2016-1889

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Julian v. US

Petitioners.

On Appeal from the United States Court of Federal Claims in Case No. 1:15-cv-01344-EJD, Superior Judge Edward J. Damich

PETITION FOR PANEL REHEARING

Pursuant to Federal Rules of Appellate Procedure 40.

Christopher B. Julian
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Pro Se Plaintiff

FORM 9. Certificate of Interest

Form 9
Rev. 03/16

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Julian **v.** US

Case No. 16-1889

CERTIFICATE OF INTEREST

Counsel for the:
☒ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Christopher B. & Renee G. Julian	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

None

8/17/2016
Date

Please Note: All questions must be answered

cc: **Melissa L. Baker**

Christopher B. Julian
Signature of counsel

Christopher B. Julian Pro Se
Printed name of counsel

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United States v. Testan, 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976);
Eastport S.S. Corp. v. United States, 178 Ct.Cl. 599, 607, 372 F.2d 1002, 1009 (1967));
Compagnie General Transatlantique v. United States, D.C., 21 F.2d 465, 466.(1927);

The Court of Appeals for the Federal District Opinion relies on:

Trevino v. United States, 557 F. App'x 995, 998 (Fed. Cir. 2014);
Hufford v. United States, 87 Fed. Cl. 696, 702 (2009);

Plaintiffs find no indication, other than the Courts reliance and citation; these cases are binding precedent in the Federal Court of Claims or in the Federal Court of Appeals for the Federal Circuit. To the extent they are Plaintiffs seek to have them overruled.

A. 18 U.S.C. §1964(c) is a money-mandating statute conferring jurisdiction on the Court of Federal Claims under 28 U.S.C. §1491(a)(1) based on identifiable decisions of the U.S. Supreme Court.

The Court of Appeals states at 5 ¶2 of their Opinion:

"to the extent that Plaintiffs now argue that the RICO Act is, itself, a money-mandating statute conferring jurisdiction on the Court of Federal Claims,[4] **we hold that it is not.**[1] *See Trevino v.*

[1] Emphasis added.

> *United States*, 557 F. App'x 995, 998 (Fed. Cir. 2014); *Hufford v. United States*, 87 Fed. Cl. 696, 702 (2009)." [2]

This statement of the Court presents numerous issues.

First the Court implies by this statement Plaintiffs had not previously argued RICO Act was a money-mandating statute, which is false, and evidenced by the Courts footnote 4 and fact it is specifically stated in the Complaint at Dkt *item* 1. p.14 ¶42(3) (Consideration)

> "This statute providing a civil cause of action identifies a source of substantive law separate from the Tucker Act creating a right to monetary damages"

It was further discussed in Plaintiffs responsive reply brief Dkt. *Item* 7 (C) p. 20-23. Second by implication the Court appears to concede RICO is a money-mandating statute but contends its one that does not confer jurisdiction on the Court of Federal Claims.[3] The Court has then citied precedent Plaintiffs were not afforded opportunity to address. If it's the Courts contention, the Federal Court of Claims does not have jurisdiction to hear a criminal RICO case plaintiffs would agree that's

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[2] The court states "Plaintiffs now argue" yet its noted in footnote 4 that plaintiffs consistently argued this point throughout the proceedings. It was in fact the DOJ who argued the RICO's damages were not money-mandating.

[3] In all prior argument the defense argued the statute was not money mandating and the Court did never clarify it.

true, however, if it's the courts contention the Federal Court of Claims does not have jurisdiction with regards to RICO's civil cause of action as another separate source of law mandating compensation by the Federal Government when paired with the Tucker act; Plaintiffs would argue that's not in accordance with the Court of Federal Claims mandated jurisdiction under 28 U.S.C. §1491(a)(1), or with the Supreme Courts interpretations which Plaintiffs relied on in filing the complaint. Plaintiffs Complaint alleges Jurisdiction under the Tucker Act of 1887, codified at 28 U.S.C. §1491(a)(1), which allows the Court of Claims to entertain claims against the United States "founded either upon the Constitution, or **any Act of Congress**. 18 U.S.C §1964(c) is an act of Congress and a Federal statute. The Supreme Court stated: Justice Anton Scalia *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009);

> ""Neither the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims **premised on other sources of law** (*e.g.,* **statutes** or **contracts**)." Quoting *United States v. Testan,* 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) "The other source of law need not *explicitly* provide that the right or duty it creates is

> enforceable through a suit for damages, **but it triggers liability only if it "`can fairly be interpreted as mandating compensation by the Federal Government."** (quoting *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 607, 372 F.2d 1002, 1009 (1967)) [4]

The court must recognize that in District court case 4:13-cv-00054 JLK; while liability usually lies with a third party defendant in a prosecution under 18 U.S.C. §1964(c), The liability in case 4:13-cv-00054 JLK and consequently this instant case lies with the U.S. Government. The U.S. Government was rightfully the defendant in the RICO civil suit filed in a Federal Court of appropriate jurisdiction. The court as agent / trustee for the U.S. Government and We The People, converted the terms of agreement to become judge, jury, and defendant, dismissing its own case without due process of law in violation of Plaintiffs procedural rights. The Government in this case is liable for damages as both Defendant and as agent / trustee, which breached its fiduciary duty of care with regards to the Plaintiffs procedural rights.[5]

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[4] Emphasis Altered.

[5] That Judge Jackson L. Kiser chose to deny the Plaintiffs procedural rights to aid the Governments RICO enterprise is a matter between him and the Government.

Justice Blackmum *United States v. Testan,* 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976);

> "The Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. The respondents do not rest their claims upon a contract; neither do they seek the return of money paid by them to the Government. It follows that the asserted entitlement to money damages depends upon whether **any federal statute** "can fairly be interpreted as **mandating compensation by the Federal Government for the damage sustained.**"[6]

In this instant case Plaintiffs have rested their claims upon a contract created with the grant of a private cause of action and although, they do not seek return of money paid by them to the Government, they have asserted entitlement to money damages based upon substantive rights conveyed to the plaintiffs by congressional grant with the evocation of federal statute 18 U.S.C. §1964(c) in case 4:15-cv-00054-JLK. When the Federal Government is defendant in a RICO case the money mandate of the statute is the liability of the Federal Government and the Federal Government is additionally liable as agent / trustee when breaching its

[6] Emphasis altered.

duty of care.

Judge Davis *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 607, 372 F.2d 1002, 1009 (1967));

> "But it is not every claim involving or invoking the Constitution, **a federal statute**, or a regulation which is cognizable here. The claim must, of course, be for money."
> "In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant**, expressly or by implication, a right to be paid a certain sum"** [7]

Plaintiffs have from the beginning maintained the particular provision of law relied upon 18 U.S.C. 1964(c) expressly granted them the right to treble damages, attorney's fees, and court cost i.e. to be paid, a certain sum of money-mandated compensatory damages, that the promise (Offer) of these substantive rights to property was conveyed by Congresses explicit grant of a civil cause of action with 18 U.S.C §1964, a grant, which conveyed the promises (offer)[8] of those damages by the filing of a complaint under 18 U.S.C. §1964(c). That this particular

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[7] Emphasis Altered.

[8] To an agrieved farmer who's business has been wipped out by government actions the prospect of being paid a reasonable attorneys fee to prosecute the offender is a very attractive offer.

provision of law relied upon conveyed the promise an express written offer to Plaintiffs who met the stated terms of qualification, adhered to terms of performance, and anticipated assuming the position of a Private Attorney General for the prosecution of a US Government operated RICO enterprise. Justice Aufustus Hand *Compagnie General Transatlantique v. United States, D.C., 21 F.2d 465, 466,(1927).*

> "* * *. To limit the recovery in cases `founded' upon a law of Congress to cases where the law provides in terms for a recovery would make that provision of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. `Founded' must therefore mean **reasonably involving the application of a law of Congress.** * * *" [9]

The courts findings the RICO Act does not confer jurisdiction is correct however, the court has jurisdiction under 28 U.S.C. §1491(a)(1) which says founded upon **any** Act of Congress and under the Supreme Courts interpretations of that Statute a RICO's Civil Cause of Action filed against the U.S. Government creates a reasonable right of recovery from the Federal Government.

