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SHOULD AFFIRMATIVE ACTION PUBLIC CONTRACTS
CONSTITUTE GOVERNMENT BENEFITS?
CALCULATING PROCUREMENT FRAUD LOSS UNDER
SECTION 2B1.1(B)(1)

*Adam Kwon**

Congress has established a program (the section 8(a) program) that, despite having taken various forms over the years, has worked to benefit disadvantaged business entities and, by extension, the socioeconomically disadvantaged individuals who run them by setting aside and awarding to those entities opportunities to perform on certain designated public contracts. Occasionally, people either lie ex ante or fail to fulfill obligations ex post in order to fraudulently procure these section 8(a) contracts (i.e., they commit procurement fraud).

This fairly esoteric area of the law is disoriented by a circuit split over how to sentence such white-collar defendants (if convicted) in cases of affirmative action procurement fraud. Specifically, the circuit courts do not agree on how to calculate the amount of loss attributed to the fraud, the value of which may result in severe sentencing enhancements. At this point, the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits have all chimed in, yet the issue on which they cannot seem to agree is whether a government contract, set aside for affirmative action purposes and awarded to a disadvantaged business entity, constitutes a “government benefit” for purposes of loss calculation.

This Essay posits that a section 8(a) public contract does constitute a government benefit when calculating loss and, in such cases, that the credits-against-loss rule should apply as well. Nominally, the circuits are split only on the first issue; however, that nomenclature is part of the reason this split persists. In actuality, the circuit-splitting issue comprises not one but two questions. Resolution will require searching for the answers with binoculars, not a telescope. This Essay attempts to assist in that search by revisiting the events that led to this split in the first place and weighing the merits of those courts’ decisions.

INTRODUCTION

Congress’s affirmative action program for public contracts is not immune to fraud. The section 8(a) program, like many similar programs before it, is designed to uplift disadvantaged business entities (DBEs) that are owned and controlled by

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socioeconomically disadvantaged individuals.¹ In order to accomplish its goal, the program grants the Small Business Administration (SBA) the power to ensure that certain federal procurement contracts are awarded to 8(a)-qualifying entities.² Sometimes, however, individuals misrepresent that their small businesses qualify for section 8(a) government contracts, even though they do not.³ When such a procurement fraud occurs, a perpetrator's criminal sentence is based on the calculated loss caused by the fraud—the greater the loss, the harsher the sentence.⁴

The federal circuits do not agree on how to calculate loss in cases of section 8(a) procurement fraud, but the choice to apply one rule over the other has practical, potentially drastic sentencing consequences.⁵ Broadly speaking, the “general rule” has been interpreted to allow for the mitigation of calculated loss by applying the fair market value of services performed as credit against the loss.⁶ In contrast, the “special rule” (a.k.a. the “government benefits rule”) has been interpreted to preclude such a credit, regardless of any performance on the relevant contract.⁷ The Fifth and Ninth Circuits apply the general rule for loss calculation,⁸ and the Fourth, Seventh, and Eleventh Circuits apply the government benefits rule.⁹ The Third Circuit has applied both rules in separate instances, but most recently, it concluded that it does not matter whether the general rule or special rule is applied because, in its view, both rules provide for the application of credits against the loss to mitigate the calculated loss amount (in other words, the calculated loss is the same either way).¹⁰

This Essay opines that the current circuit split cannot be resolved by simply adopting one side's opinion because both sides are partly right and partly wrong. Moreover, this Essay suggests that the split is nothing more than the understandable culmination of consecutive, compounding failures to recognize that the circuit-splitting issue comprises not one but two relevant questions with common sense answers: (1) the government benefits rule (not the general rule) for calculating loss

1 See 15 U.S.C. § 637(a) (2012).

2 *Id.*; *id.* § 644(g)(2).

3 See, e.g., Sarah Westwood, *Feds Gave \$400 Million in Contracts to Ineligible Firms*, WASH. EXAMINER (Sept. 28, 2014), <https://www.washingtonexaminer.com/feds-gave-400-million-in-contracts-to-ineligible-firms>.

4 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM'N 2018).

5 See Law Office of Sara Kropf PLLC, *Fifth Circuit Slaps Down District Court's Loss Calculation in Contracting Fraud Case*, GRAND JURY TARGET (June 26, 2016), <https://grandjurytarget.com/2016/06/26/fifth-circuit-slaps-down-district-courts-loss-calculation-in-contracting-fraud-case/>.

6 OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, PRIMER ON LOSS CALCULATIONS UNDER § 2B1.1(B)(1) 20–22 (2019), [hereinafter USSC PRIMER].

7 *Id.*

8 *United States v. Harris*, 821 F.3d 589 (5th Cir. 2016); *United States v. Martin*, 796 F.3d 1101 (9th Cir. 2015).

9 *United States v. Maxwell*, 579 F.3d 1282 (11th Cir. 2009); *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006); *United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300 (4th Cir. 2000).

10 See *United States v. Nagle*, 803 F.3d 167, 183 (3d Cir. 2015); *United States v. Tulio*, 263 F. App'x 258 (3d Cir. 2008).

should apply in cases of section 8(a) procurement fraud, but (2) the total loss amount should still be credited against by the fair market value of services rendered.

Part I constructs the backdrop against which the issue may be considered; Part II introduces the various courts' opinions that created and extended the circuit split at hand; Part III deconstructs the split by chronologically focusing on how the confusion among the various circuits arose not in parallel but in series; and ultimately, the goal of this Essay is to shed light on a narrow yet impactful area of the law by discussing the merits and shortcomings of the relevant courts' opinions. In doing so, the answers to the looming questions ought to be straightforward. The government benefits rule should apply to affirmative action procurement frauds, and so should the credits-against-loss rule.

