AFTER *ARBAUGH*: NEITHER CLAIM SUBMISSION, CERTIFICATION, NOR TIMELY APPEAL ARE JURISDICTIONAL PREREQUISITES TO CONTRACT DISPUTES ACT LITIGATION

Nathaniel E. Castellano

As we approach the fortieth anniversary of the Contract Disputes Act of 1978[1] (CDA), this foundational waiver of sovereign immunity continues to

1. Contract Disputes Act of 1978, Pub. L. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101-09 (2012)). The CDA was initially codified at 41 U.S.C. §§ 601–613 (1982), and

Nathaniel Castellano (nathaniel.castellano@apks.com) is an associate in the government contracts practice group at Arnold & Porter Kaye Scholer LLP and an adjunct professor at the George Washington University School of Law. He graduated from GWU Law as a Murray Schooner Procurement Scholar and clerked for the Honorable Jimmie V. Reyna at the U.S. Court of Appeals for the Federal Circuit. *He thanks Ralph C. Nash, Paul E. Pompeo, Steven L. Schooner, and Gregory C. Sisk for their valuable contributions and insights on this topic.*

be riddled with the tell-tale signs of repeated "drive-by jurisdictional rulings."[2] This unfortunate state of affairs shocks the conscience when considered in light of the Supreme Court's systematic efforts to root out such travesties by directing lower courts to reassess prior jurisdictional classification of statutory requirements.[3] To guide this effort, the Court—through a nascent series of opinions dating back to the 2006 decision in *Arbaugh v. Y&H Corporation*[4]—has provided a bright-line rule that a statutory requirement is jurisdictional only if Congress has expressed a clear intent that the requirement carries jurisdictional weight.[5] Heeding the Supreme Court's call, in 2014, the U.S. Court of Appeals for the Federal Circuit issued its *Sikorsky Aircraft Corporation v. United States* decision,[6] holding that the CDA's statute of limitations is a nonjurisdictional claim processing requirement—despite the Circuit's prior precedent treating the deadline as jurisdictional.[7] Notwithstanding this step in the right direction, the Federal Circuit continues to reflexively treat the CDA's claim submission requirements as jurisdictional prerequisites to CDA litigation.[8] Applying the Supreme Court's new bright-line rule to other CDA requirements that have been traditionally classified as jurisdictional, this article demonstrates that neither claim submission, certification, nor timely appeal requirements are jurisdictional prerequisites to CDA litigation. It concludes by urging contractors and their counsel to raise the arguments herein before the Federal Circuit and provides practical suggestions for doing so.

more than thirty years of precedent reflects that numbering scheme. In 2011, as part of a formal recodification of Title 41, Congress reorganized and renumbered the CDA (with no substantive changes) as currently found at 41 U.S.C. §§ 7101–7109 (2012). *See infra* note 138; Act of Jan. 4, 2011, Pub. L. No. 111-350, § 2, 124 Stat. 3677, 3677 (2011). This article refers only to the current (recodified) version of the statute.

2. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006).

3. *See id.* (citations omitted) ("We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit."); *see also infra* Part I.A.

4. *See generally Arbaugh*, 546 U.S. 500 (2006).

5. *See, e.g., id.* at 515–16 ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); *see also infra* Part I.A.

6. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315 (Fed. Cir. 2014).

7. *Id.* at 1320–22.

8. *See* Steven L. Schooner & Pamela J. Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors' Rights to Raise Affirmative Defenses with Sovereign Immunity*, 21 FED. CIR. B.J. 685, 704–06 (2011). Professor Schooner has previously argued that the government's approach to the claim submission and certification requirements constitutes a "breach of its contingency promise." *See* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 702 (2001) (Many of the government's standard remedy-granting clauses signal to contractors that if they submit their offers without inflating them to account for unanticipated contingencies, the government promises to make them whole when unexpected circumstances arise. Contractors rely on these promises. Creating inefficient and costly impediments to obtaining those remedies calls into question the original bargain.).

I. INTRODUCTION

In the 1970s, Congress touted the CDA as a comprehensive reform designed to create a fair, efficient, and flexible process for resolving procurement contract disputes. It was intended to provide contractors of all sizes and sophistication access to meaningful due process and judicial review.[9] Prior to the CDA, contractor claims often encountered delays while winding their way through agency-specific administrative processes, and access to meaningful judicial review was contingent on arbitrary jurisdictional distinctions between claims for breach of contract and claims "arising under" a contract clause.[10] To remedy this, Congress adopted several recommendations made by the Commission on Government Procurement.[11] These recommendations were designed to promote efficiency and fairness in U.S. procurement policy—specifically to encourage companies to do business with the government, which, in turn, would increase competition in the procurement market.[12]

Despite congressional aspirations of fairness and efficiency, decades of judicial and administrative interpretations left the CDA riddled with unintuitive, subjective, and highly contextual procedural traps for the unwary.[13] Worse yet, the Federal Circuit and its predecessor (the U.S. Court of Claims) labeled many of these procedural requirements as jurisdictional, allowing for extraordinary disruptions to the dispute resolution process.[14]

Consider the following hypothetical. A contractor submits a claim to the contracting officer seeking payment for increased costs incurred during performance. After a brief correspondence, the contracting officer submits a decision allowing the claim in part but denying some of the requested payment. On appeal at one of the Boards of Contract Appeals, agency counsel does not raise any jurisdictional concern. After a full trial, the Board finds in favor of

9. *See* S. REP. NO. 95-1118, at 1 (1978) ("The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternative forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and [g]overnment agencies . . . . [The bill] implements recommendations of the Commission on Government Procurement."); H.R. REP. NO. 95-1556, at 5 (1978) ("The purpose of the proposed legislation as amended is to provide for a fair and balanced system of administrative and judicial procedures for the settlement of administrative and judicial procedures for the settlement of claims and disputes relating to [g]overnment contracts."); *see also infra* Part II.

10. *See*, *e.g.*, Clarence Kipps, Tom Kindness & Cameron Hamrick, *The Contract Disputes Act: Solid Foundation, Magnificent System*, 28 PUB. CONT. L.J. 585, 586–87 (1999); C. Stanley Dees, *The Future of the Contract Disputes Act: Is It Time to Roll Back Sovereign Immunity?*, 28 PUB. CONT. L.J. 545, 548 (1999); *see also infra* Part II.A.

11. *See* 4 U.S. COMM'N ON GOV'T PROCUREMENT, REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 4 (1972); *see also infra* Part II.C.

12. *See Contract Disputes: Hearings on H.R. 664 and Related Bills Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary*, 95th Cong. 124 (1977) [hereinafter *Joint Hearings on H.R. 664*] (statement of the Hon. Louis Specter, Commissioner, U.S. Court of Claims) (noting the Commission's concern that "[u]nfair procedures drive the most efficient, low-cost contractors out of competition for [g]overnment contracts and encourage higher contingency bids from those who remain."); *see also infra* Part II.C.

13. *See infra* Part II.D.

14. *See infra* Part II.D..

the contractor and directs payment of the full amount claimed. On appeal at the Federal Circuit, for the first time, the Department of Justice moves to dismiss the case for lack of jurisdiction because the contractor failed to fully comply with one of the claim submission formalities—e.g., the contractor failed to request, implicitly or expressly, a decision from the contracting officer. The Department of Justice asserts that the overall tenor of the correspondence between the contractor and contracting officer indicates that the contractor may have desired further negotiation, and therefore, all subsequent proceedings were legally void.[15] The Federal Circuit reflexively recites its maxim that the claim submission requirement is a jurisdictional prerequisite to CDA litigation and accordingly dismisses the case. After years of litigation, the contractor must begin anew by more clearly requesting a contracting officer's final decision on its claim. Because jurisdictional objections can be raised at any time and may never be waived or conceded, it does not matter that: (1) the contracting officer did issue a decision; (2) the government never objected to jurisdiction at the Board; or (3) the contracting officer's decision is substantively irrelevant because review at the Board is de novo.[16]

Similar horror stories emanated from the Federal Circuit's jurisdictional classification of the CDA's certification requirement.[17] This led Congress to attempt a legislative remedy in 1992 by amending the CDA to clarify that "[a] defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim."[18] Just before Congress sent the final bill to President Clinton, its sponsor, Senator Howell Heflin, explained that the amendment "will eliminate the confusion and waste of resources that has resulted from the Contract Disputes Act certification being deemed jurisdictional."[19] Nevertheless, the Boards of Contract Appeals and Court of Federal Claims clung to definitional distinctions in the Federal Acquisition Regulation (FAR)[20] and defunct excerpts from legislative history to distinguish between "defective certification" and "failure to certify," the latter of which is still treated as a jurisdictional bar.[21] Ac-

15. *See* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1253 (2014) ("Today the persistent question is whether, even after Congress has generally dropped the shield of sovereign immunity, the executive branch may still demand that every word of text and every term of a statutory waiver be slanted in its favor.").

16. *See infra* notes 38-43and accompanying text.

17. *See* Ralph C. Nash & John Cibinic, *The Contract Disputes Act: A Prescription for Wheel Spinning*, 4 Nash & Cibinic Rep. ¶ 29 ("There have been so many defective certification cases over the years that they would make a veritable rogue's gallery of wasted effort . . . . I would guess that this has happened approximately 500 times since the CDA was passed . . . . The result is mighty curious for an Act that was passed to make the disputes process for efficient—and certainly reveals a serious flaw in the CDA.").

18. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907, 106 Stat. 4506, 4518; *see infra* Part II.D.2.

19. *See* 138 Cong. Rec. 34,204 (1992).

20. *See* FAR 33.201.

21. *See infra* note 192 and accompanying text.

cordingly, to confirm their jurisdiction, tribunals must make a factual determination as to whether the language in the contractor's documents are similar enough to the FAR's certification language to constitute a defect in certification or complete failure to certify.[22] As with any jurisdictional requirement, objections to the adequacy of certification can be raised at any time during the litigation process, can never be waived, and require dismissal if proven.[23]

For companies accustomed to dealing with the U.S. government, these unfair, inefficient, and often absurd scenarios are business as usual. But to the commercial firms, small businesses, and non-traditional contractors who are unfamiliar with the nuances of federal procurement and lack expert counsel, these jurisdictional traps represent daunting omens warning them away from the procurement market.[24] Indeed, contractors safely entrenched in the procurement market may view these jurisdictional traps as valuable barriers to entry that shield them from ruinous competition.[25]

Discouraging competition has always been bad procurement policy,[26] but in the twenty-first century it may prove fatal to the United States' technological and battlefield superiority.[27] The federal government is no longer the

22. *See infra* note 200 and accompanying text.

23. *See infra* notes 38–43 and accompanying text; *infra* Part II.D.2.

24. *See* William E. Kovacic, *Regulatory Controls as Barriers to Entry in Government Procurement*, 25 POL'Y SCI. 29, 36 (1992) ("Smaller firms may find it more difficult to cope with federal regulatory requirements than their larger counterparts. The sheer volume and complexity of public contracting controls create compliance scale economies for firms with large volumes of government contracts . . . . Compared to a new entrant, the incumbent government supplier with a large volume of government contracts can allocate compliance-related overhead costs over a large base of government work and can include a smaller increment for regulatory overhead in each bid for new contracts. Thus, for a variety of reasons, smaller commercial firms with promising ideas may be deterred from making the infrastructure investment needed to comply with the government's regulatory commands.").

25. *See id.* at 37 ("Congress has imbued federal procurement with distinctive, increasingly formidable risks that may discourage firms from entering the public contracts arena."); Schooner, *supra* note 8, at 634–35 ("The laws, regulations, and policies controlling the award and performance of government contracts present a dense thicket reflective of a large, complex bureaucracy . . . . Some firms perceive this regulatory maze as a barrier to entry, and critics suggest that those same barriers historically insulated a coddled class of less-than-competitive suppliers that had adapted to the non-commercial rules of the game."); Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 PUB. CONT. L.J. 249, 250–51 (1998) ("Unfortunately, a variety of special standards, government-unique certifications, terms and conditions, and record-keeping and reporting requirements imposed by statute and regulation discouraged many successful commercial companies from offering their products to [g]overnment.").

26. "The United States has a vital interest in preserving capabilities needed to develop new, state-of-the-art weapon systems, as well as to support existing systems. This goal implies that DoD should foster an environment in which a sufficient number of financially healthy contractors survive." William E. Kovacic & Dennis E. Smallwood, *Competition Policy, Rivalries, and Defense Industry Consolidation*, 8 J. ECON. PERSP. 91, 93 (1994); *see also* LAW ADVISORY PANEL, U.S. DEP'T OF DEF., STREAMLINING DEFENSE ACQUISITION LAWS 12–13 (1993) [hereinafter REPORT OF THE U.S. DOD ACQUISITION LAW ADVISORY PANEL] ("Declining purchases of defense-unique products mean higher unit costs, declining profits, and lost jobs in many defense-specific industries. At the same time, the high cost of doing business with the government is causing companies to leave the defense market—or never to enter it at all.").

27. "Over the past few decades, the U.S. and our allies have enjoyed military capability advantage over any potential adversary . . . . It has been a good run, but the game isn't one

primary driver of innovation, and today's technological pioneers are not reliant on the federal government for revenue.[28] Acquisition officials acknowledge that the government must behave more like a commercial buyer if it wants to attract the vendors who can deliver the next generation of paradigm-shifting innovation.[29] Of course, these officials lack authority to remedy judicial interpretation of the CDA's statutory requirements—that cure must come from Congress or the Judiciary.

Thankfully, a nascent but dense series of Supreme Court decisions, beginning in 2006 with *Arbaugh*, directs courts to reconsider their prior jurisdic-

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sided, and all military advantages based on technology are temporary." Honorable Frank Kendall, Under Sec'y of Def. for Acquisition, Tech. & Logistics, Testimony Before the House Committee on Armed Services 2–3 (Jan. 28, 2015), *available at* http://www.defenseinnovationmarketplace.mil/resources/USD(ATL)WrittenStmtHASC20150128Final.pdf [https://perma.cc/9TL9-GV23]; ADVISORY PANEL ON STREAMLINING & CODIFYING ACQUISITION REGULATIONS, SECTION 809 PANEL INTERIM REPORT 4 (2017) [hereinafter SECTION 809 PANEL INTERIM REPORT] ("The defense industrial base has changed, and to maintain technological advantage, DoD increasingly must leverage the commercial marketplace."); *see also* Steven L. Schooner & Nathaniel E. Castellano, *Reinvigorating Innovation: Lessons Learned from the Wright Brothers*, CONT. MGMT., Apr. 2016, at 46, 51.

28. The Department of Defense has acknowledged this for quite some time. *See* FRANK KENDALL, GETTING DEFENSE ACQUISITION RIGHT 110 (2017) ("It is clear that in many areas of technology the commercial market place is moving faster than the normal acquisition timeline for complex weapons systems."); *see also* UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, INTELLECTUAL PROPERTY: NAVIGATING THROUGH COMMERCIAL WATERS iii (2001) ("In the past, research programs funded by the Department of Defense (DoD) often led industry efforts in technology. Today the reverse is largely the case—technology leadership has shifted to industry, where most research and development (R&D) dollars are spent."); REPORT OF THE U.S. DOD ACQUISITION LAW ADVISORY PANEL, *supra* note 26, at 14 ("In many fields, D[o]D is no longer the primary technology driver in the U.S. economy.").