As Justice Scalia conveys **other sources of law** (*e.g.,* **statutes** or

[9] Emphasis added.

contracts) triggering liability if it can fairly be interpreted as mandating compensation by the Federal Government. Justice Blackmum entitlement to money damages confers where "**any**" **federal statute** can **fairly be interpreted** as mandating compensation by the Federal Government for the damage sustained. Judge Davis the allegation must be the particular provision of law relied upon grants the claimant**, expressly or by implication, a right to be paid a certain sum.** Justice Aufustus founded means **reasonably involving the application of a law of Congress.**

18 U.S.C. §1964(c) is a Federal statute (a law of Congress) granting to a private citizen, meeting stated requirements, the mandated promise of treble damages, attorney fees, and court cost, for accepting the Governments offer of compensation in exchange for prosecuting a criminal case in the publics interest**.** When the Federal Government is the defendant in a criminal RICO case its fair to interpret the statute as expressly mandating compensation of a certain sum from the Federal Government. Furthermore, as agent / trustee of the U.S. Government, which breached its duty of care in the prosecution of a Government Agency, the Federal Government becomes libel for the full potential

benefit of a successful prosecution.

The Courts reliance on *Trevino v. United States*, 557 F. App'x 995, 998 (Fed. Cir. 2014); and *Hufford v. United States*, 87 Fed. Cl. 696, 702 (2009)." is Misapprehended; neither of these cases involved a breach of contract or takings claim, for a specific performance failure, where the RICO statue had been evoked in an appropriate jurisdiction. Neither of these cases looked at RICO as another source of law mandating compensation by the Federal Government on which a breach of contract or taking claim under the Tucker act was founded. Neither of these cases looked at a civil action under the RICO statute.

However, if its the courts contention 18 U.S.C. §1964(c) does not fall within the Courts jurisdiction Plaintiffs challenge such an interpretation as not in accordance with the jurisdictional mandate for 28 U.S.C. §1491(a)(1) nor in accordance with Supreme Court precedential interpretation of the jurisdiction conferred on the Court as discussed supra.

To the extent *Hufford v. United States*, 87 Fed. Cl. 696, 702 (2009) is precedential opinion in the Federal Circuit which was relied on in *Trevino v. United States*, 557 F. App'x 995, 998 (Fed. Cir. 2014).

Plaintiffs would ask to have this precedent overruled by the Federal Circuit. The Court stated its justification in *Hufford v. United States*, 87 Fed. Cl. 696, 702 (2009) at p.5 B. *"The Court Lacks Jurisdiction Over Plaintiff's Criminal Claims"*

> "This court has no jurisdiction over RICO claims, because RICO is a criminal statute." And excluded 18 U.S.C. §1964(c) by specifically referencing "18 U.S.C. §§1961- 62"

In *Trevino v. United States*, 557 F. App'x 995, 998 (Fed. Cir. 2014) The Court stated:

> "These claims do not fall within the court's jurisdiction as defined by the Tucker Act because none of those statutes or constitutional provisions mandate the payment of money. *See Hufford v. United States,* 87 Fed. Cl. 696, 702 (2009) (holding that the Court of Federal Claims lacks jurisdiction over RICO claims)."

In *Hufford v. United States* the Court found it-lacked jurisdiction because RICO was a criminal statute and specified §§1961- 62, however, 18 U.S.C §1964(c) grants a "Civil" cause of action not "Criminal" a civil cause where the United States was defendant. The contention the Court lacks jurisdiction is inconsistent with Supreme Court interpretations of the court of Federal Claims jurisdictional mandate under 28 U.S.C. §1491(a)(1) as discussed supra. If the Federal

Court of Appeals has found as Plaintiffs consistently argued 18 U.S.C. §1964(c) is a Federal Statute mandating compensatory damages for economic injuries i.e. a money-mandating statute see Dkt. *Item* 7 (C) p. 20-23, and Plaintiffs maintain it is. Then it would fall within the Courts jurisdiction and the misapprehended conclusion of *Trevino v. United States*, 557 F. App'x 995, 998 (Fed. Cir. 2014). The Statute does not "mandate the payment of money" is false.

B. 18 U.S.C. §1964(c) Grants a Private cause of action a clear indication the legislature intended to create private Contractual or vested rights.

The Court of Appeals states at 6 ¶2 of their Opinion.

> "Plaintiffs' allegations do not establish that any contract existed between Plaintiffs and the government. Plaintiffs' Characterization of §1964(c) as a contract "offer" is false." "[A]bsent some clear indication that the legislature intends to bind itself contractually, the **presumption** is that a law is not intended to create private contractual or vested rights" "Nothing in RICO Act suggests it was intended to function as a contract **offer to private citizens.**" [10]

The Court of Appeals states at 4 ¶5

> " Dismissal for failure to state a claim under Rule 12(b)(6) is proper only when a plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

[10] Emphasis added.

And at 5 ¶1.

> "we must assume that all well-pled factual allegations in the complaint are true."

However, the court has based its argument on reliance of an assumption, the presumption the legislature did not intend to bind itself contractually. The Court has assumed Plaintiffs could prove no set of facts to support the claim 18 U.S.C. §1964(c) constitutes a valid offer and that in fact the statute is intended to convey contractual private rights. Contrary to the Courts precedent in *Hufford v. United States* "RICO is a criminal statute." 18 U.S.C. §1964 is the congressional "GRANT" for a "CIVIL" cause of action of criminal offenses, a clear indication Congress intended to convey to the private citizen the vested right to prosecute a criminal offense for compensation. [11]

Plaintiffs would ask the Court? How this statute conveys the right to prosecute and the compensatory damages to a private citizen if not by offering to do so? How does a Pro Se become a "Private Attorney General" for which public prosecutorial resources are deemed inadequate, a woefully painful, unusual, challenging and demanding

[11] A Pro Se would be entitled to the same Attorneys fees as a Plaintiff represented by counsel

position, without an offer from Government to do so? The term applies only to the exercise of one's ability to pursue certain specific kinds of legal actions statutorily authorized (offered). It does not create the ability to call one's self a "private attorney general". Consequently, the term is only applicable to a private non-attorney citizen who has accepted the statutory offer to do so.[12]

The Senate reports on the Civil Rights Attorney's Fees award Act of 1976 *S. Rep. 94-1011 p.6 (1976)* The Committee acknowledged that,

> "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."

The Senate obviously intended to offer citizens, the opportunity to recover what it cost them to vindicate their rights in Court. [13]

Whether it's a Grant, cognizable as a taking or an offer as a contract [14]neither is applicable without the Plaintiffs acceptance of the rights

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[12] The relationship might be different if an attorney prosecuted the case for a non-attorney client in anticipation of collecting an attorney's fees.

[13] The burden of proof in a civil case is a preponderance of the evidence.

[14] How is it appropriate for the Court to **presume** the legislature did not intend to bind itself contractually without allowing for the presentation of evidence to the contrary?

and promises conveyed and a Plaintiff cannot assume private attorney general status without a valid acceptance of the authorization to do so. Furthermore, the statute provides, a promise of substantial and significant benefit to the American people, the potential demise of USDA's RICO enterprise. This Court has balanced the scales of justice with assumptions rather than fact inconsistent with the Courts procedural rule FRCP 1. They should be construed and administered to secure the "**just**" determination of every action.

The Courts reliance on *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985) (quoting *Dodge v. Bd. of Ed.*, 302 U.S. 74, 79 (1937)).)." Is a Misapprehended assumption for injustice and to the extent the Court relies on the case as precedential Plaintiffs seek to have it overruled in this instance.

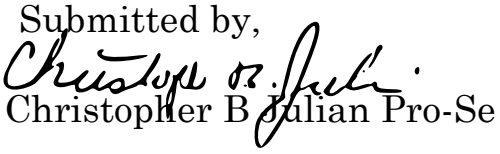
C. Plaintiff's claims are at bottom a request the Court of Federal Claims review whether Government violated the Plaintiffs procedural due process rights and failed faithfully to perform its agency / trustee duties effecting a breach of contract or taking of personal property.

The Court of Appeals states at 5 ¶2 of their Opinion:

> "Plaintiffs' claims are, at bottom, requests that the Court of Federal Claims review the Western District of Virginia's decision to dismiss Plaintiffs' earlier action."

This is false! Plaintiffs claims are at bottom a request the Court of Federal Claims review whether Government violated the Plaintiffs procedural due process rights and failed faithfully to perform its agency / trustee duties affecting a breach of contract or taking of personal property conveyed to Plaintiffs by an act of Congress. Rights granted with specific intent to grant Plaintiffs status as a prosecutor of Government corruption, in a Government violating the fundamental laws of this Nation, in a prosecutorial void, where the Governments action aided the Government in avoiding prosecution and effected the Governments will to unconstitutionally write new law preserving the Governments corrupt objectives. [15] To the extent the court relies on *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) Regarding this matter Plaintiffs would seek to have the precedent overruled in this instance.

