

# ONE COMPANY, TWO WORLDS: THE CASE FOR ALASKA NATIVE CORPORATIONS

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## ABSTRACT

*In light of the recent uproar about participation by Alaska Native Corporations in the 8(a) Small Business Development Program, this Note examines the criticisms of such participation and identifies these criticisms' shortcomings, which the Note argues result from a narrow understanding of ANCs and the 8(a) program. Instead, the Note makes the case for a more holistic understanding of ANC participation in the 8(a) program. Thinking of ANCs in this broader way provides a more useful framework for analyzing and evaluating proposed reforms to the program.*

## I. INTRODUCTION

Lately, the inclusion of Alaska Native Corporations (ANCs) in the Small Business Administration's 8(a) Business Development Program has been subject to heavy criticism.<sup>1</sup> These criticisms have resulted both in numerous proposals for regulatory change and—perhaps most notably—close scrutiny at a recent Senate subcommittee hearing. Despite the fervor with which opponents attack ANCs, this Note makes the case for ANC participation in the 8(a) program by advocating for a better, more comprehensive framework through which to analyze such participation. Part II places ANCs in their historical context in terms of the Alaska Native Claims Settlement Act (ANCSA) and the Small

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1. See, e.g., Robert O'Harrow Jr., *In Alaska, A Promise Unmet*, WASH. POST, Sept. 30, 2010, at A1 [hereinafter O'Harrow, *A Promise Unmet*], available at 2010 WLNR 19420933; Robert O'Harrow Jr., *Bethesda Consultant Made Millions with Alaska Firm*, WASH. POST, Sept. 29, 2010, at A22 [hereinafter O'Harrow, *Bethesda Consultant*], available at 2010 WLNR 19362803.

Business Act. Part III reviews the current debate about ANC participation in the 8(a) program. Part IV then uses the recent Senate Subcommittee Report as a vehicle to examine the shortcomings in the current analysis of such participation. Part V advocates a better vantage point for such analysis. Finally, Part VI examines proposed regulations in light of this new perspective.

## II. ALASKA NATIVE CORPORATIONS AND THE SMALL BUSINESS ACT

### A. The History of ANCs

The Alaska Native Corporations were established as a result of the Alaska Native Claims Settlement Act of 1971.<sup>2</sup> The Act was motivated in large part by a desire to allow the development and extraction of Alaska's oil reserves without the hassle of legal claims by Alaska's native peoples.<sup>3</sup> Under ANCSA, Alaska Natives agreed to extinguish all claims based upon any aboriginal rights.<sup>4</sup> In return, Alaska Natives received \$462,500,000 from the U.S. Treasury and \$500,000,000 in revenue sharing related to the extraction of oil, gas, and minerals.<sup>5</sup> As Julie Kitka, President of the Alaska Federation of Natives, points out, this transaction has provided enormous benefit to the United States:

The citizens of the United States and the federal government, received a bargain: . . . 16 billion barrels of domestic oil, directly attributable to the agreements that are made possible by ANCSA. The fields of Prudhoe Bay alone have delivered several hundred billions of dollars of goods, services and taxes

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2. See James D. Linxwiler, *The Alaska Native Claims Settlement Act at 35: Delivering on the Promise*, 53 ROCKY MTN. MIN. L. INST. 12-1, 12-2 (2007).

3. See *id.* at 12-3 ("ANCSA was driven in large part by the need to resolve aboriginal title claims that prevented the development of the North Slope oilfields and the Trans-Alaska Pipeline . . ."); *Contracting Preferences for Alaska Native Corporations: Hearing Before the Ad Hoc Subcomm. on Contracting Oversight of the S. Comm. on Homeland Sec. and Gov't Affairs*, 111th Cong. 112 (2009) [hereinafter *Hearing*] (statement of Julie Kitka, President, Alaska Fed'n of Natives), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_senate\\_hearings&docid=f:53113.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:53113.pdf) ("The world-class discovery of oil in Prudhoe Bay, together with the need for clear title in order to build a pipeline across Alaska to transport the oil . . . created a sense of urgency and a historic opportunity for a settlement of our land claims.").

4. 43 U.S.C. § 1603 (2006).

5. *Id.* § 1605(a). The other element of compensation was land. See *id.* § 1613.

to the federal government.<sup>6</sup>

As a general matter, ANCSA functions by dividing Alaska into twelve separate regions.<sup>7</sup> The regions were chosen so as to group Alaska Natives who “hav[e] a common heritage and shar[e] common interests.”<sup>8</sup> Alaska Natives—defined as those who are “one-fourth degree or more Alaska Indian . . . Eskimo, or Aleut blood, or combination thereof”<sup>9</sup>—were then enrolled in their respective regions based upon where they lived.<sup>10</sup> ANCSA required each region and eligible village to create a corporation.<sup>11</sup> Each Alaska Native became a shareholder in the regional corporation and in any village corporation of which he or she was a member.<sup>12</sup> ANCSA also provided forty million acres of land in fee simple to the corporations.<sup>13</sup> These corporations (ANCs) would then serve as vehicles for providing the maximum economic, social, and cultural benefit for Alaska Natives.<sup>14</sup>

ANCSA was unique in that it sought to settle aboriginal claims to the land and yet to do so in a way that did not depend on a reservation system.<sup>15</sup> Alaska Natives were now, however, thrust into a situation for which many were not readily adapted. As Melissa Campbell noted in the *Alaska Journal of Commerce*:

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6. *Hearing, supra* note 3, at 112 (statement of Kitka).

7. 43 U.S.C. § 1606(a) (2006).

8. *Id.*

9. *Id.* § 1602(b).

10. *Id.* § 1604(b). Thus, a single ANC can often encompass many different tribal heritages.

11. *Id.* §§ 1606(d), 1607(a). The twelve Regional Corporations are: Ahtna, Inc.; The Aleut Corporation; Arctic Slope Regional Corporation; Bering Straits Native Corporation; Bristol Bay Native Corporation; Calista Corporation; Chugach Alaska Corporation; Cook Inlet Region, Inc. (CIRI); Doyon, Ltd.; Koniag, Inc.; NANA Regional Corporation; and Sealaska Corporation. See ANCSA REG’L ASS’N, ALASKA NATIVE CORPORATIONS 2006 ECONOMIC DATA 15–27 (2008), available at [http://www.iser.uaa.alaska.edu/publications/8\(a\)/e-book%20layout/C/C.5/1.%202006%20Economic%20Data,%20ANCSA2008.pdf](http://www.iser.uaa.alaska.edu/publications/8(a)/e-book%20layout/C/C.5/1.%202006%20Economic%20Data,%20ANCSA2008.pdf). ANCSA also provided for the creation of the 13th Regional Corporation for Alaska Natives who had moved away from Alaska. See *id.* § 1606(c).

12. 43 U.S.C. § 1606(g)(1)(A) (providing shares in Regional Corporations); see also *id.* § 1607 (requiring residents of Native Villages to organize Village Corporations).

13. See *id.* § 1610 (withdrawing lands for selection); *id.* § 1611 (selecting lands); *id.* § 1613 (conveying lands); see also Linxwiler, *supra* note 2, at 12–24.

14. See Linxwiler, *supra* note 2, at 12–45.

15. See 43 U.S.C. § 1601(b); see also James D. Linxwiler, *The Alaska Native Claims Settlement Act: The First Twenty Years*, 38 ROCKY MTN. MIN. L. INST. 2–17 (1992) (“The basic policy of ANCSA is . . . to extinguish aboriginal title and to create a new mechanism for managing federal policy for Alaska Natives, without creating tribes or a trust relationship that did not already exist . . .”).

A group of people, most of who[m] had survived on a subsistence lifestyle in roadless areas, was suddenly immersed in the Western-based corporate world, with the mandate of providing their shareholders with a for-profit company. They were also to provide nonprofit organizations, offering shareholders social and cultural services. It was sink or swim.<sup>16</sup>

At first, ANCSA did little to help Alaska Natives.<sup>17</sup> Instead, any improvements in the status of these peoples during the first thirteen years of ANCSA were more attributable to: the “oil-fueled expansion of the state economy;” Alaska’s capital spending on housing, education, and health facilities; and on improvements to transportation and public utilities in rural Alaska.<sup>18</sup> The delays and costs that ANCs experienced in actually implementing ANCSA initially denied Alaska Natives many of the potential benefits of the Act.<sup>19</sup> Indeed, several regional corporations almost did not survive their first twenty years.<sup>20</sup> More than eighty percent of the original cash endowment was lost between 1973 and 1993.<sup>21</sup> Combined, the regional corporations averaged only a five

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16. Melissa Campbell, *ANC’s 8(a) Status Under Fire*, ALASKA J. OF COM., Jan. 29, 2006, available at [http://alaskajournal.com/stories/012906/hom\\_20060129001.shtml](http://alaskajournal.com/stories/012906/hom_20060129001.shtml); see also Robert O’Harrow Jr., Answer to Question 19 in *Two Worlds: Alaska Native Corporations, Discussions/Live Q&A’s*, WASH. POST (Sept. 30, 2010, 11:57 AM), <http://live.washingtonpost.com/alaska-natives.html#question-19> (“There’s no question about the challenges that Alaska native communities have faced as they stepped into the Western corporate world. They come from a different, equally valid culture, with its own rich traditions, not least of which is, as I have come to understand it, to always think of the well being of the group, not simply the individual. Capitalism and bottom lines was [sic] not at the core of their culture. The best ANCs are working hard to meld the two culture [sic].”).

17. See, e.g., Linxwiler, *supra* note 2, at 12-45 (“If ANCSA was an expression of America’s idealistic belief in the transformational power of capitalism applied to Alaska Natives, then for a large part of the first 25 years of ANCSA the reality largely deviated from the hope, because ANCSA’s promise of significant and widespread economic achievement largely went unrealized.”).

18. INST. OF SOC. & ECON. RESEARCH, BENEFITS OF ALASKA NATIVE CORPORATIONS AND THE SBA 8(A) PROGRAM TO ALASKA NATIVES AND ALASKA 8 (2009), available at [http://www.iser.uaa.alaska.edu/Publications/8\(a\)/Full\\_Report.pdf](http://www.iser.uaa.alaska.edu/Publications/8(a)/Full_Report.pdf).

19. Linxwiler, *supra* note 15, at 2-16.

20. INST. OF SOC. & ECON. RESEARCH, *supra* note 18, at 7.

21. Stephen Colt, *Alaska Natives and the “New Harpoon”*: Economic Performance of the ANCSA Regional Corporations, 25 J. LAND RESOURCES & ENVTL. L. 155, 155 (2005).

percent return on book equity<sup>22</sup> despite the fact that “very substantial” natural resource sales took place during that time.<sup>23</sup>

In the early 1990s, two noteworthy amendments to ANCSA took effect. The first provided that ANCSA’s initial restriction on the alienability of Alaska Natives’ stock in their corporations would become permanent unless an ANC’s shareholders voted to lift the restriction.<sup>24</sup> Then, in 1992, ANCSA was modified to include a provision that ANCs are deemed to be “economically disadvantaged” for all purposes of federal law.<sup>25</sup> This amendment was made with federal contracting programs specifically in mind:

Section 10 . . . clarif[ies] that Alaska Native corporations are minority and economically disadvantaged business enterprises for the purposes of implementing SBA [Small Business Administration] programs.

. . . .

This section would further clarify that Alaska Native corporations and their subsidiary companies are minority and economically disadvantaged business enterprises for the purposes of qualifying for participation in Federal contracting and subcontracting programs, the largest of which include the SBA 8(a) program and the Department of Defense Small and Disadvantaged Business Program. These programs were established to increase the participation of certain segments of the population that have historically been denied access to

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22. *Id.* at 156. The range of return on equity ran from negative fifty percent to positive twenty-seven percent. *Id.*

23. The Institute of Social and Economic Research links the differences in corporate performance during this period to differences in the regional corporations’ relative natural resource endowments. INST. OF SOC. & ECON. RESEARCH, *supra* note 18, at 7. Colt further notes that “only the one-time sale of old-growth timber and other natural assets and a one-time tax windfall” allowed any regional ANC to report positive income. Colt, *supra* note 21, at 155–56.

24. Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, § 8, 101 Stat. 1788, 1797–1802 (codified at 43 U.S.C. § 1626(c) (2006)); *see also* Linxwiler, *supra* note 2, at 12-16. Some say the plan to make ANC stock alienable was part of an agenda to assimilate Alaska Natives and eventually regain control of the lands they had received under ANCSA. *See, e.g.*, E. Budd Simpson, *Doing Business with Alaska Native Corporations*, BUS. L. TODAY, July/Aug. 2007.

25. Alaska Land Status Technical Corrections Act of 1992, Pub. L. No. 102-415, § 10, 106 Stat. 2112, 2115 (codified at 43 U.S.C. § 1626(e) (2006)); *see also* CONG. RESEARCH SERV., THE SMALL BUSINESS ADMINISTRATION’S 8(A) PROGRAM AND ALASKA NATIVE CORPORATIONS 8 (2009).

Federal procurement opportunities.<sup>26</sup>

The provision has been criticized, but it was crucial for Alaska Natives because it recognized the distinction between ANCs and the Natives they represent. Even if an ANC as a company was economically healthy, the Alaska Natives that it provided for remained economically disadvantaged.

## **B. The Small Business Act and the 8(a) Business Development Program**

The Small Business Act in its current form was enacted in 1958 to promote the development of small businesses.<sup>27</sup> It made the Small Business Administration (SBA) permanent in order to enact the policies laid out in the Act.<sup>28</sup> In 1978, the Act was amended to provide the SBA with statutory authority to administer a development program to benefit “socially and economically disadvantaged small business concerns.”<sup>29</sup> This program is commonly known as the 8(a) program or the Business Development program.<sup>30</sup> The 8(a) program attempts to help small disadvantaged businesses compete in the U.S. economy.<sup>31</sup> An important but often underappreciated aspect of this program is the fact that it represents the intersection of two distinct federal objectives: promoting the advancement of small business and promoting the advancement of minorities.<sup>32</sup>

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26. S. Rep. No. 102-349, at 14 (1992); *see also* *Hearing, supra* note 3, at 72 (statement of Sarah Lukin, Exec. Dir., Native Am. Contractors Ass’n) (“[President Reagan’s ‘Commission on Indian Reservation Economies’] found that tribally-owned companies had a difficult time qualifying for 8(a) program certification. The Chairman of the Senate Indian Affairs Committee believed that remedial action was necessary to address the low participation of Native American and Alaska Native-owned firms in government contracting.”).

27. Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958); *see also* CONG. RESEARCH SERV., *supra* note 25, at 2.

28. Small Business Act § 4; *see also* CONG. RESEARCH SERV., *supra* note 25, at 2. The SBA was created more or less in its current form in 1953, but previous incarnations had existed since World War II. CONG. RESEARCH SERV., *supra* note 25, at 2.

29. Act of Oct. 24, 1978, Pub. L. No. 95-507, § 201, 92 Stat. 1757, 1760-61 (codified at 15 U.S.C. § 631 (2006)); *see also* CONG. RESEARCH SERV., *supra* note 25, at 2-4. This development program itself is codified at 15 U.S.C. § 636(j)(10) (2006).

30. *See* 13 C.F.R. § 124.1 (2010).

31. *Id.*

32. JOHN R. LUCKEY & KATE M. MANUEL, CONG. RESEARCH SERV., R 40744, THE “8(A) PROGRAM” FOR SMALL BUSINESSES OWNED AND CONTROLLED BY THE SOCIALLY AND ECONOMICALLY DISADVANTAGED: LEGAL REQUIREMENTS AND ISSUES 1 (2009)

To be eligible for the 8(a) program, then, a business must qualify as socially and economically disadvantaged and must be small. In 1986, Indian tribes—defined as including ANCs—were added to the list of groups presumed to be socially disadvantaged.<sup>33</sup> Under the amendment to ANCSA mentioned above, ANCs are also presumed to be economically disadvantaged.<sup>34</sup> To be “small” a business cannot be “dominant in its field of operation.”<sup>35</sup> When determining whether a particular ANC business meets the size limitations for the 8(a) program, however, the SBA considers the business independently—that is, without regard to the ANC parent or to other businesses affiliated with the ANC parent.<sup>36</sup> This provision does not apply, however, if the SBA determines that such a business has or would have a “substantial unfair competitive advantage” within an industry.<sup>37</sup> Finally, all companies are limited to nine years in the 8(a) program.<sup>38</sup>

In practice, when a federal government agency needs a particular good or service, the SBA will contract with the government agency and then arrange for a business in the 8(a) program to perform the contract.<sup>39</sup> The SBA cannot award a contract to a particular 8(a) business, however, if doing so would cause the agency to pay more than fair market price.<sup>40</sup> Government agencies are directed to set aside a certain percentage of their contracts for 8(a) participants.<sup>41</sup> The SBA may award a contract to a particular small business in a number of ways: (1) by holding a

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(“The current 8(a) Program resulted from the merger of two distinct types of federal programs: those seeking to assist small businesses in general and those seeking to assist racial and ethnic minorities.”).

33. See CONG. RESEARCH SERV., *supra* note 25, at 8. This provision is codified at 15 U.S.C. § 637(a)(4) (2006). See also 13 C.F.R. § 124.103(b) (2010).

34. 43 U.S.C. § 1626(e) (2006); see also 13 C.F.R. § 124.109(a)(2) (2010).

35. 15 U.S.C. § 632(a) (2006). Therefore, whether a business is small depends in part on its industry. See CONG. RESEARCH SERV., *supra* note 25, at 6; Table of Size Standards, 13 C.F.R. § 121.201 (2010).

36. 13 C.F.R. § 124.109(c)(2)(iii) (2010). Size determination is made in this way for businesses owned by Native American tribes but not for other 8(a) businesses. See *id.* Logically, it makes sense to allow a tribe, which represents an entire community, to have more opportunities to operate a small business than an individual has.

37. *Id.* However, the SBA does not routinely make such determinations. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-399, INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT 33 (2006).

38. 13 C.F.R. § 124.2 (2010).

39. 15 U.S.C. § 637(a)(1)(A)–(B) (2006).

40. *Id.* § 637(a)(1)(A).

41. *Id.* § 637(d). The percentage is to be no less than twenty-three percent of all the total value of all the agency's contracts. *Id.* § 644(g)(1).

competition among all interested 8(a) businesses; (2) by awarding the contract to the small business specifically requested by the contracting agency; or (3) by awarding the contract to an 8(a) business that the SBA itself selects.<sup>42</sup>

A contract must be obtained competitively if: (1) it is reasonably expected that there will be fair market price bids from multiple 8(a) businesses; (2) the contract price exceeds a certain threshold (\$5,500,000 for manufacturing contracts or \$3,500,000 for non-manufacturing contracts); and (3) the contract was not accepted by the SBA specifically to be awarded to a business owned by a tribe or an ANC.<sup>43</sup> Thus, contracting agencies can request that a specific non-ANC 8(a) business perform a contract only when the value of that contract is less than the \$5,500,000 or \$3,500,000 thresholds; by contrast, contracting agencies can request that an ANC business perform a contract of any value.

### III. THE DEBATE OVER ANC PARTICIPATION IN THE 8(A) PROGRAM

#### A. RISING SCRUTINY OF ANC PARTICIPATION

ANCs' participation in the 8(a) program has recently generated a great deal of attention—much of it negative.<sup>44</sup> In 2006, Jennifer Yang cited “high-profile cases of alleged abuse” and identified contracts in defense and security and contracts with large multinational corporations as spurring the negative media attention.<sup>45</sup> Also in 2006 the Government Accountability Office (GAO) issued a report (GAO Report) detailing its

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42. See Jenny J. Yang, Note, *Small Business, Rising Giant: Policies and Costs of Section 8(a) Contracting Preferences for Alaska Native Corporations*, 23 ALASKA L. REV. 315, 320–21 (2006). Businesses in the 8(a) program will often lobby for agencies to request them on a particular contract. *Id.*

43. 13 C.F.R. § 124.506(a) (2010). This third provision in particular has come under a great deal of attack. Supporters point out, however, that this treatment makes sense in the same way that considering ANCs to be “economically disadvantaged” makes sense; that is, ANCs represent hundreds or thousands of shareholders rather than a single individual. *Hearing, supra* note 3, at 73 (statement of Lukin).

44. See, e.g., O’Harrow, *A Promise Unmet*, *supra* note 1; Robert Brodsky, *Out in the Cold*, GOV’T EXECUTIVE, Mar. 1, 2009, at 36 (“While their contract awards have skyrocketed in recent years, ANCs have taken a beating in terms of public opinion.”); Robert O’Harrow Jr., *FDA Takes End Run to Award Contract to PR Firm*, WASH. POST, Oct. 2, 2008, at A01, available at 2008 WLNR 18674868.

45. Yang, *supra* note 42, at 330–31.

investigation into ANC participation in the program. The GAO Report concluded that:

[t]he complex nature of some ANCs' 8(a) business practices, combined with the competing ANCSA and 8(a) program goals . . . , create the need for SBA to tailor its regulations and policies as well as to provide greater oversight in practice. . . . Without this level of oversight, there is clearly the potential for unintended consequences or abuse.<sup>46</sup>

The GAO Report then recommended ten actions for the SBA to take to address concerns about ANCs in the 8(a) program.<sup>47</sup> The point has also been made, however, that the GAO Report is most notable for what it does not contain—i.e., an indictment of ANCs themselves or their participation in the 8(a) program.<sup>48</sup>

The recent flurry of attention on ANCs would seem to result from the combination of the departure from the Senate of the strongest ANC supporter, the late Ted Stevens,<sup>49</sup> and President Obama's call to eliminate noncompetitive contracts.<sup>50</sup> On July 10, 2009, the Inspector General of the SBA released a report (hereinafter IG Report) that aimed to identify ANC 8(a) contracting trends, determine whether the 8(a) program has helped Alaska Natives, and assess the SBA's ability to monitor ANC compliance.<sup>51</sup> The IG Report discovered that the SBA had implemented only two of the GAO's ten recommendations in the three years since those recommendations were made.<sup>52</sup> All the same, the IG Report went on to question the role of ANCs in the 8(a) program.<sup>53</sup> It concluded that the growth of ANC participation in the 8(a) program may be limiting the ability of non-ANCs to secure 8(a) contracts.<sup>54</sup> The Report also questioned whether ANC contracting advantages are the most cost-effective way to assist Alaska Natives<sup>55</sup> and, perhaps most

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46. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37, at 39; *see also* Yang, *supra* note 42, at 336 ("The central conclusion of the GAO report, however, is that oversight by contracting agencies is unduly lax . . .").

47. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37, at 40–41.

48. Yang, *supra* note 42, at 355–56.

49. Weld Royal, *Facing a Loss in Alaska*, N.Y. TIMES, Oct. 30, 2008, at B12, available at 2008 WLNR 20679001.

50. *Obama Promises To Limit No-Bid Contracts*, BOSTON GLOBE, Mar. 5, 2009, available at 2009 WLNR 4201787.

51. OFFICE OF THE INSPECTOR GEN., U.S. SMALL BUS. ADMIN., PARTICIPATION IN THE 8(A) PROGRAM BY FIRMS OWNED BY ALASKA NATIVE CORPORATIONS 1 (2009).

52. *Id.* at 6.

53. *See id.* at 22–23.

54. *Id.* at 22.

55. *Id.* at 22–23.

importantly, suggested that ANCs are not disadvantaged and that including them in the 8(a) program may be inconsistent with the program's goals.<sup>56</sup> The Report concluded that Congress may want to examine ANC participation in the 8(a) program and further urged that the SBA implement the GAO's recommended actions.<sup>57</sup>

## B. The Senate Subcommittee Report

On July 16, 2009, Senator McCaskill chaired a hearing on "Contracting Preferences for Alaska Native Corporations" before the Senate Subcommittee on Contracting Oversight.<sup>58</sup> The hearing was organized because Senator McCaskill wanted to determine whether ANCs have "participated in a giant loophole to competitiveness."<sup>59</sup> Alaska's senators, however, expressed concern about the hearing. Both Democratic Sen. Mark Begich and Republican Sen. Lisa Murkowski wrote to McCaskill to express their concerns about her inquiry.

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56. *Id.* at 23.

57. *See id.* at 23–24.

58. *See Hearing, supra* note 3. The Subcommittee consisted of Claire McCaskill (D-Missouri), Susan M. Collins (R-Maine) and Daniel K. Akaka (D-Hawaii) and was chaired by Senator McCaskill. *Id.* at III. Witnesses included Debra Ritt, Assistant Inspector General for Auditing at the Office of Inspector General in the Small Business Administration; Joseph Jordan, Associate Administrator for Government Contracting & Business Development at the Small Business Administration; Shay Assad, Acting Deputy Under Secretary of Defense for Acquisition & Technology for the Department of Defense; Sarah Lukin, Executive Director of the Native American Contractors Association; Jacqueline Johnson-Pata, Executive Director of the National Congress of American Indians; Julie Kitka, President of the Alaska Federation of Natives; Mark Lumer, Senior Vice President of Federal Programs for Cirrus Technology, Inc.; and Christina Schneider, CFO of Purcell Construction Corporation. *Id.*

59. Erika Bolstad, *Native No-Bid Contracting Sows Tension in US Senate*, ANCHORAGE DAILY NEWS, July 16, 2009, at A1, available at 2009 WLNR 13627050 (internal quotation marks omitted). Bolstad reports:

McCaskill, a former state auditor from Missouri, said she plans to go into her subcommittee hearing with an open mind. But she also said she's skeptical of the large, no-bid federal contracts that Alaska Native corporations are able to obtain.

In an interview this week, she said she wants to determine whether Native corporations have "participated in a giant loophole to competitiveness."

"I will certainly admit I have a bias toward competing for contracts that involve public money," she said. "I'm not ashamed to admit that bias. I think it's a healthy bias."

*Id.*

"I think we want to make sure we're not doing it because someone 'feels' a certain way, but (because) there's some good data that shows the federal government is not spending properly or it's not doing what the mission of what 8(a)s are about," Begich said this week. "I hope it's not a witch hunt; I hope it's not a specific attack on Alaska Natives in our state."<sup>60</sup>

The day after the hearing, Senator McCaskill's office issued a Majority Staff Analysis entitled "New Information About Contracting Preferences for Alaska Native Corporations" (Subcommittee Report).<sup>61</sup>

The Subcommittee Report begins with an Executive Summary that lists seven bulleted "key findings."<sup>62</sup> After some brief background on the history of ANCs, the "preferences" for ANCs, and the information that Senator McCaskill had requested from ANCs, the bulk of the Report is dedicated to its "Findings," which are divided into three separate sections.<sup>63</sup> The first discusses ANCs' increasing involvement in federal contracting from 2000 to 2008.<sup>64</sup> The second section begins by asserting that ANCs receive a "disproportionate" number of 8(a) contracts; its subheadings then make several claims: that ANCs exceed the size limitations for small businesses; that ANCs receive large, no-bid contracts; and that ANCs use subcontracts to pass large contracts through to non-Native companies.<sup>65</sup> The third section purports to examine the relationship between federal contracts and benefits to shareholders.<sup>66</sup> In this section, the Report acknowledges the dividends and other benefits provided by ANCs but criticizes ANCs for failing to employ their shareholders and for paying high salaries to non-Native executives.<sup>67</sup> Finally, the Report announces its conclusions:

In recent years, federal auditors and academics have raised concerns that the preferences granted to Alaska Native Corporations create the potential for waste, fraud, and abuse in

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60. *Id.*

61. STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, SUBCOMM. ON CONTRACTING OVERSIGHT, 111TH CONG., NEW INFORMATION ABOUT CONTRACTING PREFERENCES FOR ALASKA NATIVE CORPORATIONS (PART II) (2009) [hereinafter SUBCOMM. STAFF REP. II], available at <http://mccaskill.senate.gov/pdf/071509/ANC.pdf>.

62. *Id.* at 2-3. These "key findings" are discussed further *infra*.

63. *See id.* at 1.

64. *Id.* at 8-9.

65. *Id.* at 9-14.

66. *See id.* at 14.

67. *See id.* at 14-16. This section also provides two "Case Studies": one focuses on Chenega Corporation and the other focuses on Cook Inlet Region, Inc. (CIRI). *Id.* at 16-17.

government contracting. The record before the Subcommittee shows that the Alaska Native Corporations are multi-million or billion dollar corporations that rank among the largest federal contractors. The Subcommittee's investigation shows that the ANCs have taken advantage of their 8(a) contracting preferences, receiving large no-bid contracts and passing through much of the work to other contractors. The record also shows that ANCs provide some benefits to their shareholders.<sup>68</sup>

Such conclusions encapsulate many of the problems that plague the Subcommittee Report's analysis more generally. In brief, note the rhetorical ploy in which the Report identifies the *potential* for waste, fraud, and abuse. Note also the assertion that ANCs rank among the largest federal contractors, which is an appealing, but hollow, claim: the mere fact that ANCs do not look like other 8(a) participants does not suggest that the treatment of ANCs is improper. Additionally, note that when the Report condemns ANCs for "taking advantage of their 8(a) contracting preferences," it is effectively criticizing ANCs themselves for the unique rules designed for ANCs' unique circumstances. Indeed, the Subcommittee singles out ANCs—rather than lax oversight, underequipped government contracting agents, or reprehensible non-Native partners—as the source of abuses in the system. Finally, note the comparative short shrift given to the benefits ANCs provide their shareholders and to the difficulties associated with living and working in Alaska. These and other analytical problems will be discussed in more depth in the next Part, which focuses on the shortcomings inherent in much of the current debate about ANCs.

### C. Recent Calls for Reform

In September and October of 2010, the *Washington Post* began publishing a series of articles by Robert O'Harrow, Jr., which brought renewed attention to the debate.<sup>69</sup> Part One of the series summarized the *Post's* findings: many ANCs have federal contracting operations based in Washington, D.C.; non-Native executives have received large salaries from ANCs; federal oversight has been lax; and most Alaska firms "operate in financial obscurity."<sup>70</sup> Another article described how a Bethesda-based consultant helped a barely solvent ANC earn

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68. *Id.* at 17.

69. See, e.g., O'Harrow, *A Promise Unmet*, *supra* note 1.

70. *Id.* Many of these points, however, had previously been identified. See Parts III.B and IV *infra*.

\$37,000,000 in profit in just a few years and also helped himself to \$15,000,000 by virtue of his dealings with that ANC.<sup>71</sup> A third article provided a case study of Eyak Corporation and juxtaposed the poverty of its shareholders with the successes of Eyak Corporation's subsidiary and its government-contracting partners.<sup>72</sup> Notably, a fourth article described the myriad ways in which ANCs provide benefits to their shareholders.<sup>73</sup>

Roughly a week after these articles appeared, Senator Claire McCaskill (D-Missouri) announced that she would introduce legislation that aims to eliminate the rules designed for ANCs.<sup>74</sup> In announcing her proposed legislation, Senator McCaskill cited the *Washington Post* series and her own "investigations" into ANCs in 2009.<sup>75</sup>

#### IV. THE CURRENT DISCOURSE ON ANCS

The Subcommittee Report is, of course, a political document rather than an objective study, but it provides an instructive lens through which to examine the debate about ANC participation in the 8(a) program—perhaps precisely because the Report is political. Notably starting with the IG Report and continuing with the Subcommittee Report and the *Washington Post* series, the current debate emphasizes ANCs as artifacts of the Small Business Act and accordingly focuses on ANCs solely as businesses.

There is an obvious argument though that examining ANC participation in the 8(a) program through a Small Business Act-centric framework is entirely appropriate because ANCs are participating in a Small Business Act program. However, while it may be appropriate to begin any examination in the context of the Small Business Act, such a beginning does not imply that consideration of ANC participation in the

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71. O'Harrow, *Bethesda Consultant*, *supra* note 1.

72. Robert O'Harrow Jr., *Behind Lucrative Deals, A Disconnect*, WASH. POST, Oct. 1, 2010, at A1 [hereinafter O'Harrow, *A Disconnect*], available at 2010 WLNR 19529083. However, this analysis suffers from some of the same flaws as does the Senate Subcommittee Report discussed *infra* in Part IV of this Note.

73. Robert O'Harrow Jr., *Despite Questions Over ANCs, Many Pay Out Millions In Dividends, Scholarships, Charitable Donations*, WASH. POST, Sept. 29, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/09/29/AR2010092907614.html> [hereinafter O'Harrow, *Despite Questions*].

74. Press Release, Senator Claire McCaskill, McCaskill To Introduce Legislation to Reform Contracting Privileges for Alaska Native Corporations (Oct. 8, 2010), available at [http://mccaskill.senate.gov/?p=press\\_release&id=1109](http://mccaskill.senate.gov/?p=press_release&id=1109). Senator McCaskill's proposed reforms will be discussed *infra* in Part VI of this Note.

75. *See id.*

8(a) program should end there. This Part will demonstrate how this business-centric perspective manifests itself and will also highlight some of the problems with such an approach.

### A. ANCs are Big Business

Analysis of ANC participation in the 8(a) program often condemns ANCs for being big. Indeed, the Subcommittee Report's first two "key findings" were that ANCs are "among the largest federal contractors"<sup>76</sup> and that ANCs are "big businesses."<sup>77</sup> However, claiming that ANCs are "big" is problematic because it focuses attention on specious arguments while failing to address problems in practice. In other words, such "findings" matter as far as determining whether or not ANCs look like the other participants in the 8(a) program; these findings do not directly address practical concerns such as whether the system is being abused, whether ANC participation in the 8(a) program benefits Alaska Natives, or whether ANC participation is in the best interests of taxpayers.

In a sense, whether or not ANCs look like other businesses encompassed by the Small Business Act is beside the point because

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76. SUBCOMM. STAFF REP. II, *supra* note 61, at 2. But, of course, size is relative. Labeling ANCs as "among the largest federal contractors" obscures the fact that NANA Regional Corporation, Arctic Slope Regional Corporation, Chugach Alaska Corporation, and Afognak Native Corporation were in only the eighty-fourth, eighty-ninth, ninety-first, and ninety-third positions respectively in a ranking of the top recipients of federal contracts in 2008. OMB Watch, *Top 100 Recipients of Federal Contract Awards for FY 2008*, FEDSPENDING.ORG, <http://www.fedspending.org/fpds/tables.php?tabtype=t2&subtypet=t&year=2008> (last visited Oct. 19, 2010). The total combined awards for these four ANCs represented only 0.48% of total federal contract awards for 2008. *See id.* Had these four ANCs been able to combine their federal contract awards for ranking purposes, their combined awards would have placed them jointly at only twenty-sixth on the list. *See id.* Moreover, in 2007, Chugach Alaska Corporation was the only ANC to rank in the top one hundred—in the eighty-eighth position. OMB Watch, *Top 100 Recipients of Federal Contract Awards for FY 2007*, FEDSPENDING.ORG, <http://www.fedspending.org/fpds/tables.php?tabtype=t2&subtypet=t&year=2007> (last visited Oct. 19, 2010). That year, the total 8(a) awards to *all Native Enterprises* would have represented only 0.7% of federal contract awards. *Hearing, supra* note 3, at 75 (statement of Lukin). Although 2009 statistics are incomplete, Chugach (in the seventy-fifth position) was again the only ANC in the top one hundred through part of the third quarter. OMB Watch, *Top 100 Recipients of Federal Contract Awards for FY 2009*, FEDSPENDING.ORG, <http://www.fedspending.org/fpds/tables.php?tabtype=t2&subtypet=t&year=2009> (last visited Oct. 19, 2010).

77. *See* SUBCOMM. STAFF REP. II, *supra* note 61, at 2. Additionally, the third and fourth "key findings" also indirectly addressed the size of ANCs: ANCs have "created multiple 8(a) subsidiaries" and have "been awarded multiple large federal contracts on a sole-source basis." *Id.* at 2-3.

ANCs *are* encompassed by the Small Business Act. Whatever their size, ANCs are not external to the Small Business Act; rather, the Act specifically embraces ANCs with specially designed rules. Rather than object to ANC participation in the 8(a) program because ANCs look different, why not understand the 8(a) program as a system that is able to embrace the needs of many different-looking types of participants?

Claiming that ANCs are big is troubling not only because it is largely moot but also because making such claims frames the debate in a way that is unfavorable to ANCs. Indeed, the Subcommittee Report repeatedly considers ANC participation in the 8(a) program not in terms of the rules designed for ANCs but in terms of the rules designed for other, non-ANC, 8(a) participants.<sup>78</sup> For instance, examining ANCs in these terms leads to a characterization of ANC rules as “exemptions” and “loopholes.”<sup>79</sup> As Sarah Lukin, Executive Director of the Native American Contractors Association, noted in her testimony before the Subcommittee:

Labeling the Native 8(a) program as “Preferences” is inaccurate[] and does not tell the whole story[] and to some may have negative connotations. The Native 8(a) program represents an important policy determination by Congress to recognize the historic obligations of the Congress to Native

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78. See, e.g., *id.* at 5. For example, note the Subcommittee Report’s description of how ANCs “effectively circumvent[] the nine-year graduation and ownership requirements.” *Id.* But also note Sarah Lukin’s testimony:

Native Enterprises have two key unique 8(a) provisions: 1. The competitive thresholds that limit the amount of sole-source contract awards do not apply; and 2. Native Enterprises can participate in the 8(a) program through more than one company as long as they are in a different industry. This was the intent of Congress, and it makes sense in light of the economic and social disadvantages with which Native communities must contend and the numbers [sic] of Native Americans in need. The disadvantages suffered by Native Americans encompass entire communities and villages, as opposed to individuals who are socially or economically disadvantaged. The ability to operate more than one company allows Native Enterprises to provide for hundreds or thousands of their people.

*Hearing, supra* note 3, at 73 (statement of Lukin). That is, ANCs do not “circumvent” anything; rather, they are bound by different rules because of their different circumstances.

79. See Bolstad, *supra* note 59; Press Release, Senator Claire McCaskill, Contracting Oversight Subcommittee to Examine Exemptions Favoring Alaska Native Corporations (July 8, 2009), available at [http://mccaskill.senate.gov/?p=press\\_release&id=95](http://mccaskill.senate.gov/?p=press_release&id=95) (“Not only is there little to no competition for these large contracts, based on a federal loophole, many of the companies who received the contracts do much of their work outside Alaska.”).

American tribes, Native Hawaiians and Alaska Natives. . . . So it disturbs me when an official press release describes Tribal, ANC and NHO participation in 8(a) as a “federal loophole.”<sup>80</sup>

In other instances, the way in which the Subcommittee Report frames the debate is even more troubling. Perhaps most egregiously, the Subcommittee Report presages its discussion of its “Findings” by stating that the GAO Report “concluded that the Alaska Native Corporation contracting preferences were an ‘open checkbook’ for government agencies.”<sup>81</sup> But this “open checkbook” language was in fact not part of GAO’s “conclusion.”<sup>82</sup> Rather, it comes from the opinion of an anonymous government contractor whom the GAO quoted in the middle of its study under a subheading entitled “Sole-Source 8(a) Contracts to ANC Firms Viewed as Expedient.”<sup>83</sup> Similarly, the Report also begins its Introduction by noting that ANCs are “uniquely eligible for federal contracting opportunities.”<sup>84</sup> While ANCs are in fact “uniquely eligible,” asserting this special treatment without first establishing what the rules for ANCs are—and in many instances never establishing why the rules for ANCs are the way they are—intimates that the treatment of ANCs is unfair.

## B. Costs and Benefits

A business-centric perspective permeates the Subcommittee’s analysis of the relative costs and benefits of ANC participation in the 8(a) program, and such a perspective leads to an emphasis on business concerns (such as company size and revenues) at the expense of benefits not commonly associated with businesses. However, ANCs are not simply businesses, and viewing them as such underestimates the good that ANCs do.

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80. *Hearing, supra* note 3, at 69–70 (statement of Lukin).

81. SUBCOMM. STAFF REP. II, *supra* note 61, at 7.

82. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37, at 39–40.

83. *Id.* at 16–17. The GAO study actually reported:

Agency officials told us that awarding sole-source contracts to 8(a) ANC firms is an easy and expedient method of meeting time-sensitive requirements. Some examples follow. . . . Another contracting official told us that it was the ‘unofficial’ policy in his organization that for urgent requirements over the competitive limits for other 8(a) firms, an ANC firm is sought out. He described contracting with ANC firms as an ‘open checkbook’ since sole-source awards can be made for any dollar amount. *Id.*

84. SUBCOMM. STAFF REP. II, *supra* note 61, at 4.

For example, the Subcommittee Report focuses on establishing the *economic* value that shareholders receive.<sup>85</sup> Although the Report then also concedes that it received “detailed accounts of various contributions to the community, the value of which is not purely monetary,” the Report takes note of only two examples.<sup>86</sup> Such a focus may make sense for ordinary businesses, which generally provide only dividends to their shareholders, but it is grossly insufficient when evaluating ANCs, which respond to the unique needs of their shareholders in a number of ways:

Shareholder preferences for benefits differed among corporations. For example, one corporation stated that its shareholders prioritized protection of their land and the subsistence lifestyle. Shareholders of other corporations placed a greater value on dividends, scholarships, training, and job opportunities. Corporations reported targeting benefits towards the needs of their shareholders.<sup>87</sup>

The GAO Report cites several specific examples of such targeted benefits:

investing in low-cost Internet service as a tool to reduce the isolation of a particularly remote village; issuing death benefits in the form of food vouchers because the cultural tradition among its shareholders is to host and feed visitors from the time of death through burial services; investing in an insurance company when other insurance companies were reluctant to insure shareholders’ homes; and subsidizing heating oil for residents of a small, remote community north of the Arctic Circle, absorbing a loss of \$2.75–\$3.00 per gallon.<sup>88</sup>

The GAO Report’s discussion of benefits provides a telling contrast to the Subcommittee Report. The GAO Report divides benefits into three

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85. *See id.* at 14. The Subcommittee concludes that federal contracts contribute a value equal to \$615 per person per year. *Id.*

86. *Id.* at 15. The Report cites only two examples, however: “Sealaska Corporation has helped secure funding for municipal drinking water improvement systems and management of the Hubbard Glacier overflow in order to prevent catastrophic flooding on the Situk River. Several corporations have funded programs to renew cultural awareness and preserve native languages.” *Id.* Compare the determination that “*several* corporations have funded programs” to the GAO Report’s finding: “[t]wenty-four of the 30 corporations we interviewed invested in cultural and heritage programs, which included museums, culture camps, or native language preservation.” U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37, at 83 (emphases added).

87. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37, at 80.

88. *Id.* at 80–81.

broad categories: dividends, other direct benefits, and indirect benefits.<sup>89</sup> “Other direct benefits” included: shareholder hiring preferences and job opportunities; other employment assistance programs; benefits for elder shareholders; scholarships; internships and other youth programs; burial assistance; land leasing, gifting, or other use;<sup>90</sup> and community infrastructure.<sup>91</sup> “Indirect benefits” included: support of the subsistence lifestyle;<sup>92</sup> cultural preservation; establishment and support of affiliated foundations or nonprofit organizations; donations to other nonprofit organizations; and support to other corporations.<sup>93</sup> Examining ANCs solely *qua* businesses—as does the Subcommittee Report—does not appreciate such benefits, which do not appear on a financial statement.

Furthermore, the Subcommittee Report does not simply gloss over noneconomic benefits to shareholders; even when such benefits are mentioned, the discussion is done in a way that minimizes their rhetorical impact. Notably, in detailing its “key findings,” the Subcommittee Report provides seven bulleted points; each bulleted point identifies a concern that has been associated with ANCs.<sup>94</sup> The Subcommittee Report then notes that the surveyed ANCs have also “provided cash, scholarships, preservation of cultural heritage, or other benefits valued at approximately \$720.1 million over the last nine years.”<sup>95</sup> Whereas each concern about ANCs gets its own individual

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89. *Id.* at 81.

90. *Id.* at 82–83. One ANC gifted five acres to any shareholder who requested it. *Id.* at 83.

91. *Id.* at 82–83. In regards to community infrastructure specifically, the GAO Report notes that “after the Department of the Interior’s Bureau of Indian Affairs ceased barge service to its remote village, one corporation established a transportation company that became the only mechanism to bring goods to the community. Other projects included remodeling the community washateria . . .” *Id.* at 83. “A washateria is a community laundry and shower facility found in villages without running water.” *Id.* at 83 n.5.

92. *Id.* at 83 (“One corporation built in subsistence leave into its personnel policy. Another corporation leased its land for ‘fish camps,’ or plots along a river for shareholders to catch and smoke fish in the summertime.”).

93. *Id.* at 83–84.

94. SUBCOMM. STAFF REP. II, *supra* note 61, at 2–3. In addition to the “key findings” identified in notes 62 and 63 *supra*, the Subcommittee also determined that ANCs “may be passing work through to subcontractors,” “employ a relatively small percentage of shareholders” and “have relied heavily on highly-paid, non-Native executives.” *Id.* at 3.

95. *Id.* The Subcommittee is unfortunately less transparent than one might hope in disclosing how it arrived at this figure. The \$720,100,000 figure is what the Subcommittee “estimates” after an “extensive analysis.” *Id.* at 14.

bullet, the benefits are lumped in a single, non-bulleted sentence.<sup>96</sup> The effect is that a single benefit is balanced against a range of costs.

But a cost/benefit analysis that is company-oriented and focuses on ANCs only as businesses tends to lead to such an unbalanced arrangement. While it is easy to see what something like providing scholarships costs an ANC, it is difficult to evaluate what those scholarships are worth to an Alaska Native community. Tuition is easy to measure, but increased capacity is not. Moreover, since economic costs are both more obvious and more quantifiable than social benefits, cost/benefit analyses that think of ANCs purely as businesses commonly recognize even *potential* costs in the economic context while at the same time overlooking *actual* gains in the social context.<sup>97</sup> For instance, the Subcommittee Report notes that the current treatment of ANCs creates the *potential* for fraud.<sup>98</sup> But the Report fails to acknowledge that current treatment of ANCs has been linked to actual benefits:

During the 1990s improvements appeared in social and economic indicators for American Indians and Alaska Natives residing in the Alaska Native regions. Interestingly, the strength of some of these improvements correlates with the regions most active in the 8(a) program. . . . [P]reliminary analysis associates higher volumes of Section 8(a) contracting with educational and economic improvement.<sup>99</sup>

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96. See *id.* While such treatment is unfortunate, it is not uncommon. See Yang, *supra* note 42, at 344–52 (balancing all benefits in “Impact on Alaska Natives” against individualized costs in “But Not Enough Jobs and Dividends,” “Padding the Taxpayer Bill,” and “Excluding Other Small Businesses and 8(a) Programs”).

97. See SUBCOMM. STAFF REP. II, *supra* note 61, at 8 (“Although ANCs *provide some benefits* to their shareholders, ANCs’ contracting preferences also *create the potential* for waste, fraud, and abuse.”) (emphases added).

98. *Id.* at 17. Abuses do occur, of course, but citing instances of abuse does not suggest that such abuses are the norm or that ANCs—as opposed to underequipped government contracting agents and overbearing non-Native partners—are to blame. Indeed, Robert O’Harrow Jr. himself, the author of the critical *Washington Post* series, noted that “the problems with the ANC program are similar to problems at the very core of the federal procurement system.” Robert O’Harrow Jr., Answer to Question 3 in *Two Worlds: Alaska Native Corporations, Discussions/Live Q&A’s*, WASH. POST (Sept. 30, 2010, 11:09 AM), <http://live.washingtonpost.com/alaska-natives.html#question-3>.

99. JONATHAN B. TAYLOR, NATIVE AMERICAN CONTRACTING UNDER SECTION 8(A) OF THE SMALL BUSINESS ACT: ECONOMIC, SOCIAL, AND CULTURAL IMPACTS 15–16 (2007); see also Question 8, *Self-Contradictions* in *Two Worlds: Alaska Native Corporations, Discussions/Live Q&A’s*, WASH. POST (Sept. 30, 2010, 9:37 AM), <http://live.washingtonpost.com/alaska-natives.html#question-8> (“[O’Harrow]

In sum, evaluating ANCs from a business-oriented perspective tends to overstate the costs associated with their participation in the 8(a) program while at the same time understating the benefits.

### C. Subcontracting

Similarly, the Subcommittee Report rails against ANCs' involvement/role in "pass-throughs," a practice in which an 8(a) participant is awarded a contract through the program but then subcontracts a large percentage of the work on that contract to a company that is ineligible for the 8(a) program.<sup>100</sup> However, the Report never establishes that pass-throughs are an actual—rather than a potential—problem.<sup>101</sup> The Report begins by noting that ANCs have the ability to subcontract their work.<sup>102</sup> The Subcommittee then observes that the GAO found "almost no evidence" that agencies were enforcing limits on subcontracting.<sup>103</sup> What is implied—but is conspicuously left unsaid—is any allegation that excessive subcontracting is, in fact, occurring. While the Report cites one example as a case study, it never suggests that the example is representative.<sup>104</sup> Rather, the Subcommittee reports that "Alaska Native Corporations *may* be passing work through to subcontractors."<sup>105</sup> As Sarah Lukin notes in a slightly different context, the "rhetorical ploy" of saying that excessive subcontracting "may" be happening puts the burden on ANCs to prove otherwise.<sup>106</sup>

Similarly, Robert O'Harrow's *Washington Post* series offers another "case study of how Alaska native corporations and their subsidiaries have been used to pass on work to large Washington area firms, sometimes under circumstances that have been questioned."<sup>107</sup> But the fact that ANCs "have been used" to pass work through does not imply that such practices are prevalent. Indeed, although the ANC in the

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never contrasts native shareholders benefiting from the ANC 8(a) program with natives whose ANC does not participate in the program. There is a difference, and you can see it in the villages.").

100. SUBCOMM. STAFF REP. II, *supra* note 61, at 12-14.

101. There is, of course, some documented objectionable conduct by ANCs. However, the fact remains that the Subcommittee Report largely bases its criticism of pass-throughs on the potential for pass-throughs.

102. SUBCOMM. STAFF REP. II, *supra* note 61, at 12-13.

103. *Id.* at 13.

104. *Id.* at 13-14. Even this example only reveals that Afognak subcontracted more than fifty percent of an 8(a) award a total of fifty-six times over the span of nine years. *Id.*

105. *Id.* at 3.

106. *See Hearing, supra* note 3, at 80 (statement of Lukin).

107. O'Harrow, *A Disconnect, supra* note 72.

O'Harrow article did engage in objectionable subcontracting, the article also effectively demonstrates how ANCs—likely more so than other firms—are wary “of being accused of being a front for a large Company” even when that large partner company is pressuring the ANC to subcontract ever-larger portions of the work.<sup>108</sup> Such anecdotal evidence then would seem to support the claims that have been made that the type of pass-throughs to which the Subcommittee Report objects are in fact no longer a major cause for concern.<sup>109</sup>

Indeed, even in the *Post's* series, which was based on “[a] review of thousands of records and dozens of interviews with native shareholders, ANC executives, government officials and others in Alaska and across the nation,”<sup>110</sup> the most egregious pass-through did not involve an ANC at all.<sup>111</sup> Whereas the ANC resisted (albeit unsuccessfully) an overbearing partner that was pushing for seventy-five percent of the profits, a non-ANC company agreed to pass-through 99.5% of a contract to that same partner business.<sup>112</sup> According to Mr. O'Harrow, “[t]hat company was not an Alaska native firm, but GTSI's relationship with it sheds light on how big firms can use little ones to get at money set aside for small businesses.”<sup>113</sup> Thus, although ANCs have been subject to a heavy dose of criticism, one noteworthy takeaway from Mr. O'Harrow's article is the fact that excessive subcontracting is not a concern that is unique to ANCs; it is a problem with the federal procurement system itself.

#### D. A “Disproportionate” Share of Awards

The Subcommittee Report begins its discussion of “Alaska Native Corporations and the 8(a) Program” by stating that ANCs “now receive a disproportionate number of 8(a) contracts.”<sup>114</sup> However, the Subcommittee Report never clearly identifies what is “disproportionate” about the number of awards to ANCs. It alternately notes that ANCs receive the majority of their contract dollars through the 8(a) program; then it switches to the observation that ANCs received nineteen percent of all 8(a) contracts; and finally, it returns to the first point to note that

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108. *Id.*

109. See Elizabeth Bluemink, *Native Firms Face Changes To Contracting*, ANCHORAGE DAILY NEWS, Oct. 28, 2009, at A4, available at 2009 WLNR 21475492.

110. O'Harrow, *A Promise Unmet*, *supra* note 1.

111. O'Harrow, *A Disconnect*, *supra* note 72.

112. *Id.*

113. *Id.*

114. SUBCOMM. STAFF REP. II, *supra* note 61, at 9.

ANCs received sixty-five percent of their contract dollars through the 8(a) program.<sup>115</sup> Thus, the Report seems on the one hand to assert that ANCs receive too many 8(a) awards as compared to other 8(a) participants, while on the other hand making the point that ANCs receive too many 8(a) awards as compared to other types of federal contract awards. But such concerns about ANCs' position in the government contracting marketplace appear to be largely unfounded.

The Subcommittee cites two sources in support of this "disproportion." First, it cites Harry Alford, President of the Black Chamber of Commerce, as calling ANCs "a runaway freight train" and "predators on the minority business community," which would seem to provide support for the idea that ANCs receive too many 8(a) awards as compared to other 8(a) participants.<sup>116</sup> Notably, however, Harry Alford has been a supporter of ANCs since early 2008.<sup>117</sup> Elizabeth Bluemink of the *Anchorage Daily News* describes Alford's reversal as resulting from the realization that business partnerships with ANCs could in fact help to provide *more* opportunities for minority businesses:

Alford has gone from fierce opponent to potent ally of the Native firms. Alford said his main beef with them was that black-owned businesses were getting a smaller piece of the federal contracting pie. . . . The main thing that changed his mind: talking to Arnold Baker, a black New Orleans executive who formed a partnership on the Gulf Coast with Eyak Technologies, a firm owned by Eyak Corp., the village corporation for Native shareholders in Cordova. Baker convinced him that the black entrepreneurs could benefit by working with the Alaska firms.<sup>118</sup>

Thus, it is entirely disingenuous for the Subcommittee Report in 2009 to be quoting Harry Alford's 2006 attack on ANCs.

Second, the Report cites Jenny Yang for the propositions that ANCs take business from other 8(a) participants and that ANCs have become

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115. *Id.* at 10.

116. *Id.*; see also Yang, *supra* note 42, at 350.

117. See, e.g., Elizabeth Bluemink, *Black Businesses Mend Fences With Native Corporations*, ANCHORAGE DAILY NEWS, Mar. 29, 2008, at A1, available at 2008 WLNR 10230757.

118. *Id.*; see also Harry Alford, *A Very Rough Week but Victorious*, NAT'L BLACK CHAMBER OF COMMERCE, (Feb. 21, 2009), [http://www.nationalbcc.org/index.php?option=com\\_content&view=article&id=649:a-very-rough-week-but-victorious&catid=63:beyond-the-rhetoric&Itemid=8](http://www.nationalbcc.org/index.php?option=com_content&view=article&id=649:a-very-rough-week-but-victorious&catid=63:beyond-the-rhetoric&Itemid=8) ("Last year we went to Alaska and made friends with various Alaska Native Corporations. A few of them have become members of the National Black Chamber of Commerce.").

overly dependent on the 8(a) program.<sup>119</sup> Ms. Yang's conclusions would seem to support characterizing ANC awards as "disproportionate" in both senses in which the Report uses that word. However, the Subcommittee Report again ignores relevant data. In an analysis commissioned by Senator Mark Begich of Alaska specifically to brief Senator McCaskill's committee on the benefits of the 8(a) program to Alaska Natives, the Institute of Social and Economic Research determined that "[t]he 8(a) program appears to be succeeding to promote the competitiveness of ANC contractors: while from 2000 to 2004 ANCs grew their sole-source 8(a) contracting four-fold (GAO), their non-8(a) federal contracting business also grew more than five-fold, and their non-sole-source 8(a) contracts grew more than three-fold."<sup>120</sup> Thus, while ANCs' sole-source 8(a) contracts did increase over this period, their non-sole-source 8(a) contracts grew at nearly the same rate, and their non-8(a) federal government contracts increased at an even higher rate than did their sole-source 8(a) contracts. Such statistics therefore appear to refute "the possibility that some ANCs, having outgrown the sheltered harbor of the 8(a) Program, are nevertheless reluctant to wade into the open waters of competitive contracting."<sup>121</sup>

The Subcommittee Report's assertion that ANCs receive a "disproportionate" share of awards resonates in the current debate beyond just the arguments of Alford and Yang. One often repeated comment observes that in 2008 ANCs received twenty-six percent of all 8(a) dollars awarded but represented only two percent of the 9500 businesses in the 8(a) program.<sup>122</sup> While the discrepancy in these figures

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119. SUBCOMM. STAFF REP. II, *supra* note 61, at 10 (quoting Yang, *supra* note 42, at 343).

120. INST. OF SOC. & ECON. RESEARCH, *supra* note 18, at 17-18; *see also* TAYLOR, *supra* note 99, at 8-9 ("Native contracting nearly quadrupled in nominal terms from FY 2000 to FY 2005 . . . Contracting growth was roughly even across forms of competition, such that the proportions at the end of the period looked very similar to the start; that is to say, competitive contracting grew in proportion to uncompetitive contracting."). Compare this research data to the methodology supporting the Subcommittee's assertion. *See* Yang, *supra* note 42, at 341-42.

121. Yang, *supra* note 42, at 342.

122. *Hearing, supra* note 3, at 3-4. (opening statement of Senator Susan M. Collins); *id.* at 51 (statement of Debra S. Ritt, Assistant Inspector Gen. for Auditing, U.S. Small Bus. Admin.); OFFICE OF THE INSPECTOR GEN., *supra* note 51, at 7; Kent Hoover, *SBA Limits Large Firms' Share of 8(a) Deals*, WASHINGTON BUS. J., Nov. 9, 2009, available at <http://washington.bizjournals.com/extraedge/washingtonbureau/archive/2009/11/09/bureau2.html>; Robert Brodsky, *IG: Alaska native firms winning a disproportionate share of 8(a) contracts*, GOV'T EXECUTIVE, July 14, 2009, available at <http://www.govexec.com/dailyfed/0709/071409rb1.htm>.

may seem troubling at first glance, one must bear in mind that the statistic is comparing 8(a) dollars to 8(a) membership and that different rules exist for different types of 8(a) participants. That is, ANCs are not subject to the same dollar limitations for sole-source contracts imposed upon other 8(a) participants.<sup>123</sup> Moreover, as Ron Perry of the Alaska 8(a) Association has pointed out, such large-scale contracts would likely have gone to large federal contractors such as Lockheed Martin.<sup>124</sup> The IG Report agreed that “[e]ven if these ANC contracts had been awarded competitively, rather than on a sole-source basis, it is questionable whether other 8(a) firms could have successfully competed for them.”<sup>125</sup> In other words, the discrepancy between the number of ANCs in the 8(a) program and the amounts awarded to ANCs is not evidence that ANCs take a disproportionate share of contracts from other 8(a) participants; it is evidence that the contracts that ANCs do receive are often higher-price contracts.<sup>126</sup>

### E. Jobs for Alaska Natives

The Subcommittee’s analysis of Alaska Native hiring by ANCs further demonstrates how thinking about ANCs exclusively in the ways that we think about ordinary businesses can be misleading in the bigger picture. For instance, the Subcommittee Report looks at what proportion of ANC employees are shareholders.<sup>127</sup> Again, such an examination makes sense if you look at ANCs in the context of the Small Business Act because a non-ANC 8(a) business must necessarily employ the person

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123. See 13 C.F.R. §§ 124.506(a)(1), 124.506(b) (2010).

124. Campbell, *supra* note 16.

125. OFFICE OF THE INSPECTOR GEN., *supra* note 51, at 5. The IG Report explains that the top ANC participants “had access to the resources of their large parent companies, which gave them a competitive advantage over other 8(a) firms. For example, the ANC-owned firms had access to capital, lines of credit, bonding capability, and administrative resources, as well as the management expertise of their parent companies.” *Id.* Moreover, Sarah Lukin has noted “logic dictates that if the ‘powerful advantage’ for ANCs [is] the ability to pursue contracts over the \$3.5M and \$5M caps, their market competitors would in fact be everyone but the individually-owned 8(a)’s.” *Hearing, supra* note 3, at 77 (statement of Lukin). Indeed, the Subcommittee Report’s claim that ANCs are “among the largest federal contractors” would also seem to bear out Lukin’s claim. See SUBCOMM. STAFF REP. II, *supra* note 61, at 2.

126. Indeed, Michael Brown—the “godfather” of tribal contracting—has said that the growth in federal work is exactly what he envisioned. Michael Scherer, *Little Big Companies*, MOTHER JONES, Jan./Feb. 2005, at 26; see also *Hearing, supra* note 3, at 73 (statement of Lukin).

127. SUBCOMM. STAFF REP. II, *supra* note 61, at 15.

that the business exists to benefit.<sup>128</sup> ANCs are unlike other 8(a) participants, however, and examining them in this way results in misleading statistics.

The Report frames the questions as: what are the *company's* staffing needs, and to what extent does the *company* fill those needs with shareholders?<sup>129</sup> But such a top-down analysis tends to lose sight of the actual people involved. In the letter sent to request information from ANCs, Senator McCaskill specifically asked for: “[t]he number of employees and the number of employees who are also shareholders.”<sup>130</sup> Such a request—and the analysis based on that request—is misleading in the first place because it fails to consider the extent to which Alaska Natives are employed by ANCs of which they are not members. Indeed, the Subcommittee Report cites the nineteen ANCs it surveyed as employing more than 45,000 people.<sup>131</sup> The Report also states that approximately 2400 employees are shareholders of their employing corporation and then concludes that “nearly 95% of ANC employees are not ANC shareholders.”<sup>132</sup> Such a statement is not strictly true, however, because it assumes that an ANC employee who is not a shareholder of that particular ANC is also not an Alaska Native. While it may be true that nearly ninety-five percent of ANCs’ employees are not shareholders of their respective employers, Alaska Natives will often be employed by ANCs of which they are not members.<sup>133</sup> Measuring ANCs narrowly in

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128. *See id.* at 15–16.

129. *See id.* at 14–16.

130. Letter from Sen. Claire McCaskill, Chairman, Subcomm. on Contracting Oversight, to Charles Totemoff, President and Chief Exec. Officer, Chenega Corp. (May 12, 2009), available at <http://mccaskill.senate.gov/files/documents/pdf/2009-05-12Chenega.pdf>.

131. *Id.* at 15.

132. *Id.*

133. *See* INST. OF SOC. & ECON. RESEARCH, *supra* note 18, at 11 (“Alaska Native hire by the 13 regional and largest village corporations averages 25 percent.”); ANCSA REG’L CORP., *supra* note 11, at 38 (“In 2006 ANCSA Regional Corporations employed 30,584 workers worldwide, 14,084 of these were employed in Alaska and 3,105 were Alaska Native.”); O’Harrow, *Despite Questions*, *supra* note 73 (“Sealaska chief executive Chris McNeil said that his corporation’s commitment to that goal means that 21 percent of employees of Sealaska subsidiaries in the SBA 8(a) program are Alaska [N]atives.”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37, at 82 (“In addition to offering a shareholder hire preference, corporations made efforts to encourage other shareholder employment. . . . Some corporations had agreements with partner companies encouraging shareholder hire. One corporation had a preference to conduct business with shareholder-owned businesses.”). While estimates of Alaska Native hiring by ANCs vary, the fact remains that measuring ANCs only in terms of *shareholder* hiring understates the good that ANCs do for Alaska Natives by a substantial percentage.

this top-down way, as Senator McCaskill and the Subcommittee Report do, understates the number of jobs that ANCs provide to Alaska Natives.

Similarly, the Subcommittee Report goes on to note that shareholders comprise less than one percent of Afognak Native Corporation's workforce.<sup>134</sup> While this analysis also exhibits the same flaws as in the example above, it is additionally flawed in that it considers the percentage of employees who are also shareholders rather than the percentage of shareholders who are also employees. The Report notes that Afognak Native Corporation has 728 shareholders and employs over 6400 people including fifty-nine shareholders.<sup>135</sup> Thinking about this situation from the perspective of the company leads to the conclusion that the ANC has filled its positions with shareholders less than one percent of the time: only fifty-nine of the 6400 people it employs are shareholders.<sup>136</sup> Thinking in this way, however, loses sight of the ANC's membership; looking at Afognak's hiring in regards to its members, Afognak directly employs fifty-nine out of its 728 members, which works out to be more than eight percent of its membership.<sup>137</sup> While there may not seem to be a huge difference between eight percent and one percent, consider that changing the measuring stick from total employees to ANC members changes the employment percentage by 879%. While the Subcommittee Report observes that one out of every hundred Afognak employees will be a shareholder,<sup>138</sup> it is equally true that Afognak employs one out of every twelve of its members.

Additionally, the Subcommittee Report offers similarly misleading evaluations in its case studies: Chenega Corporation is reported to employ 5356 employees and only fifty-two shareholders;<sup>139</sup> CIRI is reported to employ shareholders as thirty-five percent of its workforce.<sup>140</sup> However, the Report again does not consider how much of its membership an ANC employs: Chenega has only 170 members so while it employs shareholders as only .97% of its workforce—as the Report notes—it is no less true that it employs more than thirty percent of its members.<sup>141</sup> The Report focuses on the fact that one in every

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134. SUBCOMM. STAFF REP. II, *supra* note 61, at 15.

135. *Id.*

136. *Id.*

137. *See id.*

138. *Id.*

139. *Id.* at 16.

140. *Id.* at 17.

141. *See id.* at 16; *see also* OFFICE OF THE INSPECTOR GEN., *supra* note 51, at 8, tbl. 1.

hundred employees is a shareholder and loses sight of the fact that Chenega employs three out every ten of its members. Simply put, statements such as those by Senator McCaskill—“[ANCs] employ relatively few of their shareholders.”<sup>142</sup>—are not based on sound analysis and do not fare well under a perspective that actually looks at the people involved.

Indeed, the statistics cited by the Report do not demonstrate that ANCs employ few shareholders; they demonstrate that the size of an ANC’s workforce can often be larger than the size of the ANC’s membership. Two conclusions follow from this realization: (1) ANCs are held to a different standard (for instance, when an individual owns a small business, no one points out that the company’s shareholders account for only .2% of its employees) and (2) the Report’s statistics turn out to be more of an indictment of the size of ANCs than their hiring policies. As noted above, criticisms about the size of an ANC distract from the practical issues at hand. Moreover, the size of ANCs makes sense in light of the fact that an ANC is responsible for providing benefits to more people in more ways than are other types of 8(a) participants.<sup>143</sup>

Additionally, geography is a substantial factor in hiring ANC shareholders, and yet the Subcommittee’s analysis completely fails to take it into consideration. For instance, the Report commends CIRI for the fact that shareholders make up thirty-five percent of its workforce,<sup>144</sup> but the Report fails to note that CIRI’s region encompasses Anchorage,<sup>145</sup> which is home to more Alaska Natives than any other area: roughly one in every four Alaska Natives lives in the Municipality of Anchorage.<sup>146</sup> The Subcommittee itself observes that ANCs tend to employ a higher percentage of shareholders at their Alaska-based corporate offices than they do elsewhere.<sup>147</sup> Similarly, CIRI employs a relatively high number of Alaska Native shareholders because so many

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142. *Hearing, supra* note 3, at 2 (opening statement of Senator Claire McCaskill).

143. For more on this point, see Part V.B *infra*.

144. SUBCOMM. STAFF REP. II, *supra* note 61, at 17.

145. See TAYLOR, *supra* note 99, at 5, fig. 2.

146. J. GREGORY WILLIAMS, ALASKA DEP’T OF LABOR AND WORKFORCE DEV., ALASKA POPULATION OVERVIEW: 2009 ESTIMATES 85-86 (2010) *available at* [www.labor.state.ak.us/research/pop/chap2.pdf](http://www.labor.state.ak.us/research/pop/chap2.pdf) (“Anchorage had the largest number of Native Americans . . . of any borough or census area in 2009 . . . . The largest shift in the distribution of the Native American population has occurred in the Municipality of Anchorage. . . . By 2009, that proportion had increased to 24.6%–27.6%.”).

147. See SUBCOMM. STAFF REP. II, *supra* note 61, at 15.

of its shareholders live near the Anchorage-based corporate offices. Whereas many regional ANCs have their membership diffused across remote areas,<sup>148</sup> CIRI's region encompasses the area where the most Alaska Natives live. Moreover, examining ANC hiring in this way—that is, based on the staffing needs of the ANC—ignores the geographical context in yet another way. As the Subcommittee Report and the *Washington Post* series both note, ANCs conduct much of their business in the continental U.S.<sup>149</sup> But as others have pointed out, ANCs work in the lower forty-eight states because that is where the work is.<sup>150</sup> Alaska Natives, on the other hand, live predominantly in Alaska, and they do so for many reasons—including their long-standing ties to the land. ANCs exist in large part to preserve those ties to the land. The Subcommittee Report takes ANCs to task for performing so much of their work outside of Alaska, and yet ANCs work outside of Alaska so that Alaska Natives do not have to. ANCs help to provide jobs to those

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148. See, e.g., Simpson, *supra* note 24 (“[T]he true population density throughout the rest of the state is about one person per two square miles.”).

