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Programs of Parity: Current and Historical Understandings of the Small Business Act's Section 8(a) and HUBZone Programs

Votey Cheav*

I. Introduction

The United States economy is fueled by long-held notions of fair competition while ensuring the market provides for its workers through employment opportunities—a reciprocal give-and-take. Historically, the federal government interjects when it deems commercial activity as unfair and contrary to consumer welfare, but it also interjects when there is not enough opportunity for job growth. The federal government’s involvement in the advocacy of small businesses has been subtle, yet defining. Much debate has been held over the role of small businesses in America’s economy, specifically, whether investing in Main Street, instead of Wall Street, is more beneficial for all Americans.

Although the reasons for supporting growth and opportunities in small businesses may differ historically, the Small Business Act remains an active foundation for lively debate today. Most recently, the plateau of high unemployment rates near the beginning of the twenty-first century has sparked debate about whether small businesses are the strong catalyst needed to bring back overseas jobs to the United States.¹

The role of government in providing support for small businesses through technical and financial assistance has been influential.² In particular, section 8(a) and HUBZone Programs specifically highlight small business concerns in the form of little competition for government contracts and subcontracts in the solicitation process. Small businesses are supported and legitimized by the Small Business Administration’s agenda for creating opportunities for minorities and disadvantaged individuals where assistance is difficult to find. However,

in reality, interpretation and implementation of the regulations set forth to help small businesses, particularly those that are socially and economically disadvantaged, sometimes hinder the opportunities for the small businesses that really need the assistance.

Congress' goals in shaping and aligning opportunities for small businesses and minority businesses in particular have spawned different set-aside programs and have continued to lead discussions into whether this is a winning mission.³ This Comment will analyze two historically successful programs, as well as roadblocks to fulfilling Congress' goal of increasing economic freedom for the economically or socially disadvantaged. This Comment will proceed as follows: Part II will discuss the historical background of the Small Business Administration, as well as the background of both the section 8(a) and HUBZone programs. Part III of the Comment will delve more deeply into intricacies of both the section 8(a) and HUBZone programs, discussing how they are similar and how they have contrasting goals. Part IV will discuss specific criticisms of each program. Part V will discuss how the Small Business Act of 2010 changed the parity atmosphere. Part VI will analyze two specific cases coming out of the Court of Federal Claims that specifically address whether there is parity between section 8(a) and HUBZone businesses. Finally, Part VI will conclude with a focus on providing guidelines for determining whether the set-aside programs have true parity or if certain small business concerns trump others. More importantly, this Comment will attempt to further parse out the policy arguments supporting parity between these set-asides.

II. Background

A. The Historical Foundation of the Small Business Act

In its inception, the Small Business Act (SBA) created set-aside programs that authorize preferential treatment in the award of government contracts to small businesses. A set-aside is a procurement in which only certain businesses can compete. A set-aside can be total or partial, depending upon the amount to which the procurement is restricted.⁴ A "small business" is generally defined as one that is independently owned and operated and is not dominant in its field of

³ 15 U.S.C. § 631a(a) (emphasizing its listed purpose to "foster the economic interests of small businesses . . . and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses").

operation.\textsuperscript{5} Amidst World War II and its requirement of a strong industrial production base, Congress enacted the Small Business Assistance Act of 1942, which served as the enabling statute for the Small Business Administration.\textsuperscript{6} The Small Business Administration was charged with “contract[ing] with government procurement agencies to provide services and supplies, . . . subcontract[ing] with small businesses, and . . . encourag[ing] subcontracting by prime contractors with small businesses.”\textsuperscript{7} The Small Business Act of 1958 empowered the Small Business Administration to contract with qualified small business entities,\textsuperscript{8} emphasizing awards to businesses that are a “socially and economically disadvantaged small business concern.”\textsuperscript{9} The SBA charged the “8(a) Business Development Program,” with the purpose of assisting eligible small disadvantaged business concerns to compete in the American economy.\textsuperscript{10} Essentially, the SBA truncated the typical competitive bidding process,\textsuperscript{11} some courts even staunchly held that section 8(a) of the SBA “clearly constitutes specific authority to dispense with competition.”\textsuperscript{12} However, in 1988 the Small Business Act was amended\textsuperscript{13} to provide competitive thresholds for use in awarding 8(a) subcontracts.\textsuperscript{14} Contracts may either be awarded as


\textsuperscript{7} Id.

\textsuperscript{8} Nicolas M. Jones, America Cinches its Purse Strings on Government Contracts: Navigating Section 8(a) of the Small Business Act Through a Recession Economy, 33 AM. INDIAN L. REV. 491, 499 (2009).

\textsuperscript{9} 15 U.S.C. § 637 (“to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts”).

\textsuperscript{10} 13 C.F.R. § 124.1 (“The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns compete in the American economy through business development.”).

\textsuperscript{11} Jones, supra note 8, at 500.

\textsuperscript{12} Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 708 (5th Cir.1973).

\textsuperscript{13} See Pub. L. No. 100-656, 102 Stat. 3853, 3869-70 (1988) (“A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if (I) there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price, and (II) the anticipated award price of the contract (including options) will exceed $ 5,000,000 in the case of a contract opportunity assigned a standard industrial classification code for manufacturing and $ 3,000,000 (including options) in the case of all other contract opportunities.”).

sole-source contracts, given directly to the qualifying small business, or as awards won through competition with other bids.\textsuperscript{15}

This "enamorization" by Americans of their support for the "little guy" has deep roots in American history and sentiment\textsuperscript{16} with "Congress ... recogniz[ing] that, 'in troubled economic times minority business has been traditionally that segment of the economy 'hit first, hit hardest, and hit longest.'"\textsuperscript{17} However, there was initial skepticism about the effectiveness of 8(a) Programs in achieving its purported goals, so the program lay dormant for close to fifteen years after its inception "until the radical atmosphere of the 1960s provided the impetus to wrestle the SBA's 8(a) authority from its dormant state."\textsuperscript{18}

Despite initially targeting all small firms, section 8(a) of the Act in particular benefitted economically disadvantaged individuals after "racial turbulence of the 1960s brought about increased social consciousness" as inner cities saw divides between white and black communities.\textsuperscript{19} Social pressure on Congress resulted in the earliest statutory basis for federal aid to economically disadvantaged entrepreneurs, assisting small businesses owned by low-income individuals.\textsuperscript{20}