Submitted by,



Christopher B Julian Pro-Se

[15] As an Article I court, the duty of Congresses separation of powers responsibility, to hold the Federal Judiciary accountable has been conveyed to the Court of Federal Claims. The Courts Duty is to render justice against the Government in favor of citizens just as it would administer between private individuals. It just takes one bad apple corp. to spoil the whole bushel.

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

CHRISTOPHER B. JULIAN, RENEE G. JULIAN,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2016-1889

Appeal from the United States Court of Federal Claims in No. 1:15-cv-01344-EJD, Senior Judge Edward J. Damich.

Decided: August 4, 2016

CHRISTOPHER B. JULIAN, Ararat, VA, pro se.

RENEE G. JULIAN, Ararat, VA, pro se.

MELISSA BAKER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., ALLISON KIDD-MILLER.

Before PROST, *Chief Judge,* CHEN, and STOLL, *Circuit Judges.*

PER CURIAM.

Plaintiffs Christopher B. Julian and Renee G. Julian filed suit in the United States Court of Federal Claims alleging that the government breached an implied contract and/or violated the Fifth Amendment's Takings Clause when the United States District Court for the Western District of Virginia dismissed an earlier suit filed by Plaintiffs under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1964(c). In an order issued March 10, 2016, the Court of Federal Claims dismissed Plaintiffs' complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted. *Julian v. United States*, No. 15-1344C, 2016 WL 929219, at *2–3 (Fed. Cl. Mar. 10, 2016) (*Order*). In that same order, the court denied Plaintiffs' request that the assigned judge—Senior Judge Edward J. Damich—recuse himself from the case. *Id.* at *3. We find no error in the court's analysis and agree that dismissal was proper. We therefore *affirm*.

BACKGROUND

Plaintiffs' claims in this case arise from dismissal of an earlier case they filed in the Western District of Virginia. On September 16, 2013, Plaintiffs filed suit against the United States Department of Agriculture (USDA), seven federal employees, and one Virginia state employee requesting judicial review of the USDA's decision to deny Plaintiffs a Farm Ownership Loan and alleging a variety of due process and other tort claims.[1] *Julian v. Rigney*,

[1] Specifically, Plaintiffs lodged allegations of negligence, fraud, fraudulent misrepresentation, conspiracy,

No. 4:13-cv-00054, 2014 U.S. Dist. LEXIS 38311, at *13 (W.D. Va. Mar. 24, 2014). The district court dismissed Plaintiffs' claims, with the exception of the request for review of the USDA's decision to deny the loan. *Id.* at *83. The district court subsequently granted the USDA's motion for summary judgment that it acted within its authority when it denied Plaintiffs' loan request. *Julian v. Rigney*, No. 4:13-cv-00054, 2014 U.S. Dist. LEXIS 113190, at *18 (W.D. Va. Aug. 15, 2014). The Court of Appeals for the Fourth Circuit affirmed the district court's decisions, *Julian v. U.S. Dep't of Agriculture*, 585 F. App'x. 850, 850–51 (4th Cir. 2014), and the Supreme Court denied Plaintiffs' cert petition, *Julian v. U.S. Dep't of Agriculture*, 135 S. Ct. 1901, 1902 (2015).

Plaintiffs then filed suit in the Court of Federal Claims seeking damages of $42 million. They alleged that the United States government breached an implied contract when the Western District of Virginia dismissed their earlier case. Plaintiffs reason as follows: (1) the government offered to enter into a contract with private citizens through the codification of § 1964(c) of the RICO Act, which allows persons who suffer injuries to their business or property through a violation of the RICO Act to serve as "private attorneys general" and sue for damages in federal district court, *see Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987); (2) Plaintiffs accepted this offer by filing their complaint in the Western District of Virginia; and (3) the government breached the implied contract when the district court dismissed Plaintiffs' claims. In the alternative, Plaintiffs alleged that the district court's dismissal effec-

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racketeering, and violations of the Fair Credit Reporting Act. *Julian v. Rigney*, No. 4:13-cv-00054, 2014 U.S. Dist. LEXIS 38311, at *13 (W.D. Va. Mar. 24, 2014).

tuated an unlawful "taking" of Plaintiffs' personal property (i.e., the implied contract) under the Fifth Amendment.

On March 10, 2016, the Court of Federal Claims dismissed Plaintiffs' action. The court held that it lacked jurisdiction to review the Western District of Virginia's dismissal of Plaintiffs' earlier case and that Plaintiffs failed to state a claim for breach of contract or an unlawful taking. *Order*, 2016 WL 929219, at *2–3. As part of the order, Judge Damich denied Plaintiffs' request that he recuse himself because he refused to attest to Plaintiffs that he had taken his statutory oath to perform his duties under the Constitution.[2] *Id.* at *3.

In response to the Court of Federal Claims' order, Plaintiffs filed a petition for writ of mandamus to this court. We converted Plaintiffs' petition to a notice of appeal on April 19, 2016. We have jurisdiction to address Plaintiffs' appeal under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review whether the Court of Federal Claims properly dismissed a complaint for either a lack of jurisdiction or for failure to state a claim upon which relief can be granted de novo. *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000). Plaintiffs bear the burden of establishing jurisdiction by a preponderance of the evidence. *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002). We "uphold[] the Court of Federal Claims' evidentiary rulings absent an abuse of discretion." *Id.*

Dismissal for failure to state a claim under Rule 12(b)(6) is proper only when a plaintiff "can prove no set

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[2] Plaintiffs included this request in a footnote in their opposition to the government's motion to dismiss. Judge Damich treated the request as a motion for recusal. *Id.* at *3.

of facts in support of his claim which would entitle him to relief." *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002) (internal quotation marks and citation omitted). "In reviewing the Court of Federal Claims' grant of a Rule 12(b)(6) motion, we must assume that all well-pled factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-movant." *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004).

The Court of Federal Claims properly found that it lacked jurisdiction over Plaintiffs' claims. While styled as breach of contract and takings claims, Plaintiffs' claims are, at bottom, requests that the Court of Federal Claims review the Western District of Virginia's decision to dismiss Plaintiffs' earlier action.[3] "The Court of Federal Claims does not have jurisdiction to review the decisions of district courts . . . relating to proceedings before those courts." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Moreover, to the extent that Plaintiffs now argue that the RICO Act is, itself, a money-mandating statute conferring jurisdiction on the Court of Federal Claims,[4] we hold that it is not. *See Treviño v. United*

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[3] The Court of Federal Claims also dismissed claims it understood Plaintiffs to raise under the due process clauses of the Fifth and Fourteenth Amendments. *Order*, 2016 WL 929219, at *2. In their opening brief, Plaintiffs make clear that none of their claims "w[ere], or [are], based on violations of the Fifth and Fourteenth Amendments." Appellants' Opening Br. 38. "[T]he party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Therefore, we do not address this portion of the court's opinion.

[4] *See* Appellants' Opening Br. 39 ("As has been consistently argued by Appellants throughout these proceedings 18 U.S.C. § 1964(c) is absolutely [a] money

States, 557 F. App'x 995, 998 (Fed. Cir. 2014); *Hufford v. United States*, 87 Fed. Cl. 696, 702 (2009).

The Court of Federal Claims' alternative analysis—i.e., that Plaintiffs failed to state a claim for which relief could be granted—was likewise correct. Plaintiffs' allegations do not establish that any contract existed between Plaintiffs and the government. Plaintiffs' characterization of § 1964(c) of the RICO Act as a contract "offer" is false. "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights.'" *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985) (quoting *Dodge v. Bd. of Ed.*, 302 U.S. 74, 79 (1937)). Nothing in the RICO Act suggests it was intended to function as a contract offer to private citizens.

Plaintiffs also failed to allege an unlawful taking under the Fifth Amendment. Plaintiffs contend that their RICO Act claim in the Western District of Virginia represented a property right that was taken by the government when the district court dismissed the claim. We have held that frustration of a legal claim, like that alleged by Plaintiffs, is not a compensable taking. *See Belk v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988) (holding that international agreement that barred Iranian hostages from bringing legal action could not form the basis of a takings claim).