I. BACKGROUND: SECTION 8(A) CONTRACTS AND PROCUREMENT FRAUD

The United States government requires private citizens' services from time to time, and the supply side for such procurements is highly regulated.¹¹ Within the folds of this regulation, Congress identified and seized an opportunity to assist both small businesses and socioeconomically disadvantaged individuals by passing section 8(a) of the Small Business Act.¹² Specifically, section 8(a) grants the SBA the power to ensure that certain federal procurement contracts—across multiple agencies—are awarded to 8(a)-qualifying entities.¹³ And to qualify under section 8(a), an entity must, *inter alia*, be owned and controlled by one or more socioeconomically disadvantaged individuals.¹⁴ “The 8(a) program, in other words, is an affirmative action contracting program.”¹⁵

Under certain circumstances, a section 8(a) contract may be awarded to a joint venture comprised of an 8(a)-qualifying entity and a second entity that would not qualify on its own.¹⁶ When this occurs, the section 8(a) program imposes various requirements on the joint venture to ensure that the 8(a)-qualifying member of the joint venture realizes a sufficient portion of the total opportunity for itself.¹⁷ Such requirements ensure that the 8(a)-qualifying entity is not simply a shell company to misdirect the section 8(a) opportunities to nonqualifying entities by way of fictional joint ventures.¹⁸

Unfortunately, some joint ventures are nothing more than an 8(a)-qualifying shell entity cobbled together with a nonqualifying entity for the purposes of fraudulently receiving a public contract that has been set aside for a minority-owned

11 *See, e.g.*, Federal Acquisition Regulations System, 48 C.F.R. § 1.101 (2018).

12 Pub. L. No. 85-536, § 8(a), 72 Stat. 384, 389–90 (1958) (codified as amended at 15 U.S.C. § 637 (2012)).

13 *See Harris*, 821 F.3d at 591.

14 *Id.*

15 *Id.*

16 8(a) Business Development/Small Disadvantaged Business Status Determinations, 13 C.F.R. § 124.513 (2019).

17 *Id.*

18 *See Harris*, 821 F.3d at 592.

small business.¹⁹ Other times, joint ventures simply fail to comply with section 8(a) requirements, thereby failing to honor the representations made to the SBA in acquiring the contract in the first place.²⁰ In any event, either a misrepresentation to the SBA or a subsequent, deliberate failure to comply with the section 8(a) requirements can result in a conviction for procurement fraud.²¹

At the sentencing stage, certain sentence enhancements may come into play depending on the amount of loss sustained as a result of the fraud.²² In general, the greater the loss sustained as a result of the fraud, the greater the punishment.²³ For example, a loss of \$6500 or less results in no increase in the level of offense, but a loss of \$550,000 or more results in a fourteen-level increase, and a loss of \$550,000,000 or more results in a thirty-level increase.²⁴ Thus, practically speaking, the circuit split discussed herein looms with the potential for wildly inconsistent sentences for equally culpable defendants convicted of fraud in the procurement of section 8(a) public contracts.

II. HISTORY: GENERAL RULE VS. SPECIAL RULE

While section 2B1.1(b)(1) sets out escalating offense-level increases depending on the amount of loss caused by the defendant's offense, it does not directly explain how the loss should be calculated.²⁵ Rather, the method for calculation is set forth in and governed by application note 3, which has several parts, three of which are relevant for the purposes of this Essay.²⁶

First, application note 3(A) provides the "general rule" for loss calculation.²⁷ According to the general rule, loss is defined as "the greater of actual loss or intended loss—that is, the greater of the pecuniary harm that foreseeably resulted or that was intended to result from the offense."²⁸ Additionally, within application note 3(A), subdivision (v)(II) explains how to apply the general rule to procurement fraud cases:

19 See, e.g., Todd Overman, *Business Owner Sentenced to 15 Months for Defrauding SBA's 8(a) Program Through Use of "Shell" Company to Receive 8(a) Contracts*, BASS, BERRY & SIMS PLC (July 8, 2016), <https://www.bassberrygovcontrade.com/business-owner-sentenced-to-15-months-for-defrauding-sbas-8a-program-through-use-of-shell-company-to-receive-8a-contracts/>.

20 See Joel M. Androphy et al., *Government Procurement Fraud and the False Claims Act*, BERG & ANDROPHY (Oct. 18, 2010), <https://www.bafirm.com/publication/government-procurement-fraud-and-the-false-claims-act/> ("False statements are the most commonly charged offense in procurement fraud cases, and are used to penalize common forms of fraudulent procurement activity.").

21 18 U.S.C. § 1031 (2012).

22 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM'N 2018).

23 *Id.*

24 *Id.*

25 See *United States v. Harris*, 821 F.3d 589, 601 (5th Cir. 2016).

26 *Id.* at 601–02; see U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. nn.3(A), (E), (F) (U.S. SENTENCING COMM'N 2018).

27 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A) (U.S. SENTENCING COMM'N 2018).

28 *Harris*, 821 F.3d at 602.

In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.²⁹

Second, application note 3(E) contains the credits-against-loss rule, which states that the amount of loss shall be reduced by, *inter alia*,

[t]he money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.³⁰

In short, the credits-against-loss rule reduces the amount of calculated loss according to the value of any property already returned or any services already rendered.

Lastly, application note 3(F) lists various “special rules.” Among these, application note 3(F)(ii) sets forth a special rule for when “government benefits” are involved:

Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

....

(ii) **Government Benefits.**—In a case involving government benefits (*e.g.*, grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.³¹

The disagreement among the circuits lies in the collective interpretation of these application notes. Specifically, when procurement fraud involves a section 8(a) contract, courts do not agree on whether to apply the general rule, which takes into account the credits-against-loss rule, or the special government benefits rule, which does not.³²

29 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A)(v)(II) (U.S. SENTENCING COMM’N 2018).

30 *Id.* § 2B1.1 cmt. n.3(E)(i).

31 *Id.* § 2B1.1 cmt. n.3(F)(ii).

32 *See supra* notes 6–10 and accompanying text.