29. *See* SECTION 809 PANEL INTERIM REPORT, *supra* note 27, at 2 ("The acquisition system, when viewed as a whole, creates obstacles to getting the needed equipment and services because it makes DoD an unattractive customer to large and small firms with innovative, state-of-the-art solutions. The system creates additional impediments because suffocating bureaucratic requirements make the pace at which it proceeds simply unacceptable in today's rapidly changing technological environment. DoD must replace this system, designed for buying equipment for the Cold War, with one that takes advantage of technologies and methodologies available in the current marketplace."); Memorandum from the Under Sec'y of Def. for Acquisition, Tech. & Logistics to Sec'ys of the Military Dep'ts et al., Implementation Directive for Better Buying Power 3.0: Achieving Dominant Capabilities Through Technical Excellence and Innovation 9 (Apr. 9, 2015) ("[T]he Department can do a much more effective job of accessing and employing commercial technologies. Our potential adversaries are already doing so. Achieving this objective will require identification and elimination of specific barriers to the use of commercial technology and products."). In some instances, the government's unique regulatory commands may actually inhibit success in the commercial market. Kovacic, *supra* note 24, at 36–37 ("The public contracts regulatory regime does not encourage flexibility and improvisation, traits that often characterize success in commercial markets. Instead, efforts to fulfill regulatory requirements tend to introduce rigidity into the contractor's operations . . . . There is a danger that efforts to comply with public procurement regulatory requirements will begin to influence the contractor's organization in ways that undermine its prospects for success in commercial markets . . . . A company that wants to preserve its competitive acumen in commercial markets would be wise to think twice before exposing itself to a regulatory system whose requirements could deaden instincts necessary for survival in the commercial arena."). One approach to address this problem can be seen in the nascent utilization of federal prize contests. *See e.g.*, Steven L. Schooner & Nathaniel E. Castellano, *Eyes On The Prize, Head In The Sand: Filling The Due Process Vacuum In Federally Administered Prize Contests*, 24 FED. CIR. B.J. 391, 391–98 (2015).

tional classifications of statutory requirements.[30] Even when the statute in question is a waiver of sovereign immunity, the Court has provided a bright-line rule that statutory requirements should be treated as jurisdictional only if Congress has expressed a clear intent for the requirement to bear jurisdictional status.[31] In the 2014 *Sikorsky* decision, the Federal Circuit heeded the Supreme Court's call and reversed its precedent that treated the CDA's six-year statute of limitations as a jurisdictional requirement.[32] That's a good start, but not nearly enough. When reconsidered in light of the Supreme Court's latest guidance, the Federal Circuit's current jurisdictional classification of the CDA's claim submission, certification, and timely appeal requirements cannot stand.

This article proceeds as follows. Part I sets forth the Supreme Court's latest guidance on distinguishing jurisdictional from nonjurisdictional requirements, with additional discussion focusing on requirements associated with a statutory waiver of sovereign immunity. Part II is dedicated to the CDA, providing context for its enactment, its basic dispute resolution framework, and the Federal Circuit's current jurisdictional treatment of the claim submission and certification requirements. Part III reassesses the jurisdictional status of those three requirements in accordance with the Supreme Court's *Arbaugh* line of cases. That analysis demonstrates that the claim submission, certification, and timely appeal requirements do not qualify as jurisdictional prerequisites to CDA litigation. To be sure—they are important, mandatory claim-processing rules, but they do not limit any tribunal's adjudicative authority.

30. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 504 (2006) (Ginsburg, J.) (holding that Title VII's employee numerosity requirement is an element of an employee's discrimination claim against an employer, not a jurisdictional prerequisite); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157 (2010) (Thomas, J.) (holding that the Copyright Act's registration requirement is a mandatory procedural rule, not a jurisdictional precondition to maintaining an infringement suit.); Henderson v. Shinseki, 562 U.S. 428, 431 (2011) (Alito, J.) (holding that the timeline for veterans to file a notice of appeal to the Court of Veterans Appeals is a nonjurisdictional claim processing requirement); Gonzalez v. Thaler, 565 U.S. 134, 137 (2012) (Sotomayor, J.) (addressing jurisdictional nature of statutory requirements for appealing a district court's final decision in habeas corpus proceedings); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 149 (2013) (Ginsburg, J.) (holding that that the time limit for health care providers to appeal to the Provider Reimbursement Review Board is nonjurisdictional); United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1638 (2015) (Kagan, J.) (holding that the statute of limitations in the Federal Tort Claims Act is a nonjurisdictional claim processing requirement). *Cf.* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (Breyer, J.) (holding that the Tucker Act's six-year statute of limitations is jurisdictional based on *stare decisis*); Bowles v. Russell, 551 U.S. 205, 206, 209 (2008) (Thomas, J.) (holding that the deadline for filing a notice of appeal from the final decision of a federal district court is jurisdictional based on *stare decisis*).

31. *Arbaugh*, 546 U.S. at 515–16 ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character . . . .") (footnote and citations omitted); *Kwai Fun Wong*, 135 S. Ct. at 1638 ("And it makes no difference that a time bar conditions a waiver of sovereign immunity."); *see also infra* Part I.

32. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320–22 (Fed. Cir. 2014).

For far too long, the Federal Circuit's jurisdictional classification of these CDA requirements has generated unjust and inefficient outcomes based on procedural technicalities, while obstructing congressionally permitted access to contractual relief and meaningful judicial review.[33] Because the Supreme Court rarely grants certiorari in cases dealing with pure issues of procurement law,[34] the Federal Circuit will likely have the last say with respect to the jurisdictional classification of the CDA's requirements. With that in mind, this article concludes by urging contractors and their counsel to raise the arguments herein before the Federal Circuit and provides practical suggestions for doing so.

II. THE SUPREME COURT'S MODERN APPROACH TO JURISDICTION AND SOVEREIGN IMMUNITY

Determining whether any given CDA requirement carries jurisdictional import turns primarily on the Supreme Court's rules for distinguishing jurisdictional requirements from nonjurisdictional requirements. However, because the CDA dictates procedures relating to litigation against the federal government, the doctrine of sovereign immunity cannot be ignored. Thus, Section A synthesizes the Supreme Court's latest guidance on distinguishing jurisdictional rules from nonjurisdictional rules, and Section B explains how this guidance relates to requirements associated with a statutory waiver of sovereign immunity. In short, even when a statutory requirement is part of a waiver of sovereign immunity, it only has jurisdictional status if Congress has clearly expressed an intent that it have jurisdictional status.

A. *Distinguishing Jurisdictional from Nonjurisdictional Requirements*

When a court lacks subject matter jurisdiction over a claim, it lacks power to adjudicate, and the claim must be dismissed.[35] Jurisdictional rules, there-

33. *See* Ralph C. Nash & John Cibinic, *The Contract Disputes Act: Can It Be Improved?*, 1 NASH & CIBINIC REP. ¶ 88 (1987) ("Any reader of all the Claims Court decisions under the CDA might conclude that the goal of the Act is to litigate esoteric legal issues rather than to end serious controversies.").

34. *See* Richard C. Johnson, *Beyond Judicial Activism: Federal Circuit Decisions Legislating New Contract Requirements*, 42 PUB. CONT. L.J. 69, 71 & n.13 (2012) ("Moreover, because appeals on certiorari from the CAFC to the Supreme Court are as rare as hens' teeth, the CAFC has in effect become the court of last appeal in government contract cases."); *see also* Ruth C. Burg, *The Role of the Court of Appeals for the Federal Circuit in Government Contract Disputes: A Historic View from the Bench*, 42 PUB. CONT. L.J. 173, 183 (2012) ("The Federal Circuit has exclusive jurisdiction to decide appeals relating to the contracts of the United States Government and, because Supreme Court review is rare, is effectively 'the court of last resort' for government agencies and their contractors.").

35. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting *Ex parte* McCardle, 74 U.S. 506, 514 (1868)) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

fore, must be clear and lead to predictable outcomes.[36] Similarly, courts and potential litigants require a clear means of distinguishing between jurisdictional rules and nonjurisdictional rules.[37]

The substantive elements of a claim and procedural claim processing rules can be mistaken for jurisdictional rules.[38] Whereas jurisdictional rules limit a court's adjudicative authority, claim processing rules address how the court and parties behave during litigation, and the substantive elements of a claim determine whether the plaintiff ultimately prevails.[39] Statutory requirements setting forth the elements of a claim or claim processing rules lack the same special status as jurisdictional prerequisites.[40]

Courts have an independent obligation to determine whether they have subject-matter jurisdiction, and the issue can never be forfeited or waived—regardless of whether any party raises or concedes it.[41] In contrast, claim processing rules and substantive elements of a claim can be equitably tolled, conceded, and waived if not timely challenged.[42] Consequently, classifying a rule as jurisdictional can result in considerable unfairness to plaintiffs and inefficiencies for all parties and institutions involved.[43]

36. Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010) ("[W]e place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible."); Grupto Dataflux v. Atlas Glob. Grp., 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful.").

37. *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 672–73 (2005).

38. *See* Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings,"* 105 NW. U.L. REV. COLLOQUY 184, 184–85 (2011).

39. Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) (explaining that jurisdiction is a question of whether a federal court has the constitutional or statutory authority to hear a case, while a substantive cause of action is "a question of whether a particular plaintiff is a member of a class of litigants that may, as a matter of law, appropriately invoke the power of the court"); Henderson v. Shinseki, 562 U.S. 428, 435 (2011) ("Among the types of rules that should not be described as jurisdictional are what we have called 'claim-processing rules.' These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.").

40. *See Henderson*, 562 U.S. at 434 ("This question is not merely semantic but one of considerable practical importance for judges and litigants. Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system.").

41. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998); United States v. Corrick, 298 U.S. 435, 440 (1936); Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1844); *see also* Wasserman, *supra* note 37, at 651-52.

42. *See* Kontrick v. Ryan, 540 U.S. 443, 456 (2004) ("Characteristically, a court's subject matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point."); *see also Arbaugh*, 546 U.S. at 506–07 (explaining that objections to a party's failure to state a substantive claim expires after trial, while defects in subject matter jurisdiction endure post-trial and can be raised for the first time on appeal).

43. *See*, *e.g.*, *Henderson*, 562 U.S. at 434–35 (discussing the inefficiency and waste of resources that may arise when a case is belatedly dismissed for lack of jurisdiction).

Until recently, courts, including the Supreme Court, occasionally have been careless in characterizing rules as jurisdictional.[44] Beginning with its 2006 decision in *Arbaugh*, the Supreme Court repeatedly has admonished courts to carefully distinguish between jurisdictional and nonjurisdictional rules to avoid so-called "jurisdictional drive-by rulings."[45] *Arbaugh* explicitly directs lower courts to give "no precedential effect" to rulings that purport to dismiss a case for lack of subject-matter jurisdiction when the discovered defect lacks jurisdictional status.[46]

Most importantly, *Arbaugh* provided a "readily administrable bright line" rule for determining whether a statutory limitation is jurisdictional: if Congress has clearly stated that a statutory requirement is jurisdictional, then the requirement is jurisdictional; if Congress did not clearly rank a statutory limitation as jurisdictional, then the requirement is not jurisdictional.[47] The Court requires no magic words to satisfy this test.[48] Instead, the Court focuses

44. *See Arbaugh*, 546 U.S. at 511 ("On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiffs' need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits-related determination.") (internal quotation and citation omitted).

45. *Id.* (internal citations omitted) ("We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit."). To the extent that *Arbaugh* addressed only the distinction between jurisdictional requirements and the substantive elements of a claim, the Court has clarified that its analysis in *Arbaugh* extends to procedural claim processing rules as well. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) ("In light of the important distinctions between jurisdictional prescriptions and claim-processing rules, we have encouraged federal courts and litigants to facilitate clarity by using the term 'jurisdictional' only when it is apposite. In *Arbaugh*, we described the general approach to distinguish jurisdictional conditions from claim-processing requirements or elements of a claim[.]" (internal quotation marks and citations omitted)).

46. *Arbaugh*, 546 U.S. at 511 (internal citations omitted) ("We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit.").

47. *Id.* at 515–16 ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013) (quoting *Arbaugh*, 546 U.S. at 515–16) (internal citations omitted) ("To ward off profligate use of the term 'jurisdiction,' we have adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has 'clearly state[d] that the rule is jurisdictional; absent such a clear statement, we have cautioned, 'courts should treat the restriction as nonjurisdictional in character.'"); *Reed Elsevier*, 559 U.S. at 160–62; Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) (quoting *Arbaugh*, 546 U.S. at 515) ("A rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'"); United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015) ("[P]rocedural rules, including time bars, cabin a court's power only if Congress has clearly stated as much . . . . Absent such a clear statement, . . . courts should treat the restriction as nonjurisdictional.") (internal quotations and citations omitted).

48. *Kwai Fun Wong*, 135 S. Ct. at 1632 (internal citations and quotations omitted) ("Absent such a clear statement, . . . courts should treat the restriction as nonjurisdictional. That does not mean Congress must incant magic words. But traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.");

upon four factors: (1) the statutory text, (2) context, (3) the Supreme Court's prior interpretation of the provision, and (4) the statute's overall purpose.

First, the Court's jurisdictional analysis turns principally on the text of the statutory requirement in question. This focus on the statutory text derives from the principle that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction."[49] To that end, the Court has repeatedly framed the pertinent question as whether the provisions at issue "speak in jurisdictional terms."[50] A requirement is not jurisdictional simply because it is mandatory or emphatic; nor is the word "shall" alone sufficient to limit a court's authority.[51] Instead, a jurisdictional requirement must speak to the court's adjudicative authority, rather than the parties' rights or obligations.[52]

For example, filing deadlines and statutes of limitations are "quintessential" nonjurisdictional claim processing requirements because they speak to the orderly processing of a claim, not a court's adjudicative power.[53] In contrast, *Arbaugh* identified the amount-in-controversy requirement for district court diversity jurisdiction as speaking in jurisdictional terms.[54] The amount-in-controversy requirement is clearly tied to the court's jurisdictional grant: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . ."[55]

Second, the Court will consider the statutory requirement in context—particularly the relationship between the statutory provision that contains the requirement in question and the statutory provision that grants the court jurisdiction over the plaintiff's claim. For example, the amount-in-

Auburn Reg'l Med. Ctr., 568 U.S. at 153–54 (explaining that the clear statement rule does not mean "Congress must incant magic words in order to speak clearly"); *Henderson*, 562 U.S. at 436 ("Congress, of course, need not use magic words in order to speak clearly on this point.").