Finally, we hold that Judge Damich did not abuse his discretion when he denied Plaintiffs' motion that he recuse himself from the case. *See Shell Oil Co. v. United States*, 672 F.3d 1283, 1288 (Fed. Cir. 2012) ("Consistent with the vast majority of courts to consider this issue, we

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mandating statute, which provides substantive property rights in money damages.").

review a judge's failure to recuse for an abuse of discretion."). By statute, all federal judges must swear or affirm to perform their duties under the Constitution before taking office. *See* 28 U.S.C. § 453. There is no requirement that a federal judge later establish that he took that oath or affirmation to the satisfaction of any particular party.

AFFIRMED

COSTS

Each party shall bear its own costs.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* NAVAJO NATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 07–1410. Argued February 23, 2009—Decided April 6, 2009

The Navajo Nation has long sought damages under the Indian Tucker Act (ITA) for an asserted breach of fiduciary duty by the Secretary of the Interior in connection with his failure promptly to approve a royalty rate increase under a coal lease (Lease 8580) the Tribe executed in 1964. Six years ago, this Court held that "the Tribe's claim for compensation . . . fails." *United States* v. *Navajo Nation*, 537 U. S. 488, 493 *(Navajo I).* The Court explained that in order to invoke the ITA and thereby bypass federal sovereign immunity, a tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id.*, at 506. Holding that such duties were not imposed by the Indian Mineral Leasing Act of 1938 (IMLA), by the Indian Mineral Development Act of 1982 (IMDA), or by 25 U. S. C. §399, the Court reversed a judgment for the Tribe and remanded. The Court of Federal Claims then dismissed the Tribe's claim, but the Federal Circuit reversed, finding violations of duties imposed by the Navajo-Hopi Rehabilitation Act of 1950, 25 U. S. C. §§635(a), 638, and the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. §1300(e), as well as common-law duties arising from the Government's "comprehensive control" over tribal coal.

Held: The Tribe's claim for compensation fails. None of the sources of law cited by the Federal Circuit and relied upon by the Tribe provides any more sound a basis for its lawsuit than those analyzed in *Navajo I.* Pp. 8–14.

(a) *Navajo I* did not definitively terminate the Tribe's claim. Because the Court in that case did not analyze statutes other than the IMLA, the IMDA, and §399, it is conceivable, albeit unlikely, that another relevant statute might have provided a basis for the suit. How-

Syllabus

ever, *Navajo I*'s reasoning—particularly its instruction to "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions," 537 U. S., at 506—left no room for that result based on the sources of law relied on below. P. 8.

(b) Lease 8580 was not issued under §635(a), so the Tribe cannot invoke that law as a source of money-mandating duties. Section 635(a) authorizes leases only for terms of up to 25 years, renewable for up to another 25 years. In contrast, the IMLA allows "terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." §396a. Mirroring the latter language, Lease 8580's indefinite term strongly suggests that it was negotiated and approved under the IMLA. This conclusion is not refuted by §635(a)'s saving clause or by testimony that coal leasing was a centerpiece of the Rehabilitation Act's program. Pp. 8–11.

(c) Also unavailing is the argument that the Secretary violated §638's requirement that he follow the Tribe's recommendations in administering the "program authorized by this subchapter." The word "program" refers back to §631, which directs the Secretary to undertake "a program of basic improvements for the conservation and development of the [Tribe's] resources" and lists various projects to be included in the program. The statute certainly does not require the Secretary to follow recommendations of the Tribe as to royalty rates under coal leases executed pursuant to another Act. Pp. 11–12.

(d) Title 30 U. S. C. §1300(e) is irrelevant. That provision applies only "[w]ith respect to leases issued after" the statute was enacted in 1977. Lease 8580 was issued in 1964; §1300(e) is therefore inapplicable. Pp. 12–13.

(e) The Government's "comprehensive control" over Indian coal, alone, does not create enforceable fiduciary duties. The ITA limits cognizable claims to those arising under, *inter alia,* "the . . . laws . . . of the United States," 28 U. S. C. §1505, and *Navajo I* reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions," 537 U. S., at 506. If a statute or regulation imposes a trust relationship, then common-law principles are relevant in determining whether damages are available for breach of the duty, but the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, so trust principles do not come into play here. Pp. 13–14.

501 F. 3d 1327, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. SOUTER, J., filed a concurring opinion, in which STEVENS, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 07–1410

UNITED STATES, PETITIONER *v.* NAVAJO NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[April 6, 2009]

JUSTICE SCALIA delivered the opinion of the Court.

For over 15 years, the Indian Tribe known as the Navajo Nation has been pursuing a claim for money damages against the Federal Government based on an asserted breach of trust by the Secretary of the Interior in connection with his approval of amendments to a coal lease executed by the Tribe. The original lease took effect in 1964. The amendments were approved in 1987. The litigation was initiated in 1993. Six years ago, we held that "the Tribe's claim for compensation . . . fails," *United States* v. *Navajo Nation*, 537 U. S. 488, 493 (2003) *(Navajo I)*, but after further proceedings on remand the United States Court of Appeals for the Federal Circuit resuscitated it. 501 F. 3d 1327 (2007). Today we hold, once again, that the Tribe's claim for compensation fails. This matter should now be regarded as closed.

I. Legal Background

The Federal Government cannot be sued without its consent. *FDIC* v. *Meyer*, 510 U. S. 471, 475 (1994). Limited consent has been granted through a variety of statutes, including one colloquially referred to as the Indian Tucker Act:

> "The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group." 28 U. S. C. §1505.

The last clause refers to the (ordinary) Tucker Act, which waives immunity with respect to any claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." §1491(a)(1).

Neither the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (*e.g.*, statutes or contracts). *United States* v. *Testan*, 424 U. S. 392, 400 (1976); *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980) *(Mitchell I)*. The other source of law need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it "'can fairly be interpreted as mandating compensation by the Federal Government.'" *Testan*, *supra*, at 400 (quoting *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967)); see also *United States* v. *Mitchell*, 463 U. S. 206, 218 (1983) *(Mitchell II); Navajo I*, 537 U. S., at 503.

As we explained in *Navajo I*, there are thus two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act. First, the tribe "must identify a substantive source of law that establishes specific

fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id.*, at 506. "If that threshold is passed, the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Ibid.* (alteration in original). At the second stage, principles of trust law might be relevant "in drawing the inference that Congress intended damages to remedy a breach." *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 477 (2003).

II. History of the Present Case

A. The Facts

A comprehensive recitation of the facts can be found in *Navajo I*, *supra*, at 495–502. By way of executive summary: The Tribe occupies a large Indian reservation in the American Southwest, on which there are significant coal deposits. In 1964 the Secretary of the Interior approved a lease (Lease 8580), executed by the Tribe and the predecessor of Peabody Coal Company, allowing the company to engage in coal mining on a tract of the reservation in exchange for royalty payments to the Tribe. The term of the lease was set at "ten (10) years from the date hereof, and for so long thereafter as the substances produced are being mined by the Lessee in accordance with its terms, in paying quantities," App. 189; it is still in effect today. The royalty rates were originally set at a maximum of 37.5 cents per ton of coal, but the lease also said that the rates were "subject to reasonable adjustment by the Secretary of the Interior" after 20 years and again "at the end of each successive ten-year period thereafter." *Id.*, at 194.

The dispute in this case concerns the Tribe's attempt to secure such an adjustment to the royalty rate after the initial 20-year period elapsed in 1984. At that point, the Tribe requested that the Secretary exercise his power to

increase the royalty rate, and the Director of the Bureau of Indian Affairs for the Navajo Area issued an opinion letter imposing a new rate of 20 percent of gross proceeds. *Id.*, at 8–9. But Peabody filed an administrative appeal, and while it was pending the Tribe and the company reached a negotiated agreement to set a rate of 12.5 percent of gross proceeds instead. As a result, the Area Director's decision was vacated, the administrative appeal was dismissed, and the Secretary approved the amendments to the lease.

B. This Litigation through *Navajo I*

The Tribe launched the present lawsuit in 1993, claiming that the Secretary's actions in connection with the approval of the lease amendments constituted a breach of trust. In particular, the Tribe alleged that the Secretary, following upon improper *ex parte* contacts with Peabody, had delayed action on Peabody's administrative appeal in order to pressure the economically desperate Tribe to return to the bargaining table. This, the complaint charged, was in violation of the United States' fiduciary duty to act in the Indians' best interests. The Tribe sought $600 million in damages, invoking the Indian Tucker Act to bypass sovereign immunity.