A. *Initial Decisions Applied the Government Benefits Rule*

1. *Brothers Construction* (4th Cir. 2000)

The Fourth Circuit was the first circuit court to consider this question. In *United States v. Brothers Construction Company of Ohio, Inc.*,³³ the district court convicted the defendant of procurement fraud in the acquisition and performance of public contracts set aside for DBEs.³⁴ Specifically, the district court concluded that the total loss amounted to “the exact amount which . . . was diverted away from the DBE program.”³⁵ And notably, the defendant never challenged the specific loss figure before the district court.³⁶

On appeal, the defendant argued that its sentence should have been based on an actual loss figure, and that the actual loss figure was zero because the contract work had been performed. However, the Fourth Circuit explained that under U.S. Sentencing Guidelines section 2F1.1, application note 7(d), the loss figure may be based on intended loss instead of actual loss.³⁷ And the court noted that the intended loss was equal to the value of the entire contract, which would have fraudulently benefited a non-DBE but for an audit that caught the fraud.³⁸

Moreover, the court explained that because the defendant did not challenge the loss figure before the district court, the argument had been waived, and the district court’s conclusion to apply the government benefits rule was therefore only reviewable for plain error.³⁹ Upon consideration, the *Brothers Construction* court explained that an incorrect sentencing based on miscalculation of loss amount *could* be plain error, but in this case, the difference was no more than a harmless error because even if, *arguendo*, the general rule should have applied, it would not have actually resulted in the application of a lower sentencing range. Accordingly, the Fourth Circuit—applying the government benefits rule—affirmed.⁴⁰

2. *Leahy* (7th Cir. 2006)

Next, the Seventh Circuit addressed the issue in *United States v. Leahy*,⁴¹ where the defendant was similarly convicted of procurement fraud in the acquisition and performance of public contracts set aside for DBEs.⁴² In *Leahy*, the district court determined that the amount of loss was only the amount of profits that the defendant

33 219 F.3d 300 (4th Cir. 2000).

34 *See id.* at 304.

35 *Id.* at 319.

36 *Id.* at 320.

37 *See id.* at 318.

38 *See id.* at 317–18.

39 *Id.* at 320 (“[Defendant’s] ‘failure to object to a sentencing issue amounts to a waiver of [its] right to raise that issue on appeal, absent plain error.’” (quoting *United States v. Ford*, 88 F.3d 1350, 1355 (4th Cir. 1996))).

40 *Id.* at 320–21.

41 464 F.3d 773 (7th Cir. 2006).

42 *Id.* at 778.

had gained from the procurement fraud (i.e., the value of the contract minus the value of services rendered).⁴³

On appeal, the defendant argued that the district court had improperly overcalculated the amount of loss.⁴⁴ The Seventh Circuit, also relying on section 2F1.1, application note 7(d), agreed with the defendant that the district court had made a mistake, but not because it had applied the general rule incorrectly.⁴⁵ Rather, the court concluded that the government benefits rule should have been applied.⁴⁶ The court succinctly explained: “This was an affirmative action program aimed at giving exclusive opportunities to certain women and minority businesses. The contracts which these businesses received pursuant to this type of program constitute government benefits.”⁴⁷

Significantly, the *Leahy* court did not remand the issue for the district court to resentence the defendant based on the government benefits rule because (a) the government had not cross-appealed on the issue, and (b) the defendant’s sentence had actually been based on another offense that carried a higher offense level than the procurement fraud would have carried, even if loss was calculated at the total contract value. In other words, despite holding that the government benefits rule should have applied, the Seventh Circuit determined that “a remand would change nothing.”⁴⁸

3. *Maxwell* (11th Cir. 2009)

Three years after *Leahy*, the Eleventh Circuit considered the issue in *United States v. Maxwell*.⁴⁹ Following the footsteps of the Fourth and Seventh Circuits, the *Maxwell* court held that the government benefits rule applies to cases involving procurement fraud relating to DBE programs. In so holding, the Eleventh Circuit quoted the Seventh Circuit’s language explaining that such affirmative action procurement programs fall within the meaning of “government benefits.” And the court further expounded on its rationale:

[T]he primary purpose of the CSBE and DBE programs is to help small minority-owned businesses develop and grow, creating new jobs and helping to overcome the effects of past discrimination in the construction industry. Unlike standard construction contracts, these contracts focus mainly on who is doing the work. . . . Thus, the appropriate amount of loss here should have been the entire value of the CSBE and DBE contracts that were diverted to the unintended recipient.⁵⁰

43 *See id.* at 789.

44 *Id.*

45 *See id.*

46 *See id.*

47 *Id.* at 790.

48 *Id.*

49 579 F.3d 1282 (11th Cir. 2009).

50 *Id.* at 1306.

However, as was the case in *Leahy*, the government in *Maxwell* did not cross-appeal on the issue of loss calculation.⁵¹ Thus, despite its conclusion that the government benefits rule applies to contracts that are set aside for affirmative action procurement programs, the Eleventh Circuit affirmed the district court’s sentencing order based on a lower loss calculation.⁵²

B. *Subsequent Decisions Applied the General Rule*

1. *Martin* (9th Cir. 2015)

Six years after *Maxwell*, the Ninth Circuit addressed the issue in *United States v. Martin*.⁵³ Despite acknowledging the Fourth, Seventh, and Eleventh Circuit decisions that came before it, the *Martin* court arrived at a different conclusion—that the general rule for loss calculation applies in this context—because in its view, an affirmative action public-contract program is not a government benefit.⁵⁴

The Ninth Circuit offered four reasons for its conclusion. First, the court reasoned that “the Guidelines’ focus on pecuniary harm suggests a more concrete meaning. The examples given—loans, grants, and entitlement program payments—confirm that this comment deals with unilateral government assistance, such as food stamps, not a fee-for-service business deal.”⁵⁵ Second, the *Martin* court applied the canonical rule of lenity to interpret the Guidelines in favor of the defendant.⁵⁶ Third, the court noted that application note 3(A) contains what it called the “procurement fraud rule” (i.e., application note 3(A)(v)(II)), which, in its view, “indicates that procurement fraud cases fall under the general rule.”⁵⁷ And finally, the court opined that “[i]t would be unjust to set the loss resulting from [the defendant’s] fraud as the entire value of the contracts” because she had indeed fully performed all of the contracts.⁵⁸ Based on these reasons (which will be discussed further in subsection III.B.2), the Ninth Circuit deviated from its sister circuits’ precedents and created a circuit split.⁵⁹

51 *Id.* at 1307.