49. Kontrick v. Ryan, 540 U.S. 443, 452 (2004) (citing U.S. CONST. art. III, § 1).

50. *See*, *e.g.*, *Arbaugh*, 456 U.S. at 515; *Henderson*, 562 U.S. at 438; Zipes v. Trans World Airlines, Inc., 455 U.S 385, 394 (1982).

51. *Gonzalez*, 565 U.S. at 146 (internal citations and quotations omitted) ("This Court, moreover, has long rejected the notion that all mandatory prescriptions, however emphatic . . . are properly typed as jurisdictional.").

52. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (internal citations and quotations omitted) ("[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties."); *Henderson*, 562 U.S. at 435 ("[A] rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity . . . ."); *id.* ("Among the types of rules that should not be described as jurisdictional are what we have called 'claim-processing rules.' These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."); *Kwai Fun Wong*, 135 S. Ct. at 1632 (explaining that a statute of limitations was nonjurisdictional, in part because its "text speaks only to the claim's timeliness, not to a court's power").

53. *Kwai Fun Wong*, 135 S. Ct. at 1632 (internal citation omitted) ("Time and again, we have described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case."); *Henderson*, 562 U.S. at 435 ("Filing deadlines, such as a the 120-day deadline at issue here, are quintessential claim-processing rules."); *Auburn Reg'l Med. Ctr.*, 568 U.S. at 154 ("we have repeatedly held that filing deadlines ordinarily are not jurisdictional"). *But see infra* note 64 and accompanying text.

54. *See Arbaugh*, 456 U.S. at 513–15.

55. 28 U.S.C. § 1332(a) (2012).

controversy requirement above is incorporated directly into the same statutory provision granting district courts with jurisdiction in diversity cases.[56] Most decisions finding a requirement nonjurisdictional explain that holding, in part, on the basis that the requirement in question is located within a statutory provision separate and apart from the tribunal's jurisdictional grant.[57]

A more nuanced take-away from the Court's analysis of context is that just because a statutory requirement is jurisdictional does not mean that every mandatory rule related to fulfilling that requirement also carries jurisdictional weight. The Court's opinion in *Gonzalez* best illustrated this.[58] In that case, the Court examined a statute that made the issuance of a "certificate of appealability" a jurisdictional prerequisite for a court of appeals to review a district court decision in federal habeas proceedings.[59] The same statute also provided two mandatory requirements dictating what an applicant must demonstrate to obtain such a certificate and what information the certificate must contain.[60] The Court held that those two additional rules relating to issuance of a certificate were not jurisdictional prerequisites, even though they were mandatory elements of the certificate, and the certificate itself was a jurisdictional prerequisite.[61]

Third, the Supreme Court will consider its own prior analysis of the requirement at issue—i.e., stare decisis.[62] Since *Arbaugh*, the only two decisions finding a statutory requirement to be jurisdictional were grounded in stare decisis. In *Bowles*, the Court considered the statutory deadline to file a notice of appeal from a final district court decision to an Article III court,[63] and in *John R. Sand*, the Court considered the Tucker Act's six-year statute of limitations.[64] The Supreme Court had long described both deadlines as jurisdictional, and for that reason, both remain jurisdictional.[65] Subsequently, the Court has reiterated that it based its anomalous holdings in those cases on

56. *Id.*

57. *See, e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 145 (2012) ("Congress set off the requirements in distinct paragraphs and, rather than mirroring their terms, excluded the jurisdictional terms in one from the other[s]."); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 164 (2010) (emphasizing that the Copyright Act's registration requirement "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over" copyright infringement claims); *Henderson*, 562 U.S. at 439–40.

58. *Gonzalez*, 565 U.S. at 140–41 (considering 28 U.S.C. § 2253(c)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *See, e.g.*, *Henderson*, 562 U.S. at 436 (internal quotations and citations omitted) ("When a long line of this Court's decisions left undisturbed by Congress, has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course.").

63. Bowles v. Russell, 551 U.S. 205, 209 (2008).

64. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134–36 (2008) (considering 28 U.S.C. § 2501).

65. *See id.* at 134–39; *Bowles*, 551 U.S. at 206–07; *see also* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 587–98 (2008) (discussing *John R. Sand*).

stare decisis.[66] The Supreme Court has declined to extend such treatment to statutory requirements classified as jurisdictional by a long line of *lower court* decisions.[67]

Fourth, the Court has indicated that it will consider whether jurisdictional treatment of a requirement comports with the statute's overall purpose. For example, in *Henderson*, the court explained that the claimant-friendly nature of the veterans' benefits system militates against treating the statute's filing deadline for appeals as jurisdictional.[68] In *Gonzalez*, the Court noted that treating the requirement at issue as jurisdictional would thwart Congress's intent "to eliminate delays in the federal habeas review process."[69] Likewise, in *Kwai Fun Wong*, the Court held that the statute of limitations in the Federal Tort Claims Act (FTCA) is nonjurisdictional—noting that the FTCA attempts to place the government on equal footing with private litigants in cases brought under its purview, which militates toward allowing equitable tolling of the deadline, rather than imbuing it with jurisdictional consequence.[70] Notably, while the Court has relied on statutory purpose to explain why a requirement is *not* jurisdictional, it has denied attempts to characterize a requirement as jurisdictional on the grounds that doing so would promote the statutory purpose.[71]

B. *The Supreme Court's Modern, More Lenient Approach to Interpreting Statutory Waivers of Sovereign Immunity*

Pursuant to the well-established doctrine of sovereign immunity, the federal government is immune from suit only to the extent that Congress waives its immunity.[72] The doctrine looms heavy as a constant threat during litiga-

66. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 167–68 (2010) ("*Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such . . . . Rather, *Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."); United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1636 (2015) (explaining the holding of *John R. Sand* on grounds of *stare decisis*: "What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from this court's prior rulings, not from Congress's choice of wording.").

67. *See Reed Elsevier*, 599 U.S. at 169 (dismissing argument that the Copyright Act's registration requirement is jurisdictional based on long history of lower courts categorizing it as jurisdictional and explaining that: "Although § 411(a)'s historical treatment as "jurisdictional" is a factor in the analysis, it is not dispositive"). Note also that the majority in *Kwai Fun Wong* held that the FTCA's filing deadline was nonjurisdictional despite the dissent's argument that a long line of lower court cases treated it as a jurisdiction bar. *Kwai Fun Wong*, 135 S. Ct. at 1642 (Alito, J., dissenting).

68. Henderson v. Shinseki, 562 U.S. 428, 440 (2011).

69. Gonzalez v. Thaler, 565 U.S. 134, 144 (2012) (internal citations and quotations omitted).

70. *Kwai Fun Wong*, 135 S. Ct. at 1637 ("[T]he FTCA treats the United States more like a commoner than like a crown.").

71. *Reed Elsevier*, 559 U.S. at 169 n.9 ("We do not agree that a condition should be ranked as jurisdictional merely because it promotes important congressional objectives."); *Kwai Fun Wong*, 135 S. Ct. at 1632 (noting that a mandatory filing deadline is presumed nonjurisdictional regardless how "important" it may be).

72. Gregory C. Sisk, Litigation with the Federal Government § 2.3(b)(5), at 85 (2016). The origins and desirability of sovereign immunity in American jurisprudence are controversial

tion against the government.[73] Thus, a great deal of importance hinges on statutory waivers of sovereign immunity and their judicial interpretation—particularly when the government does business with the private sector.

The federal government's consent to suit must be expressed through unequivocal statutory text; waiver is a jurisdictional prerequisite, and it will not be implied.[74] Traditionally, in addition to requiring an unambiguous waiver of immunity, courts also strictly construed all requirements within a statutory waiver in the government's favor.[75] This strict construction in the government's favor was, and continues to be, a hallmark of the Justice Department's litigation strategy.[76] However, several decades of Supreme Court precedent demonstrate that the Court now separates "the threshold question of *whether* a waiver of sovereign immunity exists" from "subsequent questions as to *how* the terms of that waiver should be understood and applied."[77] Accordingly, courts still strictly construe statutory texts to find an unequivocal waiver of immunity covering the claimant's theory of liability pursued and remedy sought, but the ordinary tools of statutory interpretation apply to other terms, definitions, exceptions, and procedures.[78]

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subjects. *Compare* Kenneth Kulp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 383–402 (1970) ("The strongest support for sovereign immunity is provided by that four-horse team so often encountered—historical accident, habit, a natural tendency to favor the familiar, and inertia."), *with* Harold J. Krent, *Reconceptualizing Sovereign Immunity and the Uses of History*, 45 VAND. L. REV. 1529, 1530 (1992) ("Much of sovereign immunity . . . derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule."). Nevertheless, sovereign immunity has been recognized by Supreme Court for quite a while and is in no danger of falling out of favor any time soon. *See* SISK, *supra* note 72, § 2.3(b), at 86.

73. SISK, *supra* note 72, § 2.3(b)(5), at 86–87.

74. *See id.* § 2.5; United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

75. *See* Sisk, *supra* note 15, at 1248–53 (describing traditional approach); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 285 (2012) ("It has been a corollary of the rule disfavoring waiver of sovereign immunity—or was arguably thought to be a part of the rule itself—that 'limitations and conditions upon which the [g]overnment consents to be sued must be strictly observed and exceptions thereto are not to be implied.' . . . This rigidity made sense when suits against the government were disfavored, but not in modern times.") (citing Soriano v. United States, 352 U.S. 270, 276 (1957) ("[T]his Court has long decided that limitations and conditions upon which the [g]overnment consents to be sued must be strictly observed and exceptions thereto are not to be implied")); *see also Kwai Fun Wong*, 135 S. Ct. at 1636 (referring to an earlier era, when the Court often viewed as jurisdictional conditions on waivers of sovereign immunity).

76. *See* Sisk, *supra* note 15, at 1255.

77. SISK, *supra* note 72, § 2.5(b)–(c), at 98–100; Sisk, *supra* note 15, at 1256–1318. Full departure from the traditional approach came in 1990 with *Irwin v. Department of Veterans Affairs*, which held that statutes of limitations in waivers of sovereign immunity are subject to the same presumption of equitable tolling that applies to statutes authorizing suits between private parties. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 94–97 (1990).

78. *See* SISK, *supra* note 72, § 2.5(b), at 98–100; Sisk, *supra* note 15, at 1318 ("In sum, the continued vitality of the strict construction doctrine is doubtful. And certainly, this vestigial canon of an earlier jurisprudential period no longer allows the government to win automatically whenever a minimally plausible argument can be presented for a narrow reading. When an express waiver of sovereign immunity is clearly stated, the Court increasingly finds ordinary tools of in-

The *Arbaugh* line of cases demonstrates that the Court's new bright-line test for determining whether a requirement is jurisdictional applies to requirements within a statutory waiver of sovereign immunity. In *John R. Sand*, the Court held that the Tucker Act's statute of limitations is jurisdictional, but it did so based on grounds of stare decisis, not any strict construction owed to the Tucker Act as a waiver of sovereign immunity.[79] In *Kwai Fun Wong*, the Court majority held that the statute of limitations in the Federal Tort Claims Act (FTCA) is nonjurisdictional.[80] In doing so, the majority explicitly disagreed with the dissent's argument that the FTCA's filing deadline should be viewed as jurisdictional based on its status as an important limit to the government's waiver of sovereign immunity.[81] The *Kwai Fun Wong* majority expressly stated "it makes no difference that a time bar conditions a waiver of sovereign immunity" and also explained that it is irrelevant whether Congress enacted the provision at a time when the Court regularly interpreted all conditions in a waiver of immunity as jurisdictional.[82]

On various occasions, the Federal Circuit has stated that the terms of the CDA must be strictly construed, citing old Supreme Court cases adhering to the traditional, strict approach to interpreting waivers of immunity.[83] Indeed, it did precisely that to justify giving jurisdictional status to one of the CDA's filing deadlines.[84] Recent cases demonstrating the Supreme Court's modern approach to interpreting waivers of sovereign immunity cast doubt on

terpretation more than sufficient to the task of understanding and applying those statutory provisions that set forth standards, limitations, exceptions, or procedural rules for claims against the federal government."); SCALIA & GARNER, *supra* note 75, at 285 ("It is one thing to regard government liability as exceptional enough to require clarity of creation as a matter of presumed legislative intent. It is quite something else to presume that a legislature that has clearly made the determination that government liability is in the interests of justice wants to accompany that determination with nit-picking technicalities that would not accompany other causes of action."); *see also* Gomez-Perez v. Potter, 553 U.S. 474, 491 (2008) (internal quotation and citations omitted) ("[W]here one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision . . . that latter provision need not be construed in the manner appropriate to waivers of sovereign immunity."); United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) (quoting *Mitchell*, 463 U.S. at 218–19) ("'Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity.'"); *Kwai Fun Wong*, 135 S. Ct. at 1632, 1636–37 (interpreting a procedural requirement in a statutory waiver of sovereign immunity and stating that "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences").

79. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–39 (2008); *Kwai Fun Wong*, 135 S. Ct. at 1632, 1635–36 (explaining and distinguishing *John R. Sand* based on *stare decisis*); *see also* SISK, *supra* note 72, § 2.5(c), at 104–05 (explaining the *John R. Sand* holding on *stare decisis* grounds); Sisk, *supra* note 15, at 1279.

80. *Kwai Fun Wong*, 135 S. Ct. at 1638.

81. *Id.* at 1632.

82. *Id.* at 1636–38.

83. *See*, *e.g.*, Cosmic Constr. Co. v. United States, 697 F.2d 1389, 1390 (Fed. Cir. 1982) (first citing Soriano v. United States, 352 U.S. 270 (1957), and then citing United States v. Sherwood, 312 U.S. 584 (1941)); Winter v. FloorPro, Inc., 570 F.3d 1367, 1370 (Fed. Cir. 2009) (citing *Cosmic Constr.*, 697 F.2d at 1390).

84. *See Cosmic Constr.*, 697 F.2d at 1390.

the Federal Circuit's assertions that the CDA's requirements should be strictly construed.[85] Regardless—in the jurisdictional context—the *Arbaugh* line of cases, particularly *John R. Sand* and *Kwai Fun Wong*, demonstrate that a strict interpretation of the CDA's terms should have no bearing on whether its requirements carry jurisdictional weight.

III. THE CDA: CONTEXT, CONTENT, AND CONFUSION

A. *Pre-CDA*

Prior to the CDA, the processes for resolution of contract disputes against the government evolved in piecemeal fashion.[86] From the dawn of the Republic[87]—before any legislative waiver of sovereign immunity for breach of contract claims—contractors were forced to seek redress by petitioning Congress to enact "private bills" appropriating the funds to pay their claims.[88] The first significant waiver of sovereign immunity came in 1855, when Congress created the United States Court of Claims and gave it authority to hear claims against the United States based on federal statutes, regulations, and contracts.[89] This initial grant of authority allowed the Court of Claims only to make recommendations to Congress, not any binding judgment against the United States.[90]

In 1863, Congress gave the Court of Claims power to make final judgments, with appellate review by the Supreme Court.[91] In 1887, the Tucker Act confirmed the Court of Claims' nationwide jurisdiction over money claims—founded upon federal statutes, executive regulations, contracts, and the Constitution.[92] In 1982, Congress renamed the Court of Claims, which had Article III status,[93] as the United States Claims Court, which was designated as an Article I court subject to appellate review by the newly created Article III court, the

85. *See* Sisk, *supra* note 15, at 1256–1318 (compiling and discussing Supreme Court cases that indicate a departure from strict construction of terms within a statutory waiver of sovereign immunity).

86. *See* Kipps, Kindness & Hamrick, *supra* note 10, at 586–87.

87. The history of American procurement contracting begins as early as the French and Indian Wars. *See* JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 9–13 (3d ed. 2012).

88. *See* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 175 (1998).

89. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612–13.

90. *Id.*; *see also* SISK, *supra* note 72, § 4.2(a), at 233; William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 387–88 (1968).

91. *See* Act of March 3, 1863, ch. 92, 12 Stat. 765, 765–66; Dees, *supra* note 10, at 546.

92. *See* Tucker Act, ch. 359, 24 Stat. 505, 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

93. This status was not without controversy. *See* Dees, *supra* note 10, at 546 n.11. The Court of Claims presumed it had Article III status, but the Supreme Court shed doubt on that presumption in 1933. *See* Williams v. United States, 289 U.S. 553, 581 (1933). The Supreme Court reversed course in 1962, holding that the Claims Court did have Article III status. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 584 (1962).

United States Court of Appeals for the Federal Circuit.[94] In 1992, the Claims Court was renamed as the United States Court of Federal Claims, with its decisions still appealed to the Federal Circuit.[95]

For many decades, litigation at the Court of Claims under the Tucker Act was the primary means of resolving contract disputes against the government.[96] As procurement activities increased, agencies began to limit the availability of judicial review by including disputes provisions into government contracts dictating administrative remedies, which required exhaustion before a contractor could obtain review at the Court of Claims.[97] There was no uniformity in the administrative procedures required by each agency's disputes clause, but they typically required the submission of any claim "arising under the contract" to the contracting officer for a final decision, and for any challenge to the final decision to be raised before the agency head or a board of contract appeals appointed by the agency head.[98]

This created an odd, often arbitrary, and unpredictable jurisdictional distinction that limited access to meaningful judicial review.[99] Agency boards obtained their jurisdiction through the contract and thus, only had jurisdiction over disputes "arising under the contract."[100] If a claim involved a dispute that no contract clause granted the board jurisdiction to resolve, then the claim was referred to as one for breach of contract, and only the Court of Claims had jurisdiction.[101] This could require separating claims within a dispute to be resolved in different forums, and it was often unclear if a claim was "arising under" the contract or if a claim was for "breach of contract."[102]

94. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 36–38, (codified as amended in various sections of 28 U.S.C.).

95. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (codified in scattered sections of 18 and 28 U.S.C.); *see also* Loren A. Smith, *The Renovation of an Old Court: A New Name and New Role for the Court of Federal Claims*, 40 FED. B. NEWS & J. 530, 531 (1993). For a concise history of the Federal Circuit's jurisdiction as it relates to government contracts, see Collin D. Swan, *Government Contracts and the Federal Circuit: A History of Judicial Remedies Against the Sovereign*, 8 J. FED. CIR. HIST. SOC'Y 105, 119 (2014).

96. *See* JOHN CIBINIC, JR., JAMES F. NAGLE & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1131 (5th ed. 2016).

97. *See id.*; S. REP. NO. 95-1118, at 2 (1978) ("The present means for resolving disputes under [g]overnment contracts is a mixture of contract provisions, agency regulations, judicial decisions, and statutory coverage. Basically, the methods and forums for handling such disputes exist by executive branch fiat—that is, by the insertion of contract terms specifying how disputes in specific areas will be resolved—and by agency regulations governing the procedural and substantive adjudication of disputes.").

98. CIBINIC, JR., NAGLE & NASH, JR., *supra* note 96, at 1131, 1135. The practice of appointing boards to hear contract disputes appears to have begun during the Civil War, and the Supreme Court upheld their legitimacy in 1868, but they did not come into full use until World War II. *See* Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 L. & CONTEMP. PROBS. 39, 42, 49–51 (1964); United States v. Adams, 74 U.S. 463, 463–64 (1869).

99. *See* Dees, *supra* note 10, at 547–48.

100. *See* U.S. COMM'N ON GOV'T PROCUREMENT, *supra* note 11, at 15–16; United States v. Utah Constr. & Mining Co., 384 U.S. 394, 396–99 (1966).

101. *See* U.S. COMM'N ON GOV'T PROCUREMENT, *supra* note 11, at 15.

102. *See id.* at 16.

Once a claim "arising under" the contract made its way through an agency board, the standard of review at the Court of Claims was extremely deferential.[103] Moreover, the Supreme Court held that the Court of Claims could not receive evidence to remedy defects in the record or determine whether substantial evidence supported an agency board decision, but instead had to remand for further proceedings.[104] This resulted in more formalized procedures at the boards and more remands from the Court of Claims, which exacerbated delays and resulted in "over-adjudication" of the supposedly efficient board procedures.[105]

Eventually, this all proved too much to bear; Congress took notice, heeded the calls for reform, and began the legislative process that would result in the CDA.

B. *Creating the CDA*

As stated by Senator Lawton Chiles during joint hearings on the CDA of 1978: "This legislation was not drafted overnight."[106] The first step toward reform came in 1969. Congress created the Commission on Government Procurement with the goals "to promote economy, efficiency, and effectiveness" in federal procurement.[107] In December 1972, the Commission recommended, among other things, several changes with the goal to create an efficient dispute resolution process, "induce resolution of more contract disputes by negotiation prior to litigation[,] equalize the bargaining power of the parties when a dispute exists[,] provide alternative forums suited to handle the different types of disputes[, and] ensure fair and equitable treatment of contractors."[108]

The Commission's overarching concern was that the contract disputes process be fair and provide efficient access to meaningful judicial review.[109]

103. *See* United States v. Wunderlich, 342 U.S. 98, 99–101 (1951) (except for issues of fraud, agencies may essentially preclude judicial review of their decisions relating to contract disputes by requiring contract clauses that declare the agency boards' factual and legal findings to be final). Note that, in response to this decision, Congress passed the Wuderlich Act, making Board decisions not final on questions of law and only final for issues of fact if supported by substantial evidence and not arbitrary, capricious, fraudulent, or clearly in bad faith. Act of May 11, 1954, ch. 199, 68 Stat. 81; Dees, *supra* note 10, at 547.

104. *See* U.S. Comm'n on Gov't Procurement, *supra* note 11, at 17; United States v. Carlo Bianchi & Co., 373 U.S. 709, 714 (1963) (holding that the board must find substantial evidence in the same record that was before it); United States v. Anthony Grace & Sons, Inc., 384 U.S. 424, 430–31 (1966) (holding remand necessary to cure defect in record); *see also* Kipps, Kindness & Hamrick, *supra* note 10, at 587.

105. *See* U.S. Comm'n on Gov't Procurement, *supra* note 11, at 16–18.

106. *Contract Disputes Act of 1978: Hearing on S. 2292, S. 2787, and S. 3178 Before the Subcomm. on Fed. Spending Practices & Open Gov't of the S. Comm. on Governmental Affairs and the Subcomm. on Citizens & S'holders Rights & Remedies of the S. Comm. on the Judiciary*, 95th Cong. 1 (1978) [hereinafter *Joint Hearings on S. 2292*] (opening statement of Senator Chiles).

107. Act of Nov. 26, 1969, Pub. L. No. 91-129, § 1, 83 Stat. 269, 269; *see also* Kipps, Kindness & Hamrick, *supra* note 10, at 588.

108. *See* U.S. Comm'n on Gov't Procurement, *supra* note 11, at 4.

109. *Id.* at 3 ("On the one side, the system is often too expensive and time consuming for efficient and fair resolution of claims . . . . On the other side, the present system often fails to pro-

They considered this essential to maintaining competition and sound procurement policy.[110] The Commission was concerned, and the Honorable Louis Spencer warned Congress, that "[u]nfair procedures drive the most efficient, low-cost contractors out of competition for [g]overnment contracts and encourage higher contingency bids from those who remain."[111] The House and Senate introduced separate bills to enact the Commission's recommendations and create comprehensive legislation to provide a fair and efficient contract dispute system.[112] The bills introduced before the House and Senate shared the following three fundamental similarities.

First, they provided that all claims would initially be submitted to the contracting officer, who would have authority to resolve all disputes relating to a procurement contract.[113] The new process would both encourage settlement of claims by negotiation and increase access to judicial review by eliminating the arbitrary distinction between claims for breach of contract and claims "arising under" a contract.[114] To avoid the undue delays that plagued the prior process, most agreed that there should be some statutory time limit for issuance of a contracting officer's decision, but controversy arose over how exactly this would work.[115] A hard deadline would work well for most simple claims, but large, complex claims would take longer for the contracting officer to meaningfully consider.[116] Ultimately, the CDA included a

vide the procedural safeguards and other elements of due process that should be the right of litigants.").

110. *Id.* ("It is essential to the competitive system that there be a sufficient number of prospective or actual competitors in the procurement process. If the concerns about inequities and inefficiencies in disputes-resolving procedures cause potential contractors to avoid [g]overnment work, the procurement process will suffer.")

111. *Joint Hearings on H.R. 664*, *supra* note 12, at 124 (statement of the Hon. Louis Specter, Commissioner, U.S. Court of Claims).

112. *Joint Hearings on S. 2292*, *supra* note 106, at 1 (opening statement of Senator Chiles) ("The legislation is based on a number of the Commission's recommendations which go to the heart of the problems in the current process."); S. REP. NO. 95-1118, at 1 (1978) ("The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternative forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and [g]overnment agencies . . . . [The bill] implements recommendations of the Commission on Government Procurement."); H.R. REP. NO. 95-1556, at 5 (1978) ("The purpose of the proposed legislation as amended is to provide for a fair and balanced system of administrative and judicial procedures for the settlement of administrative and judicial procedures for the settlement of claims and disputes relating to [g]overnment contracts.").

113. *See* H.R. REP. NO. 95-1556, at 6; S. REP. NO. 95-1118, at 21.

114. *See* H.R. REP. NO. 95-1556, at 18; S. Rep. NO. 95-1118, at 19–22; 124 CONG. REC. 36,267 (1978) (statement of Sen. Byrd).

115. *See*, *e.g.*, *Joint Hearings on S. 2292*, *supra* note 106, at 12–14 (statement of Admiral Hyman G. Rickover, Deputy Commander, Nuclear Power Directorate); *id.* at 286 (statement of Steven Young, Member, Nat'l Small Bus. Ass'n); *id.* at 118 (statement of Alan Joseph, Chairman, Pub. Contract Law Section, Am. Bar Ass'n); *Joint Hearings on H.R. 664*, *supra* note 12, at 208 (statement of Prospere Virden, Jr., Office of Gen. Counsel, Honeywell, Inc.); *id.* at 136 (explaining draft bill incorporating ABA approved recommendations).

116. *See* S. REP. NO. 95-1118, at 21; 124 CONG. REC. 36,267 (1978) (statement of Sen. Byrd); *see also* U.S. COMM'N ON GOV'T PROCUREMENT, *supra* note 11, at 19–20 (noting importance of a flexible system that can account for disputes of varying complexity).

hard deadline of sixty days for small claims and a more flexible, circumstantial deadline for larger claims.[117]

Second, they provided contractors a right to appeal the contracting officer's decision to an agency board or bring action on the claim directly in federal court.[118] In theory, this would give contractors a choice between efficiency at the boards and full due process in federal court.[119] The CDA allows contractors to choose between the boards and the Court of Federal Claims, but not district courts.[120]

Third, they provided for payment of interest on amounts found due on a contractor's claim.[121] Some controversy surrounded the issue of when interest would begin to run. Many suggested that interest should start as soon as the "claim accrues," but it was difficult to precisely explain when accrual began.[122] An alternative approach was to allow interest to start running as soon as the claim was submitted,[123] but some claims are made informally and lack the information and supporting documentation necessary for the contracting officer to make a well-reasoned, informed decision. In those cases, it would seem unfair to let interest begin running against the government before the contracting officer has adequate notice of the claim and the information necessary to stop the running of interest by granting the claimed relief.[124] The final version of the bill provided that interest would run from the date of the claim's submission.[125] Senator Robert Byrd explained this solution as a means of ensuring an easily identifiable date upon which to start running interest.[126]

One issue debated in the Senate, but not the House, related to the submission of unsubstantiated and fraudulent contractor claims.[127] Admiral Hyman G. Rickover's testimony triggered this discussion.[128] Admiral Rickover's experience overseeing acquisition of Naval vessels led him to believe that major shipbuilding contractors, with their teams of lawyers, were taking advantage

117. *See* 41 U.S.C. § 7103(f)(1)–(2) (2012).

118. *See* S. Rep. No. 95-1118, at 29; H.R. Rep. No. 95-1556, at 6.

119. *See* U.S. Comm'n on Gov't Procurement, *supra* note 11, at 23–24.

120. *See* 41 U.S.C. § 7104 (2012).

121. *See* H.R. Rep. No. 95-1556, at 7; S. Rep. No. 95-1118, at 32.

122. *See Joint Hearings on H.R. 664*, *supra* note 12, at 157–58 (statements of Alan Joseph, Chairman, Pub. Contract Law Section, Am. Bar Ass'n); *id.* at 158–59 (statement of John A. McWhorter); *id.* at 173–74 (statement of Carl Vacketta, Chairman, Bd. of Contract Appeals Comm., Gov't Contracts & Litig. Div.).

123. *See Joint Hearings on S. 2292*, *supra* note 106, at 297–98 (statement of Paul Andrews).

124. *See id.*

125. 41 U.S.C. § 7109(a) (2012).

126. *See* 124 Cong. Rec. 36,267 (1978) (statement of Sen. Byrd); *see also* W. Stanfield Johnson, *A Retrospective on the Contract Disputes Act*, 28 Pub. Cont. L.J. 567, 572–73 (1999).

127. *Compare* S. Rep. No. 95-1118, at 8 (1978) (discussing Admiral Rickover's testimony in relation to the issue of fraudulent or unwarranted claims), *with* H.R. Rep. No. 95-1556 at 16–31 (1978) (no corresponding discussion of fraudulent or unwarranted claims).