The Court of Federal Claims granted summary judgment to the United States, concluding that "the Navajo Nation has failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs," *Navajo Nation* v. *United States*, 46 Fed. Cl. 217, 236 (2000), and therefore could not sue under the Indian Tucker Act. The Federal Circuit reversed that ruling and held that the Indian Mineral Leasing Act of 1938 (IMLA), 52 Stat. 347, 25 U. S. C. §396a *et seq*., among other statutes, gave the Government broad control over mineral leasing on Indian lands, thus creating a fiduciary duty enforceable through suits for monetary damages. *Navajo Nation* v. *United States*, 263

F. 3d 1325, 1330–1332 (2001). Finding that the Government had in fact violated its obligations, the Court of Appeals reinstated the suit.

We granted certiorari, *United States* v. *Navajo Nation*, 535 U. S. 1111 (2002), and (as described by the author of the ensuing opinion, concurring in a companion case) considered "the threshold question" presented by the Tribe's attempt to invoke the Indian Tucker Act: "[W]hether the IMLA and its regulations impose any concrete substantive obligations, fiduciary or otherwise, on the Government," *White Mountain*, *supra*, at 480 (GINSBURG, J., concurring). The answer was an unequivocal no.

The relevant provision of the IMLA provided as follows:

> "[U]nallotted lands within any Indian reservation or lands owned by any tribe . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U. S. C. §396a.

Another provision of the IMLA authorized the Secretary to promulgate regulations governing operations under such leases, §396d, but during the relevant period the regulations applicable to coal leases, beyond setting a minimum royalty rate of 10 cents per ton, 25 CFR §211.15(c) (1985), did not limit the Secretary's approval authority.

We construed the IMLA in light of its purpose: to "enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *Navajo I*, 537 U. S., at 508. Consistent with that goal, the IMLA gave the Secretary not a "comprehensive managerial role," *id.*, at 507, but only the power to approve coal leases already negotiated by Tribes. That authority did not create, expressly or otherwise, a

trust duty with respect to coal leasing and so there existed no enforceable fiduciary obligations that the Tribe could sue the Government for having neglected. *Id.*, at 507–508.

We distinguished *Mitchell II*, which involved a series of statutes and regulations that gave the Federal Government "full responsibility to manage Indian resources and land for the benefit of the Indians." 463 U. S., at 224. Title 25 U. S. C. §406(a) permitted Indians to sell timber with the consent of the Secretary of the Interior, but directed the Secretary to base his decisions on "a consideration of the needs and best interests of the Indian owner and his heirs" and enumerated specific factors to guide that decisionmaking. We understood that statute—in combination with several other provisions and the applicable regulations—to create a fiduciary duty with respect to Indian timber. *Mitchell II*, *supra*, at 219–224. But neither the IMLA nor its regulations established any analogous duties or obligations in the coal context. *Navajo I*, *supra*, at 507–508.

Nor did the other statutes cited by the Tribe—25 U. S. C. §399 and the Indian Mineral Development Act of 1982 (IMDA), 96 Stat. 1938, 25 U. S. C. §2101 *et seq.*—help its case. Section 399 "is not part of the IMLA and [did] not govern Lease 8580," *Navajo I*, 537 U. S., at 509; rather, it granted to the Secretary the power to lease Indian land on his own say-so. We therefore found it irrelevant to the question whether "the Secretary's more limited *approval* role under the IMLA" created any enforceable duties. *Ibid.* And while the IMDA did set standards to govern the Secretary's approval of other mining-related agreements, Lease 8580 "falls outside the IMDA's domain," *ibid.;* that law was accordingly beside the point.

Having resolved that "we ha[d] no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act," this Court

reversed the Federal Circuit's judgment in favor of the Tribe and "remanded for further proceedings consistent with this opinion." *Id.*, at 514.

C. Proceedings on Remand

On remand, the Tribe argued that even if its suit could not be maintained on the basis of the IMLA, the IMDA, or §399, a "network" of other statutes, treaties, and regulations could provide the basis for its claims. The Government objected that our opinion foreclosed that possibility, but the Federal Circuit disagreed and remanded for consideration of the argument in the first instance. 347 F. 3d 1327 (2003). The Court of Federal Claims, however, persisted in its original decision to dismiss the Tribe's claim, explaining that nothing in the suggested "network" succeeded in tying "specific laws or regulatory provisions to the issue at hand," namely, the Secretary's approval of royalty rates in coal leases negotiated by tribes. 68 Fed. Cl. 805, 811 (2005).

Once again the Federal Circuit reversed, this time relying primarily on three statutory provisions—two sections of the Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 46, 25 U. S. C. §§635(a), 638; and one section of the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. §1300(e)—to allow the Tribe's claim to proceed. The Court held that the Government had violated the specific duties created by those statutes, as well as "common law trust duties of care, candor, and loyalty" that arise from the comprehensive control over tribal coal that is exercised by the Government. 501 F. 3d 1327, 1346 (2007).

Once again we granted the Government's petition for a writ of certiorari. 554 U. S. ___ (2008).

III. Analysis

A. Threshold Matter

The Government points to our categorical concluding language in *Navajo I:* "[W]e have no warrant from any relevant statute or regulation to conclude that [the Secretary's] conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act," 537 U. S., at 514. This proves, the Government claims, that this Court definitively terminated the Tribe's claim last time around, so that the lower court's later resurrection of the suit was flatly inconsistent with our mandate. But, to be fair, our opinion (like the Court of Appeals decision we were reviewing, *Navajo Nation*, 263 F. 3d, at 1327, 1330–1331) did not analyze any statutes beyond the IMLA, the IMDA, and §399. It is thus conceivable, albeit unlikely, that some other relevant statute, though invoked by the Tribe at the outset of the litigation, might have gone unmentioned by the Federal Circuit and unanalyzed by this Court.

So we cannot say that our mandate completely foreclosed the possibility that such a statute might allow for the Tribe to succeed on remand. What we can say, however, is that our reasoning in *Navajo I*—in particular, our emphasis on the need for courts to "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions," 537 U. S., at 506—left no room for that result based on the sources of law that the Court of Appeals relied upon.

B. 25 U. S. C. §635(a)

The first of the two discussed provisions of the Navajo-Hopi Rehabilitation Act of 1950—like the IMLA—permits Indians to lease reservation lands if the Secretary approves of the deal:

> "Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members . . . may be leased by the Indian owners, with the

> approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. . . . Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law." 25 U. S. C. §635(a).

The Tribe contends that this section renders the Government liable for any breach of trust in connection with the approval of leases executed pursuant to the authority it grants. Whether or not that is so, the provision only even *arguably* matters if Lease 8580 was issued under its authority.

In *Navajo I* we presumed, as did the parties, that the lease had been issued pursuant to the IMLA. 537 U. S., at 495. But now the Tribe has changed its tune, and contends that Lease 8580 was approved under §635(a), not under the IMLA at all. Brief for Respondent 39. The Government says otherwise. Section 635(a) permits leasing only for "public, religious, educational, recreational, or business purposes," and the Government contends that mining is not embraced by those terms. While leases under §635(a) may provide for "the development or utilization of natural resources," they may do so only "in connection with operations under such leases," *i.e.*, in connection with operations for the enumerated purposes. By contrast, *mining* leases were permitted and governed by the IMLA even before the Navajo-Hopi Rehabilitation Act was enacted in 1950.

We need not decide whether the Government is correct on that point, or whether mining could ever qualify as a "business purpose" under the statute, because the Tribe's argument suffers from a more fundamental problem. Section 635(a) authorizes leases only for terms of up to 25 years, renewable for up to another 25 years. In contrast, the IMLA allows "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U. S. C. §396a. Lease 8580, mirroring the latter language, sets a term of "ten (10) years from the date hereof, and for so long thereafter as the substances produced are being mined by the Lessee in accordance with its terms, in paying quantities." App. 189. That indefinite lease term strongly suggests that it was negotiated by the Tribe and approved by the Secretary under the powers authorized by the IMLA, not the Rehabilitation Act.

The Tribe's only responses to this apparently fatal defect in its argument are (1) that §635(a) expressly leaves unaffected "any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law," including the authority to lease for indefinite terms; and (2) that Stewart Udall, who served as Secretary of the Interior during the 1960's, recently testified that "coal leasing and related development was the centerpiece of the resources development program" under the Rehabilitation Act, *id.*, at 569.

