. at 1316 (concerning the Risk Corridors program, 42 U.S.C. § 18062, which Congress did not permanently fund but which the Supreme Court found to be money mandating nonetheless).

[122] *See Sanford Health Plan*, 969 F.3d at 1378.

factors one and two will always be considered, and factor three will add clarity when the first two factors do not provide a direct answer.

1. Factors One and Two

The first factor of the proposed test is two-prong and considers whether an ACA provision creates a cause of action for breach but extends the inquiry further than the Federal Circuit in *Sanford Health Plan* by determining if secondary funding sources exist. This plays heavily off the difference between *Sanford Health Plan* and *Maine Community Health*, whereby the Risk Corridor program had only one funding source.[123] Critically, the first factor requires the court to determine whether a money-mandating program that seems discontinued on its face has, in reality, been satisfied from alternative government funding and appropriations. When the government has alternatively made whole its obligations under a statutorily created program, the taxpayer ought not bear the burden of duplicative payment.[124] This factor seeks to remedy that potential outcome under the current jurisprudence.

The second factor requires the court to analyze the intent behind certain programs and determine why Congress chose to structure programs one way rather than another. When a court is determining whether a statute is money mandating, it is necessarily inquiring about a program created by some type of legislation.[125] Therefore, legislative intent is an extremely relevant way to determine legal challenges.[126] If the programmatic goals are usurped by the awarding of damages, the courts would answer "yes," while if awarding damages is more consistent with congressional intent, the court would answer "no."

If the answer to the first prong of factor one is "yes", and the second prong of that factor is also "yes" then the result strongly disfavors the plaintiff. Whereas if the answer to the first prong of factor one is "yes" and the second is "no" then the result strongly disfavors the government. Despite the likely results from looking simply to the first factor, the court should still consider the second factor, asking whether Congress intended for the section of the ACA in question to have a different or overlapping effect with some area of the law. If there is overlap, the analysis should conclude, and damages should not be awarded. However, if there is no overlap, the court should analyze the issue under the third factor.

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[123] *Compare Sanford Health Plan*, 139 Fed. Cl. at 703, *with Me. Cmty. Health Options*, 140 S. Ct. at 1316.

[124] *See* Maguire, *supra* note 109, at 757.

[125] *See* 28 U.S.C. § 1491(a)(1) (2018); *see also Me. Cmty. Health Options*, 140 S. Ct. at 1327.

[126] *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423, 424 (1988) (equating the importance of following legislative intent to that of following the public's choice).

2. Factor Three

The third factor requires the court to inquire whether there is a policy implication for affected populations. Here, the court should consider limitations in health insurance coverage a negative factor, weighing this reality against whichever party's position would limit access to insurance coverage. This is important because it forces courts to avoid decisions that could cause harm and take into consideration all pertinent factors in these critical ACA cases.[127] When courts rule on issues that have wide-reaching implications for the health and finances of millions of Americans, the proposed test roots these decisions in their practical consequences, especially when the legal questions do not provide clear answers.

3. Application of the Proposed Test

Had the Federal Circuit applied this test in *Sanford Health Plan* and *Community Health Choice, Inc.*, the following would result. Under factor one the court would find a money-mandating provision regarding subsidies for silver-level plans, but then find that there are alternate methods of collection. The court would then look to factor two, which would analyze the various policy reasons behind the relevant sections of the ACA: providing affordable coverage to low-income families and individuals. Without another area of substantive law on point, the court would last consider—albeit in a limited fashion—factor three, and would find it favors ruling for the government and against providing double payment because increased premiums run contrary to the public policy objective of providing for affordable insurance options. Or, by contrast, the court would suggest that recovering insurance companies must re-reduce premiums and cease their post-2017 silver loading practices.

B. Legislative Remedies to Eliminate the Negative Consequences of the Federal Circuit's Decisions in *Sanford Health Plan* and *Community Health Choice, Inc.*

The last option—while non-judicial—would be for Congress to codify an amendment to the ACA specifically exempting the cost-sharing burden reductions from Tucker Act protections because of the ability for insurers to also

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[127] *See* Comm. on Codes of Conduct, Admin. Off. U.S. Cts., Guide to Judiciary Policy Ch. 2: Code of Conduct for United States Judges 5–6 (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/RXR9-9EJB] (canon 3 of the Code of Conduct advises that U.S. judges should perform their judicial duties "with respect for others, . . . should not engage in behavior that is harassing, abusive, prejudiced, or biased," and "should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law").

collect tax deductions on the same plans. In the alternative, Congress could either amend the Tax Code or the ACA to eliminate one of the duplicative subsidies. Or even further, Congress could amend the Tucker Act to clarify and limit its scope to money-mandating programs that cannot be funded through alternative government funding sources or appropriations. Each of these statutory changes would eliminate the potential for insurance companies to double-dip; however, none of these changes will rectify the erroneous decisions made by the Federal Circuit. For instance, in the hypothetical scenario where the tax incentive is reversed, the silver-level plan subsidy would still likely be within the scope of the Federal Circuit's jurisprudence requiring payment, but would no longer be duplicative.

Conclusion

In response to an epidemic of persons not adequately covered by health insurance in the United States, Congress and the President worked to pass the ACA with provisions that guaranteed numerous avenues to affordable health insurance for low-income individuals.[128] While this legislation has survived numerous legal challenges, a group of challenges from 2020 have wide-reaching implications for the way health insurers operate.[129] Specifically, the Federal Circuit's decisions in *Sanford Health Plan* and *Community Health Choice, Inc.* directly permit health insurance companies to continue to raise premiums on low-income plans to receive a tax break, while simultaneously mandating the government to pay them now-discontinued subsidies on the same plans.[130] This practice, commonly referred to as silver loading, should be discontinued by judicial decisions or legislative action to: (1) prohibit excess profits for health insurance on the backs of tax payers; and (2) require adequate affordable coverage for low-income families and individuals consistent with congressional intent.

[128] *See* Rapfogel et al., *supra* note 3; 42 U.S.C. §§ 18022(c)(3)(A), 18071(c)(3)(A) (2018).
[129] *See* Gluck et al., *supra* note 4, at 1475.
[130] *See* Aron-Dine & Young, *supra* note 72.

The Problem of Characterization Embedded Within the Federal Circuit's Choice-of-Law Framework

Olivia N. Sacks*

Introduction

Suppose a video game company, Game Girl, brings a patent infringement suit against an electronics company, Ontwodo. During the discovery phase, Ontwodo moves to compel Game Girl to produce two documents, an invention control sheet and an invention control record. Game Girl argues the two documents are protected by attorney-client privilege. The district court faces a seemingly mundane issue: whether attorney-client privilege applies.

Under the United States Court of Appeals for the Federal Circuit's ("Federal Circuit") current choice-of-law doctrine, the district court is mandated to apply Federal Circuit law if the issue "pertain[s] to patent law," "bears an essential relationship to matters committed to [the Federal Circuit's] exclusive control by statute," or "clearly implicates the jurisprudential responsibilities of [the Federal Circuit] in a field within its exclusive jurisdiction."[1] Whether the issue meets these criteria, however, depends on its characterization.[2] When characterized generally—for example, whether documents between a company and its legal counsel are protected by attorney-client privilege—the issue is not patent related at all, so Federal Circuit law does not apply.[3] But when characterized more narrowly—for example, whether an invention control sheet and an invention control record are protected by attorney-client privilege, or whether documents between a company's inventor and its patent attorneys are protected by attorney-client privilege—the issue clearly pertains

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[1] Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1357 (Fed. Cir. 1999) (en banc in relevant part) (citations omitted).

[2] *See infra* note 66 and accompanying text.

[3] *See* Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1346 (Fed. Cir. 2005) ("The court applies the law of the regional circuit . . . with respect to questions of attorney-client privilege and waiver of attorney-client privilege.").

to patent law, so Federal Circuit law *does* apply.[4] The judge faces a difficult decision, as all of these characterizations are accurate portrayals of an attorney-client privilege issue.

Because this is a patent law claim, the judge looks to Federal Circuit law. She finds that in one case, the Federal Circuit characterized the issue of attorney-client privilege over an invention record specifically, found the issue pertained to patent law, and applied Federal Circuit law.[5] In another, the court characterized the issue generally, found the issue unrelated to patent law, and deferred to the law of the regional circuit.[6] The judge can thus characterize the issue however she would like, leaving much discretion in reaching the ultimate result.[7]

Embedded in the Federal Circuit's choice-of-law doctrine is what this Note calls the "problem of characterization."[8] Though procedural issues may be susceptible to competing characterizations, the Federal Circuit has given no direction for choosing a particular characterization and has itself done so inconsistently.

The purpose of this Note is to draw attention to the Federal Circuit's characterization choices intrinsic to its choice-of -law doctrine and advocate a

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[4] *See In re* Spalding Sports Worldwide, Inc., 203 F.3d 800, 803–04 (Fed. Cir. 2000) ("We agree . . . that our own law applies to the issue whether the attorney-client privilege applies to an invention record prepared and submitted to house counsel relating to a litigated patent.").

[5] *See, e.g.*, *id.* at 804.

[6] *See, e.g.*, *Fort James*, 412 F.3d at 1346.

[7] *Compare* Hoffman-La Roche, Inc. v. Roxane Lab'ys, Inc., No. 09-6335, 2011 WL 1792791, at *4 (D.N.J. May 11, 2011) (applying Federal Circuit law in determining whether attorney-client privilege applies to certain documents relating to the preparation and filing of the patent at issue in the litigation), *with* Abbott Lab'ys v. Andrx Pharms., Inc., 2006 WL 2092377, at *3 (N.D. Ill. July 25, 2006) (applying Seventh Circuit law in determining whether attorney-client privilege was waived with respect to documents relating to the drafting of the patent at issue in the litigation).

[8] While other scholars have noted that the Federal Circuit's characterization of an issue can determine whether the court applies its own law or regional-circuit law, this Note is the first to analyze the Federal Circuit's choice-of-law through the lens of the problem of characterization. *See, e.g.*, Ted L. Field, *Improving the Federal Circuit's Approach to Choice of Law for Procedural Matters in Patent Cases*, 16 Geo. Mason L. Rev. 643, 652 (2009); Sean M. McEldowney, Comment, *The "Essential Relationship" Spectrum: A Framework for Addressing Choice of Procedural Law in the Federal Circuit*, 153 U. Pa. L. Rev. 1639, 1666 (2005); Jennifer E. Sturiale, *A Balanced Consideration of the Federal Circuit's Choice-of-Law Rule*, 2020 Utah L. Rev. 475, 521 (2020). This Note attributes the framework of the problem of characterization to constitutional scholars who have commented that constitutional decision making requires courts to characterize constitutional inputs as a precondition to reaching constitutional results. *See, e.g.*, Michael Coenen, *Characterizing Constitutional Inputs*, 67 Duke L.J. 743, 745–51 (2018).

solution that works within precedent and achieves the policy objectives underlying the Federal Circuit's creation.[9] Part I begins by exploring those policy objectives and how they influenced the court's choice-of -law doctrine in patent cases. Part II advances the two central claims of this Note. First, that the choice-of-law depends on the initial characterization of procedural issues, which leads to varying results, and second, that the Federal Circuit has not explained, defended, or provided justification for its characterization choices. Part II continues by exploring the problem of characterization inherent in the court's choice-of-law doctrine by delving into three categories of procedural issues: attorney-client privilege, case-dispositive issues, and questions of appellate review. Part III assesses previous proposals to remedy the choice-of-procedural-law problem in patent cases. Finally, Part IV argues that the Federal Circuit needs to consistently characterize procedural issues narrowly when resolving choice-of-law questions to achieve uniform results and minimize confusion in the judicial system.

I. A Brief History of the Federal Circuit

A. Policy Objectives Underlying the Federal Circuit's Creation

Congress established the Federal Circuit under Article III of the Constitution by passing the Federal Courts Improvement Act of 1982 ("FCIA").[10] In creating the Federal Circuit, Congress aimed to resolve some of the administrative and procedural problems in the federal court system, including "the widespread lack of uniformity and uncertainty of legal doctrine that exist[ed] in the administration of patent law."[11] Congress had relied in part on findings by the Hruska Commission,[12] which "singled out patent law as an area in which

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[9] *See* H.R. Rep. No. 97-312, at 23 (1981) ("[T]he central purpose is to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist in the administration of patent law."); *see also* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d. 1564, 1574 (Fed. Cir. 1984) (discussing the legislative history of the Federal Circuit's enabling act).

[10] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127, 96 Stat. 25, 37 (codified as amended in scattered sections of 28 U.S.C.); *see also About the Court*, Fed. Cir., (Mar. 24, 2023 1:30 PM) https://cafc.uscourts.gov/home/the-court/about-the-court/ [https://perma.cc/QAR6-CBHH].

[11] H.R. Rep. No. 97-312, at 23; *see also* S. Rep. No. 97-275, at 1–2 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11, 11–12.

[12] *See* S. Rep. No. 97-275, at 3 n.1 (citing Comm'n on the Revision of the Fed. Ct. App. Sys., Structure and Internal Procedures: Recommendations for Change (1975) [hereinafter Hruska Comm'n]). The Commission on Revision of the Federal Court Appellate System (commonly known as the "Hruska Commission" after its Chairman, Senator Roman L. Hruska) recommended a number of structural and procedural changes for the federal court appellate system. *See id.*; *see generally* Hruska Comm'n, *supra*. Congress rejected most

the application of the law to the facts of a case often produce[d] different outcomes in different courtrooms in substantially similar cases . . . [and] as an area in which widespread forum shopping [was] particularly acute."[13] The large-scale forum shopping in patent cases resulted in higher costs of litigation and, according to the Hruska Commission's patent law consultants, "demean[ed] the entire judicial process and the patent system as well."[14] Accordingly, the Federal Circuit was created to increase nationwide uniformity and administrability in the field of patent law and reduce forum-shopping concerns.[15]

Though it granted the Federal Circuit exclusive jurisdiction over patent cases, Congress clearly did not intend to create a specialized appellate court.[16] Instead, it stated that the establishment of the Federal Circuit "represent[ed] 'a sensible accommodation of the usual preference for generalist judges and the selective benefit of expertise in highly specialized and technical areas.'"[17] Congress was wary of the disadvantages "inherent in the creation and operation of specialized courts," such as the quality of decision-making suffering when specialized judges lose exposure to a variety of fields and see cases from a narrow perspective and specialized courts' potential for capture by special interest groups.[18] The Federal Circuit's legislative history evinces Congress's goal: both houses of Congress explicitly stated that the Federal Circuit would not be a "specialized court."[19] To achieve this goal, Congress granted the

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of these recommendations, such as the creation of a national court of appeals binding on the circuit courts. *See* Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 Calif. L. Rev. 789, 794 (2020).

[13] S. Rep. No. 97-275, at 5, *as reprinted in* 1982 U.S.C.C.A.N. 11, 15. The Hruska Commission further explained:

> Patentees now scramble to get into the 5th, 6th and 7th circuits since the courts there are not inhospitable to patents whereas infringers scramble to get anywhere but in these circuits. Such forum shopping not only increases litigation costs inordinately and decreases one's ability to advise clients, it demeans the entire judicial system as well.

Hruska Comm'n, *supra* note 12, at 152 (quoting a letter to the Commission from the Commission's patent law consultants, Professor James B. Gambrell and Donald R. Dunner).

[14] S. Rep. No. 97-275, at 5, *as reprinted in* 1982 U.S.C.C.A.N. 11, 15.

[15] *See id.*

[16] *See* S. Rep. No. 97-275, at 6, *as reprinted in* 1982 U.S.C.C.A.N. 11, 16; H.R. Rep. No. 97-312, at 19.

[17] S. Rep. No. 97-275, at 6.

[18] Hruska Comm'n, *supra* note 12, at 28; *see also* S. Rep. No. 97-275, at 6, *as reprinted in* 1982 U.S.C.C.A.N. 11, 16.

[19] *See* S. Rep. No. 97-275, at 6, *as reprinted in* 1982 U.S.C.C.A.N. 11, 16 ("The Court of Appeals for the Federal Circuit will not be a 'specialized court,' as that term is normally used."); H.R. Rep. No. 97-312, at 19 ("The proposed new court is not a 'specialized court.'").

Federal Circuit "a breadth of jurisdiction that rivals in its variety that of the regional courts of appeals," with a "varied docket spanning a broad range of legal issues and types of cases."[20]

The FCIA also intended to benefit patent holders and attorneys.[21] Patent attorneys were concerned about the lack of predictability within the U.S. patent system, calling it "a widespread and continuing fact of life" which wasted patentees' time and money.[22] Proponents of the legislation said that the FCIA would provide greater certainty and predictability within the patent system, which in turn would foster technological growth and industrial innovation.[23]

Finally, the FCIA aimed to benefit judges.[24] Congress believed the legislation would lessen the workload of generalist appellate judges by diverting the "extraordinarily time-consuming," "unusually complex and technical" cases to a singular court.[25] There, the few jurists on the Federal Circuit bench would become adept and efficient at deciding patent law legal issues.[26] As Howard Markey, who eventually became the first Chief Judge of the Federal Circuit, put it: "[I]f I am doing brain surgery every day, day in and day out, chances are very good that I will do your brain surgery much quicker . . . than someone who does brain surgery every once in a couple [of] years."[27]

In sum, Congress vested the Federal Circuit with nationwide jurisdiction over patent cases to create nationwide uniformity and administrability in the field of patent law and benefit patent holders and judges, as well as jurisdiction over a variety of other subjects to avoid overspecialization.[28]

B. The Development of the Choice-of-Law Rule

Of the thirteen federal appellate courts, the Federal Circuit is unique in that it is the only one with nationwide jurisdiction.[29] The Federal Circuit has

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[20] H.R. Rep. No. 97-312, at 19.

[21] *See* Hruska Comm'n, *supra* note 12, at 152.

[22] *Id.*

[23] *See* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. Rev. 1, 7 (1989).

[24] *See* S. Rep. No. 97-275, at 7, *as reprinted in* 1982 U.S.C.C.A.N. 11, 17.

[25] *Id.*

[26] *See* Sturiale, *supra* note 8, at 481.

[27] Dreyfuss, *supra* note 23, at 7 n.47 (quoting *Court of Appeals for the Federal Circuit: Hearing on H.R. 4482 Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 97th Cong. 42–43 (1981) (statement of the Honorable Howard T. Markey, Chief Judge, Court of Customs and Patent Appeals)).

[28] *See* 28 U.S.C. § 1295(a)(1)–(14) (2018).

[29] *See Court Role and Structure*, U.S. Courts, https://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Feb. 12, 2023) [https://perma.cc/Y39A-RSU9].

exclusive jurisdiction over patent appeals in the United States, meaning it has the power to review cases from any of the ninety-four district courts "in any civil action arising under . . . any Act of Congress relating to patents."[30] Because the Federal Circuit resolves patent law *cases*, as opposed to patent law *issues*, the Court often decides numerous issues that fall outside the scope of substantive patent law,[31] including non-patent federal and state substantive claims,[32] and, relevant to this Note, procedural questions in patent suits.[33]

Congress failed to anticipate the choice-of-law issue that necessarily results from the Federal Circuit's unique jurisdictional grant.[34] With the establishment of the Federal Circuit, practitioners and district court judges became accountable to two different courts of appeals, bound in a patent case by both the substantive patent law of the Federal Circuit and the non-patent laws of their regional circuit.[35] This requirement, for district courts to obey both sets of laws, created the Federal Circuit's choice-of-procedural-law problem: what law must a district court apply to procedural issues in patent cases?

When the choice-of-law issue first arose in In re *International Medical Prosthetics Research Associates, Inc.*,[36] the Federal Circuit had to decide whether the disqualification of a law firm was warranted, a decision the district court "must have determined . . . in view of prior associations of counsel with

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[30] 28 U.S.C. § 1295(a)(1) (2018). *See also Court Role and Structure*, *supra* note 29; Sturiale, *supra* note 8, at 484 (explaining the court's jurisdiction over patent "cases," not "issues," for example, if "a suit brought before a federal district court included both a claim of copyright infringement and a claim of patent infringement, the Federal Circuit would have appellate jurisdiction over both claims"). The Court of Appeals for the Federal Circuit also has nationwide jurisdiction in a variety of other subject areas, including international trade, government contracts, patents, trademarks, damages claims against the government, federal personnel, veterans' benefits, and public safety officers' benefits claims. *See Court Jurisdiction*, Fed. Cir., (Feb. 17, 2023, 8:12 PM) http://www.cafc.uscourts.gov/the-court/court-jurisdiction [https://perma.cc/DVS3-QNWU].

[31] *See* Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. Rev. 377, 413 (1990) (noting that the Federal Circuit's "case" jurisdiction allows it to hear non-specialty issues in areas that overlap with regional circuit jurisdiction).

[32] *See* 28 U.S.C. § 1295(a)(3) (2018); *Court Jurisdiction*, *supra* note 30.

[33] *See* discussion *infra* Section II.B.

[34] *See* Charles L. Gholz, *Choice of Law in the United States Court of Appeals for the Federal Circuit*, 13 AIPLA Q.J. 309, 310 (1995); Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d. 1564, 1573 (Fed. Cir. 1984).

[35] *See Panduit*, 744 F.2d at 1573 ("This jurisdictional grant . . . places practitioners and district courts in a unique posture: they are accountable to two different courts of appeals."); Dreyfuss, *supra* note 23, at 33.

[36] 739 F.2d 618 (Fed. Cir. 1984).

patent-related cases and issues."[37] The Federal Circuit recognized its exclusive jurisdiction over patent appeals and the "potential problem" for district courts in having to obey two sets of precedent.[38] Largely sidestepping the analysis, the court applied regional circuit law with little discussion of its methodology, stating that the "potential problem is obviated, however, when th[e] court applies the same guidance previously made available by the circuit (here the Ninth) having authority over the district court under 28 U.S.C. § 1294."[39]

The court more thoroughly addressed its choice-of-law framework in *Panduit Corp. v. All States Plastic Manufacturing Co.*[40] At issue was which attorney disqualification law should apply: the law of the Seventh Circuit or that of the Federal Circuit?[41] Recognizing that one of the primary objectives of the Federal Circuit's enabling legislation was "to bring about uniformity in the area of patent law," the court found an additional, underlying motivation: "Congress'[s] abhorrence of conflicts and confusion in the judicial system."[42] Based on its discussion of legislative history, the Federal Circuit held "as a matter of policy, that [it] shall review procedural matters, that are not unique to patent issues, under the law of the particular regional circuit court where appeals from the district court would normally lie."[43] The court reasoned that this solution best minimized confusion in the judicial system because, although the Federal Circuit would at times deal with conflicting regional interpretations of laws, one court handling such conflicts is preferable to "countless practitioners and hundreds of district judges" having to consider two different sets of laws for an identical issue.[44] It also noted that "[t]he exact parameters of [its] ruling will not be clear until such procedural matters are presented to this court for resolution."[45]

Indeed, the exact parameters were unclear. Six years after *Panduit*, the Federal Circuit attempted to reclarify its policy of deference to regional circuit

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[37] *Id.* at 620.

[38] *Id.*

[39] *Id.* (applying regional law to "procedural questions" because "a district court cannot and should not be asked to answer [procedural questions] one way when the appeal on the merits will go to the regional circuit . . . and in a different way when the appeal will come to this circuit").

[40] 744 F.2d. 1564 (Fed. Cir. 1984).

[41] *See id.* at 1570.

[42] *Id.* at 1574.

[43] *Id.* at 1574–75.

[44] *Id.* at 1575.

[45] *Id.*

law in *Biodex Corp. v. Loredan Biomedical, Inc.*[46] The court acknowledged that its test has been "variously and inconstantly phrased":[47]

> The court has recently stated the relevant test as whether the issue concerns a "subject which is not unique to patent law," or which is "not specific to our statutory jurisdiction," in which event we have deferred. Alternatively, we have looked to whether the procedural issue may be "related" to "substantive matters unique to the Federal Circuit" and thus committed to our law. Furthermore, no matter how phrased, this particular test has not always ended our inquiry. We have considered, secondarily, whether "[m]ost cases [involving the issue] will come on appeal to this court," thereby putting us in a "good position to create a uniform body of federal law" on the issue. Finally, we have generally conformed our law to that of the regional circuits, without regard to the relationship of the issue to our exclusive jurisdiction, when there is existing and expressed uniformity among the circuits.[48]

The court concluded that *Panduit* did not sufficiently define "unique to," "related to," or "pertain[ing] to" substantive patent law, and it noted that in reality it decided each case on an ad hoc basis "by reference to the core policy of not creating unnecessary conflicts and confusion in procedural matters."[49] The court said that it tended to "defer to regional circuit law when the precise issue involves an interpretation of the Federal Rules of Civil Procedure or the local rules of the district court."[50] It applied its own law, however, when the question on appeal involved substantive patent law, such as the issuance of a preliminary injunction,[51] or issues about appellate jurisdiction.[52] The court attempted to redefine its test: "[w]here there is an essential relationship between our exclusive statutory mandate or our functions as an appellate court and the relevant procedural issue," the court would apply its own law.[53]

The Federal Circuit's decision in *Biodex* brought little clarification to the choice-of-law question because it essentially required a case-by-case evaluation

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[46] 946 F.2d 850 (Fed. Cir. 1991).