149. SUBCOMM. STAFF REP. II, *supra* note 61, at 9 (“The major ANC contractors are now large national corporations. . . . Between 2000 and 2008, approximately 40% of all ANC contract dollars was awarded to ANC subsidiary companies located outside of Alaska.”); see also STAFF OF SUBCOMM. ON CONTRACTING OVERSIGHT, S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 111TH CONG., NEW INFORMATION ABOUT CONTRACTING PREFERENCES FOR ALASKA NATIVE CORPORATIONS (PART I) 2–3 (2009), available at <http://mccaskill.senate.gov/files/documents/pdf/ANCdataAnalysis.pdf> (“The Subcommittee’s investigation has shown that most contracts with Alaska Native Corporations are performed outside Alaska. Between 2000 and 2008, only 21% of all contract dollars awarded to ANCs (\$5 billion) were performed in the state of Alaska.”); Hearing, *supra* note 3, at 76 (statement of Lukin) (“Concern has been raised by some that there is a significant presence of ANC employees in Virginia, Maryland, and other states.”); O’Harrow, *A Promise Unmet*, *supra* note 1 (“In many cases, the bulk of the money and jobs has gone to nonnative executives, managers, employees and traditional federal contractors in the lower 48 states, a *Washington Post* examination has found.”).

150. TAYLOR, *supra* note 99, at 20 (“Perhaps some additional economic activity at the margin could be moved toward the reservations, but supply and demand forces, logistics costs, and geographic synergies create strong incentives for the federal government and the Tribal & ANC 8(a) contractors to operate where it is efficient to do so . . . .”); Hearing, *supra* note 3, at 77 (statement of Lukin) (“No other 8(a) or small and disadvantaged business, or federal contractor, is restricted to working only in its location of headquarters or incorporation. Just like all industries, it makes sense that government contractors operate their business where, in fact, the government contracts are.”).

shareholders who want them, but providing jobs is not their ultimate goal.<sup>151</sup>

## V. A BETTER PERSPECTIVE ON ANC PARTICIPATION IN THE 8(A) PROGRAM

What does a better perspective on ANC participation in the 8(a) program look like? As this Note has suggested, a better perspective takes a broader view of ANCs in the 8(a) program. Specifically, a better view recognizes that the current model of ANC participation is the result of complex intermingling of policies and remembers that ANCs are communities – not just businesses.

### A. The Policy Web

Examining ANC participation solely in the context of the Small Business Act can lead to a conclusion that ANCs are out of line with the 8(a) program as a matter of policy. Indeed, SBA officials have observed that there is a tension between the objectives of ANCs and the objectives of the 8(a) program.<sup>152</sup> But is this a valid objection to the current model of ANC participation? It suffers from the same infirmities as does the criticism that ANCs are big business. That is, objecting that ANCs conflict with the policy behind the 8(a) program judges ANCs according to the rationales underlying the rules for other 8(a) participants rather than the rationales underlying the rules for ANCs.<sup>153</sup> Such analysis also tends to ignore the extent to which ANC participation in the 8(a) program is – in a broader sense – very much in keeping with the policy goals of both ANCSA and the 8(a) program. A better understanding of ANC participation in the 8(a) program must focus less on whether or

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151. Indeed, part of what ANCs do is protect their shareholders' ability to continue living a subsistence lifestyle. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37, at 83.

152. *Id.* at 7–8 (“SBA officials told us that they have faced a challenge in overseeing the activity of the 8(a) ANC firms because ANCs’ charter under ANCSA is not always consistent with the business development intent of the 8(a) program. They noted that the goal of ANCs – economic development for Alaska Natives from a community standpoint – can be in conflict with the primary purpose of the 8(a) program, which is business development for individual small, disadvantaged businesses.”).

153. The Report notes that “[o]ne rationale for the Alaska Native Corporations’ contracting preferences is to further the federal government’s policy of supporting small, disadvantaged businesses[,]” but it fails to consider the policy behind the treatment of ANCs in any broader context. See SUBCOMM. STAFF REP. II, *supra* note 61, at 7.

not ANCs are a “fit” and instead realize that ANCs’ current position in the 8(a) program is the result of many overlying policies. Indeed, the very fact that ANCs *are* part of the Small Business Act’s 8(a) program as a matter of legislative judgment would seem to be a strong argument in favor of an expansive understanding of the policies underlying the program.

1. *ANCSA policy.* ANC participation in the 8(a) program is consistent with ANCSA and with U.S. policy towards Native Americans generally. In exchange for Native Americans’ ceding their lands to the United States, the government has entered into a trust relationship with Native Americans.<sup>154</sup> ANCSA is both a product of and an expression of this trust relationship.<sup>155</sup> One formalist reason that it makes no sense to view the policy underlying the 8(a) program as something distinct from ANCs themselves is that the 8(a) treatment of ANCs *is a part of ANCSA*: ANCs’ designation as “minority and economically disadvantaged” entities is written into ANCSA.<sup>156</sup> In other words, the special treatment of ANCs in the 8(a) program is thus very much a part of the settlement between Alaska Natives and the United States. As Julie Kitka notes: “[t]o look back now and seek to separate the economic treatment of Alaska Natives from the settlement of aboriginal claims would not be just or fair.”<sup>157</sup> Indeed, after watching the failure of the reservation system, the idea behind ANCSA was to create a system that would provide the maximum benefit for Alaska Natives.<sup>158</sup> The vision of ANCSA has always been—at least in part—to allow Alaska Natives to build the future they need.<sup>159</sup> But when the Subcommittee Report notes that “[o]ne of the primary rationales for the ANC contracting preferences is that

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154. *Hearing, supra* note 3, at 26 (testimony of Jacqueline Johnson-Pata, Exec. Dir., Nat’l Cong. of Am. Indians).

155. *Id.*

156. *See* 43 U.S.C. § 1626(e) (2006) (conferring minority and economically disadvantaged status on ANCs); *Hearing, supra* note 3, at 113 (statement of Kitka) (“The 8(a) treatment of Alaska Natives is part of ANCSA, literally.”).

157. *Hearing, supra* note 3, at 114 (statement of Kitka).

158. Linxwiler, *supra* note 2, at 12-45 (“This business success also signals a success, somewhat late in coming, for the original vision for ANCSA—which was to create profit-making corporations, instead of tribal governments, as the focal point of the resolution of aboriginal claims in Alaska, in hopes that this would lead to the maximum benefit for the Alaska Native community.”).

159. Linxwiler, *supra* note 15, at 2-49 (“ANCSA is part of a process. The Native Community is synthesizing for itself a complex 20th century culture, with elements of tradition and modernity. This is the achievement of one basic goal of ANCSA: in the words of ANCSA § 2, ‘a settlement in conformity with the real economic and social needs of Natives.’ This synthesis will be accomplished by Natives, for Natives.”).

they provide economic development and other benefits to the Native shareholders and communities,”<sup>160</sup> its analysis dissociates the treatment of ANCs from the legal framework of ANCSA. Whereas the Report grounds the treatment of ANCs in the legal foundation of the Small Business Act, it fails to acknowledge that ANCs’ role as providers of “economic development and other benefits” to their members is equally firmly grounded in statute. Indeed, ANCs were added to the 8(a) program precisely because ANCSA provides for ANCs to supply such benefits to their members.

2. *8(a) policy.* ANC participation in the 8(a) program is largely consistent with the policy goals of the program itself. The stated purpose of the 8(a) program is “to assist eligible small disadvantaged business concerns compete in the American economy through business development.”<sup>161</sup> Business development is exactly what the 8(a) program is allowing ANCs to do—albeit on a scale that reflects the large communities of ANC shareholders. Julie Kitka stated, “With our participation in the SBA 8(a) program, our Native corporations become *integrated in the economy*... I view the greatest benefit of our participation in the SBA 8(a) program [as being] the *capacity building*, which is occurring and continues.”<sup>162</sup> Moreover, the current 8(a) program is itself an amalgam of distinct policy interests—namely, a desire to benefit minorities and a desire to benefit small business.<sup>163</sup> Therefore, the program itself has already expanded its focus beyond its origins as purely small business legislation.<sup>164</sup> One must realize that the size of the business is only one component in the larger framework of the Small Business Act—a framework that is ultimately an attempt to provide business development help for those who need it. And as the regulations make clear, a participant’s size depends on how size is measured; allowing size to be measured in different ways in different cases thus effectively allows the 8(a) program to provide help in diverse circumstances.<sup>165</sup> As Sarah Lukin points out, the Federal Government

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160. SUBCOMM. STAFF REP. II, *supra* note 61, at 14.

161. 13 C.F.R. § 124.1 (2010).

162. *Hearing, supra* note 3, at 118–19 (statement of Kitka).

163. LUCKEY, *supra* note 32, at 1 (“The current 8(a) Program resulted from the merger of two distinct types of federal programs: those seeking to assist small businesses in general and those seeking to assist racial and ethnic minorities.”).

164. *See* SUBCOMM. STAFF REP. II, *supra* note 61, at 4 n.2; *see also Hearing, supra* note 3, at 73 (statement of Lukin).

165. Although the 8(a) program is codified as part of the “Small Business Act,” the regulations refer to the program as the “Business Development Program”—not the “Small Business Development Program.” *See* 13 C.F.R. § 124.1 (2010). The title demonstrates that the program’s purpose and substance is

itself has argued for an interpretation of the Native 8(a) program as a program that is intimately connected to—rather than independent of—broader policy concerns.<sup>166</sup>

## B. ANCs are Communities of Alaska Natives

A better understanding of ANC participation in the 8(a) program requires appreciating that ANCs represent many Alaska Natives and that Alaska Natives and ANCs themselves both face challenges unlike those faced by other 8(a) participants.

1. *Shareholders*. ANCs represent many more people than do other 8(a) participants. On a very basic level, this arrangement means that—unlike with other 8(a) participants—any contract awarded to an ANC is divided among hundreds or thousands of shareholders.<sup>167</sup> As an example:

“If an individual has a \$5 million contract, all of the benefit goes to that person,” said Chris E. McNeil Jr., chief executive officer of Sealaska, a regional corporation in southeast Alaska with 17,600 shareholders. “That is simply not the case with Alaska native corporations and tribes because that benefit is diluted down to the tribe or the native corporation.”<sup>168</sup>

2. *Alaska*. ANCs not only represent many more people than other 8(a) participants, but ANCs and the people that they represent both face challenges unlike those faced by other participants. To start with, Alaska is both huge and remote.<sup>169</sup> Even the Subcommittee Report obliquely

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business development; determinations of size and economic disadvantage clarify who is eligible for the Business Development Program.

166. *Hearing, supra* note 3, at 70 (statement of Lukin) (quoting *AFGE v. United States*, 195 F. Supp. 2d 4, 36 (D.D.C. 2002)) (“The Native 8(a) program, as the federal government has argued in court, ‘furthers the federal policy of Indian self-determination, the United States’ trust responsibility, and the promotion of economic self-sufficiency among Native American communities.’”).

167. Robert Brodsky, *Business Is Booming For Alaska Native Corporations*, GOVT EXECUTIVE, Mar. 6, 2009, available at <http://www.govexec.com/dailyfed/0309/030609rb1.htm> (“Alaskan firms argue that it is unfair to compare them to other small businesses that operate under a model designed to benefit individual entrepreneurs. ANCs reinvest much of their revenue in the native population through their shareholders.”).

168. *Id.*

169. Simpson, *supra* note 24. As Mr. Simpson eloquently puts it:

Alaska’s size and far northern location make for unique problems with unconventional solutions. Everyone knows Alaska is big. U.S. maps usually show it stuck away in a corner and represented in a smaller scale than the rest of the country, so it will fit. In Alaska, we believe the

recognizes the challenges posed by geography when it declares that “[l]ittle information [had] been made available to the public” but notes in the same paragraph that statements are available to “members of the public who travel to Alaska to access the paper documents.”<sup>170</sup> In other words, the problem is not that information is unavailable; the problem is that it is in Alaska. Moreover, because of this extreme location, Alaska Natives live their lives on the leading edge of environmental disaster.<sup>171</sup> For example, one remote Native village has had to relocate entirely because of flooding brought on by climate change.<sup>172</sup>

Perhaps most importantly, Alaska Natives are extremely poor: “The 25.7% poverty rate in Indian Country with similar poverty rates in rural Alaska and among Native Hawaiians exceeds that of all other race categories, exceeds twice the national average . . . .”<sup>173</sup> But even this statistic does not fully describe the situation that Alaska Natives face. As Jonathan Taylor, a research fellow at The Harvard Project on American Indian Economic Development, notes: “because the single national poverty standard does not account for the high cost of living in Alaska, this Alaska ‘poverty rate’ understates the proportion of individuals living with limited purchasing power.”<sup>174</sup> Indeed, “in many rural villages . . . basic necessities [are] expensive—for example, milk cost \$12 per gallon and fuel cost \$5 per gallon.”<sup>175</sup>

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mapmakers are from Texas, which has been peeved ever since Alaska became a state and made Texas second largest. Alaskans say, if the Texans don’t get over it, we will split our state in two and make Texas the third largest. From Ketchikan, the southernmost large town, to Attu, the farthest west of the Aleutians, the distance is the same as from Miami to San Diego. And Ketchikan to Barrow on the Arctic Ocean shore is like that of Miami to Portland, Maine. Alaska’s 670,000 residents are jammed together in only 600,000 square miles. Half of those residents live in and around Anchorage, the largest city, so the true population density throughout the rest of the state is about one person per two square miles. The western islands of the Aleutian chain are beyond the 180th meridian and are therefore the easternmost place in the United States. Many Alaska towns and villages are so isolated that they are not connected to any road or highway system—including the state’s capital at Juneau. *Id.*

170. SUBCOMM. STAFF REP. II, *supra* note 61, at 6.

171. *See, e.g.*, Azadeh Ansari, “Climate Change” Forces Eskimos To Abandon Village, CNN.COM (Apr. 28, 2009), [http://articles.cnn.com/2009-04-24/tech/climate.change.eskimos\\_1\\_climate-change-indigenous-communities-eskimos?\\_s=PM:TECH](http://articles.cnn.com/2009-04-24/tech/climate.change.eskimos_1_climate-change-indigenous-communities-eskimos?_s=PM:TECH).