Congress' small business concerns were supported by the fact that minority business enterprises are less profitable as a group, have an incidence of nonprofitability that is over four times greater than non-minorities, and are vulnerable to delinquency on debt obligations, making failure more likely.\textsuperscript{21} Congress was pressured to increase its authority in empowering the SBA to provide contract opportunities to small business that were owned predominantly by minorities to combat the problem of nonprofitability.\textsuperscript{22} Although later repealed, the earliest statutory basis for federal aid to economically disadvantaged business owners was the 1967 amendments to the Economic Opportu-

\begin{itemize}
  \item \textsuperscript{15} 13 C.F.R. § 124.501(b).
  \item \textsuperscript{16} Joshua E. Husbands, Comment, The Elusive Meaning of Small Business, 2 J. SMALL & EMERGING BUS. L. 355, 358 (1998) ("Sympathy for the welfare of small business is nothing new in U.S. politics. Statements made by Senator Sherman and Senator George in the 1890 Sherman Act debates illustrate the long-standing concern for small businesses.").
  \item \textsuperscript{17} Thomas J. Hasty, Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (Is There a) Future, 145 MIL. L. REV. 1 (1994) (quoting H.R. REP. NO. 97-956 (1982)).
  \item \textsuperscript{18} Id. at 12.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Pub. L. No. 90-222, § 106(a), 81 Stat. 672 (1967) (repealed 1974).
  \item \textsuperscript{21} Hasty, supra note 17, at 2–3 (citing H.R. REP. NO. 97–956 (1982)) (stating that minority businesses traditionally have been "hit first, hit hardest, and hit longest" in troubled economic times).
  \item \textsuperscript{22} Id.
\end{itemize}
nity Act of 1964, which directed the Small Business Administration to assist small businesses owned by low-income individuals.\textsuperscript{23}

Further change in the agenda and authority of section 8(a) came under an executive order initiated by then President Nixon in 1969 and 1970, when the Office of Minority Business Enterprises (OMBE) was created in the Department of Commerce to specifically authorize OMBE to provide financial assistance to public and private minority business enterprises (MBEs).\textsuperscript{24} Specifically influential at the time was the idea of "Black Capitalism," lending to the call for increased representation of the interests of small business concerns within federal departments and agencies.\textsuperscript{25} A subsequent executive order issued in 1971 encouraged federal contractors to subcontract with firms owned or controlled by socially or economically disadvantaged persons, authorizing the OMBE to provide management and technical assistance to MBEs. The orders also empowered the Secretary of Commerce to coordinate and review all federal activities to assist in minority business development.\textsuperscript{26} As a result, the orders specifically directed the executive office to promote MBEs and initiated the movement of looking to the Small Business Administration's 8(a) authority as a vehicle to assist MBEs during the Nixon administration.\textsuperscript{27}

In 1970, the Small Business Administration implemented regulations that described the intended use of the 8(a) authority by providing that "it is the policy of SBA to use such authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place."\textsuperscript{28} Passage of Public Law 95-507 in 1978 broadened the range of assistance the Small Business Administration could provide to minority businesses and "was hailed as 'landmark legislation to increase the small and minority share of the federal procurement dollar.'"\textsuperscript{29} The amendment clarified that while the purpose of the 8(a) program is to "foster" and "promote" minority businesses by taking actions to improve and advance the economic well-being of participating firms,
it is "beyond the intent of the statute and the ability of the SBA to guarantee or insure the success of participating firms."30

B. Background on the Small Business Administration's Section 8(a) and HUBZone Set-Asides

When it established the Small Business Administration, Congress intended to promote commercialization for small business owners and entities in the United States through different set-asides and incentives. It is the declared policy that the "Government should aid, counsel, assist, and protect . . . the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of . . . contracts or subcontracts for property and services for the Government" are placed with small-businesses.31 The policy arguments for set-asides in the SBA prevail over the possible loss that is presumably incurred by the Government based on the amount expended on the contract or subcontract whenever it is established that a business other than a small business concern willfully sought and received the award by misrepresentation.

Set-asides across the SBA vary, ranging from federally funded loans, grants, and contracts to resources for starting and financing a small business. The 8(a) and HUBZone programs have specific minority set-asides that are aimed towards socially and economically disadvantaged individuals based on ethnicity and locality. Under the SBA, certain individuals are presumed socially disadvantaged, including:32 African-Americans, Hispanic Americans, Asian Pacific Americans, Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians), and Subcontinent Asian Americans, women, and veterans. An individual who is not a member of one of the groups listed can be admitted to the program if shown through a "preponderance of the evidence" that they are socially disadvantaged.33 Specifically, an individual may show social disadvantage due to race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other sim-

33. Id.
ilar causes. A showing of economic disadvantage can be done through either a narrative statement or personal financial documentation of one's income, assets, and net worth.

Opportunities for those who are socially and economically disadvantaged improve the functioning of the national economy by allowing disadvantaged groups to fully participate in the free enterprise system, despite historical effects of discriminatory practices or circumstances over which they have no control.

III. DISSECTION OF THE SMALL BUSINESS ADMINISTRATION'S SET-ASIDE PROGRAMS

A. Dissecting the Small Business Administration's 8(a) Program

The more refined purposes of the 8(a) program are to provide business-development support, including: mentoring, procurement assistance, business counseling, training, financial assistance, and surety bonding to socially and economically disadvantaged business enterprises. Pertinent provisions under the 8(a) program concern awards to small businesses in the form of procurement contracts for construction work, services, or the manufacture, supply, and assembly of such articles. Essentially, the 8(a) set-asides provide businesses with opportunities involving little competition for winning a contract. However, critiques include the inherent "unfairness" of the 8(a) program when the presumption is obvious.

Minority preference programs that provide financial, marketing, management, and technical assistance to small businesses have become the "principal tools with which federal, state, and local governments have attempted to redress the effects of past discrimination." These affirmative action programs were developed to ensure equal access to all qualified persons without regard to race or national origin. Under the Small Business Administration's 8(a) program, "socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a mem-

34. Id.
38. Id.
39. Jones, supra note 8, at 506.
41. Hasty, supra note 17, at 15.
ber of a group without regard to their individual qualities” and are presumed to be eligible to apply as an 8(a) business. 42 8(a) businesses must be “unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States.” 43 To show the potential for success, businesses must generally show they have been in operation for at least two full years immediately prior to their application to the 8(a) program. 44

However, given the controversial nature of affirmative action programs, specifically the set-asides through the SBA, the Small Business Administration does provide avenues of opportunity for non-minorities as well. 45 Despite such controversy, the section 8(a) program continues to be an important small business concern under the SBA. Further, despite the presumption, other minorities and non-minorities are eligible for the 8(a) program and 8(a) certification if they can show actual economic disadvantage by producing evidence of diminished capital and credit opportunities, as well as personal net worth of no more than $250,000 at the time of entry into the 8(a) Program. 46 To be eligible for 8(a) set-asides, the business must be certified by the SBA. 47 Also, 8(a) business participants may be determined 8(a) certified for a maximum of nine years and may drop out of, or be terminated from, the program at any time before their ninth year. 48 Legislative history for the 8(a) program reveals Congress’s insistence that participation in the 8(a) program is voluntary. 49 The autonomy of participation “places the decision of when Federal assistance is appro-