[47] *Id.* at 856.

[48] *Id.* (citations omitted).

[49] *Id.* at 857.

[50] *Id.* at 857–58, 858 n.10 (identifying Federal Circuit cases on this issue between 1984, when the court decided *Panduit*, and the then-present day).

[51] *See id.* at 858 (citing Chrysler Motors Corp. v. Auto Body Panels Ohio, Inc., 908 F.2d 951, 953 (Fed. Cir. 1990)).

[52] *See id.* (citing Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc., 856 F.2d 173, 175 (Fed. Cir. 1988)); *id.* at 858 n.12 ("[D]eference is inappropriate on issues of our own appellate jurisdiction. This court has the duty to determine its jurisdiction and to satisfy itself that an appeal is properly before it.") (quoting Woodard v. Sage Prods., Inc., 818 F.2d 841, 844 (Fed. Cir. 1987)).

[53] *Biodex*, 946 F.2d at 858.

of competing policy interests.[54] In resolving those policy interests, the court balanced several factors, including "the uniformity in regional circuit law, the need to promote uniformity in the outcome of patent litigation, and the nature of the legal issue involved."[55] The court gave no direction to district court judges or practitioners for how to balance those factors, creating the potential for inconsistent results between district courts.[56] The *Biodex* test thus failed to comport with at least two congressional objectives behind the Federal Circuit's creation: reducing forum shopping and minimizing confusion in the federal judicial system.

Just a few years later, in *Midwest Industries v. Karavan Trailers Inc.*,[57] the Federal Circuit rearticulated its choice-of-law doctrine as applying Federal Circuit law to patent issues and regional circuit law to non-patent issues.[58] The court acknowledged, however, the inherent problem of characterization: in some situations, it is unclear "whether a particular issue should be characterized as a 'patent' issue or not."[59] The court explained its standards:

> We have held that a procedural issue that is not a substantive patent law issue is nonetheless governed by Federal Circuit law if the issue "pertain[s] to patent [issues]," if it "bears an essential relationship to matters committed to our exclusive control by statute," or if it "clearly implicates the jurisprudential responsibilities of this court in a field within its exclusive jurisdiction."[60]

The court went on to "conclude that the rigid division between substantive patent law issues and all other substantive and procedural issues" was no longer the line of demarcation for its choice-of-law approach.[61] In doing so, the Federal Circuit expanded its choice-of-law reach.[62]

II. The Problem of Characterization

The Federal Circuit's latest formulation of its choice-of-law doctrine in *Midwest Industries* continues to fall short of Congress's policy objectives. By explicitly expanding the reach of Federal Circuit law beyond purely substantive

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[54] *See* Manildra Milling Corp. v. Ogilvie Mills, Inc., 76 F.3d 1178, 1181 (Fed. Cir. 1996) (citing *Biodex*, 946 F.2d at 856–58).

[55] *Id.* (citing *Biodex*, 946 F.2d at 855–59).

[56] *See Biodex*, 946 F.2d at 856–60.

[57] 175 F.3d 1356 (Fed. Cir. 1999).

[58] *See id.* at 1359.

[59] *Id.*

[60] *Id.* (first quoting Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1575 (Fed. Cir. 1984), then quoting *Biodex*, 946 F.2d at 858–59, and then quoting Gardco Mfg., Inc. v. Herst Lighting Co., 820 F.2d 1209, 1212 (Fed. Cir. 1987)).

[61] *Id.* at 1360.

[62] *See* Paul R. Gugliuzza, *The Federal Circuit As A Federal Court*, 54 Wm. & Mary L. Rev. 1791, 1845 (2013).

patent law, the Federal Circuit aimed to better promote uniformity in the field of patent law; however, it became unclear when a given issue was sufficiently patent related to warrant application of Federal Circuit law.[63] As a result, the court's choice-of-law approach does not further policies of minimizing confusion and doctrinal stability in patent law. Additionally, by retaining its rule of deference for non-patent issues, the court reinforced the view that it is a specialist court not meant to interpret matters of general federal procedure, which contradicts Congress's intention for the Federal Circuit to serve as a generalist appellate court capable of handling a broad range of legal issues.[64]

The Federal Circuit's choice-of-law doctrine has led to inconsistent applications and results for two reasons. First, the current rule—apply its own law if the issue pertains to patent law—operates on the initial characterization of a procedural issue, which can be done at varying levels of generality.[65] The threshold characterization of similar procedural issues at different levels of generality—generally or specifically—can determine whether the issue pertains to patent law under *Midwest Industries*.[66] Consequently, the current rule easily allows for inconsistent application of choice-of-law principles, as different panels can reach different conclusions on what law applies to similar procedural issues in different instances.[67] Second, the Federal Circuit has not acknowledged or explained the characterization choices it makes.[68] The lack of intentionality and transparency in the initial characterization further enables the Federal Circuit to treat substantively similar cases as procedurally different,[69] and district courts and practitioners are forced to make character-

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[63] *See id.*

[64] *See* Peter J. Karol, *Who's at the Helm? The Federal Circuit's Rule of Deference and the Systemic Absence of Controlling Precedent in Matters of Patent Litigation Procedure*, 37 AIPLA Q.J. 1, 38–39 (2009).

[65] *See McEldowney*, *supra* note 8, at 1666 (stating that the Federal Circuit's choice-of-law doctrine "suffers from ambiguity because it wholly depends on the level of abstraction with which the court considers a particular issue."); *cf.* Coenen, *supra* note 8, at 750–52 (in the context of constitutional law, arguing that many rules operate on characterization inputs at varying levels of generality).

[66] *See* Field, *supra* note 8, at 652 ("Although th[e] articulation of the choice-of-law rule may seem on the surface relatively straightforward, a fundamental problem exists with this test: the Federal Circuit can apply whichever law that it wants to any issue, depending upon whether it defines the issue broadly or narrowly." (footnote omitted)); Gugliuzza, *supra* note 62, at 1845–46 ("[I]t is not easy to predict where the court will draw the line between patent and nonpatent matters.").

[67] *See* Dreyfuss, *supra* note 23, at 40.

[68] *See* discussion *infra* Section II.B.

[69] *See* discussion *infra* Section II.B.

ization choices without understanding how the Federal Circuit might rule on appeal.

This Part analyzes the problem of characterization through three categories of procedural issues: attorney-client privilege, case dispositive issues, and questions of appellate review.[70]

A. Attorney-Client Privilege, Characterized Inconsistently

The Federal Circuit reached opposite choice-of-law conclusions in two similar cases dealing with procedural issues in attorney-client privilege over invention-related documents.[71] The inconsistent conclusions resulted from the court's specific characterization in one case[72] and general characterization in the next.[73] The court did not, in either case, provide an explanation of its characterization choices.[74] The inconsistent application of choice-of-law rules to issues of attorney-client privilege is particularly vexing for patent attorneys and inventors who require consistent privilege rules to govern their conduct.

In In re *Spalding Sports Worldwide, Inc.*,[75] Spalding Sports Worldwide ("Spalding") brought a patent infringement suit against Wilson Sporting Goods, Co. ("Wilson").[76] During the discovery phase, Wilson moved to compel Spalding to produce the invention record[77] of the patent at issue, and the district court granted Wilson's motion.[78] Spalding petitioned the Federal Circuit for a writ of mandamus directing the district court to vacate the order requiring production of the invention record.[79] The issue before the Federal Circuit was whether Spalding's invention record was protected by

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[70] For a statistical analysis of the Federal Circuit's application of its own law or regional law in each of the listed scenario, see Field, *supra* note 8, at 653–69.

[71] *See In re* Spalding Sports Worldwide, Inc., 203 F.3d 800, 804 (Fed. Cir. 2000) (applying its own law to the question of whether the invention record is protected by attorney-client privilege because the underlying record "clearly implicate[d]" and "[was] unique to" substantive patent law); Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1346 (Fed. Cir. 2005) (applying regional law to the question of attorney-client privilege and privilege waivers).

[72] *See Spalding*, 203 F.3d at 803–04.

[73] *See Fort James*, 412 F.3d at 1346.

[74] *See id.*; *Spalding*, 203 F.3d at 803–04.

[75] 203 F.3d 800 (Fed. Cir. 2000).

[76] *See id.* at 802.

[77] Invention records are standard forms used by corporations in preparing a patent application and communicating to patent attorneys and will be discussed in greater detail *infra* notes 84–86 and accompanying text. *See id.* at 802 n.2.

[78] *See Spalding*, 203 F.3d at 802 n.2.

[79] *See id.* at 803.

attorney-client privilege, which turned on the threshold question of whether to apply Federal Circuit law or the regional appeals circuit's law.[80]

The court applied its own law, agreeing with Spalding that "the issue[,] whether the attorney-client privilege applies to communications between inventors and patent attorneys[,] is one of substantive patent law and should be subject to a uniform national standard."[81] The court reasoned that under its choice-of-law precedent, it applied its "own law to issues of substantive patent law"[82] and to procedural issues that satisfy the *Midwest Industries* criteria, i.e., if they "pertain[] to patent law," "bear[] an essential relationship" to matters within the court's exclusive jurisdiction, or "clearly implicate[] the jurisprudential responsibilities of this court in a field within its exclusive jurisdiction."[83]

The Federal Circuit in *Spalding* defined the documents at issue:

> Invention records are standard forms generally used by corporations as a means for inventors to disclose to the corporation's patent attorneys that an invention has been made and to initiate patent action. They are usually short documents containing space for such information as names of inventors, description and scope of invention, closest prior art, first date of conception and disclosure to others, dates of publication, etc.[84]

Here, the issue of whether the invention record was protected by attorney-client privilege "clearly implicate[d] substantive patent law" because "the invention record relates to an invention submitted for consideration for possible patent protection."[85] The court concluded that under its choice-of-law doctrine, application of Federal Circuit law was proper because the question of applicability of attorney-client privilege to an invention record, a document by its nature unique to patent law, "clearly implicate[d], at the very least, the substantive patent issue of inequitable conduct."[86]

In *Fort James Corp. v. Solo Cup Co.*,[87] the Federal Circuit again dealt with a question of attorney-client privilege, this time over an invention disclosure

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[80] *See id.* The regional appeals court would have been the United States Court of Appeals for the First Circuit. *See id.*

[81] *Id.* at 803–04 (explaining that the issue of whether attorney-client privilege applied to Spalding's invention record implicated the substantive patent issue of inequitable conduct "because the invention record relates to an invention submitted for consideration for possible patent protection").

[82] *Id.* at 803 (citing Institut Pasteur v. Cambridge Biotech Corp., 186 F.3d 1356, 1358 (Fed. Cir. 1999)).

[83] *Id.* (quoting Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1359 (Fed. Cir. 1999)).

[84] *Id.* at 802 n.2.

[85] *Id.* at 804.

[86] *Id.* at 803–04.

[87] 412 F.3d 1340 (Fed. Cir. 2005).

document, another standard form similar to the invention record defined in *Spalding*.[88] Fort James Corporation ("Fort James") brought a patent infringement suit against Solo Cup Company ("Solo Cup").[89] During discovery, Fort James waived its privilege as to numerous documents containing the opinion of legal counsel regarding the applicability of an on-sale bar to Fort James patents, the invention's discovery, and estimations of when customers would see the product.[90] Consequently, Solo Cup moved to compel production of an invention disclosure statement that it believed fell within the scope of the Fort James waiver.[91] The district court denied Solo Cup's motion, defining the scope of the waiver narrowly and making a pre-trial evidentiary decision that the "invention disclosure form" was protected by attorney-client privilege.[92] Solo Cup appealed.[93] One of the many issues before the Federal Circuit was whether the district court erred in failing to compel production of the invention disclosure form, and this issue entailed answering the threshold question of which law applied.[94]

In just one sentence, the Federal Circuit disposed of the question, writing that regional circuit law applied to questions of attorney-client privilege and waiver of attorney-client privilege.[95] In *Spalding*, however, the court determined that Federal Circuit law applied to the question of attorney-client privilege over an invention record because patent law was relevant to the question of privilege.[96]

The invention disclosure form in *Fort James* had many of the same qualities as the invention record in *Spalding*.[97] The invention disclosure form discussed the "invention of pressed paperboard plates to maximize rigidity" and was authored by an inventor to the in-house counsel.[98] It contained information including the "conception and commercialization of the claimed invention" and the "dates surrounding the conception of the invention and a description

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[88] *See id.* at 1344. Specifically, the document was an "[i]nvention disclosure statement discussing invention of pressed paperboard plates" sent to Fort James's in-house counsel. *Id.* (citation omitted).

[89] *See id.* at 1342.

[90] *See id.* at 1343–44.

[91] *See id.* at 1344.

[92] *Id.* at 1342.

[93] *See id.*

[94] *See id.* at 1345–46.

[95] *See id.* at 1346 ("This court applies the law of the regional circuit, here the Seventh Circuit, with respect to questions of attorney-client privilege . . . .").

[96] *See In re* Spalding Sports Worldwide, Inc., 203 F.3d 800, 803 (Fed. Cir. 2000).

[97] *See Fort James*, 412 F.3d at 1344, 1350; *Spalding*, 203 F.3d at 805–06.

[98] *Fort James*, 412 F.3d at 1344 (citation omitted).

of it."[99] In other words, the invention disclosure form at issue in *Fort James* and the invention record in *Spalding* were plainly similar documents.

Furthermore, just as the issue of attorney-client privilege in *Spalding* implicated the substantive patent law of inequitable conduct, the subject matter of the waiver in *Fort James* was defined as "the application of the bars to patentability found in 35 U.S.C. § 102(b),"[100] implicating the substantive patent law of patentability of inventions.[101] The Federal Circuit gave no explanation why in *Spalding* the question of attorney-client privilege over the invention record implicated substantive patent law while in *Fort James*, the question of whether privilege had been waived over an invention disclosure form did not.[102]

In sum, these two cases illustrate the problem of characterization embedded within the Federal Circuit's choice-of-law doctrine. If the Federal Circuit consistently characterized issues of attorney-client privilege and scope of waiver generally, it would have found that neither procedural issue in *Fort James* or *Spalding* was unique to patent law and, under its choice-of-law doctrine, deferred to regional circuit law in both cases. If it characterized the issues specifically—attorney-client privilege over an invention record in *Spalding* and waiver of attorney-client privilege over an invention disclosure statement in *Fort James*—the court would have found both issues pertained to patent law and applied its own law. What the Federal Circuit did instead, characterizing the issue specifically in one case and generally in the next, leaves practitioners and district court judges with unclear guidance on how to characterize attorney-client privilege issues, what standard of review will apply on appeal,[103] and a patchwork of precedent to decipher.[104] Practitioners and inventors are

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[99] *Id.* (citation omitted).

[100] *Id.* at 1350.

[101] *See generally* 35 U.S.C. § 102 (2000) (defining novelty as a condition for patentability).

[102] *See Fort James*, 412 F.3d at 1346.

[103] *See, e.g.*, RTC Indus., Inc. v. Fasteners for Retail, Inc., No. 17-C-3595, 2020 WL 1148813, at *5 n.5 (N.D. Ill. Mar. 9, 2020) (defining the choice-of-law methodology as following Seventh Circuit law for questions of attorney-client privilege and waiver of privilege that "do[es] not implicate substantive patent law, and Federal Circuit law to the extent these issues do implicate substantive patent law," then using a mix of Federal and Seventh Circuit precedent in its analysis); Meds. Co. v. Mylan, Inc., 936 F. Supp. 2d 894, 899–900, 900 n.3 (N.D. Ill. 2013) (applying Federal Circuit law to discovery issues that implicate the substantive patent law of inequitable conduct, Federal Circuit law to the extent waiver applied to privileged information used to defend a claim of inequitable conduct, and Seventh Circuit law to the issue of waiver by disclosure, but ultimately concluding that "Seventh Circuit law and Federal Circuit law treat privilege similarly, and thus the choice of law analysis does not alter the outcome in this case").

[104] *Compare In re* Seagate Tech., 497 F.3d 1360, 1367–68 (Fed. Cir. 2007) (applying Federal Circuit law to the issue of scope of waiver of attorney-client privilege when an accused

not only forced to plan their litigation strategies with two sets of law in mind, but also forced to plan their daily, patent-related business activities without complete clarity on which law applies to their conduct.

B. Case-Dispositive Issues

Another example of the Federal Circuit's problematic discretion when applying its choice-of-law rules is the court's treatment of procedural issues in case-dispositive motions, such as when it reviews motions to dismiss, summary judgement decisions, post-trial judgments as a matter of law ("JMOL") motions, or motions for relief from judgment.[105] The Federal Circuit typically characterizes these issues as purely procedural and applies regional circuit law.[106] In some cases, however, the Federal Circuit has applied its own law, ignoring the choice-of-law discussion altogether while citing to its own precedent for the standard of review.[107] The court's lack of specificity regarding its choice-of-law in these cases may be due to the fact that the choice is not dispositive in situations where the "standard does not differ circuit to circuit," such as the summary judgment standard or pleading requirements.[108] Despite this, the Federal Circuit needs to have a consistent choice-of-law framework when deciding these issues for purposes of uniformity, clarity, and predictability.

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patent infringer asserts an advice of counsel defense because "willful infringement and the scope of waiver accompanying the advice of counsel defense invoke substantive patent law"), *with* GFI, Inc. v. Franklin Corp., 265 F.3d 1268, 1272 (Fed. Cir. 2001) (applying regional law in determining whether the district court had improperly forced patentee to disclose information protected by attorney-client privilege during patent infringement suit).

[105] *See* Field, *supra* note 8, at 653–61 (providing statistics for how often the Federal Circuit applies its own law and how often the Federal Circuit applies regional circuit law to identical procedural issues).

[106] *See id.*

[107] *See, e.g.*, Xechem Int'l, Inc. v. Univ. Tex. M.D. Anderson Cancer Ctr., 382 F.3d 1324, 1326 (Fed. Cir. 2004) (citing Federal Circuit cases when discussing its standard of review for Rule 12(b)(6) dismissals with no discussion as to its rationale); Intamin, Ltd. v. Magnetar Techs., Corp., 483 F.3d 1328, 1333 (Fed. Cir. 2007) (citing Federal Circuit law when discussing its summary judgment standard without providing any rationale, and ignoring the choice altogether); Cook Biotech Inc. v. Acell, Inc., 460 F.3d 1365, 1372 (Fed. Cir. 2006) (citing Federal Circuit precedent for support of its JMOL law standard without addressing the choice-of-law issue at all).

[108] Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1191 (Fed. Cir. 2004) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986)).

1. Motions to Dismiss

The Federal Circuit has stated that "[a] motion to dismiss for failure to state a claim upon which relief can be granted is a purely procedural question not pertaining to patent law," so it normally applies "the law of the regional circuit."[109] If the court characterizes a Federal Rule of Civil Procedure Rule 12(b)(6) question generally, such as whether a party failed to state a claim upon which relief can be granted, applying regional law makes sense. If the issue is characterized specifically, however, such as whether a party failed to state an inequitable conduct claim upon which relief can be granted, for example, it pertains to patent law and applying Federal Circuit law would be proper.

Because the Federal Circuit's "practice [is] to defer to regional circuit law when the precise issue involves an interpretation of the Federal Rules of Civil Procedure,"[110] its standard approach when dealing with Rule 12(b)(6) motions is to characterize the issue generally and defer to the regional circuit.[111] Following the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,[112] which seemed to heighten pleading standards in an antitrust case,[113] the Federal Circuit heard *McZeal v. Spring Nextel Corp.*,[114] where it reviewed the dismissal of patent and trademark infringement claims for failure to state a claim.[115] The Federal Circuit looked to regional precedent to determine whether the complaint failed to meet the minimum pleading requirements.[116] In doing so, the court left practitioners and district courts without clear guidance as to whether *Twombly* altered patent pleading standard requirements.[117]

At least one district court explicitly criticized *McZeal*'s choice to follow regional circuit precedent.[118] In resolving a patent case at the motion to dismiss stage, that district court attempted to look to Eleventh Circuit precedent as the Federal Circuit required and wrote, "[t]he Eleventh Circuit has not decided whether *Twombly* has altered pleading standards in the patent context.

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[109] McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1356 (Fed. Cir. 2007).

[110] Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850, 857 (Fed. Cir. 1991).

[111] *See McZeal*, 501 F.3d at 1356.

[112] 550 U.S. 544 (2007).

[113] *See id.* at 557.

[114] 501 F.3d 1354 (Fed. Cir. 2007).

[115] *See id.* at 1355.

[116] *See generally id.* at 1354.

[117] *See, e.g.*, *id.* at 1362 (Dyk, J., courring in part and dissenting in part) (arguing that *Twombly* requirements apply in the patent law context); CBT Flint Partners, LLC v. Goodmail Systems, Inc., 529 F. Supp. 2d 1376, 1379–80 (N.D. Ga. 2007) (arguing that "*Twombly* did not alter pleading standards—especially in the patent context").

[118] *See CBT Flint Partners*, 529 F. Supp. 2d at 1379.

And it is likely not to do so."[119] The district court cited the Federal Circuit's jurisdictional statute, a nod to the Federal Circuit's decision to defer to regional circuit law in patent cases.[120]

McZeal shows that the Federal Circuit's broad characterization of Rule 12(b)(6) motions leads to confusion and fails to promote uniformity in patent law. The Federal Circuit's specific direction to follow regional circuit precedent when deciding motions to dismiss leaves district courts in a bind. They are told to follow the law of their regional circuits, but the regional circuits have never addressed—and will never address—*Twombly* requirements in patent cases, as any appeal goes to the Federal Circuit. Left without controlling authority, some district courts follow *McZeal* regardless of its nonbinding effect.[121]

In other words, because the Federal Circuit ignored the uniqueness of pleading standards in patent cases when deciding *McZeal*, district courts lack precedential authority when determining Rule 12(b)(6) motions. The district courts that follow *McZeal*—despite direction to follow regional circuit law—illustrate that the Federal Circuit should have characterized the Rule 12(b)(6) issue narrowly to create new precedent, rather than deferring to regional circuit law.

2. Judgment-Related Issues

The Federal Circuit's treatment of district court decisions regarding judgment-related issues like Federal Rules of Civil Procedure 50 and 60, has been inconsistent. The court characterizes the issue generally and applies regional law the majority of the time, but finds exceptions to that practice in unpredictable ways.[122]

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[119] *Id.*

[120] *See id.*

[121] *See, e.g.*, *id.*; Taltwell, LLC v. Zonet USA Corp., No. 3:07cv543, 2007 WL 4562874, at *13 (E.D. Va. Dec. 20, 2007). The court in *Taltwell* elaborated:

> The Fourth Circuit has not, however, had the occasion to discuss a motion to dismiss a patent infringement action in light of the *Twombly* decision. The sole Federal Circuit decision to do so thus far, *McZeal*, draws on Fifth Circuit precedent [b]ut provides appropriate guidance on the present issue nonetheless.

Taltwell, 2007 WL 4562874, at *13. *See also* Schwendimann v. Arkwright, Inc., No. 08-162, 2008 WL 2901691, at *2 (D. Minn. July 23, 2008) ("[T]he Eighth Circuit has not addressed whether *Twombly* affects the pleading standard for claims under patent law. . . . [T]his Court finds that the pleading standard discussed in *McZeal* is applicable to the case at bar and will likely be the standard applied by the Eighth Circuit."); Estech Sys., Inc. v. Target Corp., No. 2:20-cv-00123, 2020 WL 6534094, at *1 & n.2 (E.D. Tex. Aug. 27, 2020) (citing *Twombly* and *McZeal* when outlining the pleading standard for patent-related complaints).

[122] *See* Fiskars, Inc. v. Hunt Mfg. Co, 279 F.3d 1378, 1381 (Fed. Cir. 2002) (noting that "[b]ecause rulings under Rule 60(b) commonly involve procedural matters unrelated

Consider the procedural issue of whether a party's pre-verdict JMOL motion is sufficiently specific to meet the requirements of Federal Rule of Civil Procedure 50.[123] Under Rule 50(a), a party may challenge the sufficiency of the evidence prior to a case's submission to the jury.[124] After the jury verdict, the movant may renew a "sufficiency of the evidence challenge" under Rule 50(b), but only if the post-verdict motion asks for relief on similar grounds as it sought pre-verdict under Rule 50(a).[125]

On its face, this procedural issue seems like it does not pertain to patent law under the Federal Circuit's choice-of-law doctrine. Indeed, the Federal Circuit says that its default rule for questions dealing with Rule 50 motions is to apply regional circuit law.[126] This makes sense: framed broadly, the question of whether a pre-verdict JMOL motion is sufficient to preserve the right to a post-verdict JMOL motion does not pertain to patent law.