52 *Id.* (“However, because the Government has not cross-appealed on this issue, a remand to increase the amount of loss applicable to [the defendant]’s Sentencing Guidelines calculation is unwarranted. Rather, on this procedural posture, we are called upon only to determine whether the district court clearly erred in determining that [the defendant]’s loss amount was not zero.”).

53 796 F.3d 1101 (9th Cir. 2015).

54 *Id.* at 1112 (“On remand, the losses resulting from [the defendant]’s fraud should be calculated under the general rules of application note 3(A) of § 2B1.1 rather than under any of the special rules of application note 3(F) . . .”).

55 *Id.* at 1109.

56 *Id.*

57 *Id.* at 1110.

58 *Id.*

59 See USSC PRIMER, *supra* note 6, at 21–22.

2. *Harris* (5th Cir. 2016)

The Fifth Circuit was next to address the question in *United States v. Harris*.⁶⁰ Acknowledging the existence of a circuit split, the Fifth Circuit decided to join the Ninth Circuit in holding that an affirmative action procurement program is not a government benefit within the meaning of application note 3(F)(ii) and that, therefore, the general rule applies.⁶¹

Following the *Martin* court's footsteps, the *Harris* court first reasoned that the typical treatment of procurement fraud falls under the general rule as explained in application note 3(A)(v)(II).⁶² Next, the court invoked the doctrine of *noscitur a sociis* to conclude that the section 8(a) program does not fall within application note 3(F)(ii)'s meaning of the categorical term "government benefits."⁶³ In particular, the court explained that the section 8(a) program "does not share the common features of grants, loans, and entitlement program payments. . . . [U]nlike the enumerated examples, contracts awarded under the 8(a) program do not exist primarily to benefit the awardee; rather, such contracts first and foremost serve the government's own procurement needs."⁶⁴ The court further noted that although the Fourth, Seventh, and Eleventh Circuits apply the government benefits rule in similar situations, "[t]he Ninth Circuit has squarely rejected the government benefits rule in this context," and "[t]he Third Circuit has left undecided whether the government benefits rule applies."⁶⁵

Simply put, the Fifth Circuit in *Harris* extended the circuit split by rejecting the approach of the Fourth, Seventh, and Eleventh Circuits and siding with the Ninth Circuit.⁶⁶

C. *Third Circuit Cases Reflect Indecision*

Meanwhile, as noted briefly by the *Harris* court⁶⁷ and as discussed below, the Third Circuit had already considered this issue on two separate occasions by the time *Harris* was decided.

⁶⁰ 821 F.3d 589 (5th Cir. 2016).

⁶¹ *Id.* at 604 ("Our sister circuits are split on whether the government benefits rule applies to procurement frauds involving contracts awarded under affirmative action programs. . . . We are not persuaded by the reasoning of the cases applying the government benefits rule to contracts awarded under affirmative action programs.").

⁶² *Id.* at 602–03.

⁶³ *Id.* at 603 ("While the three listed examples do not exhaust the category of 'government benefits'—the list is preceded by 'e.g.'—they are certainly illustrative and limit the category to things sharing their common features.").

⁶⁴ *Id.*

⁶⁵ *Id.* at 604.

⁶⁶ *See supra* note 61 and accompanying text.

⁶⁷ *Harris*, 821 F.3d at 604 n.9 ("The Third Circuit had previously applied the government benefits rule in this context in an unpublished case. In its subsequent *Nagle* decision, however, the Third Circuit characterized *Tulio* as 'cursory' and expressly repudiated it." (citation omitted) (quoting *United States v. Nagle*, 803 F.3d 167, 182 n.9 (3d Cir. 2015)).

1. *Tulio* (3d Cir. 2008)

Before this circuit split formed, the Third Circuit first heard the question in *United States v. Tulio*.⁶⁸ However, even though *Tulio* involved a DBE-program procurement fraud, that court did not squarely address the issue, presumably because no split had yet occurred. Rather, the Third Circuit simply noted, inter alia, that “the [District] Court specifically found that Application Note 3(F) should apply, in light of several analogous cases.”⁶⁹ Without further discussing the matter, the Third Circuit ultimately affirmed the district court’s holdings, including the decision to apply the government benefits rule.⁷⁰

Additionally, the Third Circuit’s decision in *Tulio* was issued as a nonprecedential opinion. Thus, while *Tulio* marks the Third Circuit’s initial decision to apply the government benefits rule in this context, it did not preclude the Third Circuit from subsequently concluding otherwise.⁷¹

2. *Nagle* (3d Cir. 2015)

Several years after *Tulio*, and after this circuit split formed, the Third Circuit considered the issue again in *United States v. Nagle*.⁷² Ultimately, the *Nagle* court did not decide whether the government benefits rule must apply, but it did discuss the issue at length.

The Third Circuit concluded that if the general rule (application note 3(A)) applied, the appropriate loss calculation would have been the value of the contracts received minus the value of the performance on the contracts.⁷³ However, the court also concluded that if the special rule (application note 3(F)(ii)) applied instead, the appropriate loss calculation would not be any different because the credits-against-loss rule (application note 3(E)(i)) applies regardless of whether the general rule or specific rule is used.⁷⁴

Notably, in *Nagle*, the government referred to the opinions issued by the Fourth, Seventh, and Eleventh Circuits mentioned above to argue that application note 3(E)(i), the credits-against-loss rule, does not apply when application note 3(F)(ii), the government benefits rule, is invoked. In response, the Third Circuit explained to the contrary:

⁶⁸ 263 F. App’x 258 (3d Cir. 2008).