As to the former: That is precisely the point. Section 635(a) creates a *supplemental* authority for leasing Indian land; it does not displace authority granted elsewhere. But in light of the different conditions attached to the different grants, it is apparent that a *particular* lease must be executed and approved pursuant to a *particular* authorization. The saving clause in §635(a) does not allow the Tribe to mix-and-match, to combine the (allegedly) duty-creating mechanism of the Rehabilitation Act with the indefinite lease term of the IMLA. It must be one or

the other, and the record persuasively demonstrates that Lease 8580 is an IMLA lease.

As to Secretary Udall's testimony: That is not inconsistent with our conclusion. The Interior Department may have viewed coal leasing as an important part of the program to rehabilitate the Navajo Tribe but that does not prove that Lease 8580 was issued pursuant to the supplemental leasing authority granted by the Rehabilitation Act, rather than the pre-existing leasing authority of the IMLA preserved by the Rehabilitation Act. The latter, perhaps because of its longer lease terms, was evidently preferable to the Tribe or the coal company or both.

Because the lease in this case "falls outside" §635(a)'s "domain," *Navajo I*, *supra*, at 509, the Tribe cannot invoke it as a source of money-mandating rights or duties.

C. 25 U. S. C. §638

Next, the Tribe points to a second provision in the Navajo-Hopi Rehabilitation Act:

> "The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter." 25 U. S. C. §638.

In the Tribe's view, the Secretary violated this provision by failing promptly to abide by its wishes to affirm the Area Director's order increasing the royalty rate under Lease 8580 to a full 20 percent of gross proceeds.

We cannot agree. The "program" twice mentioned in §638 refers back to the Act's opening provision, which

directs the Secretary to undertake "a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation." §631. The statute then enumerates various projects to be included in that program, and authorizes appropriation of funds (in specific amounts) for each. *E.g.*, "Soil and water conservation and range improvement work, $10,000,000." §631(1).

The only listed project even remotely related to this case is "[s]urveys and studies of timber, coal, mineral, and other physical and human resources." §631(3). Of course a lease is neither a survey nor a study. To read §638 as imposing a money-mandating duty on the Secretary to follow recommendations of the Tribe as to royalty rates under coal leases executed pursuant to another Act, and to allow for the enforcement of that duty through the Indian Tucker Act, would simply be too far a stretch.

D. 30 U. S. C. §1201 *et seq.*

The final statute invoked by the Tribe is the most easily dispensed with. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 91 Stat. 445, 30 U. S. C. §1201 *et seq.*, is a comprehensive statute that regulates all surface coal mining operations. See generally §1202; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 268–272 (1981). One section of the Act, §1300, deals with coal mining specifically on Indian lands, and the Tribe cites subsection (e): "With respect to leases issued after [the date of enactment of this Act], the Secretary shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) of this section as may be requested by the Indian tribe in such leases."

According to the Tribe, this provision requires the Secretary to enforce *whatever* terms the Indians request with

respect to coal leases. In light of the fact that the referenced subsections (c) and (d) refer exclusively to environmental protection standards, that interpretation is highly suspect. In any event, because Lease 8580 was issued in 1964—some 13 years before the date of enactment of the SMCRA—the provision is categorically inapplicable. The Federal Circuit concluded otherwise on the theory that the *amendments* to the lease were approved after 1977. But §1300(e) is limited to leases "issued" after that date; and even the Tribe does not contend that a lease is "issued" whenever it is amended. The SMCRA is irrelevant here.

E. Government's "Comprehensive Control" over Coal

The Federal Circuit's opinion also suggested that the Government's "comprehensive control" over coal on Indian land gives rise to fiduciary duties based on common-law trust principles. It noted that the Government had conducted surveys and studies of the Tribe's coal resources, 501 F. 3d, at 1341; that the Interior Department imposed various requirements on coal mining operations on Indian land—regulating, for example, "signs and markers, post-mining use of land, backfilling and grading, waste disposal, topsoil handling, protection of hydrologic systems, revegetation, and steep-slope mining," *id.*, at 1342; and that the Government in practice exercised control over the calculation of coal values and quantities for royalty purposes, even though such control was codified by regulation only after the events at issue here, *id.*, at 1342–1343.

The Federal Government's liability cannot be premised on control alone. The text of the Indian Tucker Act makes clear that only claims arising under "the Constitution, laws or treaties of the United States, or Executive orders of the President" are cognizable (unless the claim could be brought by a non-Indian plaintiff under the ordinary Tucker Act). 28 U. S. C. §1505. In *Navajo I* we reiterated that the analysis must begin with "specific rights-creating

or duty-imposing statutory or regulatory prescriptions." 537 U. S., at 506. *If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a "conventional fiduciary relationship," *White Mountain*, 537 U. S., at 473, *then* trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages," *id.*, at 477. But that must be the second step of the analysis, not (as the Federal Circuit made it) the starting point.

Navajo I determined that the IMLA, which governs the lease at issue here, does not create even a "'limited trust relationship'" with respect to coal leasing. *Navajo I*, *supra*, at 508 (quoting *Mitchell I*, 445 U. S., at 542). Since the statutes discussed in the preceding subparts, *supra*, at 8–13, do not apply to the lease at all, they likewise create no such relationship. Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating. Thus, neither the Government's "control" over coal nor common-law trust principles matter.

* * *

None of the sources of law cited by the Federal Circuit and relied upon by the Tribe provides any more sound a basis for its breach-of-trust lawsuit against the Federal Government than those we analyzed in *Navajo I*. This case is at an end. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to affirm the Court of Federal Claims' dismissal of the Tribe's complaint.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 07–1410

UNITED STATES, PETITIONER *v.* NAVAJO NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[April 6, 2009]

JUSTICE SOUTER, with whom JUSTICE STEVENS joins, concurring.

I am not through regretting that my position in *United States* v. *Navajo Nation*, 537 U. S. 488, 514–521 (2003) (dissenting opinion), did not carry the day. But it did not, and I agree that the precedent of that case calls for the result reached here.

(S. 2278) to amend Revised Statutes section 722 (42 U.S.C. § 1988) to allow a court, in its discretion, to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights acts, having considered the same, reports favorably thereon and recommends that the bill do pass.

The text of S. 2278 is as follows:

S. 2278

Revised Statutes section 722 (42 U.S.C. Sec. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.".

Purpose

This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The [purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws.

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History of the Legislation

The bill grows out of six days of hearings on legal fees held before the Subcommittee on the Representation of Citizen Interests of this Committee in 1973. There were more than thirty witnesses, including Federal and State public officials, scholars, practicing attorneys from many areas of expertise, and private citizens. Those who did not appear were given the opportunity to submit material for the record, and many did so, including the representatives of the American Bar Association and the Bar Associations of 22 States and the District of Columbia. The hearings, when published, included not only the testimony and exhibits, but numerous statutory provisions, proposed legislation, case reports and scholarly articles.

In 1975, the provisions of S. 2278 were incorporated in a proposed amendment to S. 1279, extending the Voting Rights Act of 1965.

The Subcommittee on Constitutional Rights specifically approved the amendment on June 11, 1975, by a vote of 8-2, and the full Committee favorably reported it on July 18, 1975, as part of S. 1279. Because of time pressure to pass the Voting Rights Amendments, the Senate took action on the House-passed version of the legislation. S. 1279 was not taken up on the Senate floor; hence, the attorneys' fees amendment was never considered.

On July 31, 1975, Senator Tunney introduced S. 2278, which is identical to the amendment to S. 1279 which was reported favorably by this Committee last summer.

Shortly thereafter, similar legislation was introduced in the House of Representatives, including H.R. 9552, which is identical to S. 2278 except for one minor technical difference. The Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee has conducted three days of hearings at which the witnesses have generally confirmed the record presented to this Committee in 1973. H.R. 9552, the counterpart of S. 2278, has received widespread support by the witnesses appearing before the House Subcommittee.

Statement

The purpose and effect of S. 2278 are simple – it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to

Erevailing parties in suits to enforce the civil rights acts which Congress as passed since 1866. S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 19732(e). All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S.R. 1011

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Congress recognized this need when it made specific provision for such fee shifting in Titles II and VII of the Civil Rights Act of 1964:

When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general/ ' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the mjunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees — * * * to encourage individuals injured by racial discrimination to seek judicial relief under Title II. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

The idea of the "private attorney general" is not a new one, nor are attorneys' fees a new remedy. Congress has commonly authorized attorneys' fees in laws under which "private attorneys general" play a

significant role in enforcing our policies. We have, since 1870, authorized fee shifting under more than 50 laws, including, among others, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(c) and 78r(a), the Servicemen's Readjustment Act of 1958, 38 U.S.C. § 1822(b), the Communications Act of 1934, 42 U.S.C. § 206, and the Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c). In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies. As former Justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum- Griffin),

Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. Hall v. Cole, 412 U.S. 1 (1973), quoting 462 F. 2d 777, 780-81 (2d Cir. 1972).