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44. 13 C.F.R. § 124.107.
45. 13 C.F.R. § 124.103. By a preponderance of the evidence, non-minorities must establish: (1) the individual’s social disadvantage must stem from his or her color, “ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged;” (2) the individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a nondesignated group which could be considered socially disadvantaged; (3) the individual’s social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries; (4) the individual’s social disadvantage must be chronic and substantial, not fleeting or insignificant; and, (5) the individual’s social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. Id.
46. 13 C.F.R. § 124.104(c). This amount increases to $750,000 for purposes of continuing eligibility for the program.
47. 13 C.F.R. § 124.112(b).
48. Id.
49. Minority Small Business and Capital Ownership Development Assistance, 46 Fed. Reg. 57,266, 57,268 (Nov. 23, 1981) (to be codified at 13 C.F.R. pt 124) (“It is important to recognize that participation in the 8(a) program is a voluntary act on the part of the firm.”).
priate in the individual who is ultimately responsible, that is, the entrepreneur."50 A participant may not participate in the program again after exiting it for any reason.51 Also, when a firm concludes its fixed program participation term, the firm will cease to be a program participant without any right to a hearing on the record.52

After completion of its Program Participation, contracts are awarded as a result of an offer submitted in response to a published solicitation.53 Agencies have discretion to award contracts, and once a subcontract has been awarded to the SBA, it is then awarded to a certified 8(a) business.54 Award of the contract requires eligibility by the date specified for receipt of offers contained in the contract solicitation. At this point, the subcontracting must be done via a set-aside:

[W]ith eligible 8(a) firms competing for the award, whenever (1) the “rule of two” is satisfied, (2) the anticipated value of the contract exceeds $4 million ($6.5 million for manufacturing contracts), and (3) the requirement has not been accepted by the SBA for award on a sole-source basis to a firm owned by an Indian tribe, Alaska Native Corporation (ANC), or, in the case of Department of Defense requirements, Native Hawaiian Organization (NHO).55

Under the “Rule of Two,”56 a contract shall be awarded on the basis of competition if there is a “reasonable expectation that at least two eligible Program Participants will submit offers, and that award can be made at a fair market price.”57 The competition also requires that the anticipated award price of the contract will exceed $5 million in the case of a contract opportunity assigned for standard industrial contracts involving manufacturing and $3 million in the case of all other contract opportunities.58

Program Participants can receive sole-source contracts, with a ceiling placed at $4 million for goods and services, and $6.5 million for manufacturing, when “(1) contracting officers determine that the 8(a) business is a responsible contractor with respect to the performance of the contract opportunity, (2) the award of the contract would be con-

50. Id.
51. 13 C.F.R. § 124.2.
55. MANUEL, supra note 4, at 7.
57. Id.
58. Id. § 637(a)(1)(D)(ii).
sistent with the business's business plan, and (3) the award would not result in the business exceeding the limits on firm value imposed on 8(a) participants. Sole-source contracts are awards entered into or proposed by an agency after soliciting and negotiating with only one source. The Small Business Administration generally does not award sole-source contracts to businesses that are not 8(a) or HUBZone participants. Firms can also form joint ventures and teams to bid on contracts—enhancing the ability to perform larger prime contracts and overcome effects of contract bundling. 8(a) also encourages a mentorship role between other experienced 8(a) businesses (the Mentor-Protégé Program).

B. Dissecting the SBA's HUBZone Program

The Historically Underutilized Business Zones (HUBZone) Empowerment Contracting Program, enacted into law under the Small Business Reauthorization Act of 1997, encourages economic development in distressed areas by providing access to more federal contracting opportunities. HUBZone areas include census tracts or non-metropolitan counties with higher than average unemployment or lower than average median household incomes. A HUBZone small business concern is one that is: at least fifty-one percent owned and controlled by United States citizens; an Alaska Native Corporation owned and controlled by Natives; a business owned by one or more Indian tribal governments; a business wholly owned by a community development corporation that receives financial assistance under the Community Economic Development Act; or a small business concern that is a small agricultural cooperative organized or incorporated in the United States.

To be eligible, businesses must be a small business by SBA standards; owned and controlled at least fifty-one percent by U.S. citizens; its principal office must be located within a HUBZone (which

59. Manuel, supra note 4, at 7.
60. Id.
61. Id.
62. Hasty, supra note 17, at 75.
63. Id.
65. Manuel, supra note 4, at 3.
67. 13 C.F.R. § 126.202 ("Many persons share control of a concern, including each of those occupying the following positions: officer, director, general partner, managing partner, managing member and manager. In addition, key employees who possess expertise or responsibilities related to the concern's primary economic activity may share significant control of the concern. SBA will consider the control potential of such key employees on a case by case basis.").
includes lands in urban and rural counties, Native-American reservations, and certain military facilities); and at least thirty-five percent of its employees must reside in a HUBZone. A qualified HUBZone requires certification in writing to the SBA Administrator, certifying that: it is a HUBZone small business concern, fitting categories listed; its principal office is located in a HUBZone and not fewer than thirty-five percent of its employees reside in a HUBZone; the small business concern will attempt to maintain the applicable employment percentage during the performance of any contract awarded; and, with respect to subcontracts, will ensure that not less than fifty percent of the cost of contract performance incurred for personnel will be expended for its employees, and in a contract for procurement of supplies, not less than fifty percent of the cost of manufacturing the supplies will be incurred in connection with the performance of the contract in a HUBZone by one or more HUBZone small business concerns; and no certification made or information provided by the small business concern has been successfully challenged by an interested party or otherwise deemed to be materially false.

The purpose of the HUBZone Program is to provide federal contracting assistance for qualified small business concerns located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas. However, there is criticism as to its actual effect in successfully empowering these HUBZone areas with the federal contracting program. Specifically, some critics contend that “tax credits and job training money are not enough” to successfully empower America’s underutilized business zones—these critics argue that small businesses need more than a tax break or job training money to create jobs for those who need them. Despite some of the shortcomings of the HUBZone Program, Congress remains steadfast on its declared policy of ensuring that preferential treatment is delegated to these urban and rural areas that need the extra empowerment.

Congress has unambiguously delegated to the Small Business Administration’s Administrator the task of determining a contractor’s

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70. Miller, supra note 40, at 368.
71. Id.
qualified HUBZone status. The court in *Diversified Maintenance Systems, Inc. v. United States* found it was improper of Army’s contracting officer to undertake an Internet search for information about the challenged small business’ eligibility, rather than referring the matter to Small Business Administration for investigation and resolution. The court in *Contract Services, Inc. v. United States* established that offerors must appear on the Administration’s list of qualified HUBZone sites prior to a submission to a solicitation.

Benefits of the HUBZone Program include competitive and sole-source contracting; ten percent price evaluation preference in full and open contract competitions; and subcontracting opportunities. The federal government has a goal of awarding three percent of all dollars for federal prime contracts to HUBZone-certified small business concerns.

IV. CRITICISMS OF THE SECTION 8(A) AND HUBZONE PROGRAMS

A. Critiques of the Small Business Administration’s 8(a) Program

Although the SBA’s goals are founded on social and economic equality, the program has encountered some skepticism in the form of societal backlash against its favored groups. There have also been some administrative impediments preventing the easy flow and access to the set-asides. In addition, differences between the program as envisioned in the statute, versus as administered, have developed. In an attempt to pinpoint problems with the set-asides, the General Accounting Office (GAO) of the United States was tasked with conducting a full-scale audit of the Small Business Administration in 1974. Members of Congress expressed their concern over whether eligible firms were becoming self-sufficient and viable. The 1974 audit uncovered a myriad of problems. Ultimately, the GAO expressed that the 8(a) program had minimal success in helping firms become self-sufficient. It attributed the problems within the Small Business Administration to the Administration’s lack of control over the supply of contracts for the program and because “8(a) firms ha[d] not gener-

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73. *Id.* at 125.
76. Hasty, *supra* note 17, at 15.
78. *Id.* at i.
ated enough commercial sales to become independent of the need for
8(a) assistance.”

The report surveyed 110 firms in Washington D.C., Atlanta, Dallas, Detroit, Philadelphia, New York, and San Francisco and found that despite receiving a total of over $81.4 million in assistance, only thirty-one firms successfully completed the program to become self-sufficient. The report hypothesized that a major reason for the failure of many firms was due to the unpredictable relationship between amounts requested by firms and the ability of the Small Business Administration to supply the funds with contracts—there was no guarantee in the forecast of procurement opportunities. To alleviate the issue of the Small Business Administration’s lack of control over contracts, the GAO suggested alternatives, such as allocation of Administration’s resources to identifying suitable 8(a) contracts and reducing the total number of firms in the program. The GAO also suggested that the Administration provide 8(a) firms with guidance in acquiring commercial sales so that they could decrease their dependence on assistance.

1. Monitoring Fraud in the Implementation of Section 8(a) Set-Asides

Implementation of the 8(a) set-asides has led to numerous administrative difficulties. In particular, the certification of minority firms required by the SBA has led to serious abuses in the proliferation of 8(a) “fronts” described as “groups of minority members with little or no education or business experience who posed as company officers to qualify a firm for the 8(a) program.” Another problem involved accepting minority firms that were “technically” qualified but did not need special assistance due to the firms’ educational level or business experience. There were loopholes created when the Small Business Administration relinquished the responsibility of insuring viability management services, training, and capital for 8(a) firms to sponsors, which instead led to sponsors manipulating their presence in the marketplace. In the 1974 audit, the GAO reviewed the effectiveness of the sponsorship
program, specifically evaluating twenty-five firms and their seven sponsors. The results showed that the "sponsorship arrangements did little to develop viable 8(a) firms." The sponsorship program was designed to encourage "white-owned and nondisadvantaged businesses to provide [assistance in]management services, training, and capital to disadvantaged small businesses." But, contrary to fulfilling the Small Business Administration's goal of minority small businesses becoming self-sufficient, the sponsorship program instead led to the nondisadvantaged businesses retaining control over the 8(a) firm after their assistance was provided. Because the Administration considered ownership of fifty-one percent or more of an 8(a) firm as evidence of their control, results from the audit showed that actual control rested in the hands of the nondisadvantaged sponsors. The Administration did not monitor the extent to which sponsors controlled the 8(a) firms, and sponsors felt that there was little incentive to "create viable businesses which later would become competitors." Of the sponsorship agreements investigated based on interviews, results showed that twenty-three disadvantaged firm presidents "lacked even a basic understanding of routine business matters." Some interviewed did not know if they were on the board of directors or who prepared the firms' financial statements, and one "secretary-treasurer ... signed corporate documents and checks with an 'X'." The GAO and SBA both agreed that sponsorship agreements needed to be monitored and that there needed to be specific criteria to define the extent to which sponsors can charge management fees for services provided to 8(a) firms to ensure compliance.

Recognizing this as a problem, the Small Business Administration published revised guidelines. Currently, eligibility as an 8(a) firm requires that "at least fifty-one percent of the firm be 'unconditionally

87. Id. at 47 ("determin[ing] (1) how and why experienced non-8(a) firms became sponsors; (2) what controls were exercised by sponsors; and (3) what services and other items cost 8(a) firms. The results of the audit disclosed that, for a variety of reasons, these sponsorship arrangements did little to develop viable 8(a) firms"); See also GGD-75-57, supra note 77, at 1.
88. Hasty, supra note 17, at 47.
89. Id. at 45.
90. Id. at 49.
91. GGD-75-57, supra note 77, at 18.
92. Id. at 22.
93. Id.
94. Id. at 25.
95. See 13 C.F.R. § 124 (establishing and updating policies, procedures, requirements, and guidelines for the administration of the 8(a) program).
owned' by a disadvantaged individual(s). This places a tighter barrier on deeming who has control over an 8(a) firm. Specifically:

The disadvantaged person(s) also must control the management and daily business operations of the firm. To be considered in control of the business, the disadvantaged individual must have managerial or technical experience and competency directly related to the primary industry in which the firm seeks 8(a) certification. Additionally, to preclude control by nondisadvantaged persons, control of the Board of Directors must rest with the disadvantaged individual(s), either in actual numbers of voting directors or through weighted voting.

However, nondisadvantaged individuals “may be involved in management of the 8(a) firm as stockholders, partners, officers and/or directors” under some limitations. Also, the Small Business Administration set forth a non-inclusive list of circumstances to help guide the recognition of control issues in the sponsorship program. Unfortunately, unintended “fictions” in the 8(a) program have sprouted through the regulations. Although none of the shortcomings are fatal, they represent a “formidable challenge to the program’s vitality.”