⁶⁹ *Id.* at 263 (first citing *United States v. Tupone*, 442 F.3d 145 (3d Cir. 2006); then citing *United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300 (4th Cir. 2000); and then citing *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006)).

⁷⁰ *Id.* at 263–64.

⁷¹ See *United States v. Nagle*, 803 F.3d 167, 182 n.9 (3d Cir. 2015) (explaining that as a nonprecedential opinion, “[*Tulio*] is, of course, not binding”); see also INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT § 5.7 (2015) (“The court by tradition does not cite to its not precedential opinions as authority.”).

⁷² See *Nagle*, 803 F.3d at 179–83.

⁷³ *Id.* at 180–81.

⁷⁴ *Id.* at 181–83.

First, *the special rules of Note 3(F) apply “[n]otwithstanding subdivision (A).”* Thus, Note 3(F) only supplants Note 3(A) when it applies; it does not supplant the other subsections of Note 3. Second, the drafters of Note 3 knew how to indicate that no credits would be permitted. . . . Had the Sentencing Commission intended to preclude crediting services rendered against loss for Note 3(F)(ii), it would have used similar language as it used in Note 3(F)(v).

The Government’s primary argument is that other courts to have considered the issue of DBE fraud before us have not allowed a credit against the face value of the contracts received in calculating the loss. We do not find those cases persuasive on this point. First, [*Leahy and Brothers Construction*] were decided using the previous Guidelines provision on fraud and deceit, § 2F1.1. . . . [T]he old § 2F1.1 had an application note similar to current Note 3(F)(ii) . . . but no application note similar to current Note 3(E)(i). Therefore, neither the Fourth nor Seventh Circuits had occasion to consider whether Note 3(E)(i) required that the services rendered be credited against the loss. Second . . . [the Eleventh Circuit in *Maxwell*] merely relied on *Leahy and Brothers Construction* and did not consider whether Note 3(E)(i) made a difference in the analysis. Accordingly, *we see nothing in these cases that convinces us that Notes 3(E)(i) and (F)(ii) do not work together to allow a credit for the fair market value of the services rendered against the face value of the contracts.*⁷⁵

Nonetheless, while the Third Circuit *opined* that the government benefits rule should apply (and that the credits-against-loss rule should also apply),⁷⁶ the court’s holding only concluded that regardless of whether a court applies application note 3(A) or the combination of application notes 3(F) and 3(E), the loss should be the total value of the contracts minus the fair market value of the services rendered.⁷⁷

Interestingly, *Nagle* was not an entirely unanimous decision. Judge Hardiman alone concurred in part and concurred in the judgment, relying on the same arguments that the Fourth, Seventh, and Eleventh Circuits had previously deemed persuasive.⁷⁸ The concurrence stated in relevant part:

Because the loss amount calculation in a DBE fraud case of this kind is governed by Application Note 3(A) to § 2B1.1 of the Sentencing Guidelines, I would hold that the “government benefits” provision does not apply here.

. . . . A subdivision of [Note 3(A)], Note 3(A)(v)(II), specifically addresses how Note 3(A) is to be applied in procurement fraud cases. This suggests that Note 3(F)(ii), a “special rule” designed for cases involving the fraudulent receipt of

⁷⁵ *Id.* at 182–83 (emphases added) (footnotes and internal citations omitted).

⁷⁶ *Id.* at 181 (“We find the Government’s position persuasive, particularly in light of the goals of the DBE program. The DBE program cares about who performs the work. It assumes that performance of a contract allows a DBE to not only earn a profit on the deal but also to form connections with suppliers, labor, and others in the industry. The profit earned, therefore, is not the only benefit the DBE obtains when it receives the contract.”).

⁷⁷ *Id.* at 183 (“We conclude that in a DBE fraud case, regardless of which application note is used, the District Court should calculate the amount of loss under § 2B1.1 by taking the face value of the contracts and subtracting the fair market value of the services rendered under those contracts.”).

⁷⁸ *See id.* at 183–84 (Hardiman, J., concurring).

public benefits like welfare payments, has no place in a procurement fraud case. I would therefore vacate and remand for the District Court to apply Note 3(A).⁷⁹

In other words, the concurrence argued that a decision should have been made holding that the general rule, not the special rule, applies simply because a subdivision of application note 3(A) exists to explain how the general rule would apply to a case of procurement fraud.⁸⁰

C. *Déjà Vu in the D.C. District Court*

In the wake of the aforementioned cases, district courts—especially those located within the remaining circuits’ jurisdictions—are faced with murky precedents. This split has the real potential to result in inconsistent sentencing rulings from a single court,⁸¹ and such inconsistency is unfair to litigants, even more so when those litigants are criminal defendants with rightful expectations of fair notice and due process.⁸²

Moreover, the danger of inconsistent rulings has already been realized, at least in the United States District Court for the District of Columbia.⁸³ Without belaboring the details, it is sufficient to point out that the D.C. District Court’s orders in *Singh* and *Crummy* closely mirror the Third Circuit’s opinions in *Tulio* and *Nagle*, respectively. Both *Singh* and *Crummy* involved loss calculations in the context of section 8(a) procurement fraud.⁸⁴ Both courts expressly considered the Fourth, Seventh, and Eleventh Circuits’ approach, as well as the Fifth and Ninth Circuits’

⁷⁹ *Id.*

⁸⁰ See *United States v. Harris*, 821 F.3d 589, 604 (5th Cir. 2016) (summarizing the minority opinion in *Nagle*, 803 F.3d at 183–84).