Frame the same question specifically in a patent case, however, and the court will reach a different result.[127] For example, despite the Federal Circuit's default rule of deference with Rule 50 motions, the court reached an opposite result in *Duro-Last, Inc. v. Custom Seal, Inc.*,[128] because it characterized the issue very specifically: "whether a pre-verdict JMOL motion *directed to inequitable conduct and the on-sale bar* is sufficient to preserve the right to a

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to patent law issues as such, we often defer to the law of the regional circuit in reviewing such rulings" and citing examples).

[123] Federal Rule of Civil Procedure 50 requires a JMOL motion to "specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). If the court does not grant the Rule 50(a) motion, the movant may renew the motion post-verdict under Rule 50(b). *See* Fed. R. Civ. P. 50(b).

[124] *See, e.g.*, Medisim Ltd. v. BestMed, LLC, 758 F.3d 1352, 1355 (Fed. Cir. 2014) (citing Fed. R. Civ. P. 50(a)).

[125] *See id.* (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 486 & n.5 (2008)).

[126] *See* Duro-Last, Inc. v. Custom Seal, Inc., 321 F.3d 1098, 1106 (Fed. Cir. 2003) (citing Zodiac Pool Care, Inc. v. Hoffinger Indus., Inc., 206 F.3d 1408, 1416 (Fed. Cir 2000)). Generally, the court has said that where the issue involves an interpretation of the Federal Rules of Civil Procedure, it defers to the regional circuit. *See* Manildra Milling Corp. v. Ogilvie Mills, Inc., 76 F.3d 1178, 1181–82 (Fed. Cir. 1996).

[127] *See, e.g.*, *Duro-Last*, 321 F.3d at 1106 (holding that Federal Circuit law applies to the question of "whether a pre-verdict JMOL motion *directed to inequitable conduct and the on-sale bar* is sufficient to preserve the right to a post-verdict JMOL motion *directed to obviousness*" (emphasis added)); Tex. Instruments Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1566 n.6 (Fed. Cir. 1996) (applying Federal Circuit law to the question of whether a pre-verdict JMOL motion *on infringement* is "sufficient to support a post-verdict [JMOL] motion [*on infringement*] *concerning the doctrine of equivalents*" (emphasis added)).

[128] 321 F.3d 1098 (Fed. Cir. 2003).

post-verdict JMOL motion *directed to obviousness*."[129] Framed specifically, the issue clearly pertained to patent law, so Federal Circuit law applied; but, had the court characterized the issue generally as per usual, it would have applied regional law. Similarly, in *Texas Instruments Inc. v. Cypress Semiconductor Corp.*,[130] the Federal Circuit defined the Rule 50 issue as: whether a pre-verdict JMOL motion *on infringement* is "sufficient to support a post-verdict [JMOL] motion [*on infringement*] *concerning the doctrine of equivalents*."[131] The issue thus pertained to patent law and Federal Circuit law applied.

In *Fiskars, Inc. v. Hunt Manufacturing Co.*,[132] the Federal Circuit dealt with the issue of whether to apply Federal Circuit or regional circuit law in reviewing the district court's denial of Hunt Manufacturing Co.'s ("Hunt") Rule 60(b) motion.[133] Hunt argued the Federal Circuit should apply its own law because review of the lower court's judgment decision "turn[ed] on substantive matters unique to patent law."[134] Deference to regional circuit law was improper, Hunt went on, because of the clear need for uniformity and certainty when applying patent damages law.[135] In response, Fiskars, Inc. ("Fiskars") stated that the Federal Circuit normally applies the rule of the regional circuit when reviewing Rule 60(b) motions and acknowledged that it departs from the general rule when the specific issue presented turned on substantive patent law.[136] But in this case, Fiskars contended, there was nothing unique to patent law the issue was: whether the district court abused its discretion in ruling that Hunt's evidence concerning sales figures did not support vacating the judgment and granting a new damages trial.[137]

The Federal Circuit recognized that when reviewing Rule 60(b) rulings, it often deferred to the law of the regional circuit because such rulings commonly involve procedural matters unrelated to patent law issues.[138] In this case, however, the Federal Circuit decided to apply its own law and agreed with Hunt that the district court's ruling turned on substantive matters that

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[129] *Id.* at 1106 (emphasis added).

[130] 90 F.3d 1558 (Fed. Cir. 1996).

[131] *Id.* at 1566 & n.6 (emphasis added) (citation omitted).

[132] 279 F.3d 1378 (Fed. Cir. 2002).

[133] *See id.* at 1381.

[134] Brief for Defendant-Appellant at 8–9, *Fiskars*, 279 F.3d 1378 (No. 01-1193) (quoting Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1083 (Fed. Cir. 1993)).

[135] *See id.* at 9.

[136] *See* Brief of Plaintiffs-Appellees at 6–8, *Fiskars*, 279 F.3d 1378 (No. 01-1193).

[137] *See id.* at 7; *see also id.* at 8 ("The fact that this is a patent case . . . does not change the procedural nature of the Rule 60(b) inquiry, or the fact that a court is required to weigh the same considerations in any type of case presenting these events.").

[138] *See Fiskars*, 279 F.3d at 1381.

pertained to patent law.[139] The Federal Circuit framed the issue very specifically, as "whether a lost profits damages award should be set aside because post-trial sales data may show the acceptability of a non-infringing alternative product," and found it implicated substantive patent law.[140] Had the Federal Circuit accepted Fiskars's broad characterization of the issue,[141] the court would have found nothing about the Rule 60 review unique to patent law and applied regional law instead.

In these cases, the Federal Circuit departed from its usual, broad characterization of judgment issues. Instead of characterizing the issue broadly and looking to regional circuit precedent, the court characterized the issues specifically—but with little explanation as to why it departed from its usual practice. The application of its own precedent in these cases was inconsistent with the Federal Circuit's usual choice-of-law for judgment-related motions.[142] As such, the Federal Circuit failed to promote uniformity in patent cases and brought confusion for district courts and practitioners, who are left wondering whether Federal Circuit or regional circuit precedent applies to judgment-related issues on review.

C. Appellate Review: An Example of Consistent Characterization and Results

The Federal Circuit consistently applies its own law to issues of its own appellate jurisdiction,[143] yet there still remains some confusion for district court judges regarding issues of jurisdiction over certain appeals.[144] Nevertheless, the Federal Circuit's consistent approach is to define issues of appellate review specifically and almost always apply its own law.[145] In the realm of appellate review issues, the Federal Circuit's consistent characterization promotes uniformity in patent matters and minimizes confusion for practitioners. This Section serves as an example of the clarity and uniformity that results from consistent characterization.

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[139] *See id.*

[140] *Id.*

[141] *See* Brief of Plaintiffs-Appellees, *supra* note 136, at 7.

[142] *See supra* notes 123–137 and accompanying text.

[143] *See* Woodard v. Sage Prods., Inc., 818 F.2d 841, 844 (Fed. Cir. 1987) (en banc).

[144] *See, e.g.*, Microsoft Corp. v. GeoTag, Inc., 817 F.3d 1305, 1310 (Fed. Cir. 2016) (holding that the district court erred in determining that Third Circuit law governed the issue of whether the district court possessed subject matter jurisdiction over the party's patent infringement claims).

[145] *See infra* Section III.

In *Laboratory Corp. of America Holdings v. Chiron Corp.*,[146] Chiron Corporation ("Chiron") appealed the district court's grant of Laboratory Corporation of America Holdings ("LabCorp's") motion to enjoin Chiron's pursuit of a parallel litigation.[147] Chiron argued that Federal Circuit law governed and that under Federal Circuit precedent, the grant of an injunction against a parallel action is immediately appealable under 28 U.S.C. § 1292(a)(1).[148] LabCorp disagreed and contended that an appeal from an injunction is a procedural issue not unique to patent law, and thus regional law should govern.[149] Under regional precedent from the United States Court of Appeals for the Third Circuit, the grant of a motion to enjoin a parallel action is interlocutory and reviewable only by a petition for a writ of mandamus; thus, the issue would not be ripe for appellate review.[150]

The Federal Circuit distinguished earlier precedent, which LabCorp had relied on, explaining that it previously deferred to regional law because the application of the "widely applied abuse of discretion standard of review" was uncontroversial as applied to the grant or denial of injunctive relief.[151] The case involved no discussion of policy issues relevant to choice-of-law because there was no material difference between Federal Circuit and regional circuit precedent.[152] The Federal Circuit clarified that the previous decision "should not be read to foreclose consideration of the important policy factors dictating the choice of law in cases in which the regional circuit applies a different standard than the Federal Circuit."[153]

The Federal Circuit determined that its own law governed.[154] It reasoned that because the circuits were split on the issue of whether injunctions were appealable, the question was of great importance.[155] It also reasoned that the question raised the issue of national uniformity in patent cases, and invoked the Federal Circuit's obligation to avoid creating dispositive differences among the regional circuits.[156] The court determined that Federal Circuit law would apply consistent with the court's holding in *Woodard v. Sage Products, Inc.*,[157]

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[146] 384 F.3d 1326 (Fed. Cir. 2004).

[147] *See id.* at 1328.

[148] *See id.*

[149] *See id.* at 1329.

[150] *See id.* at 1328.

[151] *Id.* at 1329 (citing Katz v. Lear Siegler, Inc., 909 F.2d 1459, 1461–62 (Fed. Cir. 1990)).

[152] *See id.*

[153] *Id.*

[154] *See id.* at 1331.

[155] *See id.* at 1329–30.

[156] *See id.* at 1330 (citing Genentech v. Eli Lilly & Co., 998 F.2d 931, 937 (Fed. Cir. 1993)).

[157] 818 F.2d 841(Fed. Cir. 1987).

that deference to regional law is inappropriate in procedural issues of the court's appellate jurisdiction,[158] and with the precedent that Federal Circuit law governs the review of injunctive relief involving substantive issues in patent cases.[159] The court concluded that "injunctions arbitrating between co-pending patent declaratory judgment and infringement cases in different district courts are reviewed under the law of the Federal Circuit," phrasing the issue in a way that clearly pertained to patent law.[160]

The consistent characterization of issues of appellate review specifically leads to consistent choice-of-law results. This category of cases demonstrates that when the Federal Circuit makes consistent and explicit characterization choices, consistent choice-of-law decisions follow, promoting uniformity in the field of patent law and minimizing confusion for district courts and practitioners. Nonetheless, the Federal Circuit should acknowledge these characterization choices to be more transparent for litigants with questions regarding appellate jurisdiction in future cases.

III. Previous Suggestions for Improving the Federal Circuit's Choice-of-law Framework

Over the past four decades, the Federal Circuit's significant inconsistencies in its choice-of-law application have led scholars and commentators to note that the current regime, as applied to procedural law, is falling short of Congress's policy goals in creating the Federal Circuit: promoting nationwide uniformity and administrability in patent law matters, reducing forum shopping, increasing predictability and minimizing confusion, and avoiding overspecialization.[161] As the Federal Circuit's choice-of-law rule was created "as a matter of policy,"[162] any new solution should also comport with policy objectives.

Many scholars call for the increased application of Federal Circuit law, suggesting the court develop and apply its own law to all procedural matters in patent cases,[163] a solution that comports with the policy objectives underlying

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[158] *See id.* at 844.

[159] *See* Lab'y Corp. of Am. Holdings v. Chiron Corp., 384 F.3d 1326, 1331 (Fed. Cir. 2004).

[160] *Id.*

[161] *See supra* Section I.A.

[162] Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d. 1564, 1581 (Fed. Cir. 1984).

[163] *See, e.g.*, Dreyfuss, *supra* note 23, at 61–64 (concluding that the Federal Circuit's jurisdictional grant warrants an interpretation that allows the court to construe federal law independently when deciding procedural issues); Kimberly A. Moore, *Juries, Patent Cases, & A Lack of Transparency*, 39 Hous. L. Rev. 779, 801 (2002) ("I find the Federal Circuit's current choice of law rules unsatisfying and believe this avenue is ripe for further research into

the Federal Circuit but would require a complete overturning of four decades of choice-of-law precedent.[164] This bright-line solution promotes uniformity in the field of patent law by alleviating any procedural inconsistencies and promoting the development of uniform procedural law in patent cases.[165] It could reduce regional circuit forum shopping, as district courts would all apply the same procedural law in patent cases,[166] but could also implicate regional circuit-to-Federal Circuit forum-shopping concerns because parties who deem Federal Circuit law advantageous may tag on frivolous patent claims to gain Federal Circuit jurisdiction—something Congress was concerned about when it created the court.[167]

As to the interest in minimizing confusion in the judicial system, the advantage of a bright-line rule is obvious: it would be clear to parties, practitioners, and district court judges what law applies at the onset of a patent case, and they would no longer have to consider two different sets of law for similar issues—which the Federal Circuit made clear it wanted to avoid when it created its original choice-of-law rule in *Panduit*.[168] On the other hand, confusion may increase as cases develop and patent claims are added to ongoing disputes because parties may be forced to change their litigation strategies if the appellate path changes, and district courts may be forced to consider two sets of laws as they predict, at various stages, which court will hear the case on appeal.[169]

Earlier suggestions for the Federal Circuit to adopt a bright-line rule are understandable, as scholars encouraged the new appellate court's experimentation and oversight of technical progress.[170] However, the Federal Circuit has

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whether a blackletter rule—wherein Federal Circuit law would apply to all procedural issues in patent cases—might be superior to the current choice of law rules." (footnote omitted)); Field, *supra* note 8, at 692–98 (arguing that the Federal Circuit should apply its own law to all procedural issues in patent cases); Karol, *supra* note 64, at 43 (concluding that especially in matters of procedure the Federal Circuit should refrain from deferring to regional circuits).

[164] *See supra* Section I.A.

[165] *See* Field, *supra* note 8, at 692.

[166] *See id.* at 693–94.

[167] *See* S. Rep. No. 97-275, at 5 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11, 15; H.R. Rep. No. 97-312, at 20–21 (1981).

[168] *See* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d. 1564, 1574–75 (Fed. Cir. 1984).

[169] *See, e.g.*, Samantha Handler *Judicial 'Ping-Ponging' Over Patent-Antitrust Disputes Heats Up*, Bloomberg L. (Sept. 13, 2022, 5:10 AM), https://news.bloomberglaw.com/ip-law/judicial-ping-ponging-over-patent-antitrust-disputes-heats-up [https://perma.cc/P9MC-8JCF] (describing disagreement among the circuits over whether the Federal or the Fifth Circuit has jurisdiction over a batch of antitrust-intellectual property cases).

[170] *See* Dreyfuss, *supra* note 23, at 64.

never considered adopting a bright-line choice-of-law rule for procedural issues.[171] Implementation of such a rule today would require the Federal Circuit to overturn decades of choice-of-law precedent deferring to regional circuit law on non-patent issues—an endeavor that the court is highly unlikely to take on and would contradict important principles of *stare decisis*.[172] The solution to the Federal Circuit's choice-of-law problem should work within its current precedent, instead of completely overturning it, to retain the court's common law-development credibility. The solution should remove characterization choices to promote uniformity and reduce confusion, but does not need to do so in such a drastic manner.

IV. Consistent Characterization

As this Note has illustrated, the Federal Circuit's current choice-of-law approach, applying Federal Circuit law to patent-related procedural issues, leads to inconsistent and, at times, arguably improper results because the Federal Circuit has failed to select a consistent method for characterizing procedural issues at the onset of the inquiry. The Federal Circuit does not need to overturn its entire choice-of-law doctrine. Instead, the court should consistently characterize procedural issues specifically before applying the current *Midwest Industries* test: whether the issue pertains to patent law.[173] Under this framework, the Federal Circuit can develop procedural law in patent cases in a consistent, common-law manner. Furthermore, the Federal Circuit should clearly explain its characterization methodology in each case as it answers choice-of-law questions, so practitioners and district courts can predictably determine which law applies.

Consistent specific characterization of procedural issues allows the Federal Circuit to apply its own law to more procedural issues, thus increasing uniformity in patent matters. Once precedent is established and characterization choices are explained, district courts and practitioners will know to characterize procedural issues in patent cases specifically and, because that characterization will necessarily pertain to patent law, know to apply Federal Circuit law. Thus, by establishing clear and consistent precedent, the Federal Circuit can enhance administrability of its choice-of-law test.

Because regional courts will consistently apply Federal Circuit law to patent-related procedural issues, litigants will no longer be able to gain an advantage

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[171] *See* discussion *supra* Section II.B.

[172] As an aside, the Federal Circuit took *stare decisis* into account when creating its choice-of-law rule in order to allow district courts to continue to comply with regional circuit precedent. *See Panduit*, 744 F.2d at 1573.

[173] *See In re* Spalding Sports Worldwide, Inc., 203 F.3d 800, 803 (Fed. Cir. 2000) (quoting Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1359 (Fed. Cir. 1999)).

by choosing one forum with more favorable procedural laws than another, and forum-shopping concerns will be reduced. Better yet, the approach will discourage regional-to-Federal Circuit forum shopping because the Federal Circuit will still defer to regional circuit law on purely non-patent matters; parties will not be able to tag on frivolous patent claims to non-patent claims to gain access to favorable procedural law.

Furthermore, this approach will reduce confusion. Parties currently argue different laws apply because characterization of the issues—generally or specifically—impacts how the court rules on choice-of-law.[174] If the Federal Circuit consistently characterizes the issue specifically, practitioners will know to do so too, driving more issues to the Federal Circuit and inherently broadening its patent jurisprudence.

Consistent defined specific characterization eliminates the Federal Circuit's overbroad discretion in determining whether an issue pertains to patent law and allows the Federal Circuit and district courts to reach more consistent conclusions in deciding the procedural choice-of-law.

Consider the inconsistent choices of law in *Spalding* and *Fort James*, the attorney-client privilege cases discussed in Section II.A.[175] In *Spalding*, the Federal Circuit defined the issue specifically as "whether the attorney-client privilege applies to communications between inventors and patent attorneys," determined the issue pertained to patent law, and applied its own law.[176] Under the specific-characterization approach, in *Fort James* the Federal Circuit would have defined the issue as whether attorney-client privilege applies to invention disclosure forms between inventors and patent attorneys, determined the issue pertains to patent law, and then applied its own law. The result would have been consistent with *Spalding*, illustrating that specific characterization promotes uniformity and reduces confusion for district court judges and practitioners, as they would know to characterize the issue specifically and that Federal Circuit law would apply.

Specific characterization of motion to dismiss procedural questions would lead to development and application of Federal Circuit law, thus filling in the precedential gaps in patent cases. In *McZeal*, the Federal Circuit deferred to regional law when deciding a Rule 12(b)(6) motion to dismiss, leading to confusion among district courts about *Twombly*'s application to pleading requirements in patent cases.[177] Under the specific-characterization framework,

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[174] *See, e.g.*, *supra* notes 126–131 and accompanying text.

[175] *See* discussion *supra* Section II.A.

[176] *Spalding*, 203 F.3d at 803.

[177] *See* McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1355–56 (Fed. Cir. 2007); CBT Flint Partners, LLC v. Goodmail Systems, Inc., 529 F. Supp. 2d 1376, 1378–79 (N.D. Ga. 2007).

however, the Federal Circuit would have defined the issue in *McZeal* as whether the Plaintiff failed to state patent and trademark infringement claims upon which relief can be granted, decided that the issue pertained to patent law, and applied its own law instead. This solution would allow district courts to follow Federal Circuit, not regional, authority as precedent in patent cases, enhancing administrability for the many courts that follow *McZeal* despite the Federal Circuit's explicit direction to district courts not to do so. Further, it would eliminate confusion about *Twombly* requirements in patent cases and promote uniformity.

Reviewing a relief from judgment motion, the court in *Fiskars* characterized the Rule 60(b)(6) motion specifically and determined Federal Circuit law applied, despite its usual practice of deferring to regional circuit law in relief from judgment motions.[178] Under the specific-characterization framework, the court's approach in *Fiskars* would be the rule, not the exception, allowing Federal Circuit law to consistently apply when deciding whether to set aside damages awards in patent trials.[179] The Federal Circuit would not need to create exceptions to its general rule to promote uniformity in patent damages law, the new rule itself would while reducing confusion for practitioners and district courts when determining which law applies.

Finally, issues dealing with the Federal Circuit's appellate jurisdiction would consistently and with surety be decided by Federal Circuit law. When deciding questions of its appellate review, the Federal Circuit is already consistent in using specific characterization and applying its own law, such as in *LabCorp*.[180] It can and should do so when dealing with other procedural issues too.

A specific-characterization solution, however, is not perfect and does not address all of the Federal Circuit's concerns regarding its choice-of-law. This proposal for the Federal Circuit to characterize all procedural issues specifically before determining whether a procedural issue pertains to patent law appears to contradict the court's concern for the "countless [] practitioners and district court judges" learning and considering two sets of laws.[181] The concern, however, may be overstated. At least one commentor has noted that "because the Federal Rules of Civil Procedure are uniform across districts, the vast majority of procedural decisions made in the federal system are not impacted by the location of the district court."[182] District courts may be more familiar with the law of their respective circuits, but routinely use and

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[178] *See* Fiskars, Inc. v. Hunt Mfg. Co, 279 F.3d 1378, 1381 (Fed. Cir. 2002).

[179] *See id.*

[180] *See* Lab'y Corp. of Am. Holdings v. Chiron Corp., 384 F.3d 1326, 1330–31 (Fed. Cir. 2004).

[181] Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d. 1564, 1575 (Fed. Cir. 1984).

[182] Karol, *supra* note 64, at 28.

apply other laws, such as state substantive law when sitting in diversity,[183] or the law of the transferor court when a case has been transferred.[184]

Administrability concerns are also minimized by the fact that patent litigation practitioners often practice nationally—these attorneys are already required to research varying controlling laws on procedural matters in patent cases.[185] Specific characterization of procedural issues will lead to more application of Federal Circuit law, making it easier for these national practitioners, not more cumbersome. Additionally, the predictability of the law will be enhanced by applying Federal Circuit law to patent-related procedural issues.

Another critique is that refining the choice-of-law approach will hinder litigants' expectations as the Federal Circuit has held numerous times that deference to regional law is proper.[186] This solution, however, does not attempt to overturn the Federal Circuit's choice-of-law rules; instead, it fits within the doctrine by specifying the predicate characterization input and gently leading to less deferential results. As far as litigants' expectations go, the current rule is already too unpredictable and imprecise to generate legitimate expectations. The Federal Circuit departs from its general rule of deference even as to issues wherein that rule appears clearly established.[187] A stronger, clearer choice-of-law framework will help litigants understand what law applies, when it will apply, and why.

A final critique is that consistent, specific characterization of procedural issues in patent cases will turn the Federal Circuit into a specialist court. By deferring less and applying its own law more, however, the Federal Circuit will be able to develop and engage with procedural law in the same manner as other appellate courts in the federal system and thus be *more* of the generalist court that was envisioned by Congress. Further, the Federal Circuit's grant of jurisdiction over a variety of other subject areas inherently provides a safeguard against overspecialization.

To implement this solution, the Federal Circuit must be clear, transparent, and intentional as it characterizes procedural issues specifically at the onset of the choice-of-law inquiry. Consistent, specific characterization will ensure that all legal issues pertaining to patent law are decided under Federal Circuit law. The administrability and predictability concerns of the specific-characterization solution are negligible, especially in consideration of how deeply entrenched those concerns are in the current rule. For too long, the court

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[183] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 73 (1938).

[184] *See* Van Dusen v. Barrack, 376 U.S. 612, 642 (1964).

[185] *See* Karol, *supra* note 64, at 29.

[186] *See supra* Section I.B (explaining the evolution of the Federal Circuit's choice-of-law approach).

[187] *See, e.g.*, *supra* Section II.B.2.

has failed to provide uniformity and reduce confusion. With this solution, it can adhere to *stare decisis* and develop the common-law.

Conclusion

The Federal Circuit's choice-of-law decisions turn on the level of generality of which a given procedural issue is described, yet the court never acknowledges, examines, or explains its characterization choices. What this Note suggests is for the Federal Circuit to bring this inquiry to the forefront of the conversation, to make characterization choices intentionally, consistently, and transparently, such that litigants and district courts can predict the Federal Circuit's ultimate choice-of-law.

When faced with a procedural issue, the Federal Circuit should characterize the issue specifically in its relation to patent law. Thus, when the court applies its longstanding choice-of-law test, whether the issue pertains to patent law, it will increasingly determine that the issue does, and therefore develop and apply its own law. This approach promotes uniformity in patent law matters, reduces confusion, avoids both regional-to-regional and regional-to-Federal Circuit forum-shopping concerns, and allows the Federal Circuit to be the generalist court that Congress envisioned.

National Security Versus Full and Open Competition: When Two Roads Diverge in a Yellow Wood*

Owen E. Salyers**

Introduction

This Article argues that while the United States has built its acquisition regulations around a central dedication to full and open competition, there are times where this dedication must yield to the national security concerns of the day.[1] The current state of the law fails to give proper weight to national security concerns expressed by agencies and allows corporations through litigation, or the threat of litigation, to shape the United States' requirements when national security should control. While in some instances the dedication to full and open competition may trump national security, full and open competition should bend to national security in instances where an agency has justifiably asserted the concern.