96. Hasty, supra note 17, at 54.
97. Id. at 55.
98. Id. at 55-56 (“Nondisadvantaged individuals may not: (1) Exercise actual control or have the power to control the applicant or 8(a) concern; (2) Be an officer or director or more than a ten percent owner, stockholder, or partner of another firm in the same or similar line of business as the applicant or 8(a) concern; (3) Receive excessive compensation from the applicant or 8(a) concern as directors, officers or employees; (4) Be former employers of the disadvantaged owner(s) of the 8(a) firm unless the SBA determines that the contemplated relationship between the former employer and the disadvantaged individual does not give the former actual control or the potential to control the applicant or 8(a) concern and the relationship is in the best interests of the 8(a) firm; and (5) Have an equity ownership interest of more than ten percent in another 8(a) concern.”).
99. Id. at 56 (Circumstances can include: “(1) Nondisadvantaged individuals control the voting Board of Directors of the 8(a) concern, either directly through majority voting membership, or indirectly, if the nondisadvantaged individuals can block any action through negative control. (2) A nondisadvantaged individual, as an officer or member of the Board of Directors of the 8(a) concern, or through stock ownership, has the power to control day-to-day direction of the business affairs of the concern. (3) The nondisadvantaged individual or entity provides critical financial or bonding support or licenses to the 8(a) concern which directly or indirectly allows the nondisadvantaged individual to gain control or direction of the 8(a) concern. (4) A nondisadvantaged individual or entity exercises voting control of the participant through a nominee(s). (5) A nondisadvantaged individual or entity controls the corporation or the individual disadvantaged owners through loan arrangements. (6) Other contractual relationships exist with nondisadvantaged individuals or entities, the terms of which would create control over the disadvantaged concern.”).
100. Hopkins, supra note 27, at 171.
101. Id.
2. Establishing Constitutional Standards of Review for Race-Classification Awards

In 1995, as one of the latest in a string of important cases that addressed the ongoing issue of affirmative action in the federal procurement of contracts, the Court in *Adarand Constructors, Inc. v. Pena* explicitly held that federal racial classifications must serve a "compelling governmental interest, and must be narrowly tailored to further that interest."\(^\text{102}\) Thus, race-based classifications are held to a strict scrutiny review standard to "ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means."\(^\text{103}\) In this particular case, the contract at issue for a highway construction project came about from a Department of Transportation appropriations measure, where the prime contractor provided that the Mountain Gravel & Construction Company would receive additional compensation if it hired subcontractors certified as small businesses. Mountain Gravel solicited bids from subcontractors for the guardrail portion of the contract. The petitioner (Adarand) submitted the low bid, and Gonzales Construction Company (a "socially and economically disadvantaged" business) also submitted a bid.\(^\text{104}\) The subcontract was awarded to Gonzales, despite Adarand's low bid.\(^\text{105}\) Adarand sought declaratory and injunctive relief for future subcontract compensation clauses, alleging that the race-based compensation clauses violated its equal protection rights under the Fifth Amendment.\(^\text{106}\) Adarand filed suit claiming that but-for the preferential treatment, it would have been awarded the subcontract.

To ensure no violation of equal protection under the Fifth Amendment, the Court explicitly held that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny" and that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."\(^\text{107}\) Essentially, the *Adarand* Court announced a kind of skepticism of racial-classification programs, perhaps lending to society's greater fear of lack of competition in solicitations. One commentator even noted that though the Court may still tolerate affirmative action, set-asides may soon become a "relic of the past."\(^\text{108}\) The *Adarand* Court ulti-

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103. *Id.* at 236.
104. *Id.* at 204.
105. *Id.* at 205.
106. *Id.* at 210.
mately held that “[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test.”

3. Ambiguity in Section 8(a) Eligibility and Certification Requirements

Ambiguity in the certification procedures led to changes in regulations to prevent the abuse of firms remaining in the section 8(a) program when assistance was no longer needed. The “inadequate and vague” graduation criteria specifically in the requirement of “social or economic disadvantage” led to large numbers of minority groups to enter the 8(a) program, sometimes overstepping a position where assistance was more valid. There was also inconsistency in eligibility determinations, which ranged from “racial discrimination and injustice” to “underemployment and ghetto living during maturity.”

Also, the “subjective nature of determining social or economic disadvantage led to inconsistent application of the criteria from region to region.” It became the unofficial policy to consider black Americans automatically disadvantaged. Prior to some changes in regulations by the Small Business Administration review board, these criteria could establish 8(a) program eligibility: (1) social background, (2) past experiences with discrimination, (3) previous failures to compete for government contracts because of financial or commercial institution restrictions, “(4) length of residence in an urban area with a high concentration of unemployed or low-income persons, (5) record of unemployment or marginal employment, and (6) chronic low-income status.”

Congress later provided objective criteria with the passage of Public Law 95-507 in 1978. A subtle but major change in the statute came with defining program eligibility in terms of both social and economic disadvantage. This had the effect of ensuring that applicants could no longer qualify for the 8(a) program solely on the basis of racial or ethnic criteria. It instead required that “program entry was restricted to those minority entrepreneurs who met an economically-based standard of eligibility.”

Despite confining the opportunities for eligibility, the 8(a) program still saw problems where “firms that entered the

110. Hasty, supra note 17, at 12.
111. Id. at 59.
112. Id. at 60.
113. Id. at 63.
program validly remained in the program even after obtaining self-sufficiency because few criteria existed for determining when, if ever, an 8(a) contractor should leave the program.”

Currently, the Small Business Administration requires first that applicants make a preliminary showing they are socially disadvantaged, defined as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.” Once that has been established, an applicant must then show that the applicant is economically disadvantaged. Rather simply, this involves a process where the Administration compares the applicant’s business and financial profile with profiles of businesses in the same or similar line of work that are not owned and controlled by socially and economically disadvantaged individuals. In making its decisions, the Administration keeps its goals in mind that the “[8(a)] program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or overcome impediments to obtaining access to financing, markets, and resources.”

Despite being a minority business or firm, applicants will not be eligible for the 8(a) certification unless they can establish economic disadvantage.

The Small Business Administration also considers other factors in determining eligibility and must also determine that “with contract, financial, technical, and management support the small business concern will be able to successfully perform the 8(a) contracts awarded.”

B. Critiques of the HUBZone Program

Despite essentially taking “race-based” classification out of the procurement process as under the 8(a) program, the HUBZone program

114. Id.
117. Id. at 67–68 (“These additional factors include, but are not limited to, the following: (1) review of the applicants’ character; (2) application of the SBA’s standards of conduct regulations when eligibility questions arise involving SBA employees and their relatives; (3) eligibility limitations concerning applicants who have previously participated in and exited from the 8(a) program; (4) circumstances under which the SBA must determine that the applicant is a manufacturer or regular dealer in accordance with the Walsh-Healy Public Contracts Act regulations; and (5) special consideration when family members in the same household own, manage, or control multiple businesses.”).
118. Id. at 68.
still encounters difficulty in persuading small businesses to establish themselves in the HUBZone-certified locations. Critics often point out that there may be substantial “disincentives” for a company to locate in a HUBZone. These disincentives include the risk involved in investing in traditionally impoverished locations, therefore making these areas even less attractive for other business investment. One commentator pointed out that a “lack of investment also increases social problems, such as crime and drug use” in the locations where there are no supported small business concerns. Another critique rests in the requirement that all HUBZone participants be citizens—this requirement seems somewhat counterintuitive to the economic goals of the Small Business Administration. Kendall Miller notes: “If the goal of the program is to revitalize economically depressed areas, it would seem reasonable to provide an incentive for any company or individual to invest in those areas.”

V. THE SMALL BUSINESS ACT OF 2010: HOW THE SMALL BUSINESS ACT OF 2010 CHANGED THE PARITY ATMOSPHERE

On September 27, 2010, President Barack Obama signed the Small Business Jobs Act of 2010. P.L. 111-240 spawned from the 111th Congress’ response to several Court of Federal Claims and Government Accountability Office (GAO) decisions and amended the Small Business Act (SBA) to remove language finding that HUBZone set-asides have precedence over other set-aside programs. The 111th Congress removed any confusion to the mandatory language requiring an award to a HUBZone business, versus an 8(a) business.

Before any GAO decision established that HUBZone set-asides had precedence, regulations were set in place to clarify that HUBZone small business concerns “take priority” over the requirement to set aside acquisitions for other small business concerns. “Priority” was also found in statutes where set-asides for small business “shall be given” to small businesses within areas of concentrated unemployment or underemployment.

119. Miller, supra note 40, at 386.
120. Id. at 387.
121. Id. at 378–79.
122. Id.
123. MANUEL, supra note 4, at 1.
"Section 8(a) of the Small Business Act gives agencies 'discretion to award contract[s]' for goods or services, or to perform construction work." The categories of 8(a) and HUBZone are not mutually exclusive—a business could potentially be both, and has posed some issues requiring clarity of parity between agency awards. The SBA does not authorize sole-source awards to businesses that are not 8(a) or HUBZone participants, or veteran-owned small businesses.

Despite emphasis on the priority of HUBZone set-asides, the lack of clear precedence among the set-aside programs when "conditions for multiple types of set-asides exist" created a difference of interpretation between the Court of Federal Claims and GAO's interpretation, and the Small Business Administration's interpretation. In the past, the Small Business Administration asserted that there is no order of precedence among set-asides and that agencies "should select among the set-aside programs in order to maximize their performance on their goals for contracting with small businesses." However, the Court of Federal Claims and GAO have held that where there is a "reasonable expectation that at least two qualified HUBZone small businesses will submit offers and the award can be made at a fair market price," the HUBZone set-aside should have precedence.

VI. ANALYSIS: DECISIONS THAT RECOGNIZED A PRIORITY FOR HUBZONE CONTRACTS

Two United States Court of Federal Claims cases have established the interpretation that set-asides for HUBZone small businesses have precedence over those for 8(a) small businesses because HUBZone set-asides are mandatory while 8(a) set-asides are discretionary, and mandatory agency actions take precedence over discretionary ones. These decisions set the stage for Congressional action to amend the Small Business Act and to clarify the parity between HUBZone and 8(a) set-asides.

The analysis of a series of bid protests regarding whether there is parity between 8(a) business participants and HUBZone participants, or if HUBZone bids take precedence, brought the need for clarity between the programs to surface. Bid protests can only be made in

126. MANUEL, supra note 4, at 7 (emphasis in original) (quoting 15 U.S.C. § 637(a)(1)(A)).
128. MANUEL, supra note 4, at 11 (citing the example of "when there are at least two responsible HUBZone small businesses and two responsible Service-Disabled Veteran-Owned Small Businesses").
129. Id.
130. Id.
one of three forums: (1) the procuring agency; (2) the Government Accountability Office (GAO); and (3) the Court of Federal Claims.\textsuperscript{131} Court of Federal Claims decisions have precedential value, as opposed to GAO decisions, which are binding only on the legislative branch.

A. The Mission Court

In \textit{Mission v. United States}, the Court of Federal Claims established that it was in the "public interest" to grant injunctive relief, but did not do much to lay the foundation for determining whether government agencies have parity in determining which entity to award set-asides to.\textsuperscript{132} Mission Critical Solutions (MCS), an entity that was both an 8(a) program participant and a qualified HUBZone small business, was the incumbent contractor providing information technology (IT) support services for the Office of the Judge Advocate General, United States Department of the Army (Army).\textsuperscript{133} In December 2007, the Army requested an acceptance letter from the Small Business Administration approving MCS as the service provider, after it determined that the requirement for IT support services was appropriate for an 8(a) set-aside.\textsuperscript{134} Prior to January 2008, IBM had provided the IT support services.\textsuperscript{135} The Small Business Administration accepted MCS as the service provider and authorized the Army to negotiate directly with MCS to issue a one-year sole-source contract for $3.5 million on January 31, 2008.\textsuperscript{136} However, the Army decided that a follow-on contract for the IT services would include "a base year and two option years, increasing the anticipated value of the contract to approximately $10.5 million," surpassing the $3.5 million ceiling for sole-source awards as regulated by Federal Acquisition Regulation (FAR) § 19.805.\textsuperscript{137} FAR § 19.805 allows for open competition of the contract when the acquisition exceeds the competitive threshold and when at least two eligible 8(a) firms do not submit offers made at a fair market price—this is known as the "Rule of Two."\textsuperscript{138} Because the contract value exceeded the allotted amount for sole-source awards, the Army determined it could no longer award the contract to MCS on a sole-source basis.

\textsuperscript{131} Id. at 9.
\textsuperscript{133} Id. at 390.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Mission, 91 Fed. Cl. at 390.
\textsuperscript{138} Id. (citing 48 C.F.R. § 19.801-1(a) (2009)).
On December 17, 2008, the Army again requested that the Small Business Administration issue an acceptance letter of nomination for IT services, this time for Copper River Information Technology, LLC (Copper River), an Alaska Native corporation. The Administration accepted Copper River as the service provider on December 23, 2008, and with the Administration's approval, the Army awarded a sole-source contract to Copper River on January 13, 2009 to perform the IT services, instead of MCS.

In its protest with the GAO, MCS argued that the Army should not have awarded the contract to Copper River on a sole-source basis, because doing so deprived MCS of the opportunity to compete. The crux of MCS's argument was that since MCS was both an 8(a) and HUBZone participant, "the Army should have competed the requirement among HUBZone small businesses under the HUBZone statute." The GAO denied both of the Army's motions to dismiss, and sustained MCS's protest, thus leading to questions of the precedence of HUBZone firms over 8(a) firms in the procurement process. More confusion ensued when the Office of Management and Budget issued a memorandum directing executive branch agencies to disregard the GAO's rulings. Furthermore, the Office of Legal Counsel of the United States Department of Justice issued a memorandum opinion disagreeing with the GAO's analysis and concluding that the Small Business Administration's reading of parity between the programs was the permissible construction of the reading of the 8(a) and HUBZone statutes together. As a result, the Army informed the GAO that the SBA decided not to release the IT support services from the 8(a) program and that the Army would not be implementing the GAO's recommendations.