128. *See Joint Hearings on S. 2292*, *supra* note 106, at 5 (statement of Admiral Hyman G. Rickover, Deputy Commander, Nuclear Power Directorate, Naval Sea Sys. Command).

of the contract disputes process.[129] Admiral Rickover was particularly concerned with the idea that these contractors would submit large, unsubstantiated claims demanding more than they were entitled to, knowing that they could use their superior resources to negotiate a favorable settlement payment.[130] To that end, Rickover recommended that the CDA provide monetary penalties for unsubstantiated claims and require that all contractor claims be certified as "current, complete, and accurate."[131]

As noted by Charles Kipps, "[c]ertification of claims was not a recommendation of the Commission, was not in the bills as reported by the House and Senate Judiciary Committees, and was not in the bill as originally passed by the House."[132] Instead, two days before Congress adjourned, Senator Byrd offered a package of floor amendments that included a certification requirement whereby all contractor claims above $50,000 must be certified, and the contracting officer would not incur any obligation to issue a decision until such claims were properly certified.[133] It is often stated that Senator Byrd cited concerns raised in Admiral Rickover's testimony to explain the addition of the certification requirement,[134] but Senator Byrd actually cited Admiral Rickover's concerns for amending separate provisions unrelated to certification.[135] Nevertheless, the bill sent to the President included the certification requirement.[136]

The President signed the Contract Disputes Act of 1978 into law.[137] The Act was initially codified at 41 U.S.C. §§ 601–613, but in 2011, was moved to 41 U.S.C. §§ 7101–7109 as part of a formal codification of Title 41, with no substantive changes.[138] Note that the CDA was subsequently amended to raise the threshold for certification from $50,000 to $100,000.[139]

129. *See id.* at 5–6.

130. *See id.*

131. *See id.* at 33. Note that these recommendations did not go unchallenged. *See id.* at 118 (statement of Alan Joseph, Chairman, Pub. Contract Law Section, Am. Bar Ass'n) ("We think it is a serious error to design a remedies system around the shipbuilding problem because no system would be fully responsive to that problem."); *id.* at 160–61 (statement of Paul G. Dembling, General Counsel, Gov't Accounting Office) (responding that Rickover's recommended certification requirement is unnecessary in light of general anti-fraud laws).

132. *Court of Federal Claims Technical and Procedural Improvements Act: Hearing on S. 2521 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 102d Cong. 103 (1992) [hereinafter *Hearing on S. 2521*] (citing 124 Cong. Rec. 31,641–46 (1978)) (statement of Clarence T. Kipps, Jr., Chairman, U.S. Claims Court Advisory Council).

133. *See* 124 Cong. Rec. 36,266 (1978)

134. *See* Robert H. Koehler, *Certifying Claims Under the Contract Disputes Act of 1978—The Ghost of Rickover Past*, 21 Pub. Cont. L.J. 25, 32–33 (1991).

135. *See id.* at 32–34. Specifically, Senator Byrd cited Admiral Rickover, among others, to explain amending the timeframe within which a contracting officer's decision had to be issued and eliminating the requirement for an "informal conference" between contractors and the contracting officer. *See id.* at 34–35; 124 Cong. Rec. 36,266–67 (1978) (statement of Sen. Byrd).

136. Contract Disputes Act of 1978, Pub. L. 95-563, § 6, 92 Stat. 2383, 2385 (codified as amended at 41 U.S.C. §§ 7101-09 (2012)).

137. *Id.* § 14, 92 Stat. at 2391.

138. *See* Act of Jan. 4, 2011, Pub. L. No. 111-350, § 2, 124 Stat. 3677, 3677 (2011); *see also* H.R. Rep. No. 111-42, at 73–78 (2009).

139. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(b), 108 Stat. 3243, 3322 (1994).

C. *The CDA's Dispute Resolution Framework*

The CDA provides a procedural framework to resolve government and contractor claims. As relevant here, the five most important aspects of that framework relate to: (1) submission of claims to the contracting officer, (2) certification of claims, (3) issuance of the contracting officer's decision, (4) appeal of the contracting officer's decision, and (5) payment of interest.

First, the provisions relating to claim submission are currently codified at 41 U.S.C. § 7103(a).[140] The process slightly differs for government and contractor claims. Contractor claims against the government must be "in writing" and "submitted to the contracting officer for a decision."[141] There are no specific provisions relating to submission of a government claim except that they "shall be the subject of a written decision by the contracting officer."[142] Both contractor and government claims "shall be submitted within 6 years after the accrual of the claim," except for government claims that are based on a contractor claim involving fraud.[143] Contractors making unsupported claims are liable for the government's costs: "If a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud . . . the contractor is liable to the [f]ederal [g]overnment for an amount equal to the unsupported part of the claim plus all of the [f]ederal [g]overnment's costs attributable to reviewing the unsupported part of the claim."[144]

Second, for claims above $100,000, Section 7103(b) requires that the contractor "certify that—(A) the claim is made in good faith; (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the [f]ederal [g]overnment is liable; and, (D) the certifier is authorized to certify the claim on behalf of the contractor."[145]

Third, when a contractor submits a properly certified claim, the contracting officer is obligated to issue a timely written decision pursuant to Section 7103(f).[146] The CDA explicitly states that this obligation is not triggered if the contractor's claim is not properly certified, as long as the contracting officer provides written notice within sixty days "of the reasons why any attempted certification was found to be defective."[147]

As a general requirement, all decisions "shall be issued within a reasonable time," while "taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided

140. 41 U.S.C. § 7103(a) (2012).
141. *Id.* § 7103(a)(1)–(2).
142. *Id.* § 7103(a)(3).
143. *Id.* § 7103(a)(4)(A)–(B).
144. *Id.* § 7103(c)(2).
145. *Id.* § 7103(b)(1).
146. *Id.* § 7103(f).
147. *Id.* § 7103(b)(3).

by the contractor."[148] For claims of less than $100,000, the decision must be issued within sixty days "from the contracting officer's receipt of a written request from the contractor that a decision be rendered within that period."[149] For claims exceeding $100,000, the contracting officer has "[sixty] days of receipt of a submitted certified claim" within which to either issue a decision or "notify the contractor of a time within which a decision will be issued."[150]

If there is "undue delay on the part of the contracting officer," the contractor may request a tribunal to require the "contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned."[151] Failure to issue a decision within the required time period "is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim."[152] Once a contracting officer's decision is issued or "deemed denied," Section 7103(g) provides that the decision is "final and conclusive and is not subject to review by any forum, tribunal, or [f]ederal [g]overnment agency, unless an appeal or action is timely commenced as authorized by this chapter."[153]

Fourth, the procedures for appealing a contracting officer's decision are codified at 41 U.S.C. § 7104.[154] Paragraph (a) provides that the contractor may appeal the final decision of a contracting officer to a Board of Contract Appeals within ninety days from receipt of the decision.[155] Paragraph (b)(1) provides that in nearly all circumstances a "contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary."[156] Paragraph (b)(3) requires a claim brought to the Court of Federal Claims be filed within twelve months after receiving the contracting officer's decision.[157]

Fifth, 41 U.S.C. § 7109 provides that if a contractor is successful and found to be owed money on the claim, then the contractor is entitled to interest from the date of the claim's submission through the date the claim is paid.[158] If the certification is defective, interest is still calculated from the date the initial claim was received.[159]

148. *Id.* § 7103(f)(3).
149. *Id.* § 7103(f)(1).
150. *Id.* § 7103(f)(2).
151. *Id.* § 7103(f)(4).
152. *Id.* § 7103(f)(5).
153. *Id.* § 7103(g).
154. *Id.* § 7104.
155. *Id.* § 7104(a).
156. *Id.* § 7104(b)(1).
157. *Id.* § 7104(b)(3).
158. *Id.* § 7109(a)(1).
159. *Id.* § 7109(a)(2).

D. *The CDA's Jurisdictional Framework*

The CDA is currently interpreted to contain four jurisdictional prerequisites: (1) claim submission, (2) certification for claims over $100,000, (3) issuance of a contracting officer's decision, and (4) timely appeal of the contracting officer's decision.[160] Prior to 2014, courts also treated the six-year deadline to file a claim jurisdictionally,[161] but the Federal Circuit reversed that line of precedent in the 2014 *Sikorsky* decision—finding that the statute of limitations does not speak in jurisdictional terms.[162]

The requirements for a contracting officer's decision and timely appeal therefrom need little explanation. The Federal Circuit has long held that issuance of a contracting officer's final decision is a jurisdictional prerequisite and that the scope of a review on a tribunal's jurisdiction is limited to the issues addressed in the final decision.[163] Once the decision is issued or deemed denied, a contractor's failure to timely appeal to a Board of Contract Appeals within ninety days or bring an action at the Court of Federal Claims within twelve months is treated as a jurisdictional bar to future judicial review.[164] The claim submission and certification requirements require considerable discussion.

1. Claim Submission

The Court of Claims gave jurisdictional status to the claim submission requirement in the 1981 decision *Paragon Energy Corporation v. United States*,[165] and the Federal Circuit adopted its predecessor's position.[166] The court's reasoning in *Paragon* started with the premise that its own jurisdiction is preconditioned on the issuance of a contracting officer's decision, but then made an unexplained, illogical leap to assert that the contracting officer lacks any authority to issue a decision until a contractor's claim is properly submitted.[167] Thus, even when a contracting officer's decision is actually issued (as it was in *Paragon*), failure to submit a claim in accordance with the CDA is a jurisdictional defect.[168]

160. *See, e.g.*, Paradigm Learning, Inc. v. United States, 93 Fed. Cl. 465, 466, 471 (2010).

161. *See* Sys. Dev. Corp. v. McHugh, 658 F.3d 1341, 1347 (Fed. Cir. 2011); Arctic Slope Native Ass'n, Ltd. v. Sebelius, 583 F.3d 785, 793, 800 (Fed. Cir. 2009).

162. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320–22 (Fed. Cir. 2014).

163. *See, e.g.*, United Pac. Ins. Co. v. Roche, 294 F.3d 1367, 1369–70 (Fed. Cir. 2002); Dewey Elecs. Corp. v. United States, 803 F.2d 650, 655 (Fed. Cir. 1986).

164. *See, e.g.*, Rex Sys., Inc. v. Cohen, 224 F.3d 1367, 1371 (Fed. Cir. 2000) (addressing time to appeal to COFC); D.L. Braughler Co. v. West, 127 F.3d 1476, 1480 (Fed. Cir. 1997) (addressing time to appeal to a Board of Contract Appeals); Cosmic Constr. Co. v. United States, 697 F.2d 1389, 1390 (Fed. Cir. 1982).

165. Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981).

166. *See* Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995); Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992), *overruled in part on other grounds by Reflectone*, 60 F.3d at 1572; Sharman Co. v. United States, 2 F.3d 1564, 1568–69 & n.6 (Fed. Cir. 1993), *overruled in part on other grounds by Reflectone*, 60 F.3d at 1572.

167. *Paragon*, 645 F.2d at 971.

168. *Id.*

The jurisdictional requirements associated with claim submission are not limited to the CDA's mandate that contractor claims "shall be in writing" and "shall be submitted to the contracting officer for a final decision."[169] The Court of Claims and the Federal Circuit relied on the regulatory definition of "claim" to create several subsidiary requirements that must be met to properly submit a claim—each of which is treated as an independent jurisdictional prerequisite.[170]

Despite the recognized importance of jurisdictional tests being clear and predictable,[171] the subsidiary claim submission requirements are unintuitive, highly contextual, fact-specific, and often subjective. Three examples illustrate the complexity of these jurisdictional tests. First, a claim for payment must demand, "as a matter of right," a "sum-certain," which essentially requires the contractor to assert entitlement to the specific amount of money or at least provide enough information that the amount can be easily calculated.[172]

Second, "routine" requests for payment (i.e., requests made under the terms of the contract) must be "in dispute" before they qualify as claims, whereas "non-routine" requests for payment (i.e., requests based on unforeseen or unintended consequences) need not meet the additional "in dispute" requirement.[173] The distinction between "routine" and "non-routine" requests "depends largely on the facts under which it arose relative to the overall scheme of the contract and the parties' expectations."[174] It is also eerily similar to the pre-CDA distinction between claims "arising under" the contract and claims for breach of contract.[175]

Third—as alluded to in this article's introductory hypothetical—contactor claims must request a contracting officer's final decision.[176] This is a subjective inquiry—as long as the overall tenor of correspondence indicates that the con-

169. 41 U.S.C. § 7103(a)(1)–(2) (2012).

170. *See Reflectone*, 60 F.3d at 1575 (relying on FAR definition to discern jurisdictional requirements associated with claim submission); D.L. Braughler Co. v. West, 127 F.3d 1476, 1480 (Fed. Cir. 1997) (internal citations omitted) ("If a contractor's submission fails to meet all of the above requirements, it is not a 'claim,' and the contracting officer has no authority to issue a final decision on the submission. As a result, any subsequent proceedings on the submission have no legal significance.").

171. *See supra* note 36 and accompanying text.

172. *See* CIBINIC, JR., NAGLE & NASH, JR., *supra* note 96, at 1167–69 (explaining "sum certain" requirement); Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1265 (Fed. Cir. 1999) (internal citation omitted) ("[T]he phrase 'as a matter of right' in the regulatory definition of a claim requires only that the contractor specifically assert entitlement to the relief sought. That is, the claim must be a demand for something due or believed to be due rather than, for example, a cost proposal for work the government later decides it would like performed."); Essex Electro Eng'rs, Inc. v. United States, 960 F.2d 1576, 1580–81 (Fed. Cir. 1992), *overruled on other grounds by Reflectone*, 60 F.3d at 1572 (justifying deference to the FAR's sum-certain requirement).

173. *See Reflectone*, 60 F.3d at 1575 (explaining requirements for non-routine requests); Parsons Glob. Servs., Inc. v. McHugh, 677 F.3d 1166, 1170–71 (Fed. Cir. 2012).

174. *Parsons*, 677 F.3d at 1170–71, 1172 n.6 (citations omitted) (internal quotation marks omitted).

175. *See supra* notes 97-101 and accompanying text.

176. CIBINIC, JR., NAGLE & NASH, JR., *supra* note 96, at 1169–71; James M. Ellet Constr. Co., v. United States, 93 F.3d 1537, 1543 (Fed. Cir. 1996).

tractor desires final action by the contracting officer, that prong of the CDA is met.[177] As such, requests for a final decision can be implicit; no specific wording is required.[178] There is no necessary inconsistency between a request for final decision and an expressed desire to work mutually toward a claim's resolution.[179] But, if the overall tenor of the request suggests that the contractor is actually requesting continued negotiation, then a final decision has not been sought, and jurisdiction is lacking.[180] In that event, the correspondence may "ripen" into a claim once negotiations reach impasse.[181]

2. Certification

The Court of Claims gave jurisdictional status to the CDA's certification requirement in the 1981 decision *Paul E. Lehman, Inc. v. United States*,[182] and the Federal Circuit adopted its predecessor's position.[183] The court primarily based the justification given in *Paul E. Lehman* for granting the certification requirement jurisdictional status on legislative history. The Court of Claims started from the flawed proposition that Senator Byrd justified the certification requirement as a response to concerns raised by Admiral Rickover.[184] The court then concluded that Rickover viewed certification as a prerequisite to the disputes process: "Admiral Rickover viewed the certification requirement as a necessary prerequisite to the consideration of any claim. The provisions Congress adopted to include the certification requirement were based upon Admiral Rickover's written suggestions and fairly must be deemed to have incorporated his view concerning the effect of the certification requirement."[185] As with the claim submission requirement, the Court of Claims reasoned that, absent proper certification, the contracting officer lacks any statutory authority to issue a final decision.[186]

This general requirement, coupled with controversial regulations regarding which individuals within a company had authority to certify, resulted in a tidal wave of litigation relating to motions to dismiss for lack of jurisdiction due to inadequate certification.[187] In response to outrage and calls for re-

177. Cibinic, Jr., Nagle & Nash, Jr., *supra* note 96, at 1169–71; Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1578 (Fed. Cir. 1992).