The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws. 1 The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for cttorneys' fees in three separate provisions protecting voting rights. 2

Modern civil rights legislation reflects a heavy reliance on attorneys' fees as well. In 1964, seeking to assure full compliance with the Civil Rights Act of that year, we authorized fee shifting for private suits establishing violations of the public accommodations and equal employment provisions. 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k). Since 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions.

1 For example, the Civil Rights Act of 1866 directed Federal courtsfto "use that comb ination of Federal law, common law and State law as will be best adapted to the object of the civil rights la ws." Brown v. City of Meridian, Mississippi, 356 F. 2d 602, 605 (5th Cir. 1966). See 42 U.S.C. § 1988; Left on v. City of HaUiesburg, Mississippi, 333 F. 2d 280 (5th Cir. 1964).

3 The causes of action established by these provisions were eliminated in 1894. 28 St at. 36.

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E.g., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c); the Emergency School Aid Act of 1972, 20 U.S.C. § 1617; the Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(b); and the Voting Rights Act Extension of 1975, 42 U.S.C. § 19732(e).

These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy. Before May 12, 1975, when the Supreme Court handed down its decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), many lower Federal courts throughout the Nation had drawn the obvious analogy between the Reconstruction Civil Rights Acts and these modern civil rights acts, and, following Congressional recognition in the newer statutes of the "private attorney general" concept, were exercising their traditional equity powers to award attorneys' fees under early civil rights laws as well. 3

These -pre-Alyeska decisions remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations. However, in Alyeska, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the "private attorney general" theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization. This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to Alyeska, suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights. Likewise, fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits

under 42 U.S.C. §1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.

This bill, S. 2278, is an appropriate response to the Alyeska decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in Alyeska, and makes our civil rights laws consistent.

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Nevjman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). 4

» These civil rights cases are too numerous to cite here. See, e.g., Sirns v. Amos 340 F. Supp. 691 (M.D. Ala. 1972), aff'd. 409 U.S. 942 (1972); Stanford Daily v. Zurcher, 366 F. Supp. 18 (N.D. Cal. 1973); and cases cited in Alyeska Pipeline, supra, at n. 46. Many of the relevant cases are collected in "Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcom. on Representation of Citizen Interests of the Senate Coram, on the Judiciary," 93d Cong., 1st sess., pt. Ill, at pp. 888-1024, and 1C60-62.

4 In the lareo majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948).

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Such "private attorneys general" should not be deterred from bringing

good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F. 2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. United States Steel Corp. v. United States, 385 F. Supp. 346 (W.D. Pa. 1974), aff'd, 9 E.P.D. t 10,225 (3d Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. Similar standards have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. E.g., the Water Pollution Control Act, 1972 U.S. Code Cong. & Adm. News 3747; the Marine Protection Act, Id. at 4249-50; and the Clean Air Act, Senate Report No. 91-1196, 91st Cong., 2d Sess., p. 483 (1970). See also Hutchinson v. William Barry, Inc., 50 F. Supp. 292, 298 (D. Mass. 1943) (Fair Labor Standards Act).

In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See Bradley, supra; Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. Kopet v. Esquire Realty Co., 523 F. 2d 1005 (2d Cir. 1975), and cases cited therein; Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); Thomas v. Honeybrook Mines, Inc., 428 F. 2d 981 (3d Cir. 1970); Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N. Y. 1975).

In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. 5 We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School

Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, 6 will be collected either directly from the official, in his official capacity, 7 from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

s See, e.g., "Hearings on the Effect of Legal Fees," supra.
9 Fairmont Creamery Co. v. Minnesota, 21b U.S. 168 (1927).

7 Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity,
under the traditional bad faith standard recognized by the Supreme Court in Alyetka. See Class v. Norton,
605 F. 2d 123 (2d Cir. 1974); Doe v. Poelker, 515 F. 2d 541 (8th Cir. 1975).

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It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see Johnson v. Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. « 9444 (CD. Cal. 1974) ; and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." Davis, supra; Stanford Daily, supra, at 684.

This bill creates no startling new remedy – it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May deoision. It does not change the statutory provisions regarding the

protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Changes in Existing Law Made by the Bill Are Italicized

revised statutes § 722, 42 u.s.c. § 1988

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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Cost of Legislation

The Congressional Budget Office, in a letter dated March 1, 1976, has advised the Judiciary Committee that: "Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2278, a bill to award attorneys' fees to prevailing parties in civil rights suits.

"Based on this review, it appears that no additional costs to the government would be incurred as a result of the enactment of this

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SENATE DEBATES

[122 Cong. Rec. S 16250 (daily ed., Sept. 21, 1976)]

Civil Rights Attorney's Fees Awards Act

Mr. Robert C. Byrd. Mr. President, I move that the Senate proceed to the consideration of S. 2278.

The Presiding Officer (Mr. Rollings). The bill will be stated by title.

The legislative clerk read as follows :

A bill (S. 2278), the Civil Rights Attorney's Fees Awards Act of 1975.

A Ir. Robert C. Byrd. I ask for the yeas and nays.
The Presiding Officer. Is there a sufficient second ? There is a sufficient second.

The yeas and nays were ordered.

The Presiding Officer. The question is on agreeing to the motion to proceed. The yeas and nays have been ordered. The clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. Robert C. Byrd. I announce that the Senator from Texas (Mr. Bentsen), the Senator from Xevada (Mr. Cannon), the Senator from Idaho (Mr. Church), the Senator from Michigan (Mr. Philip A. Hart), the Senator from Indiana (Mr. Hartke), the Senator from Wyoming (Mr. McGee), the Senator from Minnesota (Mr. Mondale), (he Senator from Xew Mexico (Mr. Montoya), the Senator from California (Mr. Tunney), and the Senator from Kentucky (Mr. Ford) are necessarily absent.

I further announce that the Senator from Ohio (Mr. Glenn), the Senator from Montana (Mr. Mansfield), and the Senator from South Dakota (Mr. McGovern), are absent on official business.

Mr. Griffin. I announce that the Senator from Maryland (Mr. Beall). the Senator from Tennessee (Mr. Brock), the Senator from Xew York (Mr. Buckley) . the Senator from Maryland (Mr. Mathias) , and the Senator from Idaho (Mr. McClure) are necessarily absent.

I also announce that the Senator from Tennessee (Mr. Baker) is absent on official business.

The result was announced — yeas 69, nays 12. as follows :

[Rollcall Vote No. 613 Leg.]

YEAS— 69

Abourezk
Bartlett
Bayh

Byrd, Harry F.. Jr.

Byrd, Robert C.

Case

state unequivocally this complaint was and is an express written acceptance to the terms offered by the United States as codified in Title 18 Chapter 96 §§1961 - 1968.

41. A law is not a contract, although it can, and this law does, define an offer under which the United States Government must be bound.

42. This Federal Law (Offer) and submission of the complaint (acceptance) filed in the Federal District Court contain all the required elements of a contract, to wit, (1) mutuality of intent to contract (each party agrees to do or not do a specific act); (2). Lack of ambiguity in offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States in contract:

1. (Mutuality) Both the United States and the Plaintiffs were aware of their respective duties: The United States agreed to a civil cause of action, to hold any enterprise, and any individual, accountable for violation of Title 18 Chapter 96 §1961- §1968. This federal law agrees to hold any person, employed by or associated with any enterprise, accountable and liable for participation in any enterprise, engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or

participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debts.

Plaintiffs agreed to prove at trial to a preponderance of the evidence the commission of multiple predicate act felonies including multiple counts of Fraud, Mail Fraud, and obstruction of justice and the existence of and participation in an ongoing enterprise affecting interstate or foreign commerce. The existence of a criminal racket designed for financial gain. damages to Plaintiffs business and property.

2. (Offer and Acceptance) Every Law is an offer to the people to be protected from civil disobedience. The filing of a complaint in accordance with Federal Rules of Civil procedure 8(a) is an acceptance of that offer. The law, an Offer, its express and implied terms are codified in the Code of Federal regulations indicating the legislative branch of governments intent for the law to be binding. Government has a duty, a due process obligation, and the judiciary a duty and a contractual obligation to provide due process and equal justice under the law, and the

application of law. Plaintiffs had intent and expectation the offer of this federal law, and its precedent would be observed and upheld with the filing of a complaint in accordance with the Federal Rules of Civil procedure and the explicit directions of the Federal Court. Plaintiffs expected this contract between Plaintiffs and the United States to be binding under Federal Law and precedent.