⁸¹ See, e.g., *United States v. Singh*, 195 F. Supp. 3d 25, 29 (D.D.C. 2016) (“The government argues that the ‘loss [in this case] is the full value of the contracts obligated in connection with the scheme, which the parties have agreed is \$8,533,562.86,’ ‘result[ing] in an [eighteen]-level adjustment.’ In contrast, the defendant contends that he ‘provided valuable services to the government, gaining only \$28,768.28 [in profit] from the relevant contracts,’ resulting in only a *four-level adjustment.*” (alterations in original) (emphases added) (citations omitted) (first quoting Government’s Memorandum in Aid of Sentencing at 11, *Singh*, 195 F. Supp. 3d 25 (No. 15-173); and then quoting Defendant Tarsem Singh’s Memorandum in Aid of Sentencing at 8, *Singh*, 195 F. Supp. 3d 25 (No. 15-173))).

⁸² See 28 U.S.C. § 991(b)(1)(B) (2012); *United States v. Booker*, 543 U.S. 220, 253–54 (2005) (“This point is critically important. Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.”); *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 979 (9th Cir. 2000) (en banc) (Pregerson, J., dissenting) (“[I]ntracircuit sentencing disparities—whether the result of disparate judicial interpretations of a guideline or prosecutors’ disparate district-wide plea-bargaining policies—defeat the fundamental purpose of the Sentencing Guidelines: ‘reasonable uniformity in sentencing’ among federal districts.”).

⁸³ Compare *United States v. Singh*, 195 F. Supp. 3d 25, 27 (D.D.C. 2016) (holding that the government benefits rule applies), with *United States v. Crummy*, 249 F. Supp. 3d 475, 475 (D.D.C. 2017) (holding that the general rule applies).

⁸⁴ *Crummy*, 249 F. Supp. 3d at 477; *Singh*, 195 F. Supp. 3d at 27.

approach.⁸⁵ Both courts even explored the Third Circuit's opinion in *Nagle*.⁸⁶ Yet two judges, both representing the United States District Court for the District of Columbia, issued completely opposite orders.

In *Singh*, the court applied the government benefits rule as it was (erroneously) applied by the Fourth, Seventh, and Eleventh Circuits and held that "the amount of the loss to the Government under the fraudulently procured contracts [wa]s based on the full value of the contracts awarded," without applying the credits-against-loss rule.⁸⁷ As the court acknowledged in its order, this resulted in an eighteen-level sentencing enhancement.⁸⁸ In contrast, the *Crummy* court followed the Ninth and Fifth Circuits' (imperfect) guidance by holding that the contracts at issue "(1) d[id] not qualify as government benefits for the purposes of loss calculation, and (2) [we]re subject to the credits-against-loss provision."⁸⁹

These holdings illuminate the looming issue. In *Singh*, the defendant was sentenced with an eighteen-level sentencing enhancement in mind. And for the sake of example, an eighteen-level increase from level six to level twenty-four translates to anywhere between fifty-one and one hundred twenty-five extra months of imprisonment, depending on a defendant's criminal history.⁹⁰ Meanwhile, in *Crummy*, the court concluded that "the total pecuniary loss to the government resulting from Crummy's procurement fraud was zero. Therefore . . . the applicable Guidelines range for the offense at issue in this case . . . [wa]s zero to six months."⁹¹ This massive discrepancy is precisely why the circuit split must be resolved.

III. DISCUSSION: THE SPECIAL RULE SHOULD APPLY, BUT SO SHOULD THE CREDITS-AGAINST-LOSS RULE

A. *Simplifying the Split*

As an initial matter, this Essay contends that neither side of the current circuit split is wholly correct, and the fog which clouds the circuit courts' reasoning can be easily dissipated by an elementary yet significant reframing of the issue(s). The relevant question actually turns on not one but two issues: (1) whether government

⁸⁵ *Crummy*, 249 F. Supp. 3d at 487 ("The undersigned is persuaded that Section 8(a) program contracts are not properly considered 'government benefits' for the purpose of the loss calculation . . . although this Court acknowledges that the circuits are currently divided on this question."); *Singh*, 195 F. Supp. 3d at 29–32 ("This Circuit has not considered whether the Special Rule pertaining to government benefits applies to set-aside procurement programs administered by the SBA, but decisions from three circuits support this conclusion. . . . The Court respectfully disagrees with the Ninth Circuit's analysis in *Martin*. . . . *Harris* is . . . just as unpersuasive as the Ninth Circuit's analysis in *Martin*.").

⁸⁶ *Crummy*, 249 F. Supp. 3d at 483; *Singh*, 195 F. Supp. 3d at 32–33.

⁸⁷ *Singh*, 195 F. Supp. 3d at 35.

⁸⁸ *Id.* at 29.

⁸⁹ *Crummy*, 249 F. Supp. 3d at 487.

⁹⁰ See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2018).

⁹¹ *Crummy*, 249 F. Supp. 3d at 488.

contracts that are set aside for the section 8(a) program constitute government benefits, and (2) whether the application of the government benefits rule precludes crediting the fair market value of services rendered against the total loss.

Viewed in this light, the circuit split itself may be more particularly described. Courts on one side (the Ninth and Fifth Circuits) hold that (1) the general rule applies because contracts set aside for the section 8(a) program are not government benefits, and (2) consequently, they do not need to reach the second issue.⁹² Courts on the other side (the Fourth, Seventh, and Eleventh Circuits) hold that (1) the special rule applies because contracts set aside for the section 8(a) program are government benefits, and (2) consequently, the total loss calculation cannot be reduced by the fair market value of services rendered.⁹³

B. Revisiting the Timeline

Upon such separation of the issues, a chronological look at the aforementioned cases reveals a fairly straightforward yet troubling narrative. Specifically, this Essay questions whether the split was not simply the unfortunate consequence of a series of events entirely shrouded in misapprehension and comprising an Eleventh Circuit oversight, a policy-driven Ninth Circuit error, a glimmer of Third Circuit clarity, and, most recently, a step backwards by the Fifth Circuit.