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* Robert Frost, *The Road Not Taken*. While Mr. Frost's poem invokes thoughts of choice generally, there are times where national security and open competition walk the road together and times where they are apart.

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[1] This paper attempts to frame how the Government Accountability Office ("GAO") and the United States Court of Federal Claims ("CFC") have applied the Competition in Contracting Act ("CICA") national defense and national security exception but leaves the precise definitions of national defense and national security under CICA open for further discussion due to their "preambulatory" nature. *See* Cole v. Young, 351 U.S. 536, 544 (1956) (defining "national security" as used in the Summary Suspension Act as relating to activities "directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on general welfare."); *but see* Am. Sec. Council Ed. Found. v. FCC, 607 F.2d 438, 456 n.38 (D.C. Cir. 1979) (Wright, C.J., concurring) ("One could no more define with specificity 'national security' than one could define 'a more perfect Union,' 'Justice,' 'domestic Tranquility,' 'the common defence,' 'the general Welfare,' 'the Blessings of Liberty,' or, for that matter, 'the pursuit of Happiness.'"). Throughout this paper when the term "national security" is used, the intent is a definition which encompasses the national defense.

Part I of this Article provides a brief overview of full and open competition in the procurement process, specifically focusing on how full and open competition is asserted during the bid protest process,[2] which is set out in the Competition in Contracting Act ("CICA").[3] It will then turn to the national security exception to full and open competition, working to define the exception in CICA, as well as the national security language in the Tucker Act, using case law from the Government Accountability Office ("GAO") and the United States Court of Federal Claims ("CFC"). This Part of the Article then gives a brief overview of how the GAO and the CFC weigh national security concerns when considering bid protest challenges to contract requirements.[4]

Part II looks to recent bid protest examples where the GAO and the CFC have been called on to resolve conflicts between the Department of Defense's ("DOD") contract requirements, which were selected based on national security concerns, and full and open competition. Specifically, this Article will first look to the recent Joint Enterprise Defense Infrastructure ("JEDI")[5] procurement, where the dedication to full and open competition caused enormous delays with major national security implications and the procurement process should have bowed to the national security concern.[6] Second, this Part looks to the second increment of the DCGS-A ("DCGS-A2")[7] contract where the

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[2] Bid protests are objections to federal agency solicitations made by an interested party. *See FAQs*, U.S. Gov't Accountability Off., https://www.gao.gov/legal/bid-protests/faqs (last visited Apr. 10, 2023) [https://perma.cc/QSM5-GGYC].

[3] *See* Competition in Contracting Act of 1984, Pub. L. No. 98-368, § 2741, 98 Stat. 1175, 1199–203 (codified as amended at 31 U.S.C. §§ 3551–3557 (2018)).

[4] While the GAO and the CFC are the primary forums for bid protests, decisions from the Court of Appeals for the Federal Circuit will be cited to since the Federal Circuit reviews CFC's "legal determinations de novo" on appeal and "review[s] its factual findings for clear error." Dixon v. United States, No. 22-1564, 2023 WL 3327091, at *6 (Fed. Cir. May 10, 2023). Additionally, GAO decisions are considered final agency actions and can be appealed to the CFC for arbitrary and capricious review under the Administrative Procedure Act. *See* PAE Applied Techs., LLC v. United States, 154 Fed. Cl. 490, 505 (2021) (citing 5 U.S.C. § 706 (2018) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .")).

[5] For a full explanation of JEDI procurement, see discussion *infra* Section II.A.

[6] *See generally* Oracle Am., Inc. v. United States, 975 F.3d 1279 (Fed. Cir. 2020); Amazon Web Servs. v. United States, 147 Fed. Cl. 146 (2020) (granting an injunction on the contract); Oracle Am., Inc. v. United States, 144 Fed. Cl. 88 (2019); Oracle Am., Inc., B-416657 et al., 2018 CPD ¶ 391 (Comp. Gen. Nov. 14, 2018). While Oracle did exercise the GAO's and the CFC's concurrent jurisdiction over this contract, *see Oracle Am.*, 975 F.3d at 1284, Amazon only chose to pursue the matter at the CFC pursuant to their jurisdiction under the Tucker Act, *see Amazon Web Servs.*, 147 Fed. Cl. at 152.

[7] For a full explanation of DCGS-A2 contracting, see discussion *infra* Section II.B.

dedication to full and open competition forced the DOD to change procurement tactics entirely even though national security was at play and arguably should have been top priority.[8] Finally, this Part considers a time that full and open competition rightfully outweighed national security, looking at the recent SOF RAPTOR IV contract and decision, where even though national security was at play, the parties agreed that the concerns should bend to open and full competition.[9]

Part III concludes with suggested adjustments to the federal acquisition process to resolve the minimal deference currently given to an agency's justifiably expressed national security concerns.

I. Full and Open Competition and National Security at the Government Accountability Office and Court of Federal Claims

This Part delves into a brief overview of the Federal Acquisition Regulations ("FAR") and the United States' policy of full and open competition in the procurement process. This Part will then turn to the interplay of national security and the procurement process and conclude with an examination of the relationship between national security and full and open competition at both the GAO and the CFC.

A. A Dedication to Full and Open Competition—The Federal Acquisition Regulations

Starting with the United States Code, 10 U.S.C. § 3201 states that "the head of an agency in conducting a procurement for property or services—*shall* obtain *full and open competition* through the use of competitive procedures in accordance with the requirement of this section and [additional scattered sections] of this title and [the FAR] . . . ."[10] Taking the purpose of 10 U.S.C. § 3201(a)(1) and an eye towards FAR Part 6's competition requirement, the resounding message is that contracting officers throughout the government procurement process shall have one consistent overarching goal—full

[8] *See generally* Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018); Palantir USG, Inc. v. United States, 129 Fed. Cl. 218 (2016) *aff'd*, 904 F.3d 980 (Fed. Cir. 2018); Palantir USG, Inc., B-412746, 2016 CPD ¶ 138 (Comp. Gen. May 18, 2016).

[9] *See generally* Oak Grove Techs., LLC v. United States, 155 Fed. Cl. 84 (2021); Oak Grove Techs., LLC, B-418427.6 et al., 2021 CPD ¶ 8 (Comp. Gen. Dec. 18, 2020). For a full discussion of the SOF RAPTOR IV contract, see discussion *infra* Section II.C.

[10] 10 U.S.C. § 3201(a)(1) (Supp. 2021) (emphasis added).

and open competition.[11] But what is full and open competition, and, more importantly, what are the relevant exceptions concerning national security which allow a contracting officer to circumvent this central tenet of government procurement?

FAR Part 2 states "*[f]ull and open competition*, when used with respect to a contract action, means that all responsible sources are permitted to compete."[12] The CFC has stated that on the array of possible procurement mechanisms, "'full and open competition[]' [sits] at one extreme, and 'noncompetitive procedures' at the other extreme."[13] The ultimate goal is to "ensure[] that contracting officers receive bids at competitively low prices."[14] In ensuring full and open competition, an agency is prohibited from "exclud[ing] any responsible source capable of meeting its needs from bidding."[15] Merely allowing competing companies to submit bids is not enough to satisfy the call to full and open competition; instead, the companies must actually be entitled to *compete* for the award.[16]

CICA is the primary statute that recognizes the idea that full and open competition requires potential contractors be entitled to compete for awards; it underscores that full and open competition requires the use of competitive procedures in procurements.[17] These competitive procedures include the ability of a potential contractor to challenge a solicitation's requirements so long

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[11] *See id.*; FAR 6.000 (2021) ("This part prescribes policies and procedures to promote full and open competition in the acquisition process . . . ."); *see also* Major Bradley A. Cleveland, *The Last Shall Be First: The Use of Localized Socio-Economic Policies in Contingency Contracting Operations*, 197 Mil. L. Rev. 103, 108 (2008) ("The import of FAR Part 6 is clear: DOD awards contracts based on full and open competition—and any competition that is not full and open is unlawful unless Congress explicitly allows a specific exception." (footnote omitted)). It is important to note that FAR Part 6 specifically excludes its application from contracts using the simplified acquisition procedures of FAR Part 13 and a few other select procurements. *See* FAR 6.001(a) (2021). These exclusions, however, do not impact the conclusion that FAR at its core represents a primary dedication to full and open competition when necessary and available.

[12] FAR 2.101 (2021).

[13] Res-Care, Inc. v. United States, 107 Fed. Cl. 136, 141 (2012).

[14] Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1543 (Fed. Cir. 1996).

[15] Fire-Trol Holdings, LLC v. United States, 66 Fed. Cl. 36, 41 (2005) (citing SMS Data Prds. Grp., Inc. v. United States, 853 F.2d 1547, 1554 (Fed. Cir. 1988)).

[16] *See* Nat'l Gov't Servs. v. United States, 923 F.3d 977, 983–84 (Fed. Cir. 2019) ("We are unconvinced that the mere ability to submit an offer qualifies as full and open competition in this case, given that such a submission may be entirely futile in light of the solicitation's Award Limitations Policy.").

[17] *See generally* 31 U.S.C. §§ 3551–3557 (2018).

as the challenger is an interested party in the procurement.[18] CICA grants jurisdiction to the GAO over these bid protests subject to the limitations of full and open competition contained in the FAR as authorized by statute.[19] Looking then to the FAR to see when national security may override full and open competition for the purpose of filing a bid protest at the GAO under CICA, FAR 6.302-6 sets out an exception for national security as authorized by 10 U.S.C. § 2304(c)(6) or 41 U.S.C. § 3304(a)(6).[20]

The Tucker Act is another pertinent statute; it recognizes the importance of challenges on behalf of full and open competition and grants the CFC jurisdiction over bid protests.[21] Specifically, the Tucker Act allows the CFC to pass judgment on bid protests independent of whether or not the GAO has heard the bid protest pursuant to CICA.[22] While the Tucker Act does not have a specific exception for national security like CICA, it does expressly require the CFC to give "due regard to the interests of national defense and national security and the need for expeditious resolution of the action."[23] The United States Court of Appeals for the Federal Circuit ("Federal Circuit") reviews decisions by the CFC on appeal and is likewise bound by the Tucker Act's "due regard" for national security.[24]

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[18] *See* 31 U.S.C. §§ 3551, 3553(a).

[19] *See* 31 U.S.C. §§ 3552(a), 3554(b)–(c).

[20] *See* FAR 6.302-6(a)(2) (2021) (authorizing suspension of full and open competition when "the disclosure of an agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals"); *see also* 10 U.S.C. § 3204(a) (Supp. 2021) ("The head of an agency may use procedures other than competitive procedures only when . . . (6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number or sources from which it solicits bids or proposals."); 41 U.S.C. § 3304(a) (2018) ("An executive agency may use procedures other than competitive procedures only when . . . (6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number or sources from which it solicits bids or proposals.").

[21] *See* 28 U.S.C. § 1491(b)(1) (2018).

[22] *See id.*

[23] *Id.* § 1491(b)(3).

[24] *See id.*; 28 U.S.C. § 1295(a)(3) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of Federal Claims.").

B. When Two Worlds Collide—Full and Open Competition Versus National Security at the Government Accountability Office and the Court of Federal Claims

As has been discussed, full and open competition and national security are sometimes warring concepts.[25] The resolution of these competing interests often depends on the tribunal in which the challenge is brought.[26] The primary forums for the types of protests discussed in this Article are the GAO and the CFC.[27] Therefore, the next inquiry must be into each of the exceptions (or "due regard" in the case of the CFC) applicable in these two jurisdictions.

1. Government Accountability Office (GAO)

When the GAO exercises jurisdiction under CICA over a bid protest submitted by an interested party, the default review ensures that the agency complied with statutes governing government contracting, as well as the FAR, by considering all relevant facts and circumstances.[28] As the preferred method

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[25] *See* discussion *supra* Section I.A.

[26] *See, e.g.*, Palantir USG, Inc., B-412746, 2016 CPD ¶ 138 (Comp. Gen. May 18, 2016) (denying the protest); Palantir USG, Inc. v. United States, 129 Fed. Cl. 218, 283 (2016) (finding that the agency acted arbitrarily and capriciously by "neglecting to fully investigate the commercial availability of products that could meet at least some of the requirements of the procurement"), *aff'd*, 904 F.3d 980 (Fed. Cir. 2018).

[27] *See* FAR 33.102(a) (2021) (recognizing the authority of both the GAO and the CFC to hear bid protests); 31 U.S.C. §§ 3551–3555 (2018) (authorizing the Comptroller General, the head of the GAO, to hear bid protests); 28 U.S.C. § 1491(b)(1) (2018) (authorizing the CFC to hear bid protests); 31 U.S.C. § 3556 (recognizing the ability to file protests at both the GAO and the CFC). While 28 U.S.C. § 1491(b)(1) additionally authorized District Courts to hear bid protests, this jurisdiction was eliminated via a sunset provision in the Administrative Dispute Resolution Act of 1996. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 ("The jurisdiction of the district courts of the United States described in section 1491(1) of title 28, United States Code . . . shall terminate on January 1, 2001 unless extended by Congress."); *see* Novell v. United States, 109 F. Supp. 2d 22, 25 (D.D.C. 2000); FAR 33.101.

[28] *See* 4 C.F.R. § 21.8(a)–(b) (2021) ("GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation . . . . In determining the appropriate recommendation, GAO shall . . . consider all circumstances surrounding the procurement or proposed procurement . . . ."); *see generally* 4 C.F.R. pt. 21 (entitled "Bid Protest Regulations"). It is important to note that GAO recommendations, while technically not binding on the agency, are given due regard by the CFC and the Federal Circuit. *See* Caddell Constr. Co. v. United States, 123 Fed. Cl. 469, 478 (2015) ("This Court recognizes the long-standing expertise of GAO in the bid protest arena and accords its decision due regard." (citing Integrated Bus. Sols., Inc. v. United States, 58 Fed. Cl. 420, 426 n.7 (2003))); Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) ("Although 'these provisions do not compel procuring

of procurement is full and open competition using competitive procedures,[29] any decision that deviates from this standard must be supported by statute or regulation. But in the national security arena, FAR 6.302-6 provides an exception when national security comes into play.[30] The exception states:

> (a)(2) Full and open competition need not be provided for when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.
>
> (b) **Application.** This authority may be used for any acquisition when disclosure of the Government's needs would compromise the national security (e.g., would violate security requirements); it shall not be used merely because the acquisition is classified, or merely because access to classified matter will be necessary to submit a proposal or to perform the contract.[31]

So how has the GAO interpreted this exception which allows an agency to avoid full and open competition on the basis of national security concerns? The GAO has limited this exception to only those situations where "the general publication or dissemination of the agency's need[s] would jeopardize national security."[32]

The GAO has analyzed the exception several times, and two particular instances best exemplify when the exception may be invoked. In *Federal Labs Systems*,[33] the GAO found that the national security exception was incorrectly invoked to limit sources when the specific information allegedly being protected involved the performance capability requirements of metal detectors and existed in an unclassified solicitation and State Department report.[34]

In contrast, in *Boeing Co.*,[35] the GAO found that the national security exception was properly invoked where the Air Force determined that due to national security concerns, current contract information could not be passed on to a new contractor.[36] The Air Force used the national security exception to award the contract to the current contractor.[37] The GAO denied the pro-

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agencies to obey the recommendation of the Comptroller General,' their effect 'is to compel procurement officials to make purchase decisions in light of what the Comptroller General recommends the government do in that case.'" (quoting Ameron v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 986 (3d Cir. 1986))).

[29] *See* discussion *supra* Section I.A.

[30] *See* FAR 6.302-6 (2021); *see also* discussion *supra* Section I.A.

[31] FAR 6.302-6(a)(2), (b).

[32] Fed. Labs Sys., 66 Comp. Gen. 228, 231 (1987) (citing S. Rep. No. 98-50, at 22 (1983)).

[33] 66 Comp. Gen. 228 (1987).

[34] *See id.* at 231.

[35] B-414706 et al., 2017 CPD ¶ 274 (Comp. Gen. Aug. 25, 2017).

[36] *See id.* at 3–4, 16.

[37] *See id.*

test using reasoning similar to a previous decision where they stated that "[m]ere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show the agency's judgment is unreasonable."[38]

2. The Court of Federal Claims (CFC)

The CFC also considers the aforementioned exception to full and open competition when reaching the merits of a protest.[39] The CFC gives the amount of deference to the agency that is accorded to any agency decision under the Administrative Procedure Act ("APA")—the CFC will only sustain the protest if the agency's reasoning was arbitrary and capricious.[40]

However, the CFC must consider an additional requirement regarding national security well before the court reaches the merits of the decision. The Tucker Act requires that the CFC give "due regard to the interests of national defense and national security and the need for expeditious resolution of the action."[41] The CFC tends to rely on this requirement when discussing whether or not an injunction on a contract should be granted in response to a bid protest.[42] The language of the Tucker Act is ambiguous at best, leaving one to wonder, how much regard is "due regard"? The CFC has had several chances to analyze this standard and has stated that:

> While the Court certainly must give serious consideration to national defense concerns and arguably should err on the side of caution when such vital interests are at stake, allegations involving national security must be evaluated with the same analytical rigor as other allegations of potential harm to parties or to the public.[43]

The CFC seemingly suggests that while they are to give consideration to national security concerns, their level of deference to these concerns is equal

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[38] Womack Mach. Supply Co., B-407990, 2013 CPD ¶ 117, at 3–4 (Comp. Gen. May 3, 2013) (citing Vertol Sys. Co., Inc., B-293644.6 et al., 2004 CPD ¶ 146, at 3 (Comp. Gen. July 29, 2004); AT&T Corp., B-270841 et al., 1996-1 CPD ¶ 237, at 7–8 (Comp. Gen. May 1, 1996)); *see Boeing Co.*, 2017 CPD ¶ 274, at 20; *see also* Dep't of the Army, B-419150.2, 2021 CPD ¶ 133, at 6 n.3 (Comp. Gen. March 30, 2021) ("[O]ur decision did not mention the heightened standard of deference afforded to agencies when reviewing requirements involving to national security and human safety . . . .").

[39] *See* Analytical Graphics, Inc. v. United States, 135 Fed. Cl. 378, 409 (2017).

[40] *See id.* at 398 ("The statute says that agency procurement actions should be set aside when they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or 'without observance of procedure required by law.'" (quoting 5 U.S.C. § 706(2)(A), (D) (2018))).

[41] 28 U.S.C. § 1491(b)(3) (2018).

[42] *See, e.g.*, Harmonia Holdings Grp., LLC. v. United States, 147 Fed. Cl. 749, 755 (2020).

[43] Gentex Corp. v. United States, 58 Fed. Cl. 634, 655 (2003) (citing ATA Def. Indus., Inc. v. United States, 38 Fed. Cl. 489, 506 (1997)); *see Harmonia Holdings*, 147 Fed. Cl. at 755.

to the level of deference they give to other potential harms to the parties or the public.

Some commentators have argued that this "due regard" has allowed the CFC to avoid exercising jurisdiction by allowing "the interests of national defense and national security [to] trump the fair and open procurement practices required by CICA."[44] However, based on recent bid protest decisions by the CFC, including the JEDI contract and the DGSC-A2 contract, there appears to have been a shift in the amount of regard given to national security in situations where national security and full and open competition come into conflict.

II. National Security Concerns in the Real World

This Part of the Article will delve into three contracts: the JEDI contract, the DCGS-A2 contract, and the SOF RAPTOR IV contract. The first two contracts, JEDI and DCGS-A2, represent instances where full and open competition should have bent to national security concerns and higher deference should have been given to the agency's determinations of how to procure the contracts.[45] Conversely, the SOF RAPTOR IV contract represents an instance where national security needed to bend to full and open competition to promote the integrity of the procurement process as a whole.[46]

A. The JEDI Procurement—An Icarus Contract Burned by the Sun

On September 17, 2017, Deputy Secretary of Defense Patrick Shanahan initiated an effort to accelerate the DOD's internal efforts to create "a department-wide cloud computing system [which] . . . would be 'critical to maintaining our military's technological advantage.'"[47] He predicated this decision on three realities: "(1) technologies in areas like data infrastructure and management, cybersecurity, and machine learning are changing the

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[44] Surya Gablin Gunasekara, *The Balancing Act: Weighing National Security Against Equitable Procurement Practices*, 20 Fed. Cir. B.J. 569, 581 (2011) (citations omitted).

[45] *See* discussion *infra* Sections II.A, II.B.

[46] *See* discussion *infra* Section II.C.

[47] Thomas Spoehr, *An "Urgent Unmet" National Security Need Going Nowhere*, Heritage Found. (Mar. 15, 2021), https://www.heritage.org/defense/commentary/urgent-unmet-national-security-need-going-nowhere [https://perma.cc/N8EQ-69D3]; *see also* Memorandum from Patrick Shanahan, Deputy Sec'y of Def., Dep't of Def., to Sec'ys of the Mil. Dep'ts, Dep't of Def. 1 (Sept. 13, 2017) [hereinafter DOD Memorandum], https://www.nextgov.com/media/gbc/docs/pdfs_edit/090518cloud2ng.pdf [https://perma.cc/3Q2J-5J9E] (discussing the implementation of an initiative to accelerate the DOD's implementation of cloud computing technologies).

character of war; (2) commercial companies are pioneering technologies in these areas; and (3) the pace of innovation is extremely rapid."[48] The DOD, contemplating the complexities of a "pathfinder" contract like the JEDI contract, decided to solicit the contract for a single provider.[49]

1. Pre-Award Challenges, Award, and Post-Award Challenges

The JEDI procurement has a long and troubled litigation history comprised of many challenges. Around the one-year mark of Deputy Secretary Shanahan's announcement, the corporation Oracle began to challenge the procurement at the GAO.[50] Oracle challenged the solicitation on the following grounds: (1) that DOD's decision to award the contract to a single awardee was in violation of statute and regulation, (2) the contracting officer's single award failed to consider the advantages of multiple awards, and (3) DOD's single award violated the 2018 Defense Appropriations Act.[51] The GAO considered all of Oracle's arguments and declined to sustain the protest on any singular one.[52] As part of its reasoning, the GAO considered the contemporaneous record of the agency and found that it "contain[ed] significant documentation supporting the agency's national security concerns associated with a multiple-award solution for the JEDI Cloud procurement."[53]

Having lost at the GAO, Oracle brought its challenge at the CFC in what some practitioners would call a second bite at the apple.[54] Oracle again alleged three grounds against the procurement in its complaint: (1) that the choice to do a single award violated the law, (2) the use of certain gate criteria was improper, and (3) conflicts of interest between Amazon, another bidder, and the DOD prejudiced the entire procurement.[55] The CFC upheld the procurement on two bases: (1) that the contracting officer was reasonable in the decision to proceed with a single awardee, and (2) that Oracle could not demonstrate prejudice from the errors that existed in the procurement because Oracle itself could not satisfy the proper criteria for the procurement.[56]

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[48] DOD Memorandum, *supra* note 47, at 1.

[49] *See* Spoehr, *supra* note 47; Oracle Am., Inc., B-416657 et al., 2018 CPD ¶ 391, at 3–4 (Comp. Gen. Nov. 14, 2018).

[50] *See Oracle Am.*, 2018 CPD ¶ 391, at 10 (Oracle filed its initial protest with the GAO on August 8, 2018, and filed a "Revised and Consolidated Protest" on September 6, 2018).

[51] *See id.* at 10–13.

[52] *See id.* at 1, 12–14, 19.

[53] *Id.* at 13.

[54] *See* Oracle Am., Inc. v. United States, 144 Fed. Cl. 88, 91 (2019); Raymond M. Saunders & Patrick Butler, *A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims*, 39 Pub. Cont. L.J. 539, 540 (2010).

[55] *See Oracle Am.*, 144 Fed. Cl. at 91.

[56] *See id.* at 113, 126.

Unlike the GAO, the CFC did not mention national security as the basis for its decision.[57] Oracle appealed the CFC's decision to the Federal Circuit which affirmed.[58]

The next challenge to the JEDI procurement came from Amazon after the contract was awarded to Microsoft.[59] Amazon opted to go directly to the CFC, skipping over the GAO, because they sought injunctive relief from the contract award based on what they perceived to be multiple errors in application of the evaluation factors to their proposal.[60] The court granted Amazon's request for an injunction, dismissing the government's national security concerns by stating that "[t]he court takes seriously the national security concerns implicated by the JEDI program. But the fact that defendant is operating without the JEDI program now cuts against its argument that it cannot secure the nation if the program does not move forward immediately."[61]

2. Cancellation of the Contract

On July 6, 2021, after nearly four years of delays, the DOD announced that it was not moving forward with the JEDI contract and would instead be pursuing a different method of procurement to implement department-wide cloud computing.[62]

3. Analysis

Four years of delay ended in going back to the drawing board, and still the DOD does not have the internal cloud computing capabilities that it needs. The national security need was urgent back in September 2017 when Deputy Secretary Shanahan released the memorandum,[63] and it is even more

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[57] *See id.*

[58] *See* Oracle Am., Inc. v. United States, 975 F.3d 1279, 1303 (Fed. Cir. 2020). The Federal Circuit also did not address the various national security concerns raised by this procurement as their review of the CFC's decision was purely for reversible error of which they found none. *See id.*

[59] *See* Amazon Web Servs. v. United States, 147 Fed. Cl. 146, 150 (2020) (granting an injunction on the contract).