1. Statutory Analysis of "notwithstanding any other provision of law"

The parties' statutory interpretations of the HUBZone statute provide for two equally compelling arguments, each analyzing the meaning of the HUBZone phrase "notwithstanding any other provision of law." The Mission court began its analysis by first emphasizing "opportunity" as the purpose of the Small Business Act, and then expres-

139. Id. at 390.
140. Id. at 391.
141. Id.
143. Id.
144. Id.
singing that both parties agreed "that Congress did not prioritize one small business program over another." In determining the SBA's purpose, the Mission court held that Congress' goals did not appear to distinguish the programs by creating precedence for one over the other.

However, the parties disagreed on what the lack of prioritization of the two statutes indicated. MCS argued that the Army should not have awarded the contract to Copper River because doing so deprived MCS of the opportunity to compete as required under the HUBZone statute. MCS argued that the phrase "notwithstanding any other provision of law" is plain on its face and that the statute was clearly written to supersede other small business contracting rules. Specifically, MCS asserted that "if Congress did not intend to differentiate between the different small business procurement programs, it would have ensured each program contained identical, or at least similar, statutory language implementing the terms of each program." On the other hand, the Army argued that the Small Business Administration established parity between the 8(a) and HUBZone programs and that the word "notwithstanding" is not to be construed literally, but rather to refer to provisions outside of the Small Business Act. Further, the Army argued that Congress intended that the goals of both programs be pursued "concurrently" and that the programs were to be treated as "co-equal," with the Small Business Administration's regulations providing for parity between 8(a) and HUBZone programs as permissible. The Army argued that Congress meant to exclude unenumerated provisions of the Small Business Act and that although this "omission" clearly established the priority of other contracting preferences within the HUBZone statute, the statute itself does not expressly provide that the HUBZone program be given priority over other SBA assistance programs.

The Mission court ultimately held that if Congress indeed intended to support a position contrary to the plain meaning of the statute, it could have expressly stated that the phrase "notwithstanding any other provision of law" referred to provisions outside the Small Busi-

145. Id. at 395–96.
146. Id. at 396.
147. Mission, 91 Fed. Cl. at 396.
148. Id. at 396–97.
149. Id. at 396.
150. Id.
ness Act. The court reasoned that the “operative language of the statute combines the phrases ‘[n]otwithstanding any other provision of law’ and the directive that the ‘contract opportunity shall be awarded’” to support the conclusion that the statutory language is mandatory and its plain meaning requires a “contract opportunity to be competed among qualified HUBZone small businesses.”

2. Statutory Analysis of “shall be awarded”

MCS argued that where the HUBZone statute states, “a contract opportunity shall be awarded... on the basis of competition restricted to qualified HUBZone small business concerns,” it mandates a set-aside for HUBZone small business concerns when other HUBZone conditions are met. Again, MCS argued that the statute should be read plain on its face. The Army instead argued that the word “shall” is not sufficient to establish legislative intent that a statutory provision is mandatory.

Ultimately, the Mission court read the HUBZone’s competition provision of “shall be awarded” as mandatory and that it is properly interpreted as mandatory in relation to both the sole-source provision and the 8(a) program provisions. The court reasoned that “the word ‘shall’ is ordinarily the language of command. And when the same rule uses both ‘may’ and ‘shall,’ the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory.”

The Mission court enjoined the Army from making the proposed award to an 8(a) program and ordered to determine whether a “Rule of Two” was fulfilled and a HUBZone set-aside was required. The court found that the Army’s award of the contract to Copper River on a sole-source basis without first determining whether it was reasonable that at least two qualified HUBZone businesses would submit of-

151. Id. (holding that “no other statutory language within the Small Business Act compels the conclusion that Congress intended the phrase ‘notwithstanding any other provision of law’ to have a more limited meaning than its plain language indicates”).
153. Id. at 403.
154. Id. Specifically, the Army argued that the language of the HUBZone competition provision should be interpreted in relation to the sole-source provision that comes just before it in the HUBZone statute, which provides that a “contracting officer may award sole-source contracts under this section to any qualified HUBZone small business concern.” Further, that “shall” in the HUBZone restricted competition provisions of 15 U.S.C. § 657a(b)(2)(B) is to be contrasted with the “may” in 15 U.S.C. § 657a(b)(2)(A).
155. Id.
156. Id. (alterations in original) (quoting Anderson v. Yungkau, 329 U.S. 482, 485 (1947)).
fers of fair market price, was not in accordance with law. In particular, the language of the HUBZone statute of "notwithstanding" overrides conflicting provisions of any other sections. The court also held that the use of "shall" in the statute indicated mandatory actions, as opposed to 8(a)'s discretionary language.

Although the Mission court established some guidelines in determining whether an injury was suffered to allow for an award of injunctive relief, it did not give much clarity to the Army's argument that the lack of mention of precedence among the set-aside programs indicated parity. It also did not explicitly enjoin the government from making future awards based on the SBA's notion of parity.

B. The DGR Approach to Parity

After Mission, the court in DGR Associates v. United States again enjoined the government from using an 8(a) set-aside where the "Rule of Two" qualified HUBZone small businesses would be able to compete and where the award could be a fair market price. DGR Associates (DGR), as the incumbent contractor, challenged the Department of Air Force's decision to conduct an 8(a) set-aside procurement instead of giving priority to HUBZone small businesses, in violation of the SBA. The procurement was for "housing maintenance, inspection, and repair services at Eielson Air Force Base, Alaska." "DGR contend[ed] that the Air Force violated the Small Business Act by not giving priority to HUBZone small business concerns when there was a reasonable expectation that two or more... offers...[would] be made at a fair market price"—again, Rule of Two. Contrary to MCS in Mission, DGR was a qualified HUBZone area, but was not eligible to compete under the 8(a) program. DGR prevailed in a timely bid protest to the GAO, but the Air Force announced it would not follow the GAO's recommended decision. The Air Force in turn awarded the contract under an 8(a) set-aside to General Trades & Services, Inc. DGR protested, claiming that "[f]ederal law require[d] [the] solicitation [to] be set aside for qualified HUBZone companies [and]... DGR was prejudiced by the Air Force's actions." The Air Force argued that it is their policy.