3. (Consideration) The United States stated upon delivery and execution of the stated performance requirements Plaintiffs were entitled to treble damages, for losses suffered to their business or property, court cost, and attorney fees. This statute providing a civil cause of action identifies a source of substantive law separate from the Tucker Act creating a right to monetary damages. Furthermore, and of significance, the right to treble damages.

4. (Authorization) §1965(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs. Article III

of the Constitution Section 2. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," "to controversies to which the United States shall be a party". The FDCVAWD has the Authority under Article III of the U.S. Constitution and Authorization granted under §1965(a). Acceptance of the offer was duly received as evidenced by docketing of case 4:13-cv-00054-JLK-RSB and subsequent fillings.

43. The express written terms of this statute cannot be clearer or broader. §1962(a)(b)(c) and (d) state without exception that its unlawful for "Any" person. The plain language of the statute explicitly states "Any Person". §1962(a)(b) and (c) cannot be clearer or broader the statute is explicit and states "Any enterprise" The plain language of the statute explicitly states "Any enterprise". There are unequivocally no stated boundaries in the application of this statute, *see Boyle v. United States 556 U.S. II A (2009).*

"It is unlawful for "Any" person to be employed by or associated with "Any" enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or

C. The Court Possesses Jurisdiction, The Plaintiffs Claim is based on the Tucker Act & a Taking on a Money Mandating Statute 18 U.S.C §§1961- 1968 not on any Tort Claims Claims.

At 6 ¶3 " Defense asserts, "Because Count I does not, as pled, implicate a money mandating provision over which the Court possesses jurisdiction, this claim should be dismissed. "

As discussed supra in section I.B The Federal District Court of Claims is the only court with jurisdiction to hear this claim. Additionally, 18 U.S.C §§1961-1968 absolutely constitute an offer and 1964(c) is a money mandating provision over which the Court possesses jurisdiction. Treble damages for damages to ones business and property are a money mandate. Attorneys fees is a money mandate, Court cost is a money mandate. These damages are compensatory damages not sounding in tort but flow from economic loss as a result of the conduct of an unlawful enterprise. See as stated in "C" at 9 references to the Supreme Courts statements in *Agency Holding Corp. v. Malley-Duff & Associates][107 S.Ct. 2759, 483 U.S. 143, 151 (1987)]* : "*RICO and the Clayton Act are* ***designed to remedy economic injury*** **by** providing for the recovery of treble damages, costs, and attorney's fees.[2] **"[Emphasis altered]**

These are not punitive damages they're mandated by the statute. See also *Molzof v. United States No. 90-838 . argued November 4, 1991- decided January 14, 1992.*

> " In contrast, the Government's view that "punitive damages" must be defined as those "that are in excess of, or bear no relation to, compensation" is contrary to the statutory language, which suggests that to the extent that a plaintiff may be entitled to damages that are not legally considered "punitive damages," but which are for some reason above and beyond ordinary notions of compensation, the United States is liable "in the same manner and to the same extent as a private individual." Pp. 304-308.

By definition economic injury would be actionable under the "economic loss rule, which provides that a party who suffers only economic harm may recover damages for that harm based upon a contractual claim.

The idea behind the creation of such damages is that they will encourage citizens to sue for violations that are harmful to society in general and deter the violator from committing future violations. Substantiated in latter arguments.

By every definition in Blacks Law Dictionary this Statute constitutes and Offer

> "To bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not. *Morrison v. Springer, 15 Iowa, 340; Vincent v. Woodland Oil Co., 105 Pa. 402, 30 Atl. 991; People v. Ah Fook, 62 Cal. 494.* "

There is no identifiable difference in the terms offered by 18 U.S.C. §§1961-1968 and a Statute offer of reward!

> "If a reasonable person would understand the words used as importing that the speaker promised to do something if given a requested exchange there for, it is immaterial what intention the offeror may have had." *Hoggard v. Dickerson, 180 Mo. App. 70, 165 S. W. 1135, 1137,*

By definition in Blacks Law Dictionary the filing of a Complaint under this Statute in accordance with the FRCP was an in fact acceptance.

> "Agreements: Two parties agree to the terms of a contract. If it is denied a counter offer is made until the agreement is reached. Upon agreement the contract is legally binding when it is signed." Such as the day the complaint was filed in Federal Court.

By definition the courts actions constituted a breach of contract by conversion.

> "The essence of a conversion is not the acquisition of property but the wrongful deprivation of that property from its true owner. One who is lawfully in possession of property may nevertheless be liable for a conversion <u>for exceeding the scope of authority for that lawful possession when the use seriously violates the true owner's right of control.</u>"[Emphasis Added]

> "The exercise of ownership over property may take a number of forms. All that is required is that the defendant exercise control over the chattel in a manner inconsistent with the plaintiff's right of possession. The gist of a

conversion is not the acquisition of the property by the wrongdoer, but the wrongful deprivation of another's property which the owner is entitled to possess." Citing USLegal.com

Damages demanded by the Complaint however, do include expectation damages in the form of treble damages based on the amount of the original suit to which performance was unlawfully denied.

II. Plaintiffs have Stated actionable Claims Against The United States

A. STANDARD OF REVIEW 12(b)(6)

Rule 12(b)(6) Motion to Dismiss

The standard on a motion to dismiss filed pursuant to Rule 12(b)(6) is rigorous. "In general, a motion to dismiss for failure to state a claim should not be granted unless it appears certain the plaintiff can prove no set of facts which would support its claim and entitle it to relief." *Mylan Labs., Inc. v. Matkari , 7 F.3d 1130, 1134 (4th Cir. 1993).* Dismissal of a complaint is appropriate only when the complaint does not give a defendant fair notice of a legally cognizable claim and the basis on which it rests. *Bell Atl. Corp.v. Twombly, 550 U.S. 544, 555 (2007).* A plaintiff must plead facts showing that a violation is plausible, not just possible. *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 555).).* It admits the truth of all material facts that are properly pleaded, facts, which are impliedly alleged, and facts, which may be fairly and justly inferred. *Thompsom V. Skate America, Inc., 261 Va. 121,128 (2001).* A court considering a motion to dismiss construes all well-pled allegations in

28 U.S. Code § 1491 - Claims against United States generally; actions involving Tennessee Valley Authority

Current through Pub. L. 114-38 (http://www.gpo.gov/fdsys/pkg/PLAW-114publ38/html/PLAW-114publ38.htm). (See Public Laws for the current Congress (http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws).)

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(a)

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41 (/uscode/text/41/lii:usc:t:41:s:7104:b:1), including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6[1] of that Act.

(b)

(1) Both the Unites[2] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5 (/uscode/text/5/706).

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in

18 U.S. Code § 1964 - Civil remedies

Current through Pub. L. 114-38 (http://www.gpo.gov/fdsys/pkg/PLAW-114publ38/html/PLAW-114publ38.htm). (See Public Laws for the current Congress (http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws).)

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prev (/uscode/text/18/1963) | next (/uscode/text/18/1965)

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter (/uscode/text/18/1962)by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter (/uscode/text/18/1962)may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub. L. 91–452, title IX (http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW), § 901(a), Oct. 15, 1970, 84 Stat. 943 (http://uscode.house.gov/statviewer.htm?volume=84&page=943); amended Pub. L. 98–620, title IV (http://thomas.loc.gov/cgi-bin/bdquery/L?d098:./list/bd/d098pl.lst:620(Public_Laws)), § 402(24)(A), Nov. 8, 1984, 98 Stat. 3359 (http://uscode.house.gov/statviewer.htm?volume=98&page=3359); Pub. L. 104–67, title I (http://www.gpo.gov/fdsys/pkg/PLAW-104publ67/html/PLAW-104publ67.htm), § 107, Dec. 22, 1995, 109 Stat. 758 (http://uscode.house.gov/statviewer.htm?volume=109&page=758).)

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I hereby certify under penalty of perjury that on this 18th day of August 2016, a true and correct copy of the foregoing instrument I caused to be placed in the United States mail (first-class, postage prepaid), copies of a Petition for Re Hearing on Appeal 16-1889 of the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT to:

Melissa L. Baker
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044

Christopher B. Julian Pro-Se

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