[60] *See id.* at 149–50.

[61] *Id.* at 158.

[62] *See* Toni Townes-Whitley, *Microsoft's Commitment to the DOD Remains Steadfast*, Microsoft (July 6, 2021), https://blogs.microsoft.com/blog/2021/07/06/microsofts-commitment-to-the-dod-remains-steadfast/ [https://perma.cc/P6YZ-G5PN]. In 2022, five years after the JEDI procurement was initially solicited, the Pentagon finally awarded cloud-computing contracts to Amazon, Oracle, Microsoft, and Google. *See* Maureen Farrell, *Pentagon Divides Big Cloud-Computing Deal Among 4 Firms*, N.Y. Times (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/business/pentagon-cloud-contracts-jwcc.html [https://perma.cc/W4L6-MPGK].

[63] *See* DOD Memorandum, *supra* note 47, at 1–2.

urgent now as technology has continued to develop and the DOD has fallen further and further behind.[64] Notwithstanding the DOD's lack of progress, the CFC found that the national security concern was less pressing than the DOD asserted because the DOD has been able to continually operate without cloud computing.[65]

The fallacy in the CFC's logic is that the court evaluated the potency of the national security need by assessing the ability of the DOD to currently operate without cloud computing. But what if the disaster is just on the horizon? At what point does lack of preparedness turn into a national security concern large enough for the CFC to give it "due regard" and allow full and open competition to bend? Certainly with the pace of expanding technology, the lack of cloud computing and interconnectivity for the DOD should be one such time—but alas, no.[66] Full and open competition must be able to yield to national security in times such as this—when an urgent need has been identified, and an agency makes a procurement decision based on that need, which may not fully comply with full and open competition, but still retains its spirit.

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[64] *See* Spoehr, *supra* note 47. The author noted:

> In 2017, the Pentagon was already far behind the commercial sector in adopting cloud computing—though not for lack of trying. . . . DOD, however, remained steadfast in its pursuit of a single award, explaining that the JEDI contract was a "pathfinder" and that to reduce complexity in this initial effort, a single award was necessary.

Id.

[65] *See Amazon Web Servs.*, 147 Fed. Cl. at 158.

[66] *See* Andrew Eversden, *So What Problems Does JEDI Solve, Really?*, Fed. Times (Oct. 30, 2019), https://www.federaltimes.com/govcon/contracting/2019/10/30/so-what-problems-does-jedi-solve-really/ [https://perma.cc/SPP2-WGLZ]. Eversden noted:

> But DOD CIO Dana Deasy offered some explanation during his confirmation hearing Oct. 29, saying the need for JEDI was accentuated by a recent trip he took to Afghanistan. He watched soldiers use three separate systems to find the information they needed to identify the adversary, another to decide what actions to take and a third system to find where friendly assets were on the ground.
>
> Deasy said that JEDI will appease that problem by integrating unclassified data, classified data and top secret data into a single cloud and pushing it out to the tactical edge. In August, Deasy said the current inability to give the war fighter consolidated data is what JEDI is "trying to solve for."

Id.

B. The DCGS-A2 Contract—*Palantir USG, Inc. v. United States*[67]

On December 23, 2015, the Army issued a request for proposals for the DCGS-A2 contract.[68] "DCGS-A is the Army's primary system for the processing and dissemination of multi-sensor intelligence and weather information to the warfighter."[69] The solicitation sought a single contractor to be the system data architect, developer, and integrator of DCGS-A2.[70]

1. Challenges

In February 2016, Palantir brought a challenge against the solicitation of the DCGS-A2 contract at the GAO.[71] Palantir challenged the agency's market research, stating that the contract should have been for a commercial solution to the agency's needs rather than an individualized solution as they had solicited it.[72] Palantir makes a commercially available data management platform which it has long argued could satisfy the Army's needs.[73] The GAO dismissed the protest on the grounds that it was to give deference to the agency on what type of procurement the agency had chosen to pursue, further emphasizing that there was evidence in the record that the agency had considered approaches other than an individualized approach but had nonetheless decided to proceed.[74]

Unsatisfied with its result at the GAO, Palantir took its challenge to the CFC.[75] The CFC took a stance in direct opposition to the GAO, finding that the Army had acted arbitrarily and capriciously by failing to procure commercially available items in areas where said items were suitable to meet the agency's needs.[76] The CFC spent some time discussing national security when issuing its decision to grant the injunction, specifically stating that "the Army has not offered evidence of immediate tactical or strategic national security consequences that would sway the court from entering an injunction in this bid protest . . . ."[77] In granting the injunction, the CFC relied primarily on pre-

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[67] 129 Fed. Cl. 218 (2016).

[68] *See* Palantir USG, Inc., B-412746, 16 CPD ¶ 138, at 1 (Comp. Gen. May 18, 2016).

[69] *Id.* at 2.

[70] *See id.*

[71] *See id.* at 3.

[72] *See id.* at 5.

[73] *See* Patrick Tucker, *The War Over Soon-to-Be-Outdated Army Intelligence Systems*, Defense One (July 5, 2016), www.defenseone.com/technology/2016/07/war-over-soon-be-outdated-army-intelligence-systems/129640/ [https://perma.cc/JJ25-JNH4].

[74] *See Palantir USG, Inc.*, B-412746 at 7.

[75] *See* Palantir USG, Inc. v. United States, 129 Fed. Cl. 218 (2016) *aff'd*, 904 F.3d 980 (Fed. Cir. 2018).

[76] *See id.* at 282.

[77] *Id.* at 295.

vious case law from the CFC which states that "merely conclusory assertions of national security do not suffice to defeat motions for injunctive relief."[78]

The government appealed the injunction to the Federal Circuit.[79] The Federal Circuit opinion, unlike the CFC's opinion, makes no mention of any national security concerns related to the solicitation of the contract.[80] Noting that they were to give deference to an agency's procurement decisions, the Federal Circuit focused on what they deemed to be an "arbitrary and capricious" decision by the Army not to seek a commercial product.[81] The Federal Circuit, in affirming the CFC's decision, stated that "the Army was, or should have been, aware of Palantir's data management platform. Despite repeated notice . . . the Army concluded that DCGS-A2 could not be procured as a commercial product with scant explanation."[82] The Federal Circuit did note that while the Army was not required under regulation or statute to document its decision not to procure a commercially available product, the APA requires the agency to establish a record sufficient for judicial review.[83]

2. Analysis

The issue with the Federal Circuit's and the CFC's decisions in *Palantir* is that the courts seem to suggest that if there is a commercially available item on the market, and the agency makes the decision not to use that item, this decision will be viewed as arbitrary and capricious unless the agency thoroughly documents their decision. The statute does not require agencies to use commercial items.[84] Instead, it calls on them to use commercial items "to the maximum extent practicable."[85] The statue merely creates a preference for the acquisition of commercial items which satisfy the needs of an agency, and therefore, even if an agency finds a commercial product available, they are not required to implement it under the statute if they have a reason for not doing so, like if there is a national security concern at play.

The GAO initially got it right by deferring to the agency's decision to take an individualized approach over a commercial one.[86] The Army's primary concern with a commercial approach was that any provider of commercial products would only be able to meet the Army's requirements after a great

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[78] *Id.* at 294 (quoting Crowley Tech. Mgmt., Inc. v. United States, 123 Fed. Cl. 253, 266 (2015)).

[79] *See* Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018).

[80] *See generally id.*

[81] *Id.* at 990–91.

[82] *Id.* at 992–93.

[83] *See id.* at 993–94.

[84] *See* 10 U.S.C. § 3453 (Supp. 2021).

[85] *Id.*

[86] *See* Palantir USG, Inc., B-412746, 16 CPD ¶ 138, at 5, 7 (Comp. Gen. May 18, 2016).

deal of development and integration work.[87] This determination from the Army overlays on the background that the Army was fighting against criticism that the original DCGS-A, as implemented, was not working.[88] The GAO was right to deny the protest and defer to the Army's interpretation of its needs and the market research it had performed.

Both the CFC and the Federal Circuit failed to properly discuss and weigh the national security concerns that the Army put forth as the basis for its decision to pursue a custom product in the first place. These concerns included the need to procure a complex system that would be interconnected so that the entire effort functioned to achieve military-unique specifications classified up to the Top Secret level.[89] Instead of affording deference to the agency for its national security concerns, the courts decided that if there was a commercial product that could be modified to meet the requirements on their face, without considering national security, then it would be arbitrary and capricious of the Army to choose not to select the commercial product unless the Army gave a thorough explanation of the decision.[90] The courts recognized that there is no basis in regulation or statute that the Army need to document its decision not to procure a commercial product; however, when the Army provided its justification for review, it was criticized as "scant explanation" and a "conclusory assertion of national security."[91] The courts gave little deference to the Army's decision, instead looking to supplement their own decision and conclusions.[92] While the courts implicitly gave some regard to national security in their decisions, the bar, and deference to the agency which is the expert on national security, should be much higher.

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[87] *See id.*

[88] *See* Tucker, *supra* note 73.

[89] *See* Palantir USG, Inc. v. United States, 129 Fed. Cl. 218, 225–26, 231–33, 294–95 (2016), *aff'd*, 904 F.3d 980 (Fed. Cir. 2018); Reply Brief for the United States, Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018) (No. 2017-1465); *see also* Shane Harris, *Palantir Wins Competition to Build Army Intelligence System*, Wash. Post (Mar. 26, 2019, 6:08 PM), https://www.washingtonpost.com/world/national-security/palantir-wins-competition-to-build-army-intelligence-system/2019/03/26/c6d62bf0-3927-11e9-aaae-69364b2ed137_story.html [https://perma.cc/KX7B-V5ZG]; Jen Judson, *The Army Turns to a Former Legal Opponent to Fix Its Intel Analysis System*, DefenseNews (Mar. 8, 2018), https://www.defensenews.com/land/2018/03/09/army-awards-contract-to-buy-commercial-solutions-to-fix-troubled-intel-analysis-framework/ [https://perma.cc/C8XR-XUEU].

[90] *See supra* notes 75–83 and accompanying text.

[91] Palantir USG, Inc. v. United States, 904 F.3d 980, 993 (Fed. Cir. 2018); *Palantir USG, Inc.*, 129 Fed. Cl. at 294.

[92] *See Palantir USG, Inc.*, 904 F.3d at 993; *Palantir USG, Inc.*, 129 Fed. Cl. at 294.

C. Training Services Contract Gone Awry—*Oak Grove Technologies v. United States*[93]

On October 30, 2018, the Army issued a solicitation for training support services in support of the SOF RAPTOR IV requirement.[94] The SOF RAPTOR IV contract was to provide special operations forces training "for counter terrorism, counter narco-terrorism, counter proliferation and unconventional warfare missions using a mix of live, virtual, and constructive simulation scenarios."[95]

1. Challenges

Oak Grove first challenged the agency's determination that Oak Grove was unable to deliver under the "capability factor" outlined in the solicitation.[96] The GAO denied the protest on the basis that they found the agency had reasonably assessed the factor and found Oak Grove deficient and thus unqualified to receive the award.[97] Oak Grove decided to pursue its protest at the CFC.[98]

2. Analysis

Oak Grove is a prime example of when national security should yield to full and open competition.[99] In *Oak Grove*, the agency improperly evaluated multiple proposals, even evaluating a proposal as sufficient despite the fact that it was lacking a required agreement, and was therefore non-responsive to the request for proposals.[100] Additionally, the agency failed to properly assess

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[93] 155 Fed. Cl. 84 (2021).

[94] *See* Oak Grove Techs., LLC, B-418427.6 et al., 2021 CPD ¶ 8, at 1–2 (Comp. Gen. Dec. 18, 2020). SOF RAPTOR stands for Special Operations Forces Requirements, Analysis, Prototyping, Training, Operations, and Rehearsal. *See id.* at 2. SOF RAPTOR IV sought to continue training provided under the SOF RAPTOR III contract. *See id.*

[95] *Id.* at 2.

[96] *Id.*

[97] *See id.* at 7.

[98] *See Oak Grove Techs.*, 155 Fed. Cl. at 95.

[99] After the decision on the merits in *Oak Grove*, the CFC imposed sanctions on the government. *See* Oak Grove Techs., LLC v. United States, 156 Fed. Cl. 594, 613 (2021), *appeal docketed*, No. 22-1557 (Fed. Cir. Mar. 22, 2022). Both the decision on the merits and the sanctions are currently being appealed to the Federal Circuit, however the appeal does not affect the discussion of this case for the purposes of this Article. *See* Oak Grove Techs., LLC v. United States, No. 22-1556 (Fed. Cir. Mar. 22, 2022); *Oak Grove Techs.*, No. 22-1557 (Fed. Cir. Mar. 22, 2022).

[100] *See Oak Grove Techs.*, 155 Fed. Cl. at 102–06.

inconsistencies in one of the proposals' cost versus price volume which should have rendered that proposal deficient.[101]

It is in occasions such as *Oak Grove*, where the integrity of the procurement process is at stake, that full and open competition must win the day against national security concerns to preserve the procurement process. To allow an awarded contract to move forward when an agency failed to properly evaluate proposals based on the ground rules it set would bring the entire procurement process into question. As the CFC and commentators have noted, while national security is important, competition "should not be a secondary consideration in government procurement."[102]

However, as discussed above in regard to the JEDI contract and the DGSC-A2 contract, there exist many times when national security should outweigh full and open competition to ensure that the country does not exhibit a weakness in its national security.[103] The distinction that can be drawn between the JEDI and DGSC-A2 contracts and the contract at issue in *Oak Grove* is that the challenges to the JEDI and DGSC-A2 contracts were challenges to the way the agency chose to pursue a procurement, or challenges to the type of procurement, while the *Oak Grove* challenge was to how the agency went about awarding the procurement once it chose its type.[104] Additionally, the JEDI and DGSC-A2 contracts were entirely new procurements, while *Oak Grove* involved an existing procurement where the need could be immediately

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[101] *See id.* at 106.

[102] Gunasekara, *supra* note 44, at 581–82 (quoting DataPath, Inc. v. United States, 87 Fed. Cl. 162, 166 (2009)).

[103] *See, e.g.*, Overstreet Elec. Co. v. United States, 59 Fed. Cl. 99, 118–19 (2003) ("In these times of heightened security at home, as well as lethal hostilities overseas, it is appropriate for the court to weigh in its calculus that the nation can ill afford any temporary, let alone permanent, weakness in national security."); Gunasekara, *supra* note 44, at 582.

[104] *Compare* Oracle Am., Inc., B-416657 et al., 18 CPD ¶ 391, 391(Comp. Gen. Nov. 14, 2018) (protesting the Army's decision to award a single JEDI procurement contract instead of multiple awards at the GAO), Oracle Am., Inc. v. United States, 144 Fed. Cl. 88, 91 (2019) (challenging the JEDI procurement process at the CFC), Amazon Web Servs. v. United States, 147 Fed. Cl. 146, 149 (2020) (seeking an injunction at the CFC based on perceived errors in the Army's evaluation of proposals for the JEDI contract), Palantir USG, Inc., B-412746, 16 CPD ¶ 138, 138 (Comp. Gen. May 18, 2016) (challenging the Army's market research which led them to seek out a non-commercial solution rather than a commercial one for the DCGS-A2 contract), *and* Palantir USG, Inc. v. United States, 129 Fed. Cl. 218, 221–22 (2016) *aff'd*, 904 F.3d 980 (Fed. Cir. 2018) (protesting the Army's use of single-source rather than multi-source DCGS-A2 procurement at the CFC), *with* Oak Grove Techs., LLC, B-418427.6 et al., 21 CPD ¶ 8, 8 (Comp. Gen. Dec. 18, 2020) (opposing the Army's determination that Oak Grove could not meet one of the SOF RAPTOR IV solicitation factors), *and Oak Grove Techs.*, 155 Fed. Cl. at 94 (protesting the same at the CFC).

covered through bridge contracts.[105] In all cases, there existed an open question: what can be done to ensure that national security can be given deference over full and open competition when the integrity of the procurement process is not at stake.

III. Recommendations

What can be done to ensure that national security can trump full and open competition when it needs to, but is also able to bend to full and open competition when the integrity of the procurement process requires it to? Two potential solutions arise: (1) amending the FAR, the Tucker Act, and CICA to limit the two bites at the apple that normally occur with bid protests when national security is rightfully invoked,[106] or (2) amending the Tucker Act to clarify how much deference is owed to national security concerns in lieu of using broad language such as "due regard."

A. Rewriting CICA

While it is normal for plaintiffs to have multiple forums to choose from for their challenges, it is abnormal for that choice to remain after a decision on the merits has been reached by a tribunal.[107] Due to the nature of GAO decisions being recommendations, under the current structure of CICA, the Tucker Act, and the FAR, litigants may get a second bite at the apple. If litigants do not like their GAO recommendation, they may take the case to the CFC for a final decision on the merits.[108]

To avoid this wasteful result, this Article proposes the following solution: once an entity brings a bid protest at the GAO, if the executive agency rightfully asserts a national security exception to full and open competition, then the agency may elect to have the case removed to the CFC for a decision on the merits on an expedited track. To achieve this result, the following language (in bold) is recommended as an addition to 31 U.S.C. § 3553:

> (b)(1) Within one day after the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.
>
> **(2) When, within 10 days of notice of the protest, the head of the procuring activity responsible for award of a contract asserts national security or national defense as an exception to full and open competition as authorized by law, the**

[105] *See Oracle Am.*, 144 Fed. Cl. at 92; *Palantir USG*, 129 Fed. Cl. at 222; *Oak Grove Techs.*, 155 Fed. Cl. at 94.

[106] *See* Saunders & Butler, *supra* note 54, at 558–59.

[107] *See Res Judicata*, Black's Law Dictionary (11th ed. 2019) (outlining the general principle that a case may not be relitigated once a decision on the merits is reached by a competent tribunal).

[108] *See* discussion *supra* Section I.B.

> **Federal agency shall have the right to request for the protest to be removed to the Court of Federal Claims for a decision on the merits in accordance with that court's bid protest regulations.**
>
> **(A) Required with this assertion is a statement in writing supporting the national security or national defense concern raised, and how an expedited resolution of the protest will minimize or eliminate the concern.**
>
> **(B) An agency's assertion of a national security or national defense exception is reviewable by the Comptroller General for abuse of discretion of the Federal agency's decision to invoke the expedited litigation.**
>
> **(a) The Comptroller General must give deference to the agency's decision if national security or national defense could in any way be affected and must refer the protest for resolution at the Court of Federal Claims.**
>
> **(b) If the Comptroller General determines the agency has abused its discretion, then the request will be denied and the Government Accountability Office will continue its review of the protest.**
>
> **(3)** (2) Except as provided . . . .[109]

This solution allows for the urgency of national security concerns to be handled, but also attempts to limit abuse of the expedited resolution process. Ultimately, this solution will reduce the time between a protest being brought and the Federal Circuit's eventual review. On the other hand, this solution does not clarify the deference that CFC judges, and the Federal Circuit on appeal, are required to give to an agency's assertion of national security or defense.

B. Rewriting the Tucker Act

Another potential solution to these concerns is amending the language in the Tucker Act to formalize the amount of deference owed to national security at the CFC. The current language of the Tucker Act is: "In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action."[110]

Proposed in bold is the following amendment to the relevant provision of the Act:

> In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action. **In giving due regard, the courts shall weigh the need for consistency and openness in the procurements against any national security or national defense concern raised by the agency. National security or national**

[109] 31 U.S.C. § 3553 (2018) (proposed additions in bold).

[110] 28 U.S.C. § 1491(b)(3) (2018).

> **defense concerns shall be reviewed by this court for abuse of discretion only, weighing the agency's expertise in favor of deference to the agency.**[111]

This solution allows the courts to still have discretion to hear the case but clarifies the amount of discretion given to an agency's assertion of a national security concern due to the agency's expertise and knowledge of the area in which the procurement is being sought. Ultimately, this solution also shifts the analysis of the CFC, and the Federal Circuit on appeal, from an arbitrary and capricious review to one for abuse of discretion.

Conclusion

In conclusion, the sometimes-warring interests of full and open competition and national security will require one interest to bend to the other depending on what is at stake. Practitioners and adjudicators alike must keep in mind that national security can only override the fundamental ideal of full and open competition in limited circumstances. Even national security must bend to concepts that are core in the history of the United States such as full and open competition or fundamental constitutional rights. As the world continues to evolve, national security concerns evolve with it. Without taking deliberate steps to modify procurement practices and laws, the United States will continue to struggle to find the perfect balance between the public interest in national security and the private interests on which the country was founded.

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[111] *Id.* (proposed additions in bold).

The Exception, Not the Rule: Using the Corporate Duty of Loyalty to Protect Alaska Native Subsistence

Katharine M. Cusick*

Introduction

In the body of federal Indian law, "Alaska is often the exception, not the rule."[1] The Alaska Native Claims Settlement Act ("ANCSA"), passed in 1971,[2] exemplifies Alaska's exceptional nature because it was an extreme departure from the preceding 200 years of federal Indian law and policy.[3] Not only was ANCSA the largest land settlement in the history of the United States,[4] but it also married the concept of Indigenous self-determination with the modern corporate form.[5] Rather than establishing tribal reservations as the United States previously did for Indigenous peoples,[6] ANCSA established more than 200 corporations under Alaska law and granted these corporations title to forty-four million acres of Alaska Natives' ancestral homeland in fee simple.[7]

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[1] Sturgeon v. Frost, 577 U.S. 424, 440 (2016).

[2] *See* Alaska Native Claims Settlement Act, Pub. L. No. 92–203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h (2018)).

[3] *See* Meghan Sullivan, *The Modern Treaty: Protecting Alaska Native Land, Values*, Indian Country Today (Jun. 7, 2021) [hereinafter Sullivan, *The Modern Treaty*], https://indiancountrytoday.com/news/the-modern-treaty-protecting-alaska-native-land-values [https://perma.cc/UWZ2-JYJA]. *See generally* David H. Getches et al., Cases and Materials on Federal Indian Law 958–93 (7th ed. 2017) (dissecting historical background of ANCSA and comparing previous established law with consequences of ANCSA).

[4] *See* Sullivan, *The Modern Treaty*, *supra* note 3.

[5] *See* Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2439 (2021).

[6] *See generally* Getches et al., *supra* note 3, at 168–276 (describing the formation, dissolution, and reformation of tribal reservations in the contiguous United States from 1871 to present day).

[7] *See* 43 U.S.C. §§ 1601–1629h; *Yellen*, 141 S. Ct. at 2439.

However favorable it may seem on its face, ANCSA has come to present as many challenges for Alaska Native groups as benefits.[8] It divested Native Alaskans of unencumbered access to their ancestral homelands and their ability to practice subsistence—including traditional hunting, fishing, and gathering practices that form the core of many Alaska Native cultures.[9] ANCSA opened Alaskan natural resources to unsustainable overuse by non-Native individuals such that there is often not enough left for the subsistence uses which sustain Native communities, and it rendered Alaska Natives unable to protect their rights to practice subsistence activities or to recover against the United States when those rights are infringed.[10] The nature of ANCSA as a double-edged sword echoes the challenges that plague the corpus of federal Indian law more generally, where the actions of the federal government, that ostensibly give Indigenous peoples a greater degree of autonomy over themselves, their lands, and their resources, actually serve to deprive Native peoples of their rights.[11] New-age problems like intensifying climate change further threaten Alaska's natural resources, which already suffer from overconsumption due to lack of sufficient protections for subsistence uses under both state and federal law.[12] Now more than ever, Alaska Natives need the support of the United States to enforce their traditional subsistence rights.

This Note proposes that the United States Court of Appeals for the Federal Circuit ("Federal Circuit") determine liability for claims by Alaska Native Corporations ("ANCs") against the United States by using the standard for the fiduciary duty of loyalty that applies to corporate directors rather than the traditional trust responsibility standard. Specifically, because the United States has plenary powers over all Native entities, including ANCs,[13] and because the federal government not only played an integral role in the formation of

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[8] *See* Sullivan, *The Modern Treaty*, *supra* note 3.

[9] *See* Meghan Sullivan, *'We Don't Exist Out Here' Without Subsistence*, Indian Country Today (Oct. 19, 2021) [hereinafter Sullivan, *Subsistence*], https://indiancountrytoday.com/news/we-dont-exist-out-here-without-subsistence [https://perma.cc/ZZR9-Y62A].

[10] *See id.*

[11] *See* Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 Mich. J. Env't & Admin. L. 397, 400 (2017).

[12] *See* Sullivan, *Subsistence*, *supra* note 9.