1. Maxwell's Flawed Assumption

In *Maxwell*, the Eleventh Circuit *assumed* that the government benefits rule precludes application of the credits-against-loss rule—i.e., that application note 3(E)(i) does not apply when 3(F)(ii) is invoked.⁹⁴ Granted, the *Maxwell* court affirmed a lower loss calculation based on an application of the general rule, despite this assumption.⁹⁵ But as a base proposition, and as the Third Circuit keenly noted in *Nagle*, the assumption itself was incorrect.⁹⁶

The Eleventh Circuit's mistake is understandable in some respects. After all, it was partially caused by the fact that the Fourth and Seventh Circuits both employed careless language in *Brothers Construction* and *Leahy*, respectively. In particular, both of those cases only involved answering the question of whether the general rule or the special rule applies to DBE procurement fraud cases. The often overlooked fact, present in both cases, was that procedural circumstances precluded the practicality of questioning whether the value of any services rendered should have been credited against the total loss amount. Neither court needed to consider

92 See *supra* note 8 and accompanying text.

93 See *supra* note 9 and accompanying text.

94 *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009) (“Thus, the appropriate amount of loss here should have been the entire value of the CSBE and DBE contracts that were diverted to the unintended recipient.”).

95 See *supra* note 52 and accompanying text.

96 See *supra* note 75 and accompanying text.

the question because neither court's conclusion to apply the special rule had any further implications on the defendants' sentences.⁹⁷

In fact, the situation facing the Eleventh Circuit in *Maxwell* had been already been played out in *Leahy*. Following in the Seventh Circuit's footsteps, the Eleventh Circuit, while concluding that the special rule applied, declined to vacate or reverse the district court's sentence, which was based on an application of the general rule, because of procedural circumstances.⁹⁸ Arguably, the Eleventh Circuit can hardly be faulted for mimicking the otherwise sound reasoning of the Seventh Circuit and—by the transitive property—the reasoning of the Fourth Circuit.

However, the Eleventh Circuit is not as guiltless as the Seventh or Fourth Circuits. As the *Nagle* court pointed out, *Brothers Construction* and *Leahy* were both decided under an older version of the Sentencing Guidelines that contained a government benefits provision like application note 3(F)(ii), but did not contain a credits-against-loss provision like application note 3(E)(i).⁹⁹ The Eleventh Circuit had an opportunity to specifically consider the credits-against-loss provision whereas the Fourth and Seventh Circuits did not. But the court failed to recognize its opportunity. Thus, at least arguably, the Eleventh Circuit is the most culpable of the initial three circuits for propagating the erroneous assumption that the government benefits rule precludes application of the credits-against-loss rule.

2. *Martin's* Flawed Response to *Maxwell's* Flawed Assumption

Perhaps the Ninth Circuit would have, if faced with a procedurally similar case as *Leahy* or *Maxwell*, accepted the Eleventh Circuit's mistake as good law. Instead, however, the Ninth Circuit was presented with *Martin*, wherein the defendant had fully performed on all of her public contracts but had nonetheless been sentenced under a loss calculation according to the unmitigated, total value of the contracts. The Ninth Circuit simply could not ignore the obvious injustice in such an outcome.¹⁰⁰ Indeed, the Ninth Circuit vacated and remanded *Martin's* sentence to be recalculated (essentially according to the credits-against-loss rule)¹⁰¹ because it was the just thing to do.

However, in so holding, the Ninth Circuit seems to have made a mistake of its own. The *Martin* court took for granted the procedural posture of its sister courts' precedents and made the correlative mistake to those cases' erroneous assumption. The Ninth Circuit should have identified that application note 3(F)(ii) does not actually, in any way, preclude the effect of application note 3(E)(i). But instead, the court somewhat carelessly proceeded under the incorrect assumption that it does.¹⁰²

97 See *supra* notes 39, 48 and accompanying text.

98 See *Maxwell*, 579 F.3d at 1307.

99 See *supra* note 75 and accompanying text.

100 See *supra* note 58 and accompanying text.

101 See *supra* note 54 and accompanying text.

102 *United States v. Martin*, 796 F.3d 1101, 1110 (9th Cir. 2015) (“We have also said that ‘district courts should give credit for any legitimate services rendered to the victims.’ *United States v. Blitz*, 151 F.3d 1002, 1012 (9th Cir. 1998). Applying the general rule in this and similar cases

In other words, the Ninth Circuit failed to parse out the question into the two issues it really involves, and it assumed without discussion that only the general rule allows for credits against loss.

Consequently, rather than concluding that application note 3(E)(i) applies even when the government benefits rule is invoked, the Ninth Circuit held that the government benefits rule does not apply at all to government-administered, affirmative action procurement programs.¹⁰³ In this way, the Ninth Circuit clawed back against what it may have viewed as a draconian rule, thereby ensuring that procurement fraud losses would always reflect credits for services rendered. Notwithstanding the means by which the court achieved it, the final outcome seems to have been at least morally correct if one accepts that the credits-against-loss rule should always apply to procurement fraud loss calculations.¹⁰⁴

The trouble is, for the reasons discussed by the Fourth, Seventh, Eleventh, and Third Circuits, the section 8(a) program plainly provides a government benefit.¹⁰⁵ But in hindsight, between the Ninth Circuit's failure to recognize the flaw in its sister courts' rulings¹⁰⁶ and its blatant goal of remanding for a fairer calculation of loss,¹⁰⁷ the *Martin* court's holding is not very surprising.¹⁰⁸ Still, the argument that a government benefit under application note 3(F) must exclusively involve "unilateral government assistance" is only colorable at best, especially considering the plain language and organization of the application notes in question.¹⁰⁹

3. *Nagle* Offered Clarity

The Third Circuit heard *United States v. Nagle* after the Ninth Circuit created the circuit split and before the Fifth Circuit widened it. Notwithstanding the Fifth Circuit's decision in *Harris*,¹¹⁰ the Third Circuit was primed to consider the merits of the circuit split in its entirety, thereby facing a rare opportunity to help clarify murky waters. All things considered, the *Nagle* court's reasoning is commendable

lets district courts do just that. Applying the special rules, which apply notwithstanding application note 3(A), would not.”).