172. *Id.*

173. *Hearing, supra* note 3, at 71 (statement of Lukin).

174. TAYLOR, *supra* note 99, at 6.

175. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37, at 81.

In addition to poverty (and sometimes perhaps because of it), Alaska Natives also face many other social ills—including unemployment (forty percent), inadequate health care, suicide (at a rate double the national average), alcohol and drug abuse, diabetes and obesity—at extremely elevated rates.<sup>176</sup> Historically, Alaska Natives have also been discriminated against,<sup>177</sup> undereducated,<sup>178</sup> and undertrained.<sup>179</sup> The cumulative effects of all of these problems have been building on Native communities for multiple generations.<sup>180</sup>

Ironically, the Subcommittee Report<sup>181</sup> and the *Washington Post*<sup>182</sup> both make all of these difficulties manifest when they criticize ANCs for hiring non-Native executives and paying them larger salaries than Natives in higher-ranked positions received. These critics never stop to consider the reasons why such a state of affairs exists at all. After all, “it’s counter-intuitive to suggest ANCs would rather have non-Native people running their corporations than people from their own community.”<sup>183</sup> Rather, the more plausible explanation is that longstanding social ills have deprived the Alaska Native community of qualified candidates and that ANCs must recruit qualified directors. Moreover, as Jonathan Taylor notes, one should be careful in criticizing

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176. *Hearing, supra* note 3, at 71 (statement of Lukin).

177. *See id.* at 117 (statement of Kitka); ANCSA REGIONAL ASS’N, TRANSFORMATIONS: ALASKA NATIVE CORPORATIONS 2010 ECONOMIC DATA 10 (2010), available at [http://www.ciri.com/content/history/documents/ANCSA\\_EconomicReport\\_2010.pdf](http://www.ciri.com/content/history/documents/ANCSA_EconomicReport_2010.pdf) (“Prior to the passage of ANCSA in 1971, most Alaska Native people had very limited economic prospects. Jobs were scarce, educational opportunities were limited, health care was often inaccessible, public services were sparse, and racial discrimination was common.”).

178. *See* TAYLOR, *supra* note 99, at 15; GRETA L. GOTO ET AL., ALASKA NATIVE POLICY CENTER, OUR CHOICES, OUR FUTURE: ANALYSIS OF THE STATUS OF ALASKA NATIVES REPORT 2004 84-88 (2004), available at [http://www.firstalaskans.org/documents\\_fai/ANPCa.pdf](http://www.firstalaskans.org/documents_fai/ANPCa.pdf) (describing limited access to education, lower achievement, and higher drop-out rates for Alaska Natives).

179. *See, e.g.*, GOTO ET AL., *supra* note 178, at 95 (“A very young Native population . . . needs a quality elementary and secondary education, as well as vocational training and college, in order to obtain knowledge and skills necessary to participate in the modern workforce. Significant economic development cannot occur in Alaska, rural or urban, without a well-trained, healthy, workforce . . .”).

180. *See Hearing, supra* note 3, at 73 (statement of Lukin); TAYLOR, *supra* note 99, at 15.

181. *See* SUBCOMM. STAFF REP. II, *supra* note 61, at 15-16.

182. *See, e.g.*, O’Harrow, *A Disconnect*, *supra* note 72.

183. Letter from Sarah Lukin, Exec. Dir., Native Am. Contractors Ass’n, to Robert O’Harrow Jr., *Washington Post* (Aug. 26, 2010), available at [http://www.nativecontractors.org/media/pdf/WashingtonPost\\_NACAResponse08-26-10\(2\).pdf](http://www.nativecontractors.org/media/pdf/WashingtonPost_NACAResponse08-26-10(2).pdf).

an ANC's decision to hire a non-Native because "no one faces the incentives as directly or as consequentially as the Native directors that have to make the tough call."<sup>184</sup>

3. *Unique burdens.* In addition to representing large numbers of shareholders who face challenges unlike those faced by non-Alaska Natives, ANCs as business entities face challenges unlike those faced by other 8(a) participants. One way in which ANCs differ from other 8(a) participants is that more is required of them generally. "ANCs must also fulfill ANCSA obligations that saddle them with expenses of land selection, land management, maintenance of shareholder records, and annual audits."<sup>185</sup> But at the same time, "ANCs use their profits to fulfill a mission that is broader than the bottom line of corporations."<sup>186</sup> ANCs do more than simply generate profits for their shareholders.<sup>187</sup> ANCs are economic engines but also the guardians of their shareholders' culture and heritage.<sup>188</sup> And this arrangement is exactly as ANCSA intended it to be.<sup>189</sup>

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184. TAYLOR, *supra* note 99, at 13.

185. OFFICE OF THE INSPECTOR GEN., *supra* note 51, at 14.

186. *Id.*

187. Simpson, *supra* note 24 ("Unlike other for-profit corporations, the ANCSA corporations have assumed obligations to advance the social, cultural, and economic welfare of Alaska Natives."); *see also* OFFICE OF THE INSPECTOR GEN., *supra* note 51, at 14.

188. The individual mission statements of many of the various ANCs demonstrate that this role is fully as important to ANCs as economic stewardship. *See* ANCSA REG'L CORP., *supra* note 11, at 17-23 (Arctic Slope Regional Corporation ("ASRC's mission is to actively manage our businesses, our lands and resources, our investments, and our relationships to enhance Iñupiat cultural and economic freedom—with continuity, responsibility, and integrity."); Bering Straits Native Corporation ("To improve the quality of life of our people through economic development while protecting our land, and preserving our culture and heritage."); Bristol Bay Native Corporation ("Enriching our Native way of life."); Chugach Alaska Corporation ("Chugach Alaska Corporation is committed to profitability, celebration of our heritage and ownership of our lands."); Cook Inlet Region, Incorporated ("Our mission is to promote the economic and social well-being and Alaska Native heritage of our shareholders, now and into the future, through prudent stewardship of the company's resources while furthering self-sufficiency among CIRI shareholders and their families."); Doyon, Limited ("To continually enhance our position as a financially strong Native corporation in order to promote the economic and social well-being of our shareholders and future shareholders, to strengthen our Native way of life, and to protect and enhance our land and resources.")).

189. 43 U.S.C. § 1606(r) (2006) ("The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed.").

Additionally, because ANCs are responsible for their shareholders' economic well-being to such a degree, they generally pay a higher percentage of any earnings as dividends than would a normal corporation<sup>190</sup> and will also contribute profits to investments directed at making sure dividends continue even if the company has a down year.<sup>191</sup> As one example, an article in the *Washington Post* series revealed how an ANC managed to make donations to the village corporation's foundations and to fund scholarships despite the fact that that ANC's high-revenue subsidiary was in fact losing money at the time.<sup>192</sup>

Finally, an important but often overlooked challenge is the fact that ANCs cannot issue stock as needed or even alienate shares freely. This means that their ability to raise capital through normal channels is severely limited.<sup>193</sup> In short, ANCs often have more burdens placed on them than do other companies, and yet they often have fewer resources with which to overcome those burdens.

## VI. PROPOSED REFORMS

Recently, a number of different parties—notably, the SBA, a group of three ANCs, and Senator McCaskill—have proposed reforms to the current model of ANC participation in the 8(a) program. This section looks at these proposals and attempts to evaluate them in light of the more comprehensive perspective discussed previously in Part V.

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190. See INST. OF SOC. & ECON. RESEARCH, *supra* note 18, at 9 (“[In 2004] 42 ANCs paid \$117.5 million in dividends from a net profit of \$120.3 million, meaning that the average dividend payout ratio was 98 percent.”) (citations omitted). According to the latest figures, in 2008 sixty-six percent of the profits generated by ANCs were issued as dividends. See ANCSA REGIONAL ASS'N., *supra* note 177, at 8.

191. See TAYLOR, *supra* note 99, at 11–12.

192. O'Harrow, *A Disconnect*, *supra* note 72. Note that Mr. O'Harrow never makes this point explicitly, however. See *id.* Instead, he contrasts the ANC subsidiary's total 2004–2006 revenue of \$229 million with the \$46,300 worth of donations and scholarships provided by the ANC and its subsidiary. See *id.* However, it is misleading to compare high revenues to low payouts without acknowledging that the business is losing money. Indeed, despite all of the attention on the revenue generated by ANCs, see, e.g., SUBCOMM. STAFF REP. II, *supra* note 61, at 8, it is important to remember that dividends come from profit—not revenue, see INST. OF SOC. & ECON. RESEARCH, *supra* note 18, at 9. And as Robert O'Harrow himself acknowledges, the margins on government contracting are generally thin. See, e.g., Robert O'Harrow Jr., Answer to Question 20 in *Two Worlds: Alaska Native Corporations, Discussions/Live Q&A's*, WASH. POST (Sept. 30, 2010, 12:00 PM), <http://live.washingtonpost.com/alaska-natives.html#question-20> (“The pie is not as large as it might appear at first glance.”).

193. *Id.* at 12.

### A. The SBA's Proposed Reforms

On October 28, 2009, the SBA proposed a number of changes to its regulation of the 8(a) program.<sup>194</sup> In whole, these proposals appear to be positive changes because they formally limit the potential for abuse of the system and yet recognize that ANCs necessarily occupy a unique position in the framework of the 8(a) program.

One proposed rule change would require ANCs and other communally owned organizations to provide information demonstrating how the 8(a) program benefits its shareholders.<sup>195</sup> This information would be required as part of the business's annual review.<sup>196</sup> Requiring this information will likely be a tremendous improvement over the current arrangement precisely because it will help to provide a fuller and more contextualized picture of ANC participation in the 8(a) program. Such a requirement will also reify the less tangible aspects of ANC participation and will preserve that broader perspective as part of the record.

Another regulation proposed by the SBA would prevent an 8(a) participant involved in a joint venture from using its status to win a sole-source contract and then subcontracting fifty percent of the work to its joint partner.<sup>197</sup> While such a regulation may at first seem to represent an important change, such practices have largely already been discontinued.<sup>198</sup> Along these same lines, another proposed regulation specifies that the 8(a) participant must perform at least forty percent of the work done by a joint venture and must later report how this requirement was met.<sup>199</sup>

The SBA proposed a rule to restrict the ability of tribally-owned businesses to cycle subsidiaries through the 8(a) program such that one

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194. See Robert Brodsky, *SBA Proposes Major Revisions To Small Business Contracting Program*, GOV'T EXECUTIVE, Oct. 28, 2009, available at <http://www.govexec.com/dailyfed/1009/102809rb1.htm>.

195. 8(a) Business Development/Small Disadvantaged Business Status Determinations, 74 Fed. Reg. 55,694, 55,702 (proposed Oct. 28, 2009) (to be codified at 13 C.F.R. §§ 121, 124).

196. *Id.*

197. *Id.* at 55,705-06. As currently written, regulations would permit an arrangement where the ANC and its joint venture partner agree to each perform twenty-five percent of a sole-source contract but then subcontract the remaining fifty percent to the joint-venture partner. That is, the ANC would perform twenty-five percent of the sole-source contract while its joint-partner would ultimately perform seventy-five percent of the sole-source contract. *Id.*

198. See Bluemink, *supra* note 109, at A4.

199. 8(a) Business Development/Small Disadvantaged Business Status Determinations, 74 Fed. Reg. at 55,707.

subsidiary simply picks up the work where the previous one left off.<sup>200</sup> While regulations currently prevent subsidiaries from engaging in the same primary lines of business, the proposed rule would specify that for the first two years after beginning the 8(a) program, a new subsidiary cannot receive a contract in a secondary line of business if that secondary line of business would overlap with the primary line of business of another of the tribe's subsidiaries.<sup>201</sup> Another proposed regulation would permit the SBA to graduate an 8(a) participant from the program early if that participant outgrows the size limitations for its primary line of business.<sup>202</sup>

Finally, perhaps the most notable proposal would change the site of initial review of ANC applications from the SBA's Anchorage office to its San Francisco office or in some cases to its Philadelphia office.<sup>203</sup> The SBA suggested this change because the San Francisco office is "better suited to receive and review applications from ANC-owned applicants because it has more knowledge of SBA's eligibility requirements, in addition to having knowledge of issues specific to ANC-owned firms."<sup>204</sup> Such a change would be consistent with the recommendations that the GAO Report made in 2006 and reflects the difficulties that the SBA—and in particular its Anchorage office—have had in keeping up with the volume and complexity of ANC business arrangements.<sup>205</sup> This change is possibly the single best way to address the problems with ANC participation in the 8(a) program; spreading the load more equitably will better allow the SBA to monitor ANCs and enforce the rules. Such a change is likely also best for ANCs in the long run because having more resources available for oversight will help the SBA to prevent any inequitable conduct and can help decrease the number and intensity of objections to ANCs.

## B. Reforms Proposed by ANCs

On September 13, 2010, three ANCs—Arctic Slope Regional, CIRI, and Doyon—wrote a joint letter to the SBA in which they proposed a nine-point "Agenda for Transparency, Accountability and Integrity" to

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200. *Id.* at 55,701-02.

201. *Id.*

202. *Id.* at 55,698. Previously a firm could remain in the 8(a) program and continue to perform work in any secondary lines of business that it had not outgrown. *Id.*

203. *Id.* at 55,703.

204. *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37, at 7-8.

205. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 46, at 7-8.

reform current regulations.<sup>206</sup> According to these ANCs: “[b]y proposing changes, we become an important part of the process. Without participating in the process, Native 8(a) companies risk losing the right to participate in the program. We cannot let that happen.”<sup>207</sup>

Most notably, these ANCs stated that they would be in favor of a cap of \$100,000,000 on 8(a) sole source awards.<sup>208</sup> In other words, the SBA would be able to award a contract directly to a particular ANC only when the value of that contract was less than \$100,000,000.<sup>209</sup> Contracts worth more than that amount could be awarded only via a competition among all interested 8(a) participants.

Other reforms proposed by these ANCs include: tracking and reporting benefits to shareholders in a standardized way; prohibiting 8(a) firms from taking over contracts from affiliated 8(a) firms on a non-competitive basis; establishing a “graduated system of remedial measures” for 8(a) firms that violate program rules; requiring profits generated by joint ventures to be distributed according to the amount of work done by each partner and allowing non-competitive awards to joint ventures only when the 8(a) firm performs at least forty percent of the contract; expanding the “economic disadvantage” designation to apply to all Native American Tribe-owned entities and to Native Hawaiian Organizations; and requiring consolidated financial

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206. Letter from Rex A. Rock, Sr., President & CEO, Arctic Slope Reg'l Corp., Margaret L. Brown, President & CEO, Cook Inlet Region, Inc. & Norman L. Phillips, Jr., President & CEO, Doyon, Ltd., to Karen G. Mills, Adm'r, U.S. Small Bus. Admin. (Sept. 13, 2010), *available at* [http://www.asrc.com/\\_pdf/\\_press/Reform Package Cover Letter FINAL.pdf](http://www.asrc.com/_pdf/_press/Reform%20Package%20Cover%20Letter%20FINAL.pdf). Other Native organizations have expressed their disagreement with these reforms. *See, e.g.,* Robert O'Harrow Jr., *Breaking With Tradition, Native Executives Propose Reforms to ANCs*, WASH. POST, Oct. 1, 2010, at A9, *available at* 2010 WLNR 19469698 (“[Sarah Lukin, executive director of the Native American Contractors Association,] said the three reformers, who are not members of her association, ‘can afford to do business’ without the set-aside program because of their natural resources and real estate holdings.”).

207. Rex A. Rock, Margaret L. Brown & Norman L. Phillips, *Proposal Will Help Native Corporations Grow Into Future*, ANCHORAGE DAILY NEWS, Sept. 21, 2010, *available at* 2010 WLNR 18759281.

208. Letter from Rex A. Rock, Sr., et al. to Karen G. Mills, *supra* note 206.

209. Technically, such contracts could still be sole-sourced under the reforms proposed by these ANCs but only under the circumstances—such as when there is only one qualified contractor or when there is “unusual and compelling urgency”—that federal acquisition regulations have otherwise recognized as justifying a process other than full and open competition. *See* ARCTIC SLOPE REG'L CORP. ET AL., STRENGTHENING THE 8(A) PROGRAM: THE AGENDA FOR TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY 2 (2010), *available at* [http://www.asrc.com/\\_pdf/\\_press/Reform Package Agenda for Transparency Accountability and Integrity FINAL.pdf](http://www.asrc.com/_pdf/_press/Reform%20Package%20Agenda%20for%20Transparency%20Accountability%20and%20Integrity%20FINAL.pdf); 48 C.F.R. §§ 6.302–03 (2009).

statements from affiliated companies.<sup>210</sup> Additionally, these ANCs support a number of the SBA's proposed reforms—particularly, to the mentor/protégé program.<sup>211</sup>

Overall, the proposals of these reformers are largely commendable. While the cap on awards is understandably controversial, these ANCs can claim to have taken a balanced view of ANC involvement in the 8(a) program. The proposals recognize that 8(a) contracting is an important tool for ANCs but also that the program could be improved through transparency and accountability. Such rules would help ensure not only that the system functions as it was designed but also that ANCs, the federal government, and taxpayers can all feel comfortable that the system is working fairly.

### C. Legislative Reforms Proposed by Senator McCaskill

Finally, on October 8, 2010, Senator McCaskill announced that she would be offering her own reforms—reforms that would effectively dismantle the current system of ANC participation in the 8(a) program.<sup>212</sup> According to the Senator's press release:

U.S. Senator Claire McCaskill is continuing her efforts to crack down on waste and abuse in contracting by announcing that she will introduce legislation to eliminate the unique government contracting preferences and loopholes for Alaska Native Corporations (ANCs) . . . .

McCaskill, as chairman of the Subcommittee on Contracting Oversight, investigated Alaska Native Corporations in 2009 and found evidence of abuses in a government small business program that allows these frequently large organizations to receive unlimited, high-value government contracts without competition.

"We've seen that a very small portion of these companies' profits are reaching native Alaskans [sic], so it's time to acknowledge the fact that this program is not effective for either native Alaskans [sic] or taxpayers," McCaskill said.<sup>213</sup>

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210. ARCTIC SLOPE REG'L CORP. ET AL., *supra* note 209, at 2–5.

211. *Id.* at 4–6.

212. See Press Release, Claire McCaskill, *supra* note 74.

213. *Id.* Note that this press release itself suffers from many of the same analytical flaws and rhetorical flourishes that this Note has been discussing. See also *supra* Part III.B. In brief, referring to the rules designed for ANCs as "preferences" and "loopholes" is misleading, see *supra* Part IV.A; describing ANCs as "frequently large" organizations is disingenuous and mostly beside the

Unfortunately, the senator's proposals offer more in the way of grandstanding than practical solutions; her reforms are troubling in a number of ways.

In the first place, the senator singles out ANCs in her reforms, and yet a number of the provisions that she seeks to change currently apply to many other 8(a) participants. For instance, she would prohibit ANCs from receiving contracts above a certain threshold (\$3,500,000 for contracts for services or \$5,500,000 for contracts for goods).<sup>214</sup> Senator McCaskill would also revoke ANCs' designation as "socially disadvantaged" and would "[r]equire ANCs to count all affiliates and subsidiaries in size determinations for 8(a) eligibility."<sup>215</sup> These three suggestions appear particularly ill-conceived in that none of the rules that the senator seeks to change with these three reforms apply exclusively to ANCs. Rather, they apply equally to all tribally-owned enterprises.<sup>216</sup> Yet Senator McCaskill singles out ANCs in each of her proposed reforms.<sup>217</sup> Such treatment makes one wonder what the senator is actually proposing: does Senator McCaskill intend to impose these reforms on all Native American business, or does she intend to impose these reforms only on ANCs? If the former, then singling out ANCs in her press release would beg questions about her motivations in proposing these reforms. If the latter, then it would seem problematic that she is treating ANCs—who represent some of the neediest people in the country—differently from other Native American businesses.

Secondly, many of her suggestions do not even appear to respond to what the senator claims are the problems with ANC involvement in the 8(a) program. For example, Senator McCaskill proposes to revoke not only ANCs' designation as "socially disadvantaged" but also the designation as "economically disadvantaged."<sup>218</sup> But such reforms do not appear to be responsive—or at least not directly responsive—to the problems that the senator purports to have identified in the current system. Forcing ANCs to demonstrate their social and economic disadvantage before admission to the 8(a) program would not seem calculated to curb either "waste" or "abuse." How does a requirement

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point, *see supra* Part IV.A; finally, stating that a "very small portion" of profits go to Alaska Natives is unsubstantiated and simply wrong, *see supra* text accompanying notes 188-90.

214. Press Release, Claire McCaskill, *supra* note 74. These are the limits that apply to non-ANC 8(a) businesses. *See* 13 C.F.R. § 124.506(a) (2010).

215. Press Release, Claire McCaskill, *supra* note 74.

216. *See supra* Part II.B.

217. *See* Press Release, Claire McCaskill, *supra* note 74.

218. *Id.*

that ANCs demonstrate these disadvantages help to prevent government contracting agents from overpaying? How would it help to prevent disreputable businesses from engaging in excessive subcontracting arrangements? Moreover, as this Note has observed, ANCs can be economically healthy while the Alaska Natives that it provides for remain economically disadvantaged.<sup>219</sup> Thus, limiting 8(a) participation to economically disadvantaged ANCs would by no means ensure that the needs of economically disadvantaged *Alaska Natives* are being met. Indeed, ANCs were deemed “economically disadvantaged” in the first place precisely because the corporations had difficulty meeting the 8(a) program’s requirements despite the neediness of their members.<sup>220</sup> Without the “economic disadvantage” designation for ANCs, the 8(a) program did not work as it was meant to. So while these particular reforms may at first seem to represent little more than an inconvenience for ANCs, as a practical matter they likely mean that many ANCs would not be able to qualify for the program at all and that accordingly many Alaska Natives would be denied the benefit of ANC involvement in the program.<sup>221</sup> Indeed, in large part, Senator McCaskill’s reforms focus more on form than on function. That is, her reforms appear more concerned with appearances than with whether the program is accomplishing its objectives. For instance, as mentioned above, the senator would require the SBA to take account of all of an ANC’s affiliates when making a size determination.<sup>222</sup> But again, this proposal does not address actual flaws in the system; rather, it appears based on the argument that ANCs do not look like other 8(a) participants—an argument that itself stems from an unnecessarily narrow vision of what the 8(a) program does.<sup>223</sup> Additionally, Senator McCaskill seems to be more concerned with making grand statements than with making improvements to the system when she proposes to “[p]rohibit ANCs who chose to participate in the 8(a) program from operating as pass-throughs to non-Native companies that do not qualify under the 8(a) program.”<sup>224</sup> This proposal is particularly unhelpful because it offers no vision of what such a prohibition would look like;

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219. See Part II.A *supra*.

220. See Part II.A *supra*.

221. Of course, there is an argument that there would be less waste and abuse without ANCs in the 8(a) program. But exiling ANCs would seem to make them a scapegoat for the system’s problems. And to this point Senator McCaskill has not explicitly called for removing ANCs from the 8(a) program.

222. See Press Release, Claire McCaskill, *supra* note 74.

223. See Part IV.A *supra*.

224. See Press Release, Claire McCaskill, *supra* note 74.

the senator is identifying a problem, not a solution. In contrast, consider the SBA's specific proposals: first, that 8(a) participants be prohibited from subcontracting to their joint venture partner and, second, that 8(a) participants be required to demonstrate that they performed at least forty percent of a contract.<sup>225</sup> And the three ANC reformers suggested: first, that joint ventures be prohibited from receiving contracts noncompetitively unless the 8(a) participant performs at least forty percent of the contract and, second, that joint venture profits be divided among the partners according to the amount of work done by each partner.<sup>226</sup> These proposals would not only discourage excessive subcontracting but would also address concerns that as a practical matter, large joint venture partners are often in a position to apply outsized pressure on their 8(a) business partner. Whereas the SBA and the three ANCs attempted to address excessive subcontracting seriously, Senator McCaskill's suggestion appears long on political rhetoric and short on considered analysis.

Finally, Senator McCaskill's other proposals are also misguided because they fail to understand ANCs in the more holistic terms suggested by this Note in Part V. According to one proposal, an ANC would only be able to own a majority interest in one 8(a) business at a time.<sup>227</sup> In a second proposal, an ANC 8(a) participant would have to be managed by socially and economically disadvantaged individuals.<sup>228</sup> But such proposals attempt to make ANCs subject to the rules designed for non-ANC businesses. As this Note has demonstrated, there are good reasons why the rules are the way they are for ANCs. Reforms such as these result from an overly narrow view of the 8(a) program and from a failure to appreciate the complex array of policy choices and practical realities that are reflected in the current treatment of ANCs. ANCs are able to own multiple majority interests because they are made up of many, many disadvantaged people. Additionally, ANCs are able to be managed by non-Natives because ANCs have responsibilities that go beyond providing business development skills to the individual. While the hope is that the 8(a) program will help develop qualified Native managers, having the best possible management in place ensures that ANCs are best able to meet these larger responsibilities in the here and now.

In short, Senator McCaskill's proposed reforms appear ill-

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225. See text accompanying notes 197-99.

226. See text accompanying note 210 *supra*.

227. See Press Release, Claire McCaskill, *supra* note 74.

228. See *id.*

considered at best. Rather than expand her understanding of what the 8(a) program does, the senator attempts to curtail what the program is capable of doing. An 8(a) program recast as the senator suggests would be non-responsive to the needs of Alaska Natives and, as a practical matter, would likely be unavailable to ANCs in any event.<sup>229</sup> From the point of view of Alaska Natives, legislation that forces ANCs out of the 8(a) program would represent an egregious bait-and-switch by the federal government. Such legislation would also be inappropriate in that it would make ANCs the scapegoat for problems that exist in the federal procurement system more generally. The law, as currently written, reflects an understanding that ANCs are complex institutions that inhabit a complex situation. Yet, Senator McCaskill's proposals, do not acknowledge any such complexity; indeed, they would seem to tend more towards antagonism than thoughtfulness.

## VI. CONCLUSION

This Note makes the case for continued ANC participation in the 8(a) program by providing a more comprehensive framework for analyzing such participation. In one sense, it all comes down to a determination of what question we should be asking about ANC participation in the 8(a) program. Asking "do ANCs belong in the 8(a) program?" often leads to a simple "no" because intuitively ANCs do not have much in common with other 8(a) participants.

But when we think about ANCs more holistically, we ask a broader question: "does the treatment of ANCs *make sense*?" Answering such a question requires understanding that the current system of ANC involvement in the 8(a) program reflects considered judgments not just about the Small Business Act but about ANCSA policy and federal Native American policy generally. It requires understanding how the current system recognizes the needs of Alaska Natives and makes a meaningful difference in their lives. While mindful that the system can be improved at its edges, this Note suggests that the answer to this second question is "yes." Answering the second question is undoubtedly a more difficult task than answering the first, but hopefully, this Note has demonstrated at the least that this second, more complicated question is the right one to be asking.

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229. See text accompanying notes 218–21 *supra*.