[13] *See* Getches et al., *supra* note 3, at 339. In general, "plenary power" means "power that is broadly construed." *Plenary Power*, Black's Law Dictionary (11th ed. 2019). In the context of federal Indian law, plenary power refers to the ability of the United States to act (or refrain from acting) in a manner that alters the rights, duties, liabilities, or other legal relations of Indian tribes without the input or consent of the tribes themselves. *See* Getches et al., *supra* note 3, at 339.

ANCs but continues to influence the way ANCs operate,[14] the Federal Circuit should treat the government as a de facto corporate director of all ANCs. As a corporate director, the United States would owe both ANCs and their shareholders, who are exclusively Alaska Native individuals, the corporate fiduciary duty of loyalty.[15] This judicial solution will enable Alaska Native shareholders to recover damages against the United States for problems presented to them by ANCSA.

Part I of this Note examines the history of the legal interactions between Alaska Native groups and the United States that led to the development of ANCSA. It puts the relationship between Alaska Natives and the United States in the broader context of federal Indigenous law and describes the process by which Alaska Native individuals and groups, including ANCs, can bring claims for damages against the United States.[16] Subsequently, Part I will present a summary of corporate common and statutory law that governs ANCs.

Part II analyzes the intended and unintended consequences of ANCSA for Alaska Native peoples and how those consequences have placed Alaska Natives in a dire situation with respect to their traditional subsistence practices and the ability for their cultures to persist under the legal framework of ANCSA. It describes how ANCSA renders Alaska Natives unable to recover damages from the United States in a manner that Indigenous peoples in the lower forty-eight states can, and it highlights Alaska Natives' confusion about how to move forward as cultural groups when their identities are tied to a corporation. Finally, in Part III, this Note proposes how the Federal Circuit should move forward in future cases by applying the corporate fiduciary duty of loyalty to the United States as a de facto director of ANCs.

By utilizing the corporate duty of loyalty to hold the United States liable to Alaska Natives via ANCs, the Federal Circuit could protect the rights of Alaskans that ANCSA has ignored and find what the Supreme Court has already established: that Alaska is truly the exception to the rule.

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[14] *See, e.g.*, David S. Case & David A. Voluck, Alaska Natives and American Laws 35 (3d ed. 2012) (describing the federal government's development of ANCSA, which formed ANCs); Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2439 (2021) (detailing the distribution of COVID-19 relief funds to ANCs).

[15] ANCs were formed under Alaska law, *see* 43 U.S.C. § 1602(g), (j) (2018), and Alaska, like almost all states, imposes a duty of loyalty on directors of corporations. *See* Alaska Stat. Ann. § 10.06.210(1)(L), (M) (West 2022); Jeffrey D. Bauman et al., Business Organizations Law and Policy 748–50 (9th ed. 2017).

[16] The Tucker Act grants jurisdiction to the United States Court of Federal Claims to hear money claims against the United States. *See* 28 U.S.C. § 1491(a)(1) (2018). The Federal Circuit has appellate jurisdiction over the Court of Federal Claims. *See* 28 U.S.C. § 1295(a)(3) (2018).

I. Background

A. Historical and Cultural Overview of Alaska Native Peoples

1. Subsistence: An Alaska Native Way of Life

Fundamental to the purpose of this Note and the need for a solution to the problems presented by ANCSA is subsistence. Subsistence is much more than sustenance or food security; it is a concept that comprises traditional cultural practices that have been at the core of Alaska Native culture for thousands of years, including hunting, fishing, transportation, technology, art, language, and religion.[17] Inextricably linked with subsistence is land and Alaska Natives' deep connection to it.[18]

Alaska Natives have been living in what is now the state of Alaska for more than 11,300 years.[19] Because of the vast size of the region, approximately 570,000 square miles of land and 95,000 square miles of water,[20] Alaska Native communities are numerous and diverse.[21] Five main ethnic groups constitute the broader group now known as Alaska Natives: Northwest Coast Indians, Inupiaqs, Yupiks, Aleuts, and Athabascans.[22] Each of these groups has a rich and unique culture, but they all share a history of subsistence living.[23]

The nature of subsistence varies across different Alaska Native communities, but it can be broadly described as alimentary "cultural[,] and spiritual sustenance" based on existing seasonal and ecological cycles in nature.[24] Specific subsistence practices connect contemporary Alaska Natives to their ancestors

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[17] *See* Sullivan, *Subsistence*, *supra* note 9; Willie Iggiagruk Hensley, *ANCSA at 50: How Alaska Natives Won the Land Claims Battle*, Alaska Mag. (Oct. 3, 2021), https://alaskamagazine.com/authentic-alaska/culture/ancsa-at-50-how-alaska-natives-won-the-land-claims-battle/ [https://perma.cc/R7MW-HKQT].

[18] *See* Hensley, *supra* note 17 ("The key to our cultural survival was our land . . . .").

[19] *See* Getches et al., *supra* note 3, at 958.

[20] *See State Area Measurements and Internal Point Coordinates*, U.S. Census Bureau (Dec. 16, 2021), https://www.census.gov/geographies/reference-files/2010/geo/state-area.html [https://perma.cc/CHX8-X38T].

[21] *See* Meghan Sullivan, *Alaska Natives' Complicated Identities Part 1: Can ANCSA Answer, 'Where Are You From?'*, Indian Country Today (July 15, 2021) [hereinafter Sullivan, *Complicated Identities*], https://indiancountrytoday.com/news/alaska-natives-complicated-identities [https://perma.cc/7SBS-8444].

[22] *See Alaska Natives*, State of Alaska: Alaska Kids' Corner, https://alaska.gov/kids/learn/nativeculture.htm (last visited Feb. 4, 2023) [https://perma.cc/9DCN-MJGJ].

[23] *See* Sullivan, *Complicated Identities*, *supra* note 21; Hensley, *supra* note 17.

[24] Robert T. Anderson, *The* Katie John *Litigation: A Continuing Search for Alaska Native Fishing Rights After ANCSA*, 51 Ariz. State L.J. 845, 846 (2019) [hereinafter Anderson, *The* Katie John *Litigation*]; *see* Sophie Thériault et al., *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 Alaska L. Rev. 35, 37 (2005).

and their culture.[25] For example, the abundance of food sources in the Copper River fishing grounds led a subgroup of Athabascan people to settle in, and fiercely protect, what is now the Ahtna region of southeast Alaska over 2,000 years ago.[26] To modern-day Ahtna people, this region is not merely "a set of separate or distinct historical sites," but "a terrain that is lived in and lived with . . . an 'idea,' an 'area' integral to a people's identity and existence."[27]

With such a close connection between community and space, it is easy even for an outsider to understand the devastation that the Ahtna people felt when the Alaska state government adopted a regulation forbidding fish harvesting from the Copper River in the early 1960s.[28] Not only could locals no longer derive food from the Copper River, but their 12,000-year-old way of life was interrupted by a state governing body that had existed for less than seven years.[29] This example highlights that subsistence encapsulates food security, cultivating renewable resources from the land, and sharing rituals among community members that "are intricately woven into the fabric of [Alaska Natives'] social, psychological, and religious life."[30]

Despite myriad instances of state and federal government intervention, subsistence is still very much alive in Alaska Native communities.[31] Today, subsistence is not only threatened by such government intervention but also climate change, which is wreaking havoc on Alaska's arctic environment.[32]

2. Alaska Native Contact with Europeans and the United States

The unique circumstances of Alaska's geographic position, and its internal cultural and topographic diversity, help account for its exceptional nature within federal Indian law.[33] Alaska's physical isolation from the contiguous United States meant that European powers did not develop colonial interest

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[25] *See* Sullivan, *Subsistence*, *supra* note 9.

[26] *See* Anderson, *The* Katie John *Litigation*, *supra* note 24, at 846–47.

[27] William E. Simeone, Along the Alts'e'tnaey Nal'cine Trail: Historical Narratives, Historical Places 9 (2014), https://www.nps.gov/wrst/learn/historyculture/upload/Along-the-A-N-Trail-508-compliant.pdf [https://perma.cc/XU9Y-8R3S].

[28] *See* Anderson, *The* Katie John *Litigation*, *supra* note 24, at 847–48.

[29] *See id.* at 846–47. Since Congress did not admit the state of Alaska into the Union until 1959, the state government at the time of the Copper River closure would only have existed in that form for a maximum of six years, assuming the regulation was enacted between 1960 and 1965. *See* Proclamation No. 3269, 73 Stat. C16 (1959) ("Admission of the State of Alaska into the Union").

[30] Thériault et al., *supra* note 24, at 37 (internal citation omitted).

[31] *See* discussion *infra* Sections I.A.3–4, II.A; Sullivan, *Subsistence*, *supra* note 9.

[32] *See* Sullivan, *Subsistence*, *supra* note 9; discussion *infra* Part II.

[33] *See* Sturgeon v. Frost, 577 U.S. 424, 438–39 (2016); Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2438 (2021).

in the region until more than 200 years after Columbus's infamous landing in North America on what is now the Bahamas.[34] The first contact between aboriginal Alaskans and western colonial powers did not come until the mid-1700s when Russian explorers crossed the Bering Strait into western Alaska.[35] For the next hundred years, Russia counted Alaska as its own territory but in 1867 it ceded its interests in Alaska's lands to the United States through a treaty.[36] The United States made Alaska a territory in 1884,[37] and in *Tee-Hit-Ton Indians v. United States*,[38] the Supreme Court found that Alaska Natives had "aboriginal title" to the lands within the territory but did not "own" (in the Anglo-American sense of property ownership) the lands that they had occupied and used for centuries.[39]

Alaska joined the Union as a state in 1958,[40] which brought new tension to the existing battle for control of Alaskan lands.[41] The increasing number of disputes between the state, federal government, and Native groups over the lands in Alaska became untenable by the late 1960s.[42] Alaska Native individuals and tribes successfully lobbied Congress to begin drafting a bill to

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[34] *See* Getches et al., *supra* note 3, at 958; National Geographic Society, *Oct 12, 1492 CE: Columbus Makes Landfall in the Caribbean*, Nat'l Geographic, https://education.nationalgeographic.org/resource/columbus-makes-landfall-caribbean (last visited Feb. 5, 2023). [https://perma.cc/MS7K-HEKU].

[35] *See* Getches et al., *supra* note 3, at 958.

[36] *See* Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, Russ.-U.S., March 30, 1867, 15 Stat. 539 [hereinafter Alaska Cession Treaty]; Getches et al., *supra* note 3, at 958.

[37] *See* Act Providing a Civil Government for Alaska, Pub. L. No. 48–53, 23 Stat. 24 (1884).

[38] 348 U.S. 272 (1955).

[39] *Id.* at 290–91. "Aboriginal title" is an interest in land that "is not a property right but amounts to a right of occupancy." *Id.* at 279. Alternatively called "original Indian title," aboriginal title only includes the right of Native peoples to possess, occupy, and use land; it does not include the right to transfer the land or the aboriginal title itself. *Id.* at 290. As such, aboriginal title is "not specifically recognized as ownership by Congress." *Id.* at 279. A fundamental aspect of aboriginal title is that Congress could extinguish such title—and thereby terminate Alaska Natives' right to occupy the land—at any time. *See id.* at 290–91.

[40] *See* Admission of the State of Alaska into the Union, Proclamation No. 3269, 73 Stat. C16 (1959).

[41] *See* Getches et al., *supra* note 3, at 959–60; Hensley, *supra* note 17.

[42] *See* Getches et al., *supra* note 3, at 959–60; Gigi Berardi, *Natural Resources, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 Nat. Res. J. 85, 90 (1998) [hereinafter Berardi I]; *see also* Gigi Berardi, *The Alaska Native Claims Settlement Act (ANCSA) — Whose Settlement Was It? An Overview of Salient Issues*, 25 J. Land Res. & Env't L. 131, 131 (2005).

settle Alaska Natives' land claims once and for all, resulting in the eventual passing of ANCSA.[43]

3. The Alaska Native Claims Settlement Act

ANSCA is the most significant legal development for Alaska Native peoples in the history of the United States,[44] and it demonstrates years of advocacy by Alaska Native activists on behalf of their people and their culture.[45] These community leaders negotiated tirelessly and won major concessions from the United States, with the support of many Alaska Native individuals and communities.[46] Reflecting Alaska's exceptional nature in the framework of federal Indian law, ANCSA broke from the United States' traditional manner of handling Indigenous land claims through the imposition of a trust responsibility based on aboriginal title.[47] Instead, ANCSA used a corporate model: it conveyed forty-four million acres, approximately 70,300 square miles, of land and nearly $1 billion to ANCs in exchange for the agreement of Native Alaskans to extinguish all existing and future aboriginal land claims against the United States.[48] Under ANCSA, the ANCs consist of thirteen Regional Corporations[49] and more than 200 Village Corporations.[50] Each corporation received land within their respective regional or village boundaries to own in fee simple.[51] Twelve of the Regional Corporations represent the twelve major regions of Alaska, as defined in ANCSA, according to the ethnic makeup of the Natives who lived there and the boundaries that Native Alaskan groups historically recognized among themselves.[52] The thirteenth Regional Corporation is not attached to a geographic area of Alaska, but rather was created in recognition of Native Alaskan individuals who were not permanent residents of Alaska

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[43] *See* Getches et al., *supra* note 3, at 959–60; Berardi I, *supra* note 42, at 90.

[44] *See* William H. Rodgers, Jr. & Elizabeth Burleson, Environmental Law in Indian Country § 1:6 (3d ed. Nov. 2022 Update).

[45] *See* Meghan Sullivan, *ANCSA 50: Remembering "Power Broker" Alaska Native Leaders*, Indian Country Today (Dec. 10, 2021), https://ictnews.org/culture/ancsa-50-remembering-alaska-native-leaders [https://perma.cc/E5Z9-R2XN]; Hensley, *supra* note 17.

[46] *See* Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 Alaska L. Rev. 107, 110 (2008).

[47] *See* Berardi I, *supra* note 42, at 101; *see also* discussion *infra* Section II.B.3.

[48] *See* Case & Voluck, *supra* note 14, at 35.

[49] *See* 43 U.S.C. § 1606 (2018).

[50] *See* 43 U.S.C. § 1607 (2018); Tana Fitzpatrick, Cong. Rsch. Serv., R46997, Alaska Native Lands and the Alaska Native Claims Settlement Act 5 (2021).

[51] *See* Getches et al., *supra* note 3, at 961.

[52] *See id.*

at the time the Act was passed.[53] All ANCs were incorporated under Alaska state law.[54]

The fee land was divided into two estates under ANCSA: the surface estate and the subsurface estate.[55] The Village Corporations received the surface estate of about twenty-two million of the forty-four million acres of land conveyed through ANCSA,[56] while the Regional Corporations received the subsurface estate of all the Village Corporation-owned lands.[57] The remaining lands were divided among the Regional Corporations based on the population of Alaska Natives living in the region.[58]

Regional population was relevant not only to the division of land among the corporations, but also to the ownership of the corporations themselves.[59] There were approximately 80,000 individuals with at least one quarter Alaska Native ancestry who were alive when ANCSA went into effect on December 18, 1971.[60] ANCSA granted each of these individuals 100 shares of stock in the Regional Corporation for the region where they lived.[61] Residents of Native Villages became shareholders to their Village Corporation in addition to their Regional Corporation.[62] Stock ownership was subject to restrictions—shareholders could not transfer their shares except by bequest to an immediate relative upon death, court-ordered divorce or child support settlement, or

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[53] *See* 43 U.S.C. § 1606(c). The thirteenth Regional Corporation became insolvent in 2007 and is no longer operational. *See* Robert Snigaroff & Craig Richards, *Alaska Native Corporation Endowment Models*, 38 Alaska L. Rev. 1, 12 (2021).

[54] *See Alaska Native Claims Settlement Act (ANCSA) 1971*, Univ. of Alaska Fairbanks, https://uaf.edu/tribal/academics/112/unit-3/alaskanativeclaimssettlementactancsa1971.php (last visited Feb. 2, 2023) [https://perma.cc/YM73-RHGW].

[55] *See* Getches et al., *supra* note 3, at 961. The "surface estate," generally speaking, is the property interest that includes the right to use, occupy, and exclude others from the above-ground area of a tract of land. *Id.* The "subsurface estate"—also called the "mineral estate" or simply "mineral rights"—is the property interest that includes the right to derive resources from the below-ground areas of a tract of land. *Id.* The exact parameters of the surface and subsurface estates identified in ANCSA have been the subject of extensive litigation, the result of which has generally been to favor the Regional Corporations' subsurface rights. *See* Case & Voluck, *supra* note 14, at 174.

[56] *See* 43 U.S.C. § 1611(b) (2018).

[57] *See* 43 U.S.C. § 1613(f) (2018).

[58] *See* Case & Voluck, *supra* note 14, at 171.

[59] *See id.* at 170.

[60] *See Alaska Native Claims Settlement Act (ANCSA) 1971*, *supra* note 54.

[61] *See* 43 U.S.C. § 1606(g) (2018).

[62] *See* Getches et al., *supra* note 3, at 961.

due to a conflict of interest between the individual's profession and the ANC itself.[63]

Congress's intent when passing ANCSA was ostensibly to create an equitable division of land and resources among Alaska Native peoples.[64] ANCSA acknowledged that certain regions of Alaska were more likely to be able to profit from their natural resources than others, so it included section 7(i) to ameliorate the issue.[65] This provision of ANCSA requires Regional Corporations to divide 70% of the revenues they receive from exploitation of the timber and subsurface mineral resources within the region among the other eleven landowning Regional Corporations on a per capita basis.[66] The Regional Corporation is then required to distribute 50% of the funds it receives in the section 7(i) revenue-sharing arrangement to the Village Corporations within its regional boundaries[67] and to the Regional Corporation shareholders who are not also Village Corporation shareholders.[68]

While revenue sharing was part of the negotiated settlement agreement between Alaska Native leaders and the United States to finalize ANCSA, the realities of the program in the years since ANCSA's enactment have been controversial, even fomenting tension among Native Alaskans in different regions.[69] On the other hand, the creation of so many corporations with built-in startup capital provided jobs to thousands of Alaskans during a bleak economic time.[70] Additionally, the revenue from ANCs has helped Alaska Native Village and tribal governments operate important social services for Alaska Natives, especially during the COVID-19 pandemic.[71]

ANCSA established ANCs, laid the groundwork for those corporations to generate future profits for Alaska Native shareholders, and granted the corporations about 70,300 square miles of land in fee simple. In exchange, Alaska

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[63] *See* 43 U.S.C. § 1606(h)(1)(C)(i)–(iii) (2018).

[64] *See* 43 U.S.C. §§ 1601(a), 1605(c), 1606(i)–(m) (2018); Case & Voluck, *supra* note 14, at 176.

[65] Section 7(i) refers to the provision in ANCSA as originally written. *See* Alaska Native Claims Settlement Act, Pub. L. No. 92–203, § 7(i), 85 Stat. 688, 693 (1971). As codified, section7(i) is 43 U.S.C. § 1606(i).

[66] *See* Case & Voluck, *supra* note 14, at 176.

[67] *See* 43 U.S.C. § 1606(k).

[68] *See* 43 U.S.C. § 1606(m).

[69] *See* Aaron M. Schutt, *ANCSA Section 7(i): $40 Million per Word and Counting*, 33 Alaska L. Rev. 229, 242–53 (2016) (describing the decade of litigation between and among Regional and Village Corporations around section 7(i) revenue sharing that was rooted in a division between "haves" and "have-nots" among Alaska Natives).

[70] *See* Gary C. Anders & Kathleen K. Anders, *Incompatible Goals in Unconventional Organization: The Politics of Alaska Native Corporations*, 7 Org. Stud. 213, 218 (1986).

[71] *See* Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2439 (2021).

Natives relinquished aboriginal title claims to the remaining 500,000 square miles of land in the state.[72] As it became clear almost immediately, however, ANCSA did not extinguish, or even acknowledge, Alaska Natives' rights to use their ancestral homelands for the subsistence practices that have sustained them for thousands of years.[73]

4. The Alaska National Interest Lands Conservation Act

Nine years after ANCSA's passage came another hugely significant legal development for Alaska Native land claims—the Alaska National Interest Lands Conservation Act ("ANILCA").[74] Passed in 1980, ANILCA declared approximately 104 million acres of land in Alaska as public lands under the purview of the National Parks Service.[75] The dual purposes of ANILCA were land conservation and protection of Alaska Natives' subsistence practices.[76] Despite the explicit purpose to protect traditional Alaska Native ways of life, the text of ANILCA gave subsistence use priority on the now federally managed lands and waterways not to Indigenous Alaskans specifically, but to *rural* Alaskans.[77] While ANILCA explicitly protected traditional hunting, fishing, and gathering activities on publicly held lands for the general category of rural Alaskans, it created a patchwork of state and federal jurisdiction over the specific subsistence rights of Native Alaskans that will be explored further in Part II of this Note.[78]

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[72] *See* 43 U.S.C. § 1603 (2018). The total land area of Alaska is 570,641 square miles. *See State Area Measurements and Internal Point Coordinates*, U.S. Census Bureau, https://www.census.gov/geographies/reference-files/2010/geo/state-area.html (last visited Feb. 11, 2023) [https://perma.cc/S232-QLTU].

[73] *See* Meghan Sullivan, *ANCSA: A Complete or Incomplete Story of Sovereignty*, Indian Country Today (Feb. 22, 2022) [hereinafter Sullivan, *Complete or Incomplete*], https://indiancountrytoday.com/news/ancsa-a-complete-or-incomplete-story-of-sovereignty [https://perma.cc/J85P-BZ3A].

[74] *See* Case & Voluck, *supra* note 14, at 167.

[75] *See* Alaska National Interest Lands Conservation Act, Pub. L. No. 96–487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101–3233 (2018), 43 U.S.C. §§ 1631–1642); *Tribal Hunting and Fishing Rights: Subsistence (ANILCA 1980)*, Univ. of Alaska Fairbanks, https://uaf.edu/tribal/academics/112/unit-3/tribalhuntingandfishingrightssubsistenceanilca1980.php (last visited Feb. 3, 2023) [https://perma.cc/PY2T-3X66].

[76] *See* 16 U.S.C. § 3111(1), (5) (2018) (protection for subsistence uses essential to protect Native "cultural existence"); Cohen's Handbook of Federal Indian Law § 4.07[3][c][ii] (Nell Jessup Newton ed., 2019) [hereinafter Cohen's Handbook].

[77] *See* 16 U.S.C. §§ 3112–3114 (2018).

[78] *See* discussion *infra* Section II.B.

B. Core Concepts of Federal Indian Law

Both ANCSA and ANILCA arose in the context of hundreds of years of tumultuous legal and political interactions between the United States and Indigenous peoples. Alaska Natives have generally been subject to the broad corpus of federal Indian law that developed through the interactions of the federal government and the Native peoples of the contiguous United States.[79] Federal Indian law is the term commonly used in legal discourse for the theories that American courts have developed to interpret the Constitution, treaties, and statutes that govern Indigenous peoples living within the borders of the United States.[80] Several core features of the relationship between Indigenous peoples and the United States are sovereignty, usufructuary rights, and the trust relationship.

1. Sovereignty

Sovereignty has always been the fundamental principle at issue between the United States and Indigenous peoples, including Native Alaskans, because it defines the boundaries of Indigenous self-governance even while Native Americans are subject to the laws of the United States.[81] Before European contact, Native American tribes and villages were sovereign—that is, "vested with independent and supreme authority"[82]—over their own internal affairs, including political governance, community welfare, and interacting with other sovereign groups; they were essentially independent nations.[83]

In the lower forty-eight states, sovereign Indigenous tribes entered treaties with the American colonies and later, the United States itself.[84] In doing so, they ceded some of their internal governance controls, such as freely using the lands they occupied, in exchange for greater protections from external threats like other Indigenous groups or colonial powers.[85] These early dealings were on a nation-to-nation basis and were contemplated by the Constitution.[86] Throughout the eighteenth and nineteenth centuries, however, the United States exerted its military and political power to infringe upon the lands and internal governing practices of tribes in the lower forty-eight states.[87] The

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[79] *See* Case & Voluck, *supra* note 14, at 2.

[80] *See id.* at 1 n.1.

[81] *See* David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law 98–99 (2001).

[82] *Sovereign*, Black's Law Dictionary (11th ed. 2019).

[83] *See* Cohen's Handbook, *supra* note 76, § 4.01[1][a].

[84] *See id.*

[85] *See* Rey-Bear & Fletcher, *supra* note 11, at 403 n.23.

[86] *See* Cohen's Handbook, *supra* note 76, § 4.01[1][a]; U.S. Const. art. I, § 8, cl. 3.