103 See *supra* note 54 and accompanying text.

104 See *supra* notes 30, 58 and accompanying text.

105 See, e.g., *United States v. Leahy*, 464 F.3d 773, 790 (7th Cir. 2006) (“This was an affirmative action program aimed at giving exclusive opportunities to certain women and minority businesses. The contracts which these businesses received pursuant to this type of program constitute government benefits.”).

106 See *supra* note 102 and accompanying text.

107 See *supra* note 58 and accompanying text.

108 See generally *Marshall v. Marshall*, 547 U.S. 293, 315 (2006) (Stevens, J., concurring) (“The familiar aphorism that hard cases make bad law should extend to easy cases as well.”).

109 See generally *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010) (“We find this use of *noscitur a sociis* unpersuasive. A list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating. . . . The substantive connection, or fit, between the terms . . . is not so tight or so self-evident as to demand that we ‘rob’ any one of them ‘of its independent and ordinary significance.’”).

110 See *supra* note 62–66 and accompanying text.

as sound. Rather than carelessly following another court's opinion, the Third Circuit performed its own analysis and avoided the logical fallacies that dotted the relevant opinions that came before *Nagle*.

First, the court identified and rejected the point on which the *Martin* court was most vulnerable; it concluded in dicta that a public contract, set aside for a DBE, is a government benefit within the meaning of application note 3(F)(ii). Thus, at least partially, the Third Circuit determined that the government benefits rule should apply to cases of affirmative action procurement fraud.¹¹¹ The court also addressed and rejected the *Maxwell* court's mistake; it concluded that the credits-against-loss provision of application note 3(E)(i) should apply even if the government benefits rule is applied.¹¹² On these bases alone, this Essay contends that the Third Circuit in *Nagle* became the first circuit to correctly analyze the issues presented, at least on an individual level.

However, the holding of *Nagle* is uniquely unhelpful to weighing the circuit-splitting question as conceived of by its sister circuits. Rather than choosing a side, the court held that either the general rule or special rule could be applied because in either instance, the net loss (total value of contracts minus credits against loss) would be the same figure.¹¹³

While this may have been true in *Nagle*, it may not be true in all section 8(a) procurement fraud cases moving forward. Thus, this Essay laments that the *Nagle* court fell just short of providing a fully satisfactory opinion. Specifically, the Third Circuit should have affirmatively held that the government benefits rule applies to DBE-program public contracts. As it stands, however, the Third Circuit's holding only answered the second of the two issues as presented in Section III.A—the credits-against-loss rule applies. In this way, the Third Circuit sided with the Ninth Circuit on the issue of credits against loss, but it artfully avoided the logical fallacy that weakened the Ninth Circuit's opinion in *Martin* by also rejecting the idea that the general rule must apply in this context.

4. *Harris* Rejected *Nagle*'s Offer

Arguably, the Third Circuit's opinion in *Nagle* should have provided enough clarity and guidance on the issue such that another circuit considering the question for the first time could have been able to avoid the traps of the past. In an ideal world, the next circuit to address the issue would have similarly recognized that the government benefits rule applies in cases of section 8(a) procurement fraud, but that the credits-against-loss rule also applies.

However, when such an opportunity presented itself to the Fifth Circuit in *Harris*, the court more or less echoed the Ninth Circuit's opinion in *Martin*, and, consequently, it made the same mistakes.¹¹⁴ If *Nagle* marks a step forward towards

111 See *supra* note 76 and accompanying text.

112 See *supra* note 75 and accompanying text.

113 See *supra* note 69 and accompanying text.

114 See *supra* notes 60–66 and accompanying text.

clarity and resolution, *Harris* marks an equal step back. Despite the Third Circuit's enlightening opinion in *Nagle*, the circuit split staunchly persists.¹¹⁵ And as illustrated in Section II.C, litigants are forced to accept that their sentence enhancements may be decided, for better or worse, by a judicial coin toss.¹¹⁶

CONCLUSION

The circuit-splitting question—whether the general rule or special rule applies to loss calculations in cases of affirmative action procurement fraud—is riddled with misunderstanding. But the key to resolving this circuit split lies in reframing the issue(s) as described in Section III.A. Viewed in that light, one may more clearly see how the current split developed and, better yet, how it ought to be resolved.

The Fourth, Seventh, and Eleventh Circuits (a) held that the government benefits rule for loss calculation applies in the DBE procurement fraud context, and (b) erroneously assumed that the government benefits rule precluded any credits against the loss amount. Faced with a different set of circumstances, the Ninth Circuit (a) determined that the credits-against-loss rule always applies in procurement fraud cases, and (b) held, based on an equal and opposite erroneous assumption, that the general rule for loss calculation must apply to all procurement fraud cases (i.e., that a public contract is not a government benefit). The Third Circuit, despite failing to decisively choose a side on the first issue, explained with great clarity that (a) the government benefits rule should apply to DBE procurement fraud loss calculations, and (b) even when the government benefits rule is invoked, the credits-against-loss rule should still apply.

Finally, despite the obvious necessity for resolution, this circuit split is highly unlikely to resolve itself. The Fifth Circuit's holding in *Harris* all but ensures that the circuits will remain entrenched in misguided disagreement unless and until a higher authority sets forth a binding precedent upon the land. In the meantime, one can only hope that the next circuit to consider the issue will stumble upon and follow the Third Circuit's lead in *Nagle*. With any luck, the next circuit to decide the issue will go one step further and hold not only that the credits-against-loss rule applies in all cases of procurement fraud, but also that the government benefits rule, not the general rule, applies to the calculation of losses caused by the fraudulent procurement of affirmative action public contracts.

¹¹⁵ See, e.g., USSC PRIMER, *supra* note 6, at 21 (“Courts have disagreed about whether to apply this special rule where defendants have improperly received benefits pursuant to a set-aside or similar program.”).

¹¹⁶ See *supra* note 90 and accompanying text.