178. *Transamerica*, 973 F.2d at 1578.

179. *Id.* at 1579.

180. *See* Cibinic, Jr., Nagle & Nash, Jr., *supra* note 96, at 1170–71; Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 485–86 (Fed. Cir. 1993); *James M. Ellet*, 93 F.3d at 1543–44.

181. *See James M. Ellet*, 93 F.3d at 1543–44; Rex Sys., Inc. v. Cohen, 224 F.3d 1367, 1371 (Fed. Cir. 2000).

182. Paul E. Lehman, Inc. v. United States, 673 F.2d 352, 355 (Ct. Cl. 1982).

183. *See* W.M. Schlosser Co. v. United States, 705 F.2d 1336, 1337–39 (Fed. Cir. 1983).

184. *Paul E. Lehman*, 673 F.2d at 354–55. See *supra* note 135 and accompanying text for explanation of Senator Byrd's comments explaining the amendment.

185. *Paul E. Lehman*, 673 F.2d at 355.

186. *Id.* at 355.

187. *See, e.g.*, Ruth C. Burg, *The Role of the Court of Appeals for the Federal Circuit in Government Contract Disputes: A Historic View from the Bench*, 42 Pub. Cont. L.J. 173, 175 (2012) ("For fourteen years, motion after motion (numbering in the thousands) challenging the validity of a certification followed. This plethora of motions was extremely frustrating since it impacted not

form,[188] Congress attempted a legislative remedy through the Federal Courts Administration Act of 1992, which: (1) clarified who could certify a claim, (2) provided that the contracting officer had no obligation to issue a final decision on a claim that was not properly certified, and (3) affirmed that "[a] defect in the certification of a claim shall not deprive a court or an agency board of jurisdiction over that claim."[189]

Just before sending the bill to President Clinton, Senator Helfin explained that the latest version of the bill would balance concerns expressed by key witnesses[190] during Senate hearings by retaining the incentives created by the certification requirement while eliminating the wasteful litigation resulting from its jurisdictional classification:

> [The amendment] will eliminate the confusion and waste of resources that have resulted from the Contract Disputes Act certification being deemed jurisdictional, while both addressing the Justice Department's concern that contractors have sufficient incentive to properly certify their claims, and ensuring that all claims are properly certified before they are paid.
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> ***

only a particular case where, if the certification was invalid, the matter had to start all over, but the entire docket . . . too many motions were litigation strategy by the government or, at times, contractor counsel to delay proceeding with the dispute on its merits."); *see also* Nash & Cibinic, *supra* note 17, ¶ 29 ("There have been so many defective certification cases over the years that they would make a veritable rogue's gallery of wasted effort . . . . I would guess that this has happened approximately 500 times since the CDA was passed . . . . The result is mighty curious for an Act that was passed to make the disputes process for efficient—and certainly reveals a serious flaw in the CDA.").

188. *See* Nash & Cibinic, *supra* note 17, ¶ 29; Kipps, Kindness & Hamrick, *supra* note 1086, at 592–95; H.R. Rep. No. 102-1006, at 28 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3921, 3931 ("Wasteful and esoteric litigation over this issue has produced several hundred written and, oftentimes, conflicting opinions from various courts and agency appeal boards."); *see also* United States v. Grumman Aerospace Corp., 927 F.2d 575, 583–84 (Fed. Cir. 1991) (Plager, J., dissenting); Aleman Food Servs., Inc. v. United States, 24 Cl. Ct. 345, 352 (1991) ("[T]his court also will not interpret the certification requirements so rigidly that ordinary business ventures will be brought to their knees and that the prospect of doing business with the government will becomes so unappealing that sensible businessmen will refuse to enter into business relationships with the sovereign, to the detriment of its citizenry.").

189. Federal Courts Administration Act of 1992, Pub. L. No. 102–572, § 907, 106 Stat. 4506, 4518 (codified in scattered sections of 18 and 28 U.S.C.).

190. *Hearing on S. 2521*, *supra* note 132, at 2–3 (statement of Loren A. Smith, Chief Judge, U.S. Claims Court) ("The court feels very strongly that certification is a good thing, and nothing in your bill would change that, would in any way weaken certification. What it would do is eliminate a very serious problem that is costing American citizens, many of them small business people having one-man businesses, some being large businesses employing many thousands of workers, a lot of money unnecessarily. It is also imposing a burden on the court system . . . . I think the worst thing a judge can do is spend a lot of the judge's time and feel that at the end of that they really accomplished nothing; they have just been spinning the wheels of the system of justice. It brings our system into disrepute, and the current system of making certification jurisdictional does exactly that."); *id.* at 11–12 (describing the possibility of ambush by government motion to dismiss for lack of jurisdiction after trial based on defect in certification); *id.* at 32 (statement of Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Div., Dep't of Justice) ("Elimination of the jurisdictional nature of the certification requirement for purposes of proceedings pursuant to . . . [the CDA] would appear to do away with *any* incentive for a contractor to comply with the certification requirement.").

> [The amendment] . . . will permit the contracting officer to notify a contractor within 60 days of receiving a claim that the certification is defective. If a timely notification is provided, the 60 day period for issuing a final decision will not begin to run until the defect is cured and a proper certification submitted, and the claim will not be deemed denied. This will create a strong incentive for contractors to carefully certify their claims because until a proper certification is filed the contractor will not be able to appeal to the Court of Federal Claims or agency board. If the contracting officer issues a decision on a claim that is not properly certified, the contractor may appeal that decision and the Court of Federal Claims or agency board will have jurisdiction but must require that the contractor provide a valid certification before a decision is rendered or the contractor is paid.[191]

Despite the amendment's plain language and legislative intent, the Boards of Contract Appeals and certain judges of the Court of Federal Claims distinguish between "defective certification" and "failure to certify," the latter of which is still treated as a jurisdictional bar.[192] The basis for this distinction is primarily rooted in the FAR, which states that "[f]ailure to certify shall not be deemed to be a defective certification."[193] The distinction is often also supported by reference to legislative history that purports to explain which types of certification defects would satisfy the term "technically defective." That discussion concerned an early proposed amendment to the bill that would have provided: "If the certification of a claim pursuant to this Act is technically defective, a court or agency board of contract appeals may permit the certification to be corrected at any time prior to a final decision."[194] But the bill ultimately excluded the "technically defective" language,[195] so reliance on any discussion of that term is irrelevant to defining the scope of the version of the passed amendment.[196]

The Federal Circuit does not appear to have provided a precedential holding as to whether failure to certify is still a jurisdictional defect after

191. 138 CONG. REC. 34,204 (1992).

192. *See* CIBINIC, JR., NAGLE & NASH, JR., *supra* note 96, at 1175–77. The Court of Federal Claims judges appear to be divided on this subject. *Compare* Engineered Demolition, Inc. v. United States, 60 Fed. Cl. 822, 827–28 (2004) (Lettow, J.) (reading legislative history to suggest that Congress did not intend to distinguish between failure to certify and defecting certification; explaining that the FAR's definitional distinction is overbroad to the extent that it purports to limit the court's jurisdiction over contract disputes), *with* Scan-Tech Sec., L.P. v. United States, 46 Fed. Cl. 326, 334–39 (2000) (Bush, J.) (reading legislative history and case law to find that Congress did not intend the 1992 amendments to eliminate the certification requirement and relying on the FAR's definition to justify a distinction between failure to certify and defective certification); Estes Express Lines v. United States, 123 Fed. Cl. 538, 550 (2015) (Griggsby, J.) (stating, without discussion, that failure to certify is a jurisdictional defect); Williams v. United States, 118 Fed. Cl. 533, 539 n.7 (2014) (Bruggink, J.) (explaining that failure to certify is a jurisdictional defect). Note that Judge Bush, the author of *Scan-Tech*, subsequently suggested in an unpublished decision that failure to certify may not be a jurisdictional defect. *See* M.K. Ferguson Co. v. United States, No. 12–57 C, 2016 WL 1551650, at *4 & n.4 (Fed. Cl. Apr. 14, 2016).

193. FAR 33.201.

194. 138 CONG. REC. 21,033 (1992).

195. 138 CONG. REC. 31,172 (1992).

196. *See Engineered Demolition*, 60 Fed. Cl. at 827–29 (setting forth legislative history of 1992 amendment).

the 1992 amendments; however, it has suggested in dicta and non-precedential opinions that failure to certify is not a jurisdictional issue.[197] Nevertheless, as explained above, the lower tribunals continue treat it as such. Even though the Supreme Court has repeatedly emphasized the importance of clear and predictable jurisdictional tests,[198] the Court of Federal Claims decisions attempting to determine whether a contractor provided defective certification or failed to certify reveal that it can be a very complex, even convoluted determination.[199] It is not as simple as looking for the FAR's provided certification language, because the Federal Circuit has long held that the certification need not contain any magic words or match the certification language provided by the CDA or the FAR.[200] Thus, courts must make a factual determination as to whether the language in documents submitted by the contractor is close enough to the FAR's certification language to constitute a defect in certification or a complete failure to certify.[201]

IV. REASSESSING THE CDA'S JURISDICTIONAL REQUIREMENTS AFTER *ARBAUGH*

Having set out the mechanisms of the CDA and the Federal Circuit's jurisdictional treatment of its requirements, this Part reconsiders the propriety of that jurisdictional treatment in light of the Supreme Court's guidance in the *Arbaugh* line of cases. To determine whether a statutory requirement limits a court's jurisdiction, it is necessary to first look at the tribunal's statutory grant of jurisdiction over the type of case in question.[202] Thus, Section A looks to the statutory grants of jurisdiction over CDA cases to the Court of Federal Claims and Boards of Contract Appeals. Doing so reveals

197. *See* M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1329 (Fed. Cir. 2010) ("[W]hile technical compliance with certification is not a jurisdictional prerequisite to litigation of a contractor's claim under the CDA, it is a requirement to the maintenance of such an action."); J&E Salvage Co. v. United States, No. 97-5066, 1998 WL 133265, at *6 n.4 (Fed. Cir. Mar. 25, 1998) ("Pursuant to the Federal Courts Administration Act of 1992, proper certification of a CDA claim is no longer a jurisdictional requirement."); James M. Ellet Constr. Co., v. United States, 93 F.3d 1537, 1545 (Fed. Cir. 1996) ("We part ways with the government as its predicate: that a proper certification of the settlement proposal was a jurisdictional prerequisite.").

198. *See* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1185–86 (2010)

199. Scan-Tech Sec., L.P. v. United States, 46 Fed. Cl. 326, 334–40 (2000); *M.K. Ferguson*, 2016 WL 1551650, at *3–13.

200. *See* Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1580 (Fed. Cir. 1992).

201. *See e.g.*, Scan-Tech Sec., L.P. v. United States, 46 Fed. Cl. 326, 334–40 (2000); M.K. Ferguson Co. v. United States, No. 12–57 C, 2016 WL 1551650, at *3–13 (Fed. Cl. Apr. 14, 2016).

202. This is a common trend to the Supreme Court's cases in this area. *See*, *e.g.*, Gonzalez v. Thaler, 565 U.S. 134, 145 (2012) ("Congress set off the requirements in distinct paragraphs and, rather than mirroring their terms, excluded the jurisdictional terms in one from the other[s]."); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 164 (2010) (emphasizing that the Copyright Act's registration requirement "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over" copyright infringement claims); Henderson v. Shinseki, 562 U.S. 428, 439 (2011).

that issuance of a contracting officer's decision is a prerequisite to those tribunals' jurisdictional grants. That does not mean, however, that all statutory requirements associated with issuance of a contracting officer's final decision are also elevated to jurisdictional status. With that context, Sections B, C, and D, respectively, demonstrate that claim submission, certification, and timely appeal are not jurisdictional requirements, just important claim-processing rules.

A. *Issuance of a Contracting Officer's Decision Is a Jurisdictional Prerequisite to CDA Litigation*

When examining the statutory provisions granting the Court of Federal Claims and the Boards of Contract Appeals jurisdiction over CDA cases, it is clear that those jurisdictional grants are contingent on the issuance or deemed denial of a contracting officer's decision. Nevertheless, just because a decision by the contracting officer is a jurisdictional prerequisite to CDA litigation does not mean that every statutory requirement ancillary to the issuance of a contracting officer's decision is also jurisdictional.

The requirement for issuance of a contracting officer's decision satisfies *Arbaugh*'s bright line test because the need for such a decision is stated in jurisdictional terms that limit the adjudicative authority of the Boards of Contract Appeal and the Court of Federal Claims. As explained above in Part I.A, perhaps the clearest example of a jurisdictional requirement provided by the Supreme Court is the amount-in-controversy rule associated with district courts' diversity jurisdiction:[203] "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . ."[204]

Just as that requirement is incorporated directly into the same statutory language granting district courts diversity jurisdiction,[205] the need for a contracting officer's decision is, likewise, tied directly into the same statutory language that grants the Boards of Contract Appeals and the Court of Federal Claims their jurisdiction over CDA cases. The Boards obtain their jurisdiction through the CDA's provisions at 41 U.S.C. § 7105(e), which provide that each Board "has jurisdiction to decide any appeal from a decision of a contracting officer . . . ."[206] The Court of Federal Claims receives jurisdiction over CDA cases from Section 1491(a)(2) of the Tucker Act, which explicitly conditions its grant on the issuance of a contracting officer's decision:

> 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, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other non-

203. *See supra* notes 49-55 and accompanying text.
204. 28 U.S.C. § 1332(a) (2012).
205. *Id.*
206. 41 U.S.C. § 7105(e)(1) (2012).

> monetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.[207]

Those jurisdictional grants are clearly conditioned upon the issuance of a contracting officer's decision, and thus, the issuance of such a decision is properly categorized as a jurisdictional requirement.

Note that the Tucker Act's reference to "section 6 of that Act" corresponds to what is now 41 U.S.C. § 7103, which dictates the rules for claim submission, certification, and issuance of a final decision, among other requirements.[208] Just because the Court of Federal Claim's jurisdictional grant references compliance with the provisions in Section 7103, it does not mean all of the requirements of that section are also jurisdictional. The Supreme Court's analysis in *Steel* is instructive.[209] In that case, the Court considered a statutory grant of jurisdiction that provided: "The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement."[210] The Court explained that: "It is unreasonable to read this as making all the elements of the cause of action under subsection (a) as jurisdictional, rather than as merely specifying the remedial powers of the court, viz., to enforce the violated requirement and to impose civil penalties."[211] The same is true for the Tucker Act.

Likewise, just because the Boards' jurisdiction relies on a contracting officer's decision does not mean that every statutory requirement relating to issuance of that decision also carries jurisdictional weight. As demonstrated in *Gonzalez*, a statutory requirement does not obtain jurisdictional status just because it is a mandatory element of a requirement that is jurisdictional.[212] In that case, the Court recognized that a Circuit Court of Appeals' jurisdiction to review the final decision of a district court in a federal habeas proceeding was contingent on obtaining a "certificate of appealability" from the district court.[213] However, it held that separate provisions dictating unequivocal requirements for when the certificate may issue and what it must contain were not jurisdictional, because those requirements did not speak to jurisdiction and were located in separate provisions from those that did.[214] The same should be true for statutory requirements that are mandatory aspects of a contracting officer's decision.

As demonstrated in the next two sections, the jurisdictions of the Court of Federal Claims and Boards of Contract Appeals should not be conditioned

207. 28 U.S.C. § 1491(a)(2) (2012) (footnote omitted).

208. *See* Contract Disputes Act of 1978, Pub. L. 95-563, § 6, 92 Stat. 2383, 2384–85 (codified as amended at 41 U.S.C. §§ 7101-09 (2012)).

209. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998).

210. *See id.* (quoting 42 U.S.C. § 11,046(c)).

211. *See id.*

212. *See supra* notes 57–62 and accompanying text.

213. *See* Gonzalez v. Thaler, 565 U.S. 134, 140–41 (2012).

214. *Id.*

on the submission or certification of a claim. Nor can those requirements be given jurisdictional status just because they may be prerequisites to issuance of a contracting officer's decision. Instead of being limitations on any tribunal's adjudicative authority claim submission and certification are just mandatory claim-processing rules—albeit important ones.

B. *Claim Submission Is Not Jurisdictional*

The two provisions of the CDA that most clearly articulate a claim submission requirement are those of Section 7103(a), which require that contractor claims "shall be in writing" and "shall be submitted to the contracting officer."[215] Those requirements do not speak to adjudicative authority; they dictate behavior of the parties and thus are more accurately characterized as nonjurisdictional claim processing rules.[216] Context confirms this, as the rules for claim submission are located in an entirely different statutory section than those that grant the Court of Federal Claims and Boards of Contract Appeals jurisdiction over CDA cases, making no reference to proper claim submission.[217]

The analysis in *Paragon*[218]—concluding that claim submission is a jurisdictional requirement because the contracting officer lacks authority to issue a final decision until the contractor submits a claim—is unsupported by the CDA's text and legally insufficient. In some circumstances, submission of a claim triggers the contracting officer's statutory *obligation* to issue a final decision within a certain time frame, but nothing in the CDA suggests that submission of a claim triggers the contracting officer's *authority* to issue a decision.[219] And even if submission of a claim is a prerequisite to the issuance of a contracting officer's decision, that alone would not automatically make claim submission a jurisdictional requirement. As demonstrated in *Gonzalez*, a requirement does not obtain jurisdictional status simply because it is a mandatory element of a requirement that does have jurisdictional status.[220]

Section 7104(b)(1) of the CDA, which sets forth procedures for appealing a contracting officer's final decision, provides that a contractor "may bring an action directly on the claim in the United States Court of Federal Claims."[221] This provision cannot be read to create a jurisdictional requirement that a claim must be submitted to the contracting officer before the Court of Federal Claims can exercise jurisdiction. It does not speak to the Court of Federal Claims' jurisdiction, but instead to procedural rights and obligations of the

215. 41 U.S.C. § 7103(a)(1)–(2) (2012).
216. *See supra* notes 49–55 and accompanying text.
217. *See supra* notes 57, 209–10 and accompanying text.
218. *See* Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981).
219. 41 U.S.C. § 7103(f)(2) ("A contracting officer shall, within [sixty] days of receipt of a certified claim over $100,000 . . . . ").
220. *See supra* notes 58–62 and accompanying text.
221. 41 U.S.C. § 7104(b)(1).

contractor after receipt of a contracting officer's decision. Context confirms this, as the Court of Federal Claim's jurisdictional grant is in an entirely different statutory provision that references only the issuance of a contracting officer's decision, not a "claim."[222]

Even if the provision could be read to mean that the contractor cannot appeal a contracting officer's decision to the Court of Federal Claims unless it submits a claim to the contracting officer, that still would not give the claim submission requirement jurisdictional status. This follows from the Court's analysis in *Reed Elsevier*, which considered the Copyright Act's registration requirement.[223] District courts have jurisdiction over copyright infringement claims, and the Copyright Act authorizes infringement claims, but provides that "no civil action for infringement of the copyright . . . shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."[224] Even though the Copyright Act clearly requires registration before bringing an infringement claim,[225] in *Reed Elsevier*, the Court held that that registration requirement is nonjurisdictional because it does not speak in jurisdictional terms and is located in separate statutory provisions than those that give district courts jurisdiction over copyright infringement claims.[226] Likewise, even if contractors' right to bring an action directly to the Court of Federal Claims is conditioned on submitting a claim to the contracting officer, it does not follow that the claim submission rules are jurisdictional, because they do not speak to the Court of Federal Claims' adjudicative authority and are located in an entirely different statutory section than those that do.

Unlike the filing deadlines at issue in *Bowles*[227] and *John R. Sand*,[228] no long line of Supreme Court precedent treats the claim submission requirement as a jurisdictional prerequisite.[229] While the Federal Circuit has treated the claim submission requirement as jurisdictional for several decades,[230] the Supreme Court has repeatedly indicated that its own precedent, not any lower court's, matters in this regard.[231] Further, in *Reed Elsevier*, Justice

222. 41 U.S.C. § 7104(b)(1); *see also supra* notes 206–10 and accompanying text.
223. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 169 (2010).
224. *Id.* at 163 (quoting 17 U.S.C. § 411(a) (2006)).
225. *Id.*
226. *Id.* at 166.
227. *See* Bowles v. Russell, 551 U.S. 205, 206–07 (2008).
228. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–34 (2008).
229. *See supra* notes 62-67 and accompanying text.
230. *See supra* notes 166-167 and accompanying text.
231. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 167–68 (2010) (internal citations omitted) ("*Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such . . . . Rather, *Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."); United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1635–36 (2015) ("What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from this court's prior rulings, not Congress's choice of wording."); Henderson v. Shinseki, 562 U.S. 428, 436 (2011) (citations omitted) (internal quotation marks omitted) ("When a long line of this Court's deci-

Thomas, the author of *Bowles*, acknowledged that lower courts had historically interpreted the copyright registration requirement as a jurisdictional prerequisite but explained how that alone was not enough to give jurisdictional status to this provision.[232]

Given the text, context, and past Supreme Court interpretation of the claim submission requirement, there is no basis for affording it jurisdictional weight. Because claim submission is not jurisdictional, it follows that neither are any of the judicially and administratively conjured elements of claim submission—e.g., the need to demand a "sum-certain," the need for "routine" requests for payment to be "in dispute," and the need to request a final decision.[233] These elements of claim submission lack any support in the statutory text, much less a clear statement of jurisdictional import.

More fundamentally, the current jurisdictional treatment of the claim submission requirement undermines the very purpose of the CDA. The CDA resulted from the comprehensive reform undertaken because the prior system failed to give contractors reliable and efficient access to meaningful judicial review.[234] Only inefficiency and inequity result from allowing agency counsel and the Department of Justice to impede judicial review by having a case dismissed for lack of jurisdiction based on the argument that the contracting officer's decision was invalid because the contractor failed to adequately request it.

This does not mean that the claim submission requirement or its subelements are meaningless; to the contrary, they are important, mandatory claim processing rules. Until a claim is submitted, the contracting officer has no obligation to issue a written decision and interest does not being to run.[235] As demonstrated throughout the legislative history, those are critical aspects of the CDA's design—it is important that the contracting officer not be forced to issue a final decision or incur interest on behalf of the government before the contracting officer receives adequate notice of the contractors' claim and enough information to resolve that claim.[236] In that context, it makes sense that contractors must submit written claims to the contracting officer and request a decision before triggering the contracting officer's obligation to write a decision or the government's obligation to pay interest.[237]

sions left undisturbed by Congress, has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course.").

232. *Reed Elsevier*, 559 U.S. at 169 ("Although § 411(a)'s historical treatment as 'jurisdictional' is a factor in the analysis, it is not dispositive.").

233. *See supra* Part II.D.1.

234. *See supra* Part II.

235. 41 U.S.C. § 7103(f) (2012); 41 U.S.C. § 7109(a) (2012).

236. *See supra* notes 113–126 and accompanying text.

237. Government contracts practitioners need not look far for an analogy that can distinguish a congressionally mandated right to payment from congressionally mandated accrual of interest on a payment. The Prompt Payment Act, 31 U.S.C. § 3901 (2012), generally mandates a self-executing interest remedy when the government fails to timely pay a proper invoice, but the government is never obligated to pay an invoice that is improperly submitted. However, if the government fails to promptly notify the contractor any defect in the invoice, then interest begins to accrue in the con-

However, nothing in the CDA's legislative history supports the proposition that failure to submit a particular kind of claim in a particular kind of way could create a jurisdictional defect that fatally infects all subsequent proceedings. In the CDA's entire, voluminous legislative history, there is not a single discussion relating to the manner of claim submission that might be sufficient to trigger the CDA's dispute resolution procedures.[238] As noted by Professors Nash and Cibinic shortly after the CDA passed, the only discussion about when a contractor submission would constitute a "claim" occurred in the context of determining when interest would begin to run.[239] All reasonable implications suggest that the issuance of a contracting officer's decision, not the submission of a contractor's claim (or certification), would trigger the procedures envisioned by Congress and the Commission on Government Procurement. Perhaps the most compelling evidence that the drafters of this legislation intended the process to begin at the contracting officer's decision, and not include any particularly important claim submission step, are two figures provided in the Commission's report and the Senate Report: both graphically illustrate their proposed dispute resolution systems, both begin with the contracting officer's decision, and neither illustrate a claim submission step.[240]

C. *Certification Is Not Jurisdictional*

The CDA's requirement that a contractor "shall certify" claims for more than $100,000[241] does not speak in jurisdictional terms. Like the claim submission rules, the certification requirement dictates parties' behavior, not any tribunal's adjudicative authority, and is thus nonjurisdictional.[242] Context confirms this because the certification requirement is located in an entirely different statutory section than those that grant the Court of Federal Claims and Boards of Contract Appeals with jurisdiction over CDA cases.[243] The Court of Claim's reasoning in *Paul E. Lehman*—that certification is jurisdictional because "Admiral Rickover viewed the certification re-

tractor's favor (until a proper invoice leads to payment). *See* FAR 32.904(b)(1)(ii)(B)(3); FAR 32.905(b)(3).

238. Neither the Senate nor House reports on the Contract Disputes Act devote any attention to the claim submission requirement. *See* S. REP. NO. 95-1118 (1978); H.R. REP. NO. 95-1556 (1978). Nor did any witness in any hearing. *See* JOHN CIBINIC, JR. & RALPH C. NASH, JR., GOVERNMENT CONTRACT CLAIMS 58–59 (1981). Even though the Department of Justice objected to practically every aspect of the proposed legislation, it never voiced any concern that the definition of claim need be limited. *See Joint Hearings on S. 2292*, *supra* note 106, at 175–87 (statement of Irving Jaffe, Deputy Assistant Attorney General, Civil Div., U.S. Dep't of Justice).

239. *See* CIBINIC, JR. & NASH, JR., *supra* note 244, at 58–59 ("The only legislative history relating to the issue of when a claim arises is found in the Senate explanations of the final amendments to the Act relating to the section on interest . . . ."); *see also supra* notes 121–126 and accompanying text.

240. *See* U.S. COMM'N ON GOV'T PROCUREMENT, *supra* note 11, at 4; S. REP. NO. 95-1118, at 3 (1978).

241. 41 U.S.C. § 7103(b)(1) (2012).

242. *See supra* notes 49–55 and accompanying text.

243. *See supra* notes 57, 206–07 and accompanying text.

quirement as a necessary prerequisite to the consideration of any claim"[244]—carries no weight under the *Arbaugh* line of cases.[245]

For the same reasons explained in relation to claim submission,[246] the notion that a contracting officer's decision is invalid unless a properly certified claim is submitted cannot stand. The CDA speaks only to the relationship between certification and the contracting officer's *obligation* to issue a timely decision, not the contracting officer's *authority*—the "contracting officer is *not obligated* to render a final decision on a claim of more than $100,000 that is not certified . . . ."[247] And even if certification was a mandatory prerequisite to issuance of a valid contracting officer decision, that alone could not give the certification requirement jurisdictional status. As demonstrated in *Gonzalez*, one requirement does not obtain jurisdictional status just because it is a mandatory element of another requirement that does have jurisdictional status.[248]

Although the certification requirement itself does not speak in jurisdictional terms, one sentence of the CDA at Section 7103(b)(3), added during the 1992 amendments, states that: "A defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim."[249] In light of its plain language and clear legislative history, that sentence should be read as providing further affirmation that the certification requirement is not jurisdictional. Even with the sentence interpreted narrowly to affirm only that a particular type of certification—"defective certification"—is not jurisdictional, such affirmation cannot also be read to implicitly state that the general certification requirement is jurisdictional and that, therefore, a complete failure to certify is a jurisdictional defect. The text does not clearly indicate that certification is a jurisdictional requirement or that complete failure to certify is a jurisdictional defect. The text does not attempt to limit any tribunal's power at all—only to affirm it. Context confirms this, because the Boards of Contract Appeals and Court of Federal Claims derive their jurisdictional grant over CDA cases from entirely different statutory provisions, which make no reference at all to certification.[250]

The Supreme Court's reasoning in *Reed Elsevier* lends further support. The same paragraph in the Copyright Act that requires copyright registration before bringing an infringement claim also allows the Register of Copyrights to join the infringement action with respect to the issue of registerability, but provides that "the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue."[251] The Court

244. Paul E. Lehman, Inc. v. United States, 673 F.2d 352, 355 (Ct. Cl. 1982).
245. *See supra* Part II.A.
246. *Id.*
247. 41 U.S.C. § 7103(b)(3) (2012) (emphasis added).
248. *See supra* notes 55–58 and accompanying text.
249. 41 U.S.C. § 7103(b)(3).
250. *See supra* notes 57, 206–07 and accompanying text.
251. 17 U.S.C. § 411(a) (2012).

looked to legislative history to determine that Congress amended the Copyright Act to clarify that the Register's failure to join was not a jurisdictional defect.[252] Congress did so in response to disruptive lower court decisions holding otherwise.[253] Considering that context, the Court explained that the Copyright Act's affirmation of jurisdiction in one circumstance could not be interpreted as an implicit statement that another requirement is jurisdictional.[254] Likewise, Congress's 1992 affirmation that certification defects do not limit jurisdiction cannot be interpreted to implicitly state that the general certification requirement is jurisdictional.