[87] *See* Joanne Barker, *For Whom Sovereignty Matters*, *in* Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination

United States broke, renegotiated, or simply ignored so many of the treaties it made with tribes[88] that the interactions no longer resembled those between two independently sovereign nations, but rather resembled those "of a ward to his guardian."[89]

Three Supreme Court cases decided in the early 1800s form the structural basis of the modern concept of Indigenous sovereignty.[90] Known as the Marshall Trilogy after Chief Justice John Marshall, who authored the opinions,[91] these cases were the legal precedent for the United States to claim Indian lands and classify them as "domestic dependent nations."[92] Domestic dependent nations, according to Marshall, better reflected the evolving relationship between tribes and the United States at that time because, while most tribes had some vestiges of the sovereignty they previously enjoyed, the political reality of the day was that the United States had ultimate authority over how tribes operated, the lands they could claim as their own, and even their membership.[93]

Even though the relationship between Alaska Natives and the United States did not center around treaties as with tribes in the lower forty-eight states, American courts applied Marshall's concept of sovereignty to Alaska Natives as well.[94] It is still the guardian-ward definition of Indigenous sovereignty that governs the rights of contemporary Alaska Native peoples, and as such, it is within the guardian-ward context that Indigenous peoples operate when they bring claims in U.S. courts to assert their rights.[95]

2. Usufructuary Rights

One of the primary consequences of the Marshall Trilogy's conception of sovereignty is that it complicates the ability of Indigenous peoples to enforce their usufructuary rights. Usufructuary rights are the rights of an individual

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1, 5 (Joanne Barker ed., 2005).

[88] *See id.*

[89] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). A ward-guardian relationship is that between a person (the guardian) "who has the legal authority and duty to care for" another person (the ward, who is usually a minor) "especially because of the other's infancy, incapacity, or disability." *Guardian*, Black's Law Dictionary (11th ed. 2019); *see also Ward*, Black's Law Dictionary (11th ed. 2019).

[90] *See* Getches et al., *supra* note 3, at 3; Johnson v. McIntosh, 21 U.S. 543 (1823); *Cherokee Nation*, 30 U.S. 1; Worcester v. Georgia, 31 U.S. 515 (1832).

[91] *See* Getches et al., *supra* note 3, at 3.

[92] *Cherokee Nation*, 30 U.S. at 17.

[93] *See id.*

[94] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 273, 279–80 (1955).

[95] *See Cherokee Nation*, 30 U.S. at 17; Taiaiake Alfred, *Sovereignty*, *in* A Companion to American Indian History 460, 464–66 (Philip J. Deloria & Neal Salisbury eds., 2004).

or group to use a piece of personal or real property even if that individual or group does not own the title to the property.[96] The Marshall Trilogy and subsequent cases acknowledge that Native peoples possess such rights as part of their aboriginal claims to their ancestral homelands.[97]

In attempting to exercise usufructuary rights, Indigenous peoples across what is now the United States and Canada have faced opposition, sometimes violent, from local non-Native community members,[98] as well as from governing bodies at the local, state, and federal levels.[99] Such opposition usually stems from the fact that opponents view these treaty rights as a handout or special privilege given only to Native people.[100]

For Native Alaskans, usufructuary rights include the ability to conduct traditional subsistence activities like hunting, fishing, and gathering both on lands owned or governed by ANCs or Alaska Native tribes and on lands in surrounding areas which comprise each tribe's ancestral homeland but are owned by the state or the federal government.[101] Usufructuary rights can present a challenge to the notion of sovereignty across federal Indian law, especially for Native Alaskans who depend on subsistence practices but do not have sovereignty over the land on which they perform those practices.[102]

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[96] *See Usufruct*, Black's Law Dictionary (11th ed. 2019).

[97] *See* Richard L. Barnes, *From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction*, 57 Loy. L. Rev. 435, 440, 443 (2012) (citing Johnson v. McIntosh, 21 U.S. 543, 603–04 (1823) and Worcester v. Georgia, 31 U.S. 515, 520 (1832)); Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, 33 Alaska L. Rev. 187, 203 n.112 (2016) [hereinafter Anderson, *Sovereignty and Subsistence*] (citing Mitchell v. United States, 34 U.S. 711, 746 (1835)).

[98] *See* Vine Deloria Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 Ariz. L. Rev. 963, 966–67 (1996); Zoltán Grossman, Unlikely Alliances: Native Nations and White Communities Join to Defend Rural Lands 6–7 (2017).

[99] *See* Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J.L. Reform 417, 467–68 (2013).

[100] *See* Grossman, *supra* note 98, at 5, 7.

[101] *See* Getches et al., *supra* note 3, at 988, 991.

[102] *See, e.g.*, United States v. Winans, 198 U.S. 371, 371, 378 (1905) (holding that the state of Washington had no authority to exclude citizens of the Yakima Nation from fishing in "usual and accustomed places" that were outside of their reservation because the treaty between the Yakima and the United States expressly granted these rights and the treaties supersede contrasting state laws); Puyallup Tribe v. Dep't of Game (*Puyallup I*), 391 U.S. 392, 398 (1968) (holding that, notwithstanding *Winans*, states can regulate tribal usufructuary rights "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians" because the treaty in question was not specific as to the "mode" of fishing in the "usual and accustomed places"); Dep't of Game v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 48 (1973) (holding that the state of Washington

3. The Trust Relationship

Also stemming from the legal concept of Indigenous sovereignty is the trust relationship, which originated alongside the notion of "domestic dependent nations."[103] In defining the relationship between Indigenous peoples and the United States as one akin to a guardian-ward relationship, the Marshall Trilogy laid out the first formulation of what is now called the trust relationship.[104] At common law, guardians owe fiduciary duties to their wards much like the duties owed by trustees to the beneficiaries of the trust they oversee.[105] The trust relationship between the United States and Indians is distinct from a standard trustee-beneficiary relationship; Marshall's opinions indicate that it derives not from common law or statute but from some natural or inherent order of authority.[106]

In a subsequent decision, *United States v. Kagama*,[107] the Supreme Court determined that the federal government would have jurisdiction over major criminal acts that took place on Indian reservations, rather than allowing the tribal governing bodies to oversee such cases.[108] The final case that solidified the nature of the trust relationship was *Lone Wolf v. Hitchcock*,[109] a landmark case that granted the federal government "plenary power" over all Indigenous nations and their operations.[110] A member of Congress justified the decision by comparing getting tribal consent on spending with obtaining the permission of a "child of 8 or 10 years of age" to invest the child's funds.[111] The trust responsibility is the traditional means of regulating the federal-Indian relationship.[112] Many Native people disliked the trust relationship and distrusted the

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discriminated against Indians when, after the decision in *Puyallup I*, the state continued to regulate the ability of the Puyallup tribe to fish in their "usual and accustomed places").

[103] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[104] *See* Barnes, *supra* note 97, at 442–43, 450–52.

[105] *See id.* at 450–52, 472.

[106] *See id.* at 442–43; Anderson, *Sovereignty and Subsistence*, *supra* note 97, at 190–91.

[107] 118 U.S. 375 (1886).

[108] *See id.* at 383.

[109] 187 U.S. 553 (1903).

[110] *Id.* at 565. "Plenary power" means a federal authority that is "paramount" over Indian tribes and that is not subject to judicial review under the political question doctrine. Walter Echo-Hawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided 163 (2010).

[111] Routel & Holth, *supra* note 99, at 428–29.

[112] *See, e.g.*, United States v. Kagama, 118 U.S. 375, 383–84 (1886) (holding that the federal government has jurisdiction over crimes between Indians of the same tribe that occur within a reservation because of the historical relationship between Indian tribes and the United States that is akin to the relationship between a ward and a guardian, which under the common law of trusteeship imposes a duty upon the guardian to act in the best

federal government for enforcing it.[113] "The trust relationship implies or results in Indian tribes being less than complete international sovereigns . . . The trust relationship has benefits for Indians, but it also has a negative aspect that means there is a subsidiary relationship to another sovereign."[114]

C. Bringing Claims Against the United States: The Jurisdiction of the Federal Circuit and the Indian Tucker Act

A breach of trust claim is one of the most common of the limited ways that Native individuals and tribes can obtain relief for wrongs done to them by the federal government.[115] The other claims that Native peoples bring against the United States fall into the following categories: (1) Fifth Amendment takings; (2) breach of contract; (3) Fifth and Fourteenth Amendment due process; (4) Fourteenth Amendment equal protection; and (5) breach of fiduciary duty, including breach of the trust relationship.[116]

The Federal Circuit hears many federal Indian law cases because it has jurisdiction over appeals of final decisions from the United States Court of Federal Claims ("Court of Federal Claims").[117] The Court of Federal Claims can hear "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States."[118] Thus, the Federal Circuit hears federal Indian law cases based on Fifth Amendment takings claims, which are founded on the Constitution, breach of contract claims (which are founded upon contracts with the United States), and breach of

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interests of the ward); United States v. Sandoval, 213 U.S. 28, 46 (1913) (finding that the United States possesses "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired"); United States v. Mitchell, 463 U.S. 206, 225 (1983) (establishing that when the United States exercises "elaborate control" over Indian resources, lands, and funds, then the United States is acting as a common-law trustee even if nothing in the underlying statute or applicable governing document explicitly identifies or creates a fiduciary relationship).

[113] *See* Getches et al., *supra* note 3, at 338.

[114] Charles F. Wilkinson et al., *The Trust Obligation*, *in* Indian Self-Rule: First-Hand Accounts of Indian-White Relations from Roosevelt to Reagan 302, 302 (Kenneth R. Philip ed., Utah State Univ. Press 1995) (1986).

[115] *See* Rey-Bear & Fletcher, *supra* note 11, at 407, 454.

[116] *See* Cohen's Handbook, *supra* note 76, §§ 5.04[2], 5.06[4].

[117] *See* 28 U.S.C. § 1295(a)(3) (2018); *Court Jurisdiction*, Fed. Cir., https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/ (last visited Feb. 1, 2023) [https://perma.cc/DVS3-QNWU].

[118] 28 U.S.C. § 1491(a)(1) (2018).

trust claims (which are founded, albeit in an attenuated manner, on the Constitution and on various other acts of Congress).[119]

To bring a claim for damages in the Court of Federal Claims, Indigenous plaintiffs often use the Indian Tucker Act.[120] The Indian Tucker Act waives the sovereign immunity of the United States so long as two criteria are met:[121] (1) the plaintiff must "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties"[122] and (2) the court decides that the source of law identified by the plaintiff "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties . . . impose[d]."[123] To satisfy the first element, the substantive source of law must "bear[] the hallmarks of a conventional fiduciary relationship."[124] To satisfy the second element, the identified source of law must "be money-mandating as to the particular class of plaintiffs."[125]

While the Indian Tucker Act enables Indigenous groups to sue the United States for breaches of fiduciary duty broadly, the specific fiduciary duty analyzed in such suits has almost exclusively been the trust obligation.[126] The trust obligation has been the only type of fiduciary relationship that U.S. courts have found to exist between the United States and Indians because of the nature of the federal-Indian relationship as described in the Marshall Trilogy.[127]

D. Corporate Law and Corporate Directors' Duties

Alaska state law governs ANCs because the entities are incorporated in Alaska.[128] Generally, the power to conduct and manage the day-to-day business operations of a corporation is vested in a board of directors,[129] the members of which are held to certain standards of behavior when they act on behalf

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[119] *See* Cohen's Handbook, *supra* note 76, § 5.06[4].

[120] *See* 28 U.S.C. § 1505 (2018); United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 538 (1980); United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 211–12 (1983).

[121] *See Mitchell I*, 445 U.S. at 541–42; *Mitchell II*, 463 U.S. at 212, 216, 218; Wolfchild v. United States, 731 F.3d 1280, 1288 (Fed. Cir. 2013).

[122] United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (citing *Mitchell II*, 463 U.S. at 216–17, 219).

[123] *Mitchell II*, 463 U.S. at 219.

[124] Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015).

[125] Greenlee Cnty. v. United States, 487 F.3d 871, 876 n.2 (Fed. Cir. 2007).

[126] *See, e.g.*, United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003); United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011); *Navajo Nation*, 537 U.S. at 488; *Mitchell II*, 463 U.S. at 206; *Mitchell I*, 445 U.S. at 535.

[127] *See* discussion *supra* Section I.B.3.

[128] *See* Case & Voluck, *supra* note 14, at 35, 195.

[129] *See* Alaska Stat. Ann. § 10.06.450(a) (West 2022).

of the corporation they serve.[130] Generally, shareholders elect directors; however, many U.S. jurisdictions have recognized, either via the courts or through legislation, the possibility of a "quasi" or "de facto" director where someone who was not formally elected or appointed to the board of directors nevertheless performs a director's duties and thus should be subject to a director's liabilities.[131]

Corporate directors owe the corporation and its shareholders a duty of care and a duty of loyalty.[132] The duty of care obliges a director of a corporation to act "in a manner the director reasonably believes to be in the best interests of the corporation" and with the care "that an ordinarily prudent person in a like position would use under similar circumstances."[133] The duty of loyalty requires that directors place the interests of the corporation before their own personal or financial interests and includes the obligation to refrain from self-dealing, to strive for fairness in all business decisions, to act in good faith, and to inform shareholders of business decisions that have the potential to affect the welfare of the corporation.[134] The same duties apply to both de jure and de facto directors.[135]

Shareholders who bring suits against directors are more likely to prevail on a theory of breach of the duty of loyalty than on breach of the duty of

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[130] *See id.* § 10.06.210(1)(L), (M); Bauman et al., *supra* note 15, at 748–49.

[131] *See* Erik L. Katz, Board Advisers and Corporate Advisory Boards, Thomson Reuters: Prac. L. Connect, https://us.practicallaw.thomsonreuters.com/5-544-9105 (last visited Feb. 13, 2024) (cases maintained) [https://perma.cc/8782-FD7Y]; *e.g.*, Olster Inst. v. Forde, 333 F.3d 832, 838 (7th Cir. 2003). Many states have codified the obligations of a de facto director. *See, e.g.*, Tex. Bus. Corp. Act Ann. art. 21.401 (West 2013); S.D Codified Laws § 47-29-6 (1983); Utah Code Ann. § 16-10a-801 (West 2010); 805 Ill. Comp. Stat. 5 / 8.05 (1994); N.J. Stat. Ann. § 14a:6-1 (West 1989); Del. Code Ann. tit. 8 § 141 (West 2020); Mo. Rev. Stat. § 162.291 (2023); Cal. Bus. & Prof. Code § 301 (West 1975); Mass. Gen. Laws ch. 156, § 22 (2023); 15 Pa. Cons. Stat. and Cons. Stat. Ann. § 1725 (West 2023).

[132] *See* Bauman et al., *supra* note 15, at 748.

[133] Alaska Stat. Ann. § 10.06.450(b). It is difficult for shareholders to prevail on claims of breach of the duty of care against the corporation's directors because the standard of liability for such a claim is gross negligence. *See* Bauman et al., *supra* note 15, at 748, 750, 880.

[134] *See* Bauman et al., *supra* note 15, at 748, 843, 846–49, 864, 867. Self-dealing means "[p]articipation in a transaction that benefits oneself instead of another who is owed a fiduciary duty." *Self-Dealing*, Black's Law Dictionary (11th ed. 2019). A conflict of interest arises when there exists "[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties." *Conflict of Interest*, Black's Law Dictionary (11th ed. 2019).

[135] *See* James D. Cox & Thomas Lee Hazen, 1 Treatise on the Law of Corporations § 8:17 (3d ed. Nov. 2023) ("A de facto officer may not exercise the prerogatives of a corporate position and yet avoid its attendant fiduciary duties and liabilities." (quoting S. Seas Corp. v. Sablan, 525 F. Supp. 1033, 1038 (D.N. Mariana Islands 1981))), [https://perma.cc/RM7Z-HPJ8].

care.[136] However, shareholder success in such suits is still difficult because corporate directors receive the benefit of the business judgment rule ("BJR"), a rebuttable presumption that, in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and with the honest belief that the action taken was in the best interest of the company and of the shareholders.[137] The BJR is highly deferential to the decisions of corporate directors, and a court will defer to the decisions of a corporation's board of directors unless (1) directors breach their duty of loyalty because their decision is tainted by fraud, illegality, or conflict of interest or (2) directors breach their duty of care because they do not conduct sufficient investigation or deliberation to make a business judgment.[138] When a director engages in self-dealing or otherwise has a conflict of interest that implicates their duty of loyalty, the director's conduct is evaluated under an entire fairness analysis.[139] The fairness analysis offers less protection to corporate directors because they bear the burden of proof to show the inherent fairness of the transaction rather than the plaintiff.[140]

The directors of ANCs are subject to the fiduciary duties described above just like any other director of an Alaska corporation. As directors of ANCs, however, they have the additional responsibility of managing huge swaths of land to benefit not only their own shareholders, but all shareholders of ANCs through the revenue-sharing provisions of ANCSA.[141]

II. Analysis

Since the cession of the Alaska territory from Russia to the United States in 1867,[142] the federal government has treated Alaska Native communities differently from the Indian tribes of what is now the contiguous United States.[143] The most stark instance of this differential treatment is undoubtedly ANCSA.[144] While its purpose was to settle all past and future Alaska Native land claims, it created as many, if not more, problems for Alaska

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[136] *See* Bauman, *supra* note 15, at 843, 845, 884–85, 897.

[137] *See id.* at 751. The BJR was first applied to directors of Alaska corporations in *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 278 (Alaska 1980). *See also* Fred W. Triem, *Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule*, 24 Alaska L. Rev. 23, 23–24 (2007).

[138] *See* Bauman et al., *supra* note 15, at 755–58, 898.

[139] *See id.* at 861–62.

[140] *See id.* at 765, 867; Triem, *supra* note 137, at 29–33.

[141] *See* discussion *supra* Section I.A.3.

[142] *See* Alaska Cession Treaty, *supra* note 36.

[143] *See* Case & Voluck, *supra* note 14, at 24–25.

[144] *See* Rodgers & Burleson, *supra* note 44, § 1:6.

Native peoples than it solved.[145] Those problems fall into the three broad categories of lack of protections for subsistence living and usufructuary rights, confusion between Alaska Native identity and ANC shareholder status, and fundamental misunderstanding of Indigenous sovereignty in ANCSA and in federal Indian jurisprudence more broadly.

A. Lack of Protection for Alaska Native Subsistence Culture

ANCSA did not protect subsistence; instead it extinguished "any aboriginal hunting and fishing rights" existing at the time, including usufructuary rights.[146] In effect, ANCSA left Alaska Native communities who relied on traditional hunting, fishing, and farming practices vulnerable to encroachment from state regulatory authorities and non-Native neighbors.[147] Native Alaskans have been engaged in a legal and political battle to protect their traditional subsistence practices with the state for decades.[148]

Because ANCSA lacked protections for such a vital part of Alaska Native life and culture, Congress passed ANILCA in 1980, but ANILCA does not adequately fill ANCSA's subsistence gap.[149] First, ANILCA does not explicitly grant Native Alaskans priority to use the ANILCA lands for subsistence; it only acknowledges the hunting and fishing practices of *rural* residents regardless of Native cultural ties to the land.[150] Second, ANILCA only applies to public lands, meaning it does not protect subsistence on the privately owned lands held by ANCs under ANCSA.[151] Thus, subsistence in Alaska is governed by a dual-management system.[152] The state manages hunting and fishing on state and private lands, including ANC-owned land, and gives no preference for subsistence use; instead, it allows for hunting and fishing use by the general public subject to minimal regulation.[153] The federal government, on the other hand, gives priority only to rural subsistence users, some of whom are Alaska Native, on the public lands set aside by ANILCA and implements more robust and sustainable protections than the state.[154]

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[145] *See* Sullivan, *Complete or Incomplete*, *supra* note 73.

[146] 43 U.S.C. § 1603(b) (2018); *see* Anderson, *Sovereignty and Subsistence*, *supra* note 97, at 208. Usufructuary rights stem from aboriginal title. *See* discussion *supra* Section I.B.2.

[147] *See* Sullivan, *Subsistence*, *supra* note 9. *See generally* Thériault et al., *supra* note 24.

[148] *See* Getches et al., *supra* note 3, at 959; Case & Voluck, *supra* note 14, at 74.

[149] *See* Anderson, *Sovereignty and Subsistence*, *supra* note 97, at 212.

[150] *See* 16 U.S.C. §§ 3112–3114; Case & Voluck, *supra* note 14, at 296–97.

[151] *See* Case & Voluck, *supra* note 14, at 296–97.

[152] *See id.*

[153] *See id.*

[154] *See* Cohen's Handbook, *supra* note 76, § 4.07[3][c][ii][C]; E. Barrett Ristroph, *Still Melting: How Climate Change and Subsistence Laws Constrain Alaska Native Village Adaptation*,

On ANC-owned lands, the Alaska Department of Fish and Game ("DFG") manages hunting, fishing, and gathering.[155] The DFG's leadership is dominated by white, urban Alaskans who do not necessarily have the cultural familiarity with subsistence to factor it into their decision making;[156] instead, they seem to cater to the desires of their white, urban community rather than the urgent needs of rural Natives.[157] For example, a 2016 study found that the number of permits that the DFG issued for a fishery on the Kenai River in southcentral Alaska increased from 14,576 in 1996 to 34,315 in 2012, and the number of fish harvested increased five-fold from 107,627 in 1996 to 535,236 in 2012.[158] Because the state does not restrict access at this particular fishery (or any fishery on private or state-held lands) to Indigenous, or even rural, residents, almost 80% of the fishers came from the nearby urban area.[159] While the study does not note whether these urban-dwelling fishers were Alaska Native or were practicing subsistence, the increase in activity at this Kenai River fishery is unsustainable for both recreational and subsistence fishers.[160] The larger crowds leave more waste behind, and more fishing boats contribute to pollution in the water and on "ecologically sensitive" banks.[161] By allowing the general public access to fisheries and "maintaining few barriers to entry,"[162] rather than carving out the rights of Alaska Native subsistence users to take sustainably from these sites before other users, the DFG puts the long-term sustainability of the entire fishery at risk.[163]

The Kenai River fishery is just one of the many sites on state-owned or private land or water across the state managed by the DFG, and it exemplifies the environmental impact of the DFG's limited regulation. Because the DFG is outside the jurisdiction of ANILCA, there is no outright way for shareholders of ANCs to protect their subsistence rights on their own lands because ANCSA had them relinquish those claims when they took title.[164] This is a gap in the overlapping laws of ANCSA and ANILCA that has led to a dire

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30 Colo. Nat. Res., Energy & Env't L. Rev. 245, 256 (2019).

[155] *See* Case & Voluck, *supra* note 14, at 295.

[156] *See id.* at 294.

[157] *See* Hannah L. Harrison & Philip A. Loring, *Urban Harvests: Food Security and Local Fish and Shellfish in Southcentral Alaska*, 5 Agric. & Food Sec. 1, 8 (2016).

[158] *See id.*

[159] *See id.*

[160] *See id.*

[161] *Id.*

[162] *Id.*

[163] *See id.* ("If the dipnet fishery continues to draw such crowds, then these environmental impacts are likely to persist.").

[164] *See* Anderson, *The* Katie John *Litigation*, *supra* note 24, at 876; Anderson, *Sovereignty and Subsistence*, *supra* note 97, at 215.

situation for Alaska Natives in small, rural villages who rely on subsistence for survival.[165] ANCSA left Native Alaskans to grapple with these existential problems alone and without recourse from the United States, whose actions created the circumstances for ANCSA in the first place. A solution must be found within the framework of ANCSA itself to protect the subsistence practices that form the bedrock of many Alaska Natives' culture and even survival.

B. Disconnect Between Alaska Native Identity and ANC Shareholder Status

The corporate structure of ANCs has also meant that Alaska Native identity has become tied to shareholder status, which is both confusing and has already begun to dilute Alaska Native identity.[166] "Today's Alaska Native shareholder may look to their ANC as part of their self-identity. The ANC, in some respects, has become a key identifier for the modern Alaska Native person."[167] Consequently, many Alaskans, Native and non-Native, do not know that the ANCs differ from federally recognized tribes.[168] This knowledge gap is problematic because while ANCs own land and can provide employment opportunities for shareholders, tribes are the governing bodies of Alaska Native individuals and provide vital health and education services that ANCs are neither equipped nor permitted to administer.[169]

The conflation of ANC shareholder status with Alaska Native cultural identity underscores the inherent contradiction of using the corporate form as a mechanism for furthering Alaska Native self-determination:

> Native status, however, is not a fungible asset. It is based on association and community, and is closely dependent on group landholding. The choice of the corporation over the tribe as a paradigm for Native organization is not just symbolic. When Alaska

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[165] *See* Thériault et al., *supra* note 24, at 55 (pointing out that food insecurity is a major issue among rural Alaska Natives); Heather Sauyaq Jean Gordon, *Alaska Native Subsistence Rights: Taking an Anti-Racist Decolonizing Approach to Land Management and Ownership for Our Children and Generations to Come*, 12 Societies 1, 11 (2022) (explaining that the state allowed "not only the approximately 800 rural residents from Ninilchik," a primarily Native community, to engage in their traditional subsistence practice of clamming, but also allowed more than 500,000 urban residents from surrounding areas to dig for clams in the same area to the point that the beaches were closed and have not been opened since).

[166] *See* Sullivan, *Complicated Identities*, *supra* note 21.

[167] Snigaroff & Richards, *supra* note 53, at 4 (citation omitted).