158. Id.
159. DGR Assoc's. v. United States, 94 Fed. Cl. 189 (2010).
160. Id. at 193.
161. Id.
162. Id. (citation omitted).
163. Id.
164. DGR, 94 Fed. Cl. at 193-94.
165. Id. at 198.
“not to provide priority to HUBZones but rather to treat them with parity with the other small business programs.”

The *DGR* court determined the central issue was again how to interpret the HUBZone statute, specifically, Congress' intent to prioritize the HUBZone participants over 8(a) program participants. The court explicitly stated that, “Congress established a priority for the HUBZone program over other competing small business programs.” Despite executive memoranda proving contrary, the Court of Federal Claims and the GAO have consistently held that there is no explicit parity between the set-aside programs and that the SBA mandates a priority to HUBZone businesses. The *DGR* court entered a permanent injunction requiring the Air Force to terminate its unlawful contract awarded to General Trades & Services and to determine whether requirements of HUBZone qualifications are met by DGR. The *DGR* court rejected the Air Force’s argument that legislative history indicates Congress' intent not to prioritize the HUBZone program. Specifically, the court explained that because the Senate Report did not explicitly explain why parity language was removed, pure speculation as to its removal is inconclusive and not a reason to support the notion that because the parity provision was dropped without explanation that it still stands.

The *DGR* court supports the reasoning in *Mission* but relies too heavily on the explanation that legislative history is insufficient to rebut congressional intent in the plain language of the statute.

C. **Congress’s Reaction and Attempt to Create Parity**

The outcomes of *Mission* and *DGR* had the potential to promulgate views contrary to Congress' intent. Certain small businesses could have decreased opportunities to obtain federal contracts, or some agencies may not be able to meet their contracting goals with certain types of small businesses. Through P.L. 111-240, Congress amended the Small Business Act by removing the language that *Mission* and *DGR* relied on in finding that HUBZone set-asides have precedence.

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166. Id. at 194.
167. Id.
168. Id. (reiterating that if Congress had intended something different from what was stated, Congress alone must "enact an appropriate amendment" to rectify any confusion; also, that courts must presume that a legislature says in a statute what it means).
169. *DGR*, 94 Fed. Cl. at 194 (explaining that the executive orders merely express disagreement with the interpretation, rather than strict guidelines for interpretation of parity between the two set-asides).
170. Id. at 194.
over other set-asides. Some key differences include changes to the language of HUBZone provisions to clarify that agencies "may," rather than "shall" use HUBZone set-asides when there is a reasonable expectation that at least two qualified HUBZone small business will submit offers and the award can be made at a fair market price. This change clarified that agencies are not bound to award contracts to the HUBZone set-asides. Furthermore, the Act deleted the words "notwithstanding any other provision of law," which had been interpreted as authorizing contracting officers to make awards to HUBZone small businesses on a sole-source or set-aside basis. These changes led to true parity between the 8(a) and HUBZone set-asides.

VII. CONCLUSION: CURRENT SMALL BUSINESS CONTRACTING GOALS

The Small Business Administration is responsible for setting yearly goals for procurement opportunities by negotiating individual agency goals, which in turn constitute government-wide goals. The Administration also negotiates a subcontracting goal based on recent achievement levels, and HUBZone subcontracting goals based on the required prime HUBZone goal. The goal-making process begins with agencies submitting their proposed goals to the Small Business Administration. The Administration’s Office of Government Contracting then determines if the agency’s goals meet or exceed the government-wide statutorily mandated goals in each small business category. Finally, the Administration notifies the agency of their final goals. The groups covered by the statutory goals include: small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, and small businesses owned and controlled by women or those who are socially disadvantaged. The current government-wide goal is that three percent of federal contract and subcontract dollars go to HUBZone small businesses and five percent go to 8(a) small businesses.

172. Manuel, supra note 4, at 6.
173. Id.
175. Id.
176. Manuel, supra note 4, at 17. Achieving goals for 8(a) and other set-asides would have been difficult if a HUBZone set-aside had to be used whenever it was reasonably expected that at least two qualified HUBZone small businesses would submit offers.
The Small Business Administration has also established annual Procurement Scorecards, which are an assessment tool to evaluate whether federal agencies reach their contracting and subcontracting goals and a means to provide transparency of contracting data. The Administration negotiates biannually with each federal agency for contracting and subcontracting goals to ensure that the sum total of all the goals exceeds the twenty-three percent statutory total. An agency earns an A+ if it meets or exceeds 120% of their goals, an A for 100% to 119%, a B for 90% to 99%, a C for 80% to 89%, a D for 70% to 79%, and an F for less than 70%. Further, an agency’s overall grade is comprised of three quantitative measures: prime contracts (which accounts for 80% of its grade), subcontracts (10%), and its progress plan for meeting goals (10%).

In the 2011 fiscal year Scorecard, the government-wide grade was 96.16%, or a B. For the prime contracting achievement category in 2011, 8(a) firms earned 7.67% of the 5% goal, earning a B, and HUBZones earned 2.35% of the 3% goal, also earning a B. For the subcontracting achievement category in 2011, 8(a) firms earned 5.4% of the 5% goal, and HUBZones earned 1.9% of the 3% goal. Out of an overall possible score of 7 for Success Factors, FY2011 scored a 6.86% on a peer review score. Some factors look to whether agencies have documented evidence that they are committed to utilizing small businesses to obtain goods and services, whether the agencies’ senior leadership, through action and documented evidence, communicated the importance of the SBA’s contracting goals, and whether agencies have expanded subcontracting opportunities. There are also Scorecards for specific agencies, with detailed comments evaluating their performance in relation to the agreed upon goals with the SBA.

The current interpretations of both the 8(a) and HUBZone competition provisions are now in agreement in regard to both the SBA’s purpose and goal of parity between the two set-asides. This Comment

178. Id.
179. Id.
180. Id.
182. Id.
183. Id.
184. Id.
185. Id.
looked to the historical background of the Small Business Administration in Part II, in light of contemporary social and economic issues, to define Congress' purpose in creating set-aside programs for section 8(a) and HUBZone programs specifically. Part III of the Comment further dissected the statutory qualifications and certification processes for each respective program, which revealed some loopholes in the actual procurement process later discussed as criticisms of each program. Further analysis of relevant cases showed that the Court of Federal Claims was ready to establish a precedence for mandating HUBZone concerns over 8(a) concerns, which in turn led to the passage of Public Law 111-240, putting to rest the confusion over whether HUBZone small business concerns take priority over others. The Small Business Act of 2010 effectively promulgates that Congress' initial intent of creating opportunities for all qualified small business concerns is intact, with the message that specific statutes will be interpreted to require parity between both 8(a) and HUBZone small business concerns.