As with the claim submission requirement, there is no long line of Supreme Court precedent interpreting the certification requirement as jurisdictional, and the Federal Circuit's precedent cannot tip the scale on its own.[255] Thus, based on the certification requirement's text, context, and prior Supreme Court interpretation, it is not jurisdictional. The legislative history supports this conclusion. Just before the 1992 amendments were passed by the Senate and sent to the President, Senator Helfin, the bill's sponsor, made no distinctions of technical defects or failures to certify; instead, he stated that the bill would "eliminate the confusion and waste of resources that has resulted from the Contract Disputes Act certification being deemed jurisdictional."[256] Statements made in the House Report attempting to define "technically defective" are irrelevant because that narrow term was removed from the bill before it passed.[257]

Demoting the certification requirement from jurisdictional status does not eliminate its importance or any contractor's incentive to take certification seriously. If a claim is submitted with defective certification, the contracting officer has no obligation to issue a written decision, as long as it provides written notice of the defects.[258] Because the contracting officer can refuse to issue a final decision until proper certification is provided, the contractor cannot obtain any remedy under the contract until it provides proper certification, and the government is never forced to decide an uncertified claim.[259] This addresses Admiral Rickover's concern of contractors gaming the disputes system by submitting unsubstantiated claims for unjustifiably high payments, only to settle for a reduced amount.[260] Separate CDA provisions providing monetary penalties for claims that are unsupportable due to fraud and misrepresentations addressed Admiral Rickover's additional

252. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 163–64 (2010).
253. *See id.*
254. *See id.*
255. *See supra* notes 229–232 and accompanying text.
256. *See* 138 CONG. REC. 34,204 (1992).
257. *See supra* notes 194–196 and accompanying text.
258. 41 U.S.C. § 7103(b)(3) (2012).
259. *Id.*
260. *See supra* notes 127–131 and accompanying text.

concerns of foul play.[261] But once the contracting officer does issue a decision, only unfairness and inefficiency result from treating the failure to certify as a jurisdictional defect—particularly when the CDA expressly requires that certification be provided before entry of final judgment.[262]

D. *Timely Appeal Is Not a Jurisdictional Requirement*

Like the six-year filing deadline determined to be non-jurisdictional by the Federal Circuit in *Sikorsky*, the CDA's deadlines for timely appeal from a contracting officer's decision[263] are mere claim processing rules, not a limit to any tribunal's adjudicative authority. As the Supreme Court has reiterated several times, filing deadlines are the "quintessential claim processing requirements,"[264] regardless of how emphatic and non-conditional they may appear.[265] Accordingly, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it."[266] The Court has stated that "the [g]overnment must clear a high bar to establish that a statute of limitations is jurisdictional."[267] The CDA's filing deadlines do not clear this hurdle, and holding so would be logical extensions of the Supreme Court's decision in *Kwai Fun Wong* and the Federal Circuit's decision in *Sikorsky*.

The filing deadlines in Section 7104 are mundane at best, and they do not speak to adjudicative authority. The requirement to appeal to the Boards within ninety days is not even stated in mandatory terms: "A contractor, within [ninety] days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title."[268] The deadline to bring an action to the Court of Federal claims says "shall," but is otherwise not particularly emphatic: "A contractor shall file any action . . . within [twelve] months . . . ."[269]

The only language in the CDA that could limit the reviewability of an untimely appealed contracting officer's decision speaks to the finality of a contracting officer's decision, not the adjudicative authority of a forum: "The contracting officer's decision on a claim is final and conclusive and is not

261. *See supra* notes 131, 144 and accompanying text.
262. 41 U.S.C. § 7103(b)(3).
263. 41 U.S.C. § 7104 (2012).
264. Henderson v. Shinseki, 562 U.S. 428, 435 (2011) ("Filing deadlines, such as a the 120-day deadline at issue here, are quintessential claim-processing rules."); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 154 (2013) ("[W]e have repeatedly held that filing deadlines ordinarily are not jurisdictional."); United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015) (internal citation omitted) ("Time and again, we have described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case.").
265. *See Kwai Fun Wong*, 135 S. Ct. at 1632.
266. *Id.*
267. *Id.*
268. 41 U.S.C. § 7104(a) (2012).
269. 41 U.S.C. § 7104(b)(3).

subject to review by any forum, tribunal, or [f]ederal [g]overnment agency, unless an appeal or action is timely commenced as authorized by this chapter."[270] While that language may seem to conclusively limit any reviewing forum's adjudicative authority, it is no more emphatic than the language of filing deadline found nonjurisdictional by the Court in *Kwai Fun Wong*, Section 2401(b) of the FTCA, which states that: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate [f]ederal [a]gency within two years . . . ."[271] Indeed, the *Kwai Fun Wong* majority expressly dismissed the notion that language as emphatic "forever barred" could limit a court's jurisdiction:

> Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.
>
> In enacting the FTCA, Congress did nothing of that kind. It provided no clear statement that Section 2401(b) is the rare statute of limitations that can deprive a court of jurisdiction. Neither the next nor the context nor the legislative history indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar.
>
> It states that "[a] tort claim against the United States shall be forever barred unless it is presented [to the agency] within two years . . . or unless action is begun within six months" of the agency's denial of the claim. That is mundane statute-of-limitations language, saying only what every time bar, by definition, must: that after a certain time a claim is barred. The language is mandatory—"shall" be barred—but (as just noted) that is true of most such statutes, and we have consistently found it of no consequence. Too, the language might be viewed as emphatic—"forever" barred—but (again) we have often held that not to matter. What matters instead is that Section 2401(b) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." It does not define a federal court's jurisdiction over tort claims generally, address its authority to hear untimely suits, or in any way cabin its usual equitable powers. Section 2401(b), in short, "reads like an ordinary, run-of-the-mill statute of limitations," spelling out a litigant's filing obligations without restricting a court's authority.[272]

Further, as in *Kwai Fun Wong*, the CDA's provisions relating to timeliness are provided in statutory provisions separate and apart from those giving the Boards and Court of Federal Claims jurisdiction over CDA disputes.[273] As explained above, the Court of Federal Claims and Boards obtain their jurisdiction over CDA claims pursuant to 28 U.S.C. § 1491(a)(2) and 48 U.S.C. § 7105(e) respectively, but the CDA's filing deadlines are located at 48 U.S.C. § 7104.

270. 41 U.S.C. § 7103(g) (2012).
271. 28 U.S.C. § 2401(b) (2012).
272. United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632–33 (2015) (citations omitted).
273. *Id.* at 1633 (citations omitted) ("This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional. So too here. Whereas § 2401(b) houses the FTCA's time limitations, a different section of Title 28 confers power on federal district courts to hear FTCA claims.").

As demonstrated in *Bowles*[274] and *John R. Sand*,[275] one way to rebut the presumption that a filing deadline is nonjurisdictional is showing a long line of Supreme Court precedent treating it jurisdictionally.[276] But, unlike in *Bowles* and *John R. Sand*, no such line of Supreme Court precedent exists to save the jurisdictional status of these deadlines. Even if Federal Circuit precedent alone were enough to bestow jurisdictional status, those decisions rest on an anachronistic application of principles of sovereign immunity. The Federal Circuit's initial reasoning for classifying the filing deadlines as jurisdictional was based on them being a "part of a statute waiving sovereign immunity, which must be strictly construed, and which defines the jurisdiction of the tribunal[.]"[277] That 1982 decision cited to Supreme Court decisions from 1957 and 1941 for the proposition that a statute waiving sovereign immunity must be strictly construed.[278] But, as explained above in the discussion of sovereign immunity,[279] the Supreme Court no longer takes such a strict approach to sovereign immunity.[280] And as the Court's 2015 decision in *Kwai Fun Wong* demonstrates, its bright-line rule for distinguishing jurisdictional from nonjurisdictional requirements applies equally to provisions within a statutory waiver of immunity. [281]

This is not to say that the CDA's filing deadlines are not important or mandatory. Just as the CDA provides, a contracting officer's decision is final and non-reviewable unless timely appealed.[282] As with any mandatory claim processing rule, failure to timely appeal from a contracting officer's decision warrants dismissal for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[283] An end to courts viewing these requirements as having jurisdictional status creates only two caveats. First, the government must raise its defense of untimely appeal at the outset of litigation, or it will be waived.[284]

274. *See* Bowles v. Russell, 551 U.S. 205, 216 (2008).

275. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134, 137 (2008).

276. *See*, *e.g.*, *Kwai Fun Wong*, 135 S. Ct. at 1631.

277. *See* Cosmic Constr. Co. v. United States, 697 F.2d 1389, 1390 (Fed. Cir. 1982).

278. *Id.* (first citing Soriano v. United States, 352 U.S. 270 (1957); then citing United States v. Sherwood, 312 U.S. 584, 586-87 (1941)).

279. *See supra* notes 72-85 and accompanying text.

280. *See supra* notes 78-85 and accompanying text.

281. *See Kwai Fun Wong*, 135 S. Ct. at 1632 (interpreting a procedural requirement in a statutory waiver of sovereign immunity and stating that "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences").

282. 41 U.S.C. § 7103(g) (2012).

283. FED. R. CIV. P. 12(b)(6).

284. Kontrick v. Ryan, 540 U.S. 443, 456 (2004) ("Characteristically, a court's subject matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point."); Arbaugh v. Y & H Corp., 546 U.S. 500, 506–07 (2006) (explaining that objections to a party's failure to state a substantive claim expires after trial, while defects in subject matter jurisdiction endure post-trial and can be raised for the first time on appeal).

Second, a tribunal may, in exceptional circumstances, equitably toll a filing deadline.[285]

V. CONCLUDING THOUGHTS AND NEXT STEPS

For far too long, jurisdictional classification of the CDA's claim submission, certification, and timely appeal requirements has thwarted fair and efficient access meaningful judicial review. To right this wrong, contractors and their counsel should raise the arguments presented herein before the Federal Circuit. Of course, the Supreme Court could resolve the issue, but it seldom reviews cases raising issue of pure procurement law.[286] Thus, the power to reorient CDA jurisdictional jurisprudence likely lies with an en banc panel of the Federal Circuit.

En banc review is an extraordinary event, usually granted only to correct prior precedential rulings, resolve conflicting precedent, and address issues of extraordinary importance.[287] The jurisdictional treatment of the claims submission and certification requirements are clearly issues of extraordinary importance that require correction of past precedent. Nonetheless, counsel cannot assume that the Federal Circuit possesses the context necessary to intuitively arrive at that same conclusion. The Federal Circuit simply does not hear enough appeals in government contracts cases for its judges and their law clerks to maintain a working knowledge of procurement law or intuitively grasp the significance of any given issue.[288] Thus, in petitioning for en banc rehearing, counsel should assume that the judges and clerks reading that petition lack context for the issues presented, direct the reader to helpful secondary sources, and encourage amici to weigh in.[289]

Ideally, a challenge to the jurisdictional status of the claim submission, certification, and timely appeal requirements will be adjudicated first at a

285. *Kwai Fun Wong*, 135 S. Ct. at 1631 (explaining that jurisdictional treatment of a filing deadline creates a rebuttable presumption precluding equitable tolling); Henderson v. Shinseki, 562 U.S. 428, 441–42 (2011) (holding that filing deadline was not jurisdictional and directing lower could to determine if equitable tolling is appropriate); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990) ("We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.").

286. *See* Johnson, *supra* note 34, at 71 & n.13 ("Moreover, because appeals on certiorari from the CAFC to the Supreme Court are as rare as hens' teeth, the CAFC has in effect become the court of last appeal in government contract cases."); *see also* Burg, *supra* note 34, at 183 ("The Federal Circuit has exclusive jurisdiction to decide appeals relating to the contracts of the United States Government and, because Supreme Court review is rare, is effectively 'the court of last resort' for government agencies and their contractors.").

287. *See* Jimmie V. Reyna & Nathaniel E. Castellano, *Successful Advocacy in Government Contracts Appeals Before the Federal Circuit: Context Is Key*, 46 PUB. CONT. L.J. 209, 214 (2016).

288. *See id.* at 209–10.

289. *Id.* at 210–12; *see also* Jayna Marie Rust, *How To Win Friends and Influence Government Contracts Law: Improving the Use of Amicus Briefs at the Federal Circuit*, 42 PUB. CONT. L.J. 185, 187 (2012).

Board of Contract Appeals or the Court of Federal Claims. This serves two purposes. First, fleshing out these arguments provides the trial court or board with an opportunity to flag the importance of this issue for the Federal Circuit. Second, it avoids any subsequent challenge that the argument has been waived. Of course, waiver is a prudential—not jurisdictional—rule, and the Federal Circuit does have authority to address arguments raised for the first time on appeal.[290]

Once squarely before the Federal Circuit, a three-judge merits panel could—and hopefully, will—follow the *Arbaugh* cases and hold that the claim submission, certification, and timely appeal requirements are not jurisdictional. As a general rule, the Federal Circuit's prior precedential rulings bind merits panels, and absent intervening statute or Supreme Court decision, an en banc decision is needed to overturn prior precedent.[291] Because the Federal Circuit has not yet made a precedential ruling regarding the 1992 amendments to the CDA, nothing precludes a merits panel from holding that those amendments overturned its prior cases treating the certification requirement as jurisdictional.[292] Similarly, a merits panel could hold that the *Arbaugh* line of cases effectively overrules prior holdings that treat the claim submission and timely appeal requirements as jurisdictional. Indeed, that is exactly what the *Sikorsky* panel did.[293] If, however, a merits panel finds itself bound by prior precedent, efforts before the panel may prompt a dissenting or concurring opinion, which will likely increase the chances of en banc rehearing.[294]

Of course, the Federal Circuit, either through an en banc decision or denial of en banc rehearing, could decline to reverse its prior precedent treating claim submission, certification, and timely appeal as jurisdictional requirements. If old habits carry the day, the private bar will have to take its chances petitioning the Supreme Court to grant certiorari or lobbying Congress for further reform. While success on either of those fronts seem unlikely, the stakes are too high to give up the fight. Congress never envisioned—much less intended to create—the arbitrary, inefficient, and unjust obstacle course that the current jurisdictional classification of the claim submission and certification requirements represents. No defensible policy is served by depriving

290. *See* Singleton v. Shinseki, 659 F.3d 1332, 1334–35, 1334 n.2 (Fed. Cir. 2011).

291. *See* U.S. Court of Appeals for the Fed. Circuit, Internal Operating Procedures 33 (2016), http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/IOPs/IOPsMaster1a.pdf [https://perma.cc/9HDU-WG7Z].

292. *See supra* note 197 and accompanying text.

293. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320–21 (Fed. Cir. 2014) (explaining that prior decision treating the CDA statute of limitations as jurisdictional were "effectively overruled by the Supreme Court's more recent decision in *Sebelius v. Auburn*[,] . . . the latest in a series of Supreme Court opinions that have articulated a more stringent test for determining when statutory time limits are jurisdictional").

294. *See* Reyna & Castellano, *supra* note 287, at 214–15.

contractors a fair and efficient access to meaningful judicial review. Nor can the government afford to unnecessarily discourage small and non-traditional companies that drive innovation from doing business with the federal government, particularly when their participation is critical to maintaining the nation's technological and battlefield superiority.