[168] *See* Meghan Sullivan, *Charlene Stern: Recognize Sovereignty, Fight for 'Inherent Rights'*, Indian Country Today (Dec. 18, 2021), https://indiancountrytoday.com/culture/charlene-stern-ancsa-50 [https://perma.cc/QXU2-PBFL].

[169] *See id.*

> Natives speak of losing control of their corporations, they speak in terms of losing their heritage as Natives.[170]

ANCSA created an enormous tension between traditional Native culture in Alaska, which is geared toward community and harmony with nature that is greater than any one individual, and modern American corporate culture, which prioritizes acquisition of material wealth at the expense of the natural environment.[171] As one Native Alaskan put it, "[i]t's like you and I never saw a baseball game in our lives . . . . We'd never seen mitts or bats or baseballs. All of a sudden you were told, 'Here's your mitts. Here's your bats. Here's your balls. Tomorrow you play the Yankees.'"[172] The corporate model is ill-equipped to further the mission of ANCs as vehicles of Alaska Native cultural longevity because of the inherently short-term nature of corporations, the expense of maintaining ANCs, and the lack of alignment between Indigenous and corporate cultures.[173] Further, imposing a corporate model on Alaska Natives muddies the already abstruse landscape of federal Indian law in Alaska.

C. Mistaking Ownership for Sovereignty

ANCSA's problems run much deeper than the disjunction between Native Alaskan identity and ANC shareholder status. First, ANCSA treats land ownership through fee simple title as a replacement for true sovereignty, which underscores a deeper disconnect between the Indigenous conception of sovereignty and the definition of sovereignty applied in federal Indian law jurisprudence. Second, ANCSA ignores the specific needs and traditional values of Alaska Natives by equating land with money.

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[170] Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 Yale L.J. 1331, 1342 (1992) (footnote omitted).

[171] *See* Linda O. Smiddy, *Responding to Professor Janda—The U.S. Experience: The Alaska Native Claims Settlement Act (ANCSA) Regional Corporation as a Form of Social Enterprise*, 30 Vt. L. Rev. 823, 832–35 (2006); Michael M. Pacheco, *Toward a Truer Sense of Sovereignty: Fiduciary Duty in Indian Corporations*, 39 S.D. L. Rev. 49, 58–60 (1994); Chaffee, *supra* note 46, at 132.

[172] Laurel Downing Bill, *Statehood Ignites Land Rights Legal Battle*, Senior Voice (Dec. 1, 2017), https://www.seniorvoicealaska.com/story/2017/12/01/columns/statehood-ignites-land-rights-legal-battle/1552.html [https://perma.cc/TZ7F-SSK6].

[173] *See* Snigaroff & Richards, *supra* note 53, at 34 ("Every ANC will at some point face insolvency. That is not a statement against the efficacy of ANC managements; it is a simple statement about the nature of all business viability."); Chaffee, *supra* note 46, at 135 ("Alaska Native corporations have paid nearly half a billion dollars to maintain and defend the corporations established by the Act."); Anders & Anders, *supra* note 70, at 220 ("It would be difficult to find a greater set of differences between values regarding private property, materialism, and individualism than those found in the Alaska Natives and their corporations.").

ANCSA mistakes land ownership for political and legal sovereignty, which exemplifies the Act's colonialist underpinnings and highlights the two conflicting understandings of sovereignty at work when the United States deals with Native peoples.[174] Federal Indian law is deeply rooted in a legacy of colonialism, wherein white settler institutions imposed, and continue to impose, traditionally European values upon Native peoples.[175] ANCSA is a prime example: the corporation is a construct of European capitalism, yet the United States imposed the corporate form on Native Alaskans whose thousands of years of history had never entertained ideas of limited liability or profit margins, instead favoring community, subsistence, and land conservation.[176]

Underlying the disconnect between ANCSA and Alaska Native cultural values is the definition of sovereignty and how Indigenous peoples have attempted to carve out some degree of self-determination in their interactions with the United States. Sovereignty is at the core of the complex laws that govern Native peoples, their land, and their rights,[177] but many different conceptions of sovereignty exist with no single clear and universally accepted definition.[178] One definition of sovereignty from a Native perspective is the right to complete self-determination and recognition of the legitimacy of that self-determination.[179] This interpretation indicates that Indigenous sovereignty is a process, and therefore the meaning of the term is not static; it is malleable and fluid, changing to suit the context or the speaker.[180]

The definition of Indigenous sovereignty first outlined in the Marshall Trilogy, and still used by U.S. courts when handling matters of federal Indian law, emanates from colonialism and prioritizes ownership of limited parcels of space over the more ephemeral concept of self-determination.[181] This view of sovereignty as a kind of gift or privilege that the federal government can grant and take away from tribes[182] has become the default in the legal sphere, and

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[174] *See* Steven W. Thornburg & Robin W. Roberts, *"Incorporating" American Colonialism: Accounting and the Alaska Native Claims Settlement Act*, 24 Behav. Rsch. Acct. 203, 204–08 (2012).

[175] *See* Alfred, *supra* note 95, at 460–61, 464–65.

[176] *See* Anders & Anders, *supra* note 70, at 220; Thornburg & Roberts, *supra* note 174, at 210.

[177] *See* Wilkins & Lomawaima, *supra* note 81, at 98–99.

[178] *See* Barker, *supra* note 87, at 1.

[179] *See* Stephen Young, *The Sioux's Suits: Global Law and the Dakota Access Pipeline*, 6 Am. Indian L.J. 173, 207–08 (2017).

[180] *See* Barker, *supra* note 87, at 26.

[181] *See* Alfred, *supra* note 95, at 465.

[182] *See* Barker, *supra* note 87, at 26. *Compare* Worcester v. Georgia, 31 U.S. 515, 561 (1832) (holding that the Cherokee Nation was a sovereign nation that was not subject to the laws of the state of Georgia because the United States entreated with the Cherokee as

it complicates proceedings between tribal members and non-Native people because the two competing notions of sovereignty are pitted against each other.[183] In such a scenario, the U.S. definition generally prevails because it is so deeply instilled in federal jurisprudence.[184] For Alaska Natives, ANCSA represented an attempt to regain the sovereignty that they were losing under the colonial pressure of the United States,[185] but the two sides were never talking about the same kind of sovereignty. As a result, while Alaska Natives are sovereign over land in that they have voting rights as shareholders to ANCs that own the land in fee simple, they do not have the sovereign power of tribal self-determination or self-governance that they originally sought.[186]

In addition to mistaking land ownership for sovereignty, the monetary settlement aspect of ANCSA represents a commensuration of land and money that is antithetical to the conception of land and subsistence in Alaska Native culture.[187] ANCSA effectively "divid[ed] the communal claims of aboriginal title into individual shares of property," specifically, property in the form of money, corporate stock, and land.[188] The funds that accompanied the land transfer were designed to account for the land that Alaska Natives would be giving up in accepting this settlement with the United States.[189] The very fact that the United States offered a monetary payment in exchange for rights to use and own land demonstrates a fundamental misunderstanding of Alaska

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it did with other sovereign nations), *with* United States v. Kagama, 118 U.S. 375, 381–84 (1886) (holding that Indian tribes "regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations" because their relationship to the United States was more akin to that of a ward to a guardian than that between two nations).

[183] *See Kagama*, 118 U.S. at 383 (explaining defendant Kagama's position that a crime committed by an Indian on an Indian reservation should not be subject to the criminal jurisdiction of the United States because the tribe had inherent sovereignty over its own lands and people that did not conflict with the sovereignty of the United States or of any individual state).

[184] *See id.* at 384 (siding with the United States in its argument that Indian tribes are not sovereign and that instead, "[t]he power of the General Government" over Indians must lie in the government of the United States "because it never has existed anywhere else").

[185] *See* Hensley, *supra* note 17; Anderson, *Sovereignty and Subsistence*, *supra* note 97, at 204.

[186] *See* Anderson, *Sovereignty and Subsistence*, *supra* note 97, at 219.

[187] *See* Hensley, *supra* note 17; Ristroph, *supra* note 154, at 247.

[188] Case & Voluck, *supra* note 14, at 170.

[189] *See id.* at 175–76. ANCSA provides for a one-time payment of $962.5 million to the Alaska Native Fund, *see* 43 U.S.C. § 1605 (2018), which was created as part of ANCSA for the Regional Corporations to use as "start-up capital" in their corporate operations. Case & Voluck, *supra* note 14, at 175–76.

Natives' relationship to land because subsistence culture is about so much more than extracting monetary value from natural resources.[190]

Even if Alaska Natives' spiritual, cultural, and historical connection to the land were commensurable to a dollar amount, the exchange rate was meager. Without ANCSA, it is estimated that Native Alaskans would have been able to assert cognizable aboriginal title claims to approximately 365 million acres of land in Alaska, forty-four million acres of which were actually conveyed to them through ANCSA.[191] To put this exchange in perspective, to relinquish their claims on approximately 320 million acres of land, Alaska Natives only received about three dollars per acre in monetary compensation.[192]

ANCSA's problems, particularly those curtailing Native Alaskans' ability to protect subsistence practices, outweigh the law's benefits, however, a solution lies in the very corporate model that ANCSA so bluntly inflicted on Alaska Natives.

III. Solution

A. Imposing the Duty of Loyalty on the United States in Its Dealings with ANCs

To address the problems presented by ANCSA, the Federal Circuit should impose the corporate duty of loyalty on the United States as a de facto director of all ANCs. Doing so would require the United States to compensate ANC shareholders for past instances where the United States did not act in the shareholders' best interests when it improperly removed their ability to recover for damages to their lands and traditional ways of life. It would further permit ANC shareholders to request an injunction if the United States engages in future behavior that is contrary to Native subsistence interests.

In the context of corporate law, the fiduciary duty of loyalty to shareholders generally means maximizing profits because the fundamental goal of a corporation is to generate profits for shareholders.[193] However, given the exceptional nature of ANCs, the duty of loyalty in this context should look different from the typical director-shareholder relationship. Federal Indian law jurisprudence has not acknowledged, or even considered, that a type of fiduciary duty other than the trust obligation could exist between the United States and Alaska Natives.[194] But the term "fiduciary" is flexible and should be

[190] *See* Anders & Anders, *supra* note 70, at 219–20; discussion *supra* Section I.A.1.

[191] *See* Case & Voluck, *supra* note 14, at 175 n.65.

[192] *See id.*

[193] *See* Snigaroff & Richards, *supra* note 53, at 2.

[194] Extensive research on major legal databases Westlaw and Lexis+ yielded no results of a court applying specific fiduciary duties other than the common law fiduciary components

considered within its legal context.[195] Consequently, the fiduciary obligations of a trustee differ from the fiduciary obligations of a corporate director, for example, and the imposition of such a duty will depend on the surrounding circumstances.[196] An ad hoc fiduciary relationship can be found where the facts and circumstances point to its existence, even if no agency agreement has been made between the parties.[197]

While neither the United States itself nor any administrative agency or individual representative has been officially appointed as a director of any ANC, the Federal Circuit should find that the federal government—through a representative such as the Secretary of the Interior or the Director of the Bureau of Indian Affairs—is a de facto director of all ANCs, both Village Corporations and Regional Corporations. The concept of a de facto director has precedent in many U.S. states, including Alaska, as well as countries around the world.[198] Characteristics of de facto directors that have led courts to impose fiduciary obligations on actors include that "[they] must be[,] or

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that underlie the trust obligation and the trust responsibility itself.

[195] *See* Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 797 (1983).

[196] *See id.*; Lauren Henry Scholz, *Fiduciary Boilerplate: Locating Fiduciary Relationships in Information Age Consumer Transactions*, 46 J. Corp. L. 143, 147 (2020).

[197] *See* Scholz, *supra* note 196, at 147–48 (noting that "[f]iduciary duties have evolved and changed" from their "deep roots in the common law . . . based on social and economic contexts . . . [and] more relationships have been found to have fiduciary status over time").

[198] *See, e.g.*, Wolff v. Arctic Bowl Inc., 560 P.2d 758 (Alaska 1977); S. Seas Corp. v. Sablan, 525 F. Supp. 1033 (D.N. Mariana Islands 1981); Philippine Airlines Inc. v. City Trust Bank, 1997 WL 604123 (9th Cir. Oct. 1, 1997). Countries worldwide recognize de facto directors, including the United Kingdom, Japan, Germany, Spain, France, and Nigeria, among many others. *See, e.g.*, Nick Garland & Michelle Jones, *Corporate Governance and Directors' Duties in the UK (England and Wales): Overview*, Thomson Reuters Prac L. (law stated as of Nov. 1, 2022), https://us.practicallaw.thomsonreuters.com/3-597-4626 [https://perma.cc/ZWR4-XUZC]; Katsuyuki Yamaguchi et al., *Corporate Governance and Directors' Duties in Japan: Overview*, Thomson Reuters Prac. L. (law stated as of Oct. 1, 2022), https://us.practicallaw.thomsonreuters.com/1-502-0177 [https://perma.cc/S2UC-YHXS]; Christoph H. Seibt & Sabrina Kulenkamp, *Corporate Governance and Directors' Duties in Germany: Overview*, Thomson Reuters Prac. L. (law stated as of Oct. 1, 2022), https://us.practicallaw.thomsonreuters.com/8-502-1574 [https://perma.cc/R64Z-6JCZ]; Estibaliz Aranburu Uribarri & Fernando Marin de la Barcena, *Corporate Governance and Directors' Duties in Spain: Overview*, Thomson Reuters Prac. L. (law stated as of Oct. 1, 2022), https://us.practicallaw.thomsonreuters.com/w-014-6527 [https://perma.cc/ARK9-4NN3]; Youssef Djehane, *Corporate Governance and Directors' Duties in France: Overview*, Thomson Reuters Prac. L. (law stated as of Mar. 1, 2023), https://us.practicallaw.thomsonreuters.com/8-502-1296 [https://perma.cc/GU3A-5PQ8]; Gbenga Oyebode et al., *Corporate Governance and Directors' Duties in Nigeria: Overview*, Thomson Reuters Prac. L. (law stated as of May 1, 2023), https://us.practicallaw.thomsonreuters.com/w-039-5016 [https://perma.cc/AV59-HDKX].

have been in point of fact[,] part of the corporate governing structure and participated in directing the affairs of the company in relation to the acts or conduct complained of" and "[t]he functions [they] perform[] and the acts of which [a] complaint is made must be such as could only be undertaken by a director, not ones which could properly be performed by a manager or other employee below board level."[199] Further, "[l]ack of accountability to others may be an indicator; so also may the fact of involvement in major decisions," and finally, "[t]he power to intervene to prevent some act on behalf of the company may suffice."[200] These criteria are rational indicators of the existence of a fiduciary relationship that obliges the de facto director to be accountable for their actions.

The Federal Circuit should impose this title, and its accompanying duties, because the actions of the United States, from the formation of ANCs in 1971 to present day, have mirrored the behavior of corporate directors in other contexts. The United States has the power to fundamentally change the nature of ANCs according to its own judgment through legislation,[201] administrative action,[202] and executive oversight.[203] Similarly, corporate directors can exercise even the most dubious judgment to alter the fundamental structure and purpose of the corporations they serve through changes to the corporation's bylaws, which only require approval of the board.[204] Finally, based on its historical relationship with Alaska Native peoples—which even the Supreme

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[199] *In Re* UKLI Ltd. (No 2) v. Chohan [2013] EWHC 680 (Ch) [41] (England and Wales).

[200] *Id.*

[201] ANCSA and ANILCA themselves show that the United States can issue legislation that fundamentally alters the relationship between Alaska Native peoples and their ancestral homelands. *See* discussion *supra* Section II.A.

[202] *See, e.g.*, Press Pool, *Partners to Hold First-Ever Tribal Consultations on Alaska Fisheries Protection and Restoration*, Indian Country Today (Sept. 29, 2022), https://indiancountrytoday.com/the-press-pool/federal-partners-to-hold-first-ever-tribal-consultations-on-alaska-fisheries-protection-and-restoration [https://perma.cc/AR8N-RQMR] (describing a series of consultations between the Department of the Interior, the National Oceanic and Atmospheric Administration, and Alaska Native leaders and subsistence users to discuss protecting and restoring Alaska fisheries to rehabilitate and maintain subsistence practices). While the talks described in this article were on a nation-to-nation basis, that is, between the United States and Alaska Native tribes rather than ANCs, *see id.*, the scenario demonstrates the ability of the United States to alter how Alaska Natives—the shareholders of ANCs—interact with the land and resources owned by ANCs.

[203] *See* 43 U.S.C. § 1606(e); Case & Voluck, *supra* note 14, at 111. For example, the Secretary of the Interior must approve any corporate charter of an ANC even though ANCs are incorporated under Alaska state law. *See* Case & Voluck, *supra* note 14, at 111.

[204] *See* Alaska Stat. Ann. § 10.06.228 (West 2022). Changing a corporation's articles of incorporation requires a shareholder vote. *See id.* § 10.20.176.

Court has admitted is unique and should be analyzed within that atypical framework[205]—it would not be outside the realm of reason to impose a unique fiduciary duty of loyalty on the United States in its interactions with ANCs.

Thus, the Federal Circuit should impose an ad hoc fiduciary relationship on the United States as a quasi-director of each ANC. Because of the ANCs' historical and present purpose as a vehicle for Alaska Native self-sufficiency, the fiduciary duty to act in the shareholders' best interests should be found to mean preserving Alaska Native identity and culture to the maximum extent possible. When the United States acts in a manner that substantially affects the rights and interests of ANC shareholders—for example when the United States acts in its capacity as a director of an ANC—its action should be subject either to a shareholder vote, as is required for major decisions affecting a corporation, or to a vote by the other directors of the ANC who are Alaska Native individuals. Such a duty would require the United States not only to allow Alaska Native communities to engage in traditional subsistence practices, but also to actively pave the way for them to do so by creating physical and legal infrastructure that facilitate the exercise of usufructuary rights to hunt, fish, and gather using traditional methods on ANC-owned land.

B. Application to *Bay View Inc. v. United States*

To illustrate this proposed solution, this Section will examine the 2001 Federal Circuit case *Bay View Inc. v. United States*[206] and apply the above-proposed ad hoc corporate duty of loyalty analysis rather than the traditional fiduciary duty analysis used by the court in that case.[207] At issue in *Bay View* were the 1995 Amendments to ANCSA which exempted revenues received from the sales of net operating losses ("NOLs") from inclusion in the revenue shared among the Regional and Village Corporations under § 1606.[208] Bay View Inc. ("Bay View"), an Alaska Native Village Corporation, argued

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[205] *See* Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2439 (2021).

[206] 278 F.3d 1259 (Fed. Cir. 2001).

[207] *Bay View* does not concern the assertion of Alaska Native subsistence rights under ANCSA or ANILCA; in fact, extensive research yielded no cases within the Federal Circuit's jurisdiction where Alaska Natives, either individually or through ANCs, brought suit to enforce their subsistence rights. The underlying facts of *Bay View* are not relevant to this Note; rather, the case serves to exemplify how the solution proposed in Section III.A. *infra* would operate. The factual background of *Bay View* is discussed briefly for reference only. *See infra* notes 208–210 and accompanying text.

[208] *See Bay View* 278 F.3d at 1262; 43 U.S.C. § 1606(i)(2) (2018); *see also* discussion of the revenue-sharing provisions of ANCSA *supra* Section I.A.3 and notes 65–68. The sale of NOLs became important to ANCs in the 1980s because the value of natural resources had declined since the enactment of ANCSA. *See Bay View*, 278 F.3d at 1262. By selling off their NOLs to private corporations, ANCs obtained more favorable tax treatment while

that the loss of shared revenues from NOLs constituted a taking, a breach of trust, and a breach of contract.[209] The Federal Circuit held that Bay View was not entitled to compensation under any of its claims including, importantly, its breach of trust claim.[210]

Bay View used the analysis outlined by the Supreme Court in *United States v. Mitchell*[211] ("*Mitchell II*") that "a plaintiff claiming a breach of fiduciary duty must identify a statute that creates a trust relationship [between the plaintiff and the United States] and mandates the payment of money for damages stemming from the breach of that trust relationship."[212] The Federal Circuit found that ANCSA did not create a trust relationship between the United States and Alaska Natives because ANCSA did not place traditional trustee obligations on the United States—namely, the direct control or supervision of tribal money or property.[213] Because there was no substantive trust obligation created by ANCSA, the Federal Circuit found that there was no compensable breach of trust under the *Mitchell II* analysis.[214]

However, under the solution proposed above, the Federal Circuit could have imposed the fiduciary duty of loyalty on the United States as a de facto director of Bay View. While ANCSA was not found to be money mandating when it comes to the *trust* relationship, it could still serve as the basis of an Indian Tucker Act Claim under a different type of fiduciary relationship: the duty of loyalty that a corporate director owes to the corporation's shareholders.[215] The United States meets the criteria of a de facto director that owes an ad hoc fiduciary duty to Bay View's shareholders. The Federal Circuit could justify imposing this unique duty of loyalty on the United States to ANC shareholders because fiduciary duties should be analyzed in the proper legal context; here, within corporate law rather than trust law.

Finding a fiduciary duty similar to the corporate duty of loyalty, the court would then determine that the United States must act in the best interests of the corporation's shareholders to promote the corporation's stated mission to improve the lives of their shareholders and to maintain land stewardship for generations to come. The United States would not be able to pass a statute directly adverse to the interests of Bay View's shareholders, and the

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receiving additional revenue. *See id.* Congress amended the Internal Revenue Code in 1988 to forbid further sales of NOLs by ANCs. *See id.*

[209] *See Bay View*, 278 F.3d at 1263.

[210] *See id.* at 1266.

[211] 463 U.S. 206 (1983).

[212] *Bay View*, 278 F.3d at 1265 (citing *Mitchell II*, 463 U.S. at 226).

[213] *See id.*

[214] *See id.*

[215] *See id.*

shareholders of the other Regional and Village ANCs, because it would be bound by the duty of loyalty not to do so. Further, given that there were tax consequences to the exclusion of NOL sales revenue, the United States would be on both sides of the corporate transaction as director of the ANC being taxed on one side and through the Internal Revenue Service, which collects federal taxes, on the other. A conflict of interest arises when a director is on both sides of a corporate transaction and rebuts the default presumption of the BJR to assess the director's actions.[216] Thus, under the proposed solution, the federal government would not receive the default deference of the BJR but would instead be held to a higher standard of conduct in dealing with ANCs.

While there is no precedent for imposing the obligations of a corporate director upon the United States as an entity or upon an individual representative of the United States, the wholly unique context of ANCs serves as the perfect place to do so for the first time. This is not an issue that treaty renegotiation can fix, as there are no treaties between the United States and Alaska Native tribes. It is true that courts have found that ANCSA is not money mandating as to the trust relationship between the federal government and Alaska Natives because ANCSA extinguished any trust relationship.[217] However, the requirements of the Indian Tucker Act would be met to bring a case like this into the jurisdiction of the Federal Circuit through the Court of Federal Claims under the corporate fiduciary relationship analysis.[218]

Applying the duty of loyalty analysis to *Bay View* shows that the United States could find itself on both sides of a corporate transaction in a revenue-sharing context, as in *Bay View*, but the analysis would also operate effectively in the context of enforcing Alaska Native subsistence rights when they come under threat from private parties, the state of Alaska, or even the federal government. The United States would similarly be on both sides of a transaction when entering government contracts with ANCs or entities whose business affects the ability of ANC shareholders to practice subsistence, such as oil companies and commercial fisheries that harm the environment. More broadly, establishing the United States as a de facto director and creating a fiduciary duty of loyalty would require the United States to act in good faith to protect the interests of Alaska Native shareholders. This analysis would empower Alaska Natives to hold the United States accountable for the dangerous gaps left by ANCSA and to secure their vital interest in maintaining subsistence culture for generations to come.

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[216] *See* Bauman et al., *supra* note 15, at 861–62.

[217] *See Bay View*, 278 F.3d at 1265 (citing *Mitchell II*, 463 U.S. at 226).

[218] *See* 28 U.S.C. § 1295(a)(3) (2018).

Conclusion

In creating ANCs through ANCSA, the United States stripped Alaska Natives of their ability to protect the practices that have been sustaining their communities and their culture for thousands of years. Under the guise of giving Alaska Natives more autonomy over their lands by conveying fee simple title to corporate entities, ANCSA left Native Alaskans with significantly less land and few remedies to incursions upon their rights to use that land to keep with cultural traditions.

To rectify that harm, the Federal Circuit should analyze claims by Alaska Native Corporations, individual ANC shareholders, or groups of ANC shareholders against the federal government under ANCSA using the fiduciary duty of loyalty that applies to corporate directors rather than the trust responsibility traditionally applied in federal Indian law cases. The Federal Circuit should further deem the United States a de facto corporate director of all ANCs because of the exceptional historical relationship to Alaska Native peoples. Under corporate law and in the unique context of ANC governance, the United States should owe a fiduciary duty of loyalty to ANC shareholders that honors Alaska Natives' deeply held subsistence way of life. As climate change threatens to irrevocably alter our environment, Alaska Natives deserve the ability to safeguard precious natural resources and to rely on their exceptional status under the law.