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Kathleen H. Harne

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Note

UNITED STATES EX REL. DRC, INC. v. CUSTER BATTLES, LLC: A BRUTAL BATTLE FORESHADOWING THE FUTURE OF FALSE CLAIMS ACT LITIGATION

KATHLEEN H. HARNE*

In *United States ex rel. DRC, Inc. v. Custer Battles, LLC* (*DRC IV*),[1] the United States Court of Appeals for the Fourth Circuit considered whether a contractor was liable under the False Claims Act ("FCA") for submitting fraudulent claims to the Coalition Provisional Authority ("CPA") in Iraq.[2] The court, reversing in part and remanding the lower court's decision, held that all of the fraudulent claims presented by the contractor, including those paid out of the Development Fund for Iraq ("DFI"), qualified under the FCA for two primary reasons.[3] First, the United States had contributed a portion of funds that became part of the DFI, a source of funds belonging to the Iraqi people.[4] Second, a jury could reasonably conclude that U.S. Government contracting officers assigned to the CPA constituted U.S. employees acting in their official capacity.[5] In so holding, the Fourth Circuit erroneously ignored precedent by extending the FCA to claims where U.S. funds were absent.[6] By neglecting to employ an instrumentality test, the court failed to recognize that the CPA was a non-U.S. instrumentality whose employees could not implicate the FCA's presentment requirement.[7] Finally, the Fourth Circuit distorted the restitutive purpose of the FCA.[8]

If the Fourth Circuit had applied traditional FCA analysis, it would have avoided an alarming expansion of the FCA, thereby preventing contractor uncertainty and evading surrender to overarching U.S. political interests in a unique international situation.[9] Moreover, the court would have provided less clout to Congress's subsequent approval of imprudent

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* Kathleen H. Harne is a third-year law student and *Maryland Law Review* staff member at the University of Maryland School of Law. She would like to thank all of the *Maryland Law Review* editors who continuously motivated her and assisted her in the drafting of this Note. She would also like to thank her friends and family for their considerable support.

1. 562 F.3d 295 (4th Cir. 2009).
2. *Id.* at 297.
3. *Id.* at 298, 305–06.
4. *Id.* at 304–05.
5. *Id.* at 308.
6. *See infra* Part IV.A.1.
7. *See infra* Part IV.B.1.
8. *See infra* Part IV.C.1.
9. *See infra* Part IV.A.1–C.1.

amendments to the FCA under the Fraud Enforcement and Recovery Act of 2009 ("FERA").[10] Instead, *Custer Battles* foreshadowed Congress's complete overhaul of the FCA through amendments that now destroy the vital nexus between the U.S. Government and the contractor,[11] create limitless liability,[12] and erode the FCA's original purpose of providing restitution to the U.S. Government.[13]

I. THE CASE

On August 27, 2003, Custer Battles, LLC ("Custer Battles"), a firm providing support services to governments engaged in global conflicts, entered into the Iraqi Currency Exchange ("ICE") contract with the CPA, a temporary entity that governed Iraq from May 2003 to June 2004.[14] In an effort to replace Iraqi dinars, or the Iraqi currency, which bore the portrait of Saddam Hussein, the CPA contracted with Custer Battles to provide "security, construction, and operational services" to support the ICE contract.[15] Agreeing to a time and materials contract, the CPA would reimburse Custer Battles for direct costs and would pay an extra twenty-five percent of these direct costs.[16] The CPA initially provided Custer Battles with a $3 million advance with a U.S. Treasury check, which comprised a

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10. *See infra* Part IV.A.2–C.2.

11. *See infra* Part IV.A.2.

12. *See infra* Part IV.B.2.

13. *See infra* Part IV.C.2.

14. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC I*), 376 F. Supp. 2d 617, 619, 623, 631 (E.D. Va. 2005), *rev'd*, 562 F.3d 295 (4th Cir. 2009). The Fourth Circuit later referred to this contract as the "Dinar Exchange Contract." United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 298 (4th Cir. 2009). Custer Battles had also previously entered into a separate Baghdad International Airport Contract with the CPA in August 2003, which was a "firm-fixed price" contract in which Custer Battles received advances and monthly installments. *DRC I*, 376 F. Supp. 2d at 630. On April 16, 2003, U.S. General Tommy R. Franks announced the formation of the CPA in his "Freedom Message to the Iraqi People." *Id.* at 620. He stated that the CPA would "'exercise powers of government temporarily'" and "'provide security, to allow the delivery of humanitarian aid and to eliminate the weapons of mass destruction.'" *Id.* In May 2003, the U.N. Security Council, without establishing or creating the CPA, formally recognized its formation. *Id.* at 621. Ambassador L. Paul Bremer, officially appointed as the Presidential Envoy to Iraq without Senate confirmation, was later designated as the CPA's "Administrator" by Secretary of Defense Donald Rumsfeld. *Id.* While most CPA officials were U.S. citizens, thirteen percent of them were from other Coalition member countries. *Id.* at 623. After the CPA's dissolution, the Interim Government of Iraq assumed governance until an elected Transitional Government of Iraq was established. *Id.*

15. *DRC I*, 376 F. Supp. 2d at 619.

16. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC II*), 444 F. Supp. 2d 678, 680 (E.D. Va. 2006), *rev'd*, 562 F.3d 295 (4th Cir. 2009). Although the parties disputed the details of the ICE contract, the jury found these facts to be true regarding the ICE contract. *Id.*

portion of the CPA's "Seized Funds" of former Iraqi government sources.[17] Custer Battles received payment from the DFI for all subsequent invoices.[18]

United States personnel detailed to work for the CPA received these invoices from Custer Battles, forwarded them to "a U.S. retained contractor and U.S. Military personnel for approval," and then eventually submitted them to the CPA's finance office for payment.[19] The contract, excluding the advance, ultimately totaled $12 million.[20] Throughout its performance, Custer Battles allegedly presented falsely inflated invoices to the CPA by listing fictional subcontractors, or "shell companies," as requiring additional payments.[21] A few months later, Custer Battles's co-owner accidentally left behind a spreadsheet of invoices revealing these inflated amounts at a meeting with CPA officials.[22] DRC, Inc., a subcontractor of Custer Battles, subsequently brought a *qui tam* suit as a relator under the FCA.[23] The relator claimed that Custer Battles knowingly presented false claims to a U.S. government official under the ICE contract in violation of 31 U.S.C. § 3729(a)(1), and that it had knowingly made false records, or invoices, to ensure that the false claims under the contract would be paid in violation of 31 U.S.C. § 3729(a)(2).[24]

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17. *Id.* at 683. The Fourth Circuit later clarified that the advance was paid with a U.S. Treasury check. *DRC IV*, 562 F.3d at 298.

18. *DRC I*, 376 F. Supp. 2d at 632.

19. *DRC IV*, 562 F.3d at 299.

20. *DRC I*, 376 F. Supp. 2d at 632.

21. *Id.* at 619.

22. *DRC II*, 444 F. Supp. 2d at 681.

23. *Id.* at 679–80. At the time when both the district court and the Fourth Circuit ruled on *Custer Battles*, the FCA authorized "private persons" to bring a civil action against a private entity that did the following:

> (1) knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or] (2) knowingly [made], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

31 U.S.C. § 3729(a) (2006).

24. *DRC II*, 444 F. Supp. 2d at 679–80. There were many defendants in this case. Apart from Custer Battles, the defendants included Custer Battles's principals, various subsidiaries, and a former Custer Battles's employee. *Id.* at 679 n.1. William Baldwin, a former Custer Battles employee, also brought suit and claimed that Custer Battles retaliated against him in violation of 31 U.S.C. § 3730(h) for whistle-blowing the contractor's fraudulent behavior. *Id.* at 680. In addition, the relators subsequently alleged that Custer Battles committed fraud in the inducement in their airport contract with the CPA by failing to provide a consistent number of security personnel at the Baghdad International Airport. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC III*), 472 F. Supp. 2d 787, 788 (E.D. Va. 2007), *aff'd*, 562 F.3d 295 (4th Cir. 2009).

The United States District Court for the Eastern District of Virginia limited the relator's claims on the ICE contract to $3 million because it concluded that payment requests taken out of DFI funds did not constitute a claim under the FCA.[25] Employing a source-of-funds analysis,[26] the court evaluated whether the specific type of funds paid to Custer Battles constituted a claim.[27] It first found that only the $3 million advance was drawn from "Seized Funds," or legally confiscated Iraqi funds that later became U.S. property; moreover, the remaining $12 million in invoices were paid out of the DFI, which constituted Iraqi funds.[28] Second, the court determined that the United States did not "provide" funds to Custer Battles because the United States had relinquished control of the funds that were previously Vested Funds, or U.S. property, when they were transferred to the DFI.[29] Therefore, these prior Vested Funds of the DFI ceased to remain U.S. property.[30] Since they now constituted Iraqi funds, even if the CPA, as a U.S. or non-U.S. instrumentality, administered or held them, the court reasoned that they did not qualify as U.S. funds under the FCA.[31]

In a subsequent ruling, the district court granted Custer Battles's Federal Civil Procedure Rule 50(a) motion for judgment as a matter of law based on its finding that under Section 3729(a)(1), the relators failed to prove that Custer Battles's invoices were presented to U.S. government officials.[32] Thus, in addition to its previous ruling that the DFI constituted

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25. *DRC I*, 376 F. Supp. 2d at 647.

26. *Id.* at 623. The court considered the various "funding sources" used to maintain and support the CPA as "dispositive clues to the FCA question." *Id.*

27. *Id.* at 641.

28. *Id.* at 647. Relying on the Hague Regulations, the district court explained that Seized Funds included "Iraqi state-owned cash and other movable property" that U.S. and Coalition troops had previously seized. *Id.* at 644. Conversely, the U.N. Security Council created the DFI as a depository to hold proceeds from the sale of Iraqi national resources, as well as for "repatriated Iraqi funds" that U.N. member states had seized and returned to Iraq. *Id.* at 645. In its brief supporting the relators, the U.S. Government further explained that the "funds in the DFI have always been Iraqi funds" and never constituted U.S. property. *Id.* (internal quotation marks omitted) (quoting Brief of the United States in Response to the Court's Invitation of Dec. 21, 2004, *DRC I*, 376 F. Supp. 2d 617 (No. CV-04-199 A)).

29. *Id.* at 646. Despite this limitation, the court nonetheless acknowledged that since $3 million of the contract were paid with Seized Funds, or U.S. funds that remained U.S. property, defendants had failed to prove that there was no FCA "claim." *Id.* at 647. President Bush, in accordance with the International Emergency Economic Powers Act ("IEEPA"), had issued executive orders confiscating Iraqi funds within U.S. jurisdictions. *Id.* at 624.

30. *Id.* at 646.

31. *Id.*

32. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC II*), 444 F. Supp. 2d 678, 689 (E.D. Va. 2006), *rev'd*, 562 F.3d 295 (4th Cir. 2009). The judge originally deferred the ruling on the defendants' Rule 50(a) motion. *Id.* at 681. The court initially submitted the case to the jury,

Iraqi funds and were therefore inapplicable to the FCA,[33] the court reasoned that U.S. contracting officers were not acting in an official U.S. capacity because the CPA was not a U.S. instrumentality.[34] Although most CPA personnel were U.S. government employees, the court dismissed the CPA as a U.S. instrumentality because it did not remain under the exclusive control of the U.S. government.[35] Rather, the CPA constituted "a wholly distinct entity that exercise[d] power through a structure agreed to by its member states."[36]

On appeal, the relators claimed that the district court ruled erroneously in two ways: (1) by using a "source-of-funds analysis" to limit damages on the ICE contract, and (2) by concluding that the relators had failed to prove that Custer Battles presented false claims to the U.S. Government.[37] The relators subsequently appealed to the Fourth Circuit.[38]

II. LEGAL BACKGROUND

A tension between judicial adherence to precedent and modern FCA interpretation has evolved as the U.S. Government remains a prominent provider of domestic and international funds. While historically the FCA did not apply to claims involving non-U.S. funds simply administered by the United States or held in U.S. possession or custody, recently approved FCA amendments now permit liability for claims involving such funds.[39] Moreover, while in the past courts closely scrutinized whether an entity constituted a U.S. instrumentality in order to satisfy the FCA's requirement of direct presentment to the U.S. Government, new FCA amendments no longer mandate presentment.[40] Finally, while courts historically promoted the FCA's legislative intent of providing restitution to the U.S. Government

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who found in favor of the relators on all counts, including that the defendants had knowingly presented false claims and records. *Id.* The jury found the defendants jointly and severally liable for $3 million in damages, based on the $3 million advance they received on the ICE contract. *Id.* The relators subsequently filed a motion for judgment on the jury's verdict in addition to judgment as a matter of law under Rule 50(b). *Id.* at 682.

33. *DRC I*, 376 F. Supp. 2d at 646.

34. *DRC II*, 444 F. Supp. 2d at 689.

35. *Id.*

36. *Id.* Moreover, the court held that under § 3729(a)(2), there was an implied requirement to present the false records to the U.S. Government. *Id.* at 685.

37. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 301 (4th Cir. 2009).

38. *Id.* at 297.

39. *See infra* Part II.A.

40. *See infra* Part II.B.

where it suffered extensive financial detriment, recent FCA amendments have left the door open to a revised interpretation of "restitution" in the FCA context.[41]

A. While the FCA Was Historically Inapplicable to Non-U.S. Funds, Recent Amendments Permit Non-U.S. Funds to Apply in the FCA Context

When the Fourth Circuit ruled on *Custer Battles*, the FCA imposed liability on any individual who "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval,"[42] or on any individual who "knowingly [made], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."[43] The FCA defined a claim as "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded."[44] However, recent May 2009 amendments altered standards for FCA liability, thereby illuminating and distinguishing the legal background from which *Custer Battles* was originally decided.[45] In particular, non-U.S. funds are now applicable under the FCA.[46]

Under the FCA, the U.S. Department of Justice may file suit to collect damages for fraudulent claims involving the expenditure of U.S. Treasury funds on behalf of the federal government.[47] Alternatively, a private relator may bring a civil *qui tam* action under the FCA on behalf of the U.S. Government and in its own name.[48] Consequently, the relator may receive

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41. *See infra* Part II.C.
42. 31 U.S.C. § 3729(a)(1) (2006).
43. *Id.* § 3729(a)(2).
44. *Id.* § 3729(c).
45. *See infra* Part II.A.2.
46. *See infra* Part II.A.2.
47. Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 181 (3d Cir. 2001).
48. *Id.* at 181–82; *see also* 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government."); BLACK'S LAW DICTIONARY 588 (3d pocket ed. 2006) (defining a *qui tam* action as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive"). The term "*qui tam*" is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," a Latin phrase that is translated as one "'who

between fifteen to thirty percent of the share of any possible Government recovery.[49] The relator's *qui tam* complaint is filed under seal and the U.S. Government, upon being served, may choose to intervene and take control of the action.[50] At the time of the *Custer Battles* ruling, if the relator prevailed, then the U.S. Government was entitled to receive double damages from the contractor responsible and could also recover $2000 for each false claim submitted.[51]

1. The FCA Historically Imposed Liability on Individuals Who Submitted False Claims that Implicated the Payment of U.S. Funds, but Did Not Impose Liability on Claims Related to Non-U.S. Funds Simply Administered by the United States or Held in U.S. Possession or Custody

The success of a relator's FCA claim historically was contingent on a showing that U.S. funds were directly implicated.[52] The FCA's legislative history indicates that the FCA sought to protect the Federal Treasury,[53] and that "the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims."[54] Honoring legislative intent, in 1926 in *United States v. Cohn*,[55] the Supreme Court considered whether the FCA applied to false claims submitted to U.S. customs officials, who held in custody cigars owned by a third party in the Philippines.[56] The Court held that a FCA claim cannot include a demand for property in which "the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession."[57] In light of

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pursues this action on our Lord the King's behalf as well as his own.'" Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

49. 31 U.S.C. § 3730(d)(1)–(2). The new FCA amendments did not alter the percentage of the award that relators are eligible to receive. *See* 31 U.S.C.A. § 3730(d) (West 2009). The relator's award is calculated based on the level of contribution he makes to the prosecution as well as whether the U.S. Government joins in pursuing the claim. *Id.*

50. 31 U.S.C.A. § 3730(b)(2), (b)(4).

51. S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

52. *See* United States v. Cohn, 270 U.S. 339, 345–46 (1926).

53. S. REP. NO. 99-345, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

54. Rainwater v. United States, 356 U.S. 590, 592 (1958).

55. 270 U.S. 339.

56. *Id.* at 343–45.

57. *Id.* at 346. Although *Cohn* involved an earlier version of the FCA, subsequent courts continued to apply the U.S. custodian principle in requiring the U.S. Treasury to either actually suffer or potentially suffer a financial loss. *See, e.g.*, United States v. Neifert-White Co., 390 U.S.

Cohn, it was therefore insufficient for the United States simply to act as a custodian or bailee for another individual's or entity's money or property.[58]

Throughout the twentieth and early twenty-first century, the existence of U.S. funds has remained dispositive in implicating fraudulent claims that satisfied the FCA.[59] In fact, a successful FCA claim was contingent on "a call upon the government fisc . . . for liability to attach."[60] In 1943 in *United States ex rel. Marcus v. Hess*,[61] the Supreme Court considered a FCA claim involving fraudulent contracts with local government entities who received a "large portion" of federal funding from the Federal Public Works Administrator, a U.S. official.[62] In finding the FCA applicable, the Court weighed numerous factors clearly demonstrating that contractors had submitted fraudulent claims to recipients of federal funding.[63] These factors included the stipulation of U.S. Government involvement and the applicability of federal law prohibiting fraudulent claims on the Public Works Administrator forms as well as the fact that the contract work was subject to "constant federal supervision."[64] The totality of factors therefore indicated that contractors were fully notified that federal funds were implicated and involved.[65]

In 1958 in *United States v. McNinch*,[66] the Supreme Court implicitly upheld the *Cohn* rule requiring that FCA claims implicate U.S. funds when it held that a fraudulent loan application to the Federal Housing Administration ("FHA") did not constitute a FCA claim because the FHA, as a U.S. instrumentality, "disburse[d] no funds nor d[id] it otherwise suffer immediate financial detriment."[67] Thus, because there was no such disbursement, the FCA's goal "to stop [the] plundering of the public treasury" was simply inapplicable.[68]

228, 230–31 (1968) (noting that *Cohn* was decided under a prior statute, yet still acknowledging its general principle that the FCA did not apply where the United States acted only as bailee).

58. *Cohn*, 270 U.S. at 346.

59. *See infra* notes 60–73 and accompanying text.

60. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999).

61. 317 U.S. 537 (1943).

62. *Id.* at 542–43. This judicial assessment of the actual amount of funding contributed by the U.S. Government becomes even more noteworthy in later cases. *See infra* Part II.C.1.

63. *Hess*, 317 U.S. at 542–43.

64. *Id.* at 543.

65. *Id.* at 542–44.

66. 356 U.S. 595 (1958).

67. *Id.* at 598–99.

68. *Id.* at 599.

Later, in 1968, in *United States v. Neifert-White*,[69] the Court determined that false invoices submitted to the Commodity Credit Corporation ("CCC") constituted a FCA claim, and reiterated that unlike in *Cohn*, here the U.S. Government was forced "to part with its [own] money or property."[70] Finally, in the recent 2008 case *Allison Engine Co. v. United States ex rel. Sanders*,[71] the Supreme Court considered a relator's claim where U.S. Department of Navy subcontractors allegedly submitted false statements, or certificates of conformance, regarding the fulfillment of specifications under a contract for building Navy destroyers.[72] In finding that Section 3729(a)(2) of the FCA, which pertains to false records or statements, requires that "[the] defendant must intend that the Government itself pay the claim" and "not . . . another entity," the Court implicitly acknowledged that U.S. funds were necessary in a FCA claim.[73]

2. *FCA Liability No Longer Requires that the United States Holds Title to the Funds Implicated in the Claim*

A little more than one month after the Fourth Circuit issued its decision in *Custer Battles*, Congress passed the Fraud Enforcement and Recovery Act ("FERA") in the aftermath of the global mortgage and financial crisis.[74] Overriding the multiple decades of precedent noted above, Congress changed the definition of a FCA claim to "any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property."[75] Under the revised statute, the U.S. Government no longer needs to hold title to the implicated funds; rather, the FCA can include funds for which the U.S. Government merely acts as a custodian or administrator of another entity's funds.[76]

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69. 390 U.S. 228 (1968).

70. *Id.* at 230–33.

71. 128 S. Ct. 2123 (2008).

72. *Id* at 2127.

73. *Id.* at 2128–29. The Court concluded that under § 3729(a)(2), the defendant must make "a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the Government.'" *Id.* at 2130 (quoting 31 U.S.C. § 3729(a)(2)). The intent must not be just to target claims paid using U.S. funds, but actually to intend the U.S. Government itself to rely on the false statement in paying or approving the claim. *Id.*

74. *See* S. REP. NO. 111-10, at 1 (2009) (explaining the need to improve enforcement and recovery against fraud).

75. 31 U.S.C.A. § 3729(b)(2)(A) (West 2009).

76. S. REP. NO. 111-10, at 12–13. In addition, technically under the new statutory language, FCA liability can now apply to defendants who merely present false or fraudulent claims to a U.S.

According to the 2009 Senate Report on FERA, this revision was essential as "[f]alse claims made against Government-administered funds harm the ultimate goals and U.S. interests and reflect negatively on the United States."[77] Moreover, the Senate opined that FCA applicability to government-administered funds was "to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government."[78] Thus, although it remains to be seen how courts will interpret this new definition, it is possible that they may now interpret the FCA claim provision in light of this legislative history.

B. While Courts Historically Employed an Instrumentality Test in Assessing the Presentment Requirement, Recent FCA Amendments Eliminate the Need for Presentment to the U.S. Government

As FCA litigation continued in the modern era of increased federal funding,[79] courts determined whether and how a federal recipient could constitute a U.S. instrumentality in order to satisfy the presentment requirement of Section 3729(a)(1).[80] Under this provision, an individual

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official, regardless of whether the U.S. has title to the funds, *and* regardless of whether the U.S. Government has ever provided a portion of the funds. Currently, a claim is defined in full as:

> any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—(i) is presented to an officer, employee, or agent of the United States; *or* (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, *and* if the United States Government—(I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded . . . .

31 U.S.C.A. § 3729(b)(2)(A) (emphasis added). The choice of the word "or" between subsections (i) and (ii) indicates the possibility that the U.S. Government may never need to have provided money for the claim if someone simply presents the claim to a U.S. official.

77. S. REP. NO. 111-10, at 12.

78. *Id.* at 12–13.

79. *See The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing on S. 2041 Before the S. Comm. on the Judiciary*, 110th Cong. 3–4 (2008) [hereinafter *The False Claims Correction Act*] (statement of Sen. Arlen Specter, Member, S. Comm. on the Judiciary) (discussing *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), a FCA suit involving Amtrak as a recipient of federal funding, and noting that "grantees [now] get most of the money or a great deal of the money from the Government").

80. *See* 31 U.S.C. § 3729(a)(1) (2006) (setting forth the presentment requirement). The "presentment" requirement derived from the Section's statutory language requiring that the defendant "knowingly presents, or causes to be presented . . . a false or fraudulent claim." *Id.* Conversely, § 3729(a)(2) simply held a defendant liable when he "knowingly [made], use[d], or

met the presentment requirement when he knowingly presented to a U.S. Government officer or employee a fraudulent claim for approval.[81] Thus, if a relator could prove that the contractor presented the claim to someone employed by a U.S. instrumentality, then FCA liability was applicable as the claim was essentially presented to the U.S. Government.[82] Nevertheless, in light of *Custer Battles*, Congress completely eliminated the presentment requirement under FERA.[83]

1. Historically, Courts Employed a Multi-Factor Analysis to Assess Whether an Entity Constituted a U.S. Instrumentality

Prior to the FCA's revision, courts employed a multi-factor analysis to assess whether an entity constituted a U.S. instrumentality. In 1958 in *Rainwater v. United States*,[84] the Supreme Court, in considering a case in which the complaint alleged that the defendants satisfied the presentment requirement, determined that the CCC was a U.S. instrumentality under the FCA.[85] The Court assessed multiple factors in finding that the CCC was a U.S. instrumentality, such as the fact that Congress had created the CCC for agricultural commodity support, and that the U.S. Department of Agriculture had generally supervised and directed the entity.[86] In addition, the Court considered that congressional appropriation provided all of the CCC's capital and that all CCC officers and personnel were federal employees.[87] Finally, it looked at the general purpose of the CCC, which was to provide "an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds,"[88] and noted that the CCC's incorporation statute expressly stated that it was "an 'agency and instrumentality of the United States.'"[89] Given the totality of

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cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Id.* § 3729(a)(2).

81. *Id.* § 3729(a)(1).

82. *See infra* Part II.B.1.

83. *See* 31 U.S.C.A. § 3729(a)(1)(A) (West 2009) (imposing liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"); *see also* S. REP. NO. 111–10, at 11 (explaining that amended § 3729 no longer requires direct presentment for liability to attach); *infra* Part II.B.2.

84. 356 U.S. 590 (1958).

85. *Id.* at 591–92.

86. *Id.* at 591.

87. *Id.*

88. *Id.* at 592.

89. *Id.* at 591 (quoting Commodity Credit Corporation Charter Act, 62 Stat. 1070 (1948) (codified as amended at 15 U.S.C. §§ 714–714p (2006))).

these factors, the Court confidently affirmed the FCA's applicability because the CCC was "wholly owned and closely controlled" by the Federal Government.[90]

In 2004, in *United States ex rel. Totten v. Bombardier Corp.* (*Totten II*),[91] the D.C. Circuit considered the *Rainwater* factors in deciding whether Amtrak constituted a U.S. instrumentality under the FCA.[92] In this case, the relator alleged that the contractor had delivered defective railway cars to Amtrak, and had submitted invoices to an account that included federal funds.[93] In concluding that Amtrak was not a U.S. instrumentality, the court analyzed Amtrak's "organic statute," which explicitly stated that the entity "'is not a department, agency, or instrumentality of the United States Government.'"[94] In addition to the conflicting language in the CCC statute versus the Amtrak statute, the D.C. Circuit further noted that Amtrak lacked factors characteristic of a U.S. instrumentality that were present in *Rainwater*, such as the presence of federal employees and complete funding from the U.S. Treasury.[95] *Totten II* therefore illustrated that the particular analysis employed in *Rainwater*, although not yielding a positive determination in this particular case, remained relevant in modern FCA interpretation.

2. In Light of Recent Amendments, a FCA Claim No Longer Requires Direct Presentment to the U.S. Government

In May 2009, Congress also amended the FCA by completely eliminating the requirement that a defendant directly present false or fraudulent claims to the U.S. Government.[96] The amended statute now states that a person is liable if he "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," explicitly abolishing the requisite involvement of a U.S. official or employee.[97]

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90. *Id.* at 594.

91. 380 F.3d 488 (D.C. Cir. 2004).

92. *Id.* at 491–92.

93. *Id.* at 490.

94. *Id.* at 491 (quoting 49 U.S.C. § 24301(a)(3) (2000)). The court effectively dismissed Totten's argument that presentment was satisfied because Amtrak was "a mixed-ownership government corporation prior to December 1997" and because "the Government ha[d] continued to hold all of Amtrak's preferred stock, and ha[d] provided sizeable subsidies to Amtrak." *Id.* The explicit provisions of the statute simply outweighed the other factors present. *Id.* at 491–92.

95. *Id.* at 492.

96. *See* 31 U.S.C.A. § 3729(a)(1)(A) (West 2009) (eliminating the requirement of direct presentment).

97. *Id.*

Simple presentment of a false or fraudulent claim to another subcontractor, contractor, or individual will now suffice.[98] Indeed, if *Totten II* had been decided under the new amendments, FCA liability would have likely attached to the defendant-contractor, since presentment to any recipient of federal funds, such as Amtrak, would have sufficed as the entity's status is no longer relevant.[99]

C. While the FCA's Original Purpose Was to Provide Restitution to the U.S. Government, Recent FCA Amendments Have Left the Door Open for Revising the Meaning and Application of "Restitution" in the FCA Context

The FCA historically applied to situations in which there was a need to obtain restitution for damage done to the U.S. Government—either directly or indirectly through entities that received a significant percentage of federal funding, control, or involvement, and that therefore had a close nexus between the U.S. Government and the entity.[100] Although the FCA had its roots in countering fraud in the defense contractor arena, it later applied to a variety of arenas, including the Medicare and Medicaid contexts.[101] Moreover, although courts historically interpreted legislative intent for the FCA as providing restitution to the U.S. Government for fraud specifically targeting the United States,[102] new FCA amendments now call the FCA's original purpose into question.[103]

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98. *See id.* (removing the involvement of a U.S. official or employee from the statute's language).

99. *See Totten II*, 380 F.3d at 496 (noting that Congress could have "amend[ed] subsection (a)(1) to provide that claims be presented to the Government *or a grantee or recipient of Government funds*[, b]ut Congress did not touch (a)(1) at all").

100. *See* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 738 (D.C. Cir. 1998) (noting that FCA liability may not be appropriate where there is not a "sufficiently close nexus between [the U.S. Government and the recipient of federal funds] such that a loss to the former is effectively a loss to the latter"). In *Yesudian*, the D.C. Circuit noted such nexus, and thus attached FCA liability where the grantee, Howard University, received over eighty percent of its funding from the Federal Government and could be inspected by the U.S. Secretary of Education. *Id.* at 739.

101. *See infra* Part II.C.1.

102. *See infra* Part II.C.1.

103. *See infra* Part II.C.2.

1. Prior to May 2009, Congress Intended the FCA to Provide Restitution for Damage Substantially Linked to and Targeted at the U.S. Government

The original legislative intent of providing restitution to the U.S. Government was apparent when Congress initially passed the FCA to address severe contract fraud during the American Civil War.[104] In 1863, Congress enacted the FCA to combat fraud against contractors who "submitt[ed] inflated invoices and shipp[ed] faulty goods to the government" during the Civil War.[105] The *qui tam* provision under the FCA therefore assisted the Federal Government by allowing a "posse of *ad hoc* deputies to uncover and prosecute frauds against the government."[106] During World War II, Congress subsequently revised the FCA in another wartime context.[107]

By the early twentieth century, however, courts applied the FCA beyond the defense contracting context.[108] As FCA litigation matured, courts broadly applied the FCA out of a belief that the Act was "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government."[109] For example, in *Rainwater*, the Court applied the FCA in the context of false applications for crop loans to the CCC.[110] Subsequently, in response to judicial decisions that narrowly applied the FCA through "restrictive interpretations of the act's liability standard, burden of proof, *qui tam* jurisdiction and other provisions,"[111] Congress sought to amend the FCA "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[112] Approving

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104. *See* United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995) ("Enacted during the Civil War, the FCA's specific aim was to clamp down on widespread fraud by government contractors . . . .").

105. *Id.*

106. United States *ex rel.* Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 49 (4th Cir. 1992).

107. *See* S. REP. NO. 99-345, at 10–12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275–77 (discussing defense contractor fraud during the Civil War and World War II, and how Congress played the dominant role in combating such fraud through the FCA).

108. *See, e.g.*, Rainwater v. United States, 356 U.S. 590, 591–92 (1958) (applying the FCA to fraudulent claims against the CCC); *see also* United States v. Neifert-White Co., 390 U.S. 228, 233 (1968) (attaching liability again in the context of the CCC and noting the multiple FCA cases that involved the corporation); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 539 (1943) (applying the FCA in the context of public works projects).

109. *Neifert-White*, 390 U.S. at 232.

110. *Rainwater*, 356 U.S. at 591–92.

111. S. REP. NO. 99-345, at 4.

112. *Id.* at 1.

amendments to the FCA in 1986, Congress expanded the scope of losses under the FCA, such as by explicitly permitting the Government to sue under the FCA for fraud against federal grantees and U.S. Government fund recipients, including states.[113] While in the past, courts might have insisted that the U.S. Government actually suffer damage, many later cases established that the Government need not have suffered actual damage from the fraud in order for FCA liability to attach.[114]

Despite the FCA's expansion, FCA interpretation nonetheless remained loyal to its original intent of providing restitution to the U.S. Government where there had at least been the potential for damages targeted against it. Given the civil nature of the FCA, in the 1943 case *United States ex rel. Marcus v. Hess*,[115] the Supreme Court concluded that the purpose of the FCA was not to punish the defendant, but rather "to provide for restitution to the government of money taken from it by fraud . . . to make sure that the government would be made completely whole."[116] Later in 1968 in *United States v. Neifert-White Co.*,[117] the Court characterized the FCA as "remedial" rather than punitive in nature, with the goal to target "all fraudulent attempts to cause the Government to pay out sums of money."[118] The focus on "restitution," but only for justifiable compensation for the U.S. Government's loss of its own money, continued

113. *Id.* at 21. The 1986 amendments stemmed from a heightened awareness of the "growing pervasiveness of fraud" committed by U.S. government contractors, due to the increased publicity of defense procurement fraud in the 1980s. *Id.* at 2. The 1986 amendments therefore enhanced financial and non-financial incentives for private citizens to bring FCA suits on the U.S. Government's behalf. *Id.*

114. *See, e.g.*, Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 n.7 (4th Cir. 1999) (indicating a split in authority and that the Fourth Circuit does not require the U.S. Government to suffer actual damages). In *Harrison*, the Court explained that under § 3729(c), the phrase "'any request or demand . . . for money or property' where the government provides any portion of the [requested] money" requires at a minimum that there is a "a call upon the government fisc." *Id.* at 785 (first alteration in original) (quoting 31 U.S.C. § 3729(c)); *see also* Kennard v. Comstock Res. Inc., 363 F.3d 1039, 1047 (10th Cir. 2004) (stating that "[t]he *transmission* of funds to the Government is enough; there is no requirement . . . that the Government itself suffer a loss"); Varljen v. Cleveland Gear Co., 250 F.3d 426, 429 (6th Cir. 2001) ("[R]ecovery under the FCA is not dependent upon the government's sustaining monetary damages."). *But see* Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 827 (S.D.N.Y. 1986) (noting that an element necessary to satisfy a FCA claim is that the Federal Government "suffered damages as the result of the false or fraudulent claim").

115. 317 U.S. 537 (1943).

116. *Id.* at 551–52.

117. 390 U.S. 228 (1968).

118. *Id.* at 233.

to permeate FCA cases.[119] Later cases, such as the Eighth Circuit's *Costner v. URS Consultants, Inc.*,[120] emphasized the following even in light of a broad interpretation of FCA liability:

> [O]nly those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due, are properly considered "claims" within the meaning of the FCA.[121]

In response to the Federal Government's pervasive role in funding the American economy, courts warned against the potential boundless application of the FCA. In 1958 in *United States v. McNinch*,[122] the Supreme Court warned that the FCA was "not designed to reach every type of fraud practiced on the Government."[123] Later in 1998, in *United States ex rel. Yesudian v. Howard University*,[124] the D.C. Circuit noted that FCA liability may not attach "where the grantee's federal funds are an insubstantial percentage of its total budget."[125] In addition to emphasizing serious fraud in relation to substantial U.S. funding, in the 2002 case *United States ex rel. Totten v. Bombardier Corp.* (*Totten I*),[126] the D.C. Circuit warned against subjecting contractors to redundant liability in a FCA suit for fraud against Amtrak, a recipient of federal funding.[127] Given the

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119. *See* Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 183 (3d Cir. 2001) (noting *Hess*'s principle of restitution with regard to the FCA and that consequently "[i]t was not intended to impose liability for every false statement made to the government"); *see also infra* note 121 and accompanying text.

120. 153 F.3d 667 (8th Cir. 1998).

121. *Id.* at 677; *see also* United States v. Lawson, 522 F. Supp. 746, 750 (D.N.J. 1981) (noting that "only actions which have the purpose and effect of causing the Government to pay out money are clearly claims within the purpose of the Act" (internal quotation marks omitted) (quoting United States v. Silver, 384 F. Supp. 617, 620 (E.D.N.Y. 1974))). Furthermore, in *Hutchins*, the Third Circuit noted that "[e]xtending the False Claims Act to reach any false statement made to the government, regardless of any impact on the United States Treasury, would appear to impermissibly expand standing doctrine." *Hutchins*, 253 F.3d at 184 n.5. The Third Circuit further held that "the submission of false claims to the United States government for approval which do not or would not cause financial loss to the government are not within the purview of the False Claims Act." *Id.* at 184.

122. 356 U.S. 595 (1958).

123. *Id.* at 599.

124. 153 F.3d 731 (D.C. Cir. 1998).

125. *Id.* at 738.

126. 286 F.3d 542 (D.C. Cir. 2002).

127. *See id.* at 554 (Randolph, J., concurring) ("[S]uppose the plaintiff in this case prevailed. The recovery would go to the plaintiff and the federal government. Amtrak would recover nothing. . . . Presumably, Amtrak would . . . be able to sue the defendants on its own . . . . The

intended remedial and non-punitive nature of the FCA, the D.C. Circuit later underscored the danger of automatically attaching liability to any institution that had received federal grants in *United States ex rel. Totten v. Bombardier Corp.* (*Totten II*).[128] Subsequently, in *Allison Engine Co. v. United States ex rel. Sanders*,[129] the Court refused to impose FCA liability under the submission of false records or statements under Section 3129(a)(2)[130] against subcontractors who allegedly presented fraudulent invoices to a contractor, even though they were paid out of funds that "ultimately came from the Federal Treasury."[131] Instead, the Court reversed and remanded the lower court's decision because it concluded that Section 3729(a)(2) requires that the defendant "made a false record or statement *for the purpose of* getting 'a false or fraudulent claim paid or approved by the *Government*.'"[132] The Court further warned that "[r]ecognizing a cause of action under the FCA for fraud directed at *private entities* [as opposed to the Federal Government itself] would threaten to transform the FCA into an all-purpose antifraud statute."[133]

In addition to judicial warnings, prior to May 2009, legislative history emphasized the careful imputation of FCA liability where the U.S. Government provided "significant Federal regulation and involvement" to federal grantees.[134] The 1986 Senate Report to the FCA's revisions discussed how Medicare and state Medicaid programs constituted the ideal situation in which FCA liability applied to state agencies that received federal funding.[135] In the Medicare context, individuals submit false or fraudulent claims to private intermediaries, such as insurance companies,

effect would be a quadruple damage award—Amtrak's recovery plus the treble damages awarded under the False Claims Act.").

128. 380 F.3d 488, 496 (D.C. Cir. 2004) (warning against acknowledging direct presentment to a federal grantee for three main reasons: (1) there could be the potential of "quadruple liability"; (2) the possibility of complications involving the scienter requirement; and (3) the Act could become "almost boundless").

129. 128 S. Ct. 2123 (2008).

130. Whereas § 3729(a)(1) previously held individuals liable for directly presenting false or fraudulent claims to the Federal Government, prior to May 2009, § 3729(a)(2) attached FCA liability to one who "knowingly [made], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2) (2006).

131. *Allison Engine*, 128 S. Ct. at 2127–31.

132. *Id.* at 2130 (emphasis added) (quoting 31 U.S.C. § 3729(a)(2)).

133. *Id.* (emphasis added).

134. S. REP. NO. 99-345, at 22 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5287.

135. *Id.* at 21–22.

rather than directly to the federal agency.[136] Nevertheless, the Senate Report noted that "false Medicare claims have been uniformly held to be within the ambit of the False Claims Act," despite the fact that insurance companies actually pay and receive the claims.[137]

The Senate Report noted three principal characteristics unique to the Medicare and Medicaid programs that may justify this result: (1) after the submission of claims, the United States subsequently, rather than initially, reimburses insurance companies for Medicare claims; (2) federal funding may constitute a significant percentage of state Medicaid funds; and (3) the Federal Government can likely have "'substantial contacts'" with Medicaid programs such that Congress exerts "extensive Federal regulations and control."[138] Medicare and Medicaid programs therefore constituted the primary context in the past where Congress emphasized the application of the FCA to state agencies and private intermediaries which the Federal Government substantially regulated and controlled.[139]

2. *Recent FCA Amendments Have Left the Door Open for Revising the Meaning and Application of "Restitution" in the FCA Context*

Recent FCA amendments have left the door open for a potential expanded interpretation of "restitution" by abolishing direct presentment and the intent to defraud the U.S. Government, as well as by expanding the definition of a FCA claim.[140] Similar to prior FCA revisions, these recent amendments arose during a time of heightened federal funding in which Congress intended the amendments to ameliorate the recent financial crisis.[141] Unlike in the past when FCA revisions may have targeted defense contractors, Congress opined that revisions were necessary so that the FCA could be "corrected and clarified in order to protect from fraud the Federal

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136. *Id.* at 21.

137. *Id.*

138. *Id.* at 21–22 (citing and discussing United States *ex rel.* Davis v. Long's Drugs, Inc., 411 F. Supp. 1144, 1146–47 (S.D. Cal. 1976)). In *Long's Drugs*, the court held that fraudulent claims submitted to Medical, California's Medicaid program, fell within the ambit of FCA liability because the program entailed fifty percent of federal funds and was subject to "a myriad of federal regulations" in order to qualify for federal disbursements. *Id.*

139. S. REP. NO. 99-345, at 21–22.

140. *See* 31 U.S.C.A. § 3729(a)(1)(A), (a)(1)(B), (b)(2) (West 2009) (broadening the reach of FCA liability).

141. *See* S. REP. NO. 111-10, at 1–4 (2009) (noting that the FCA must be clarified to protect federal assistance and relief from fraud, especially assistance and relief spent in response to the current economic crisis).

assistance and relief funds expended in response to our current economic crisis."[142] Thus, overruling *Allison Engine*'s requirement that under Section 3729(a)(2) there must be at least an intent "to get the Government to pay its claim,"[143] the elimination of this intent requirement may strain the nexus between federal funding and an actual or potential financial harm to the U.S. Government.[144] Furthermore, the new definition of a claim as a demand for money "to be spent or used on the Government's behalf or to advance a Government program or interest," as opposed to requiring the U.S. Treasury to actually hold title to the funds, may further expand the definition of Federal Government damages.[145] Thus, the recent legislative history and new statutory language may alter prior case law's narrowed tailoring of restitution for damage directed at the U.S. Government.

III. THE COURT'S REASONING

In *United States ex rel. DRC, Inc. v. Custer Battles, LLC* (*DRC IV*),[146] the Fourth Circuit issued a decision reversing in part and remanding the judgment of the United States District Court for the Eastern District of

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142. *Id.* at 4.

143. Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2130 (2008).

144. *See* S. REP. NO. 111-10, at 12 (noting that unlike the prior intent requirement, "the provision now just extends FCA liability to those who conspire to commit a violation of any substantive section of 3729(a)").

145. *See* 31 U.S.C.A. § 3729(b)(2)(A)(ii) (broadening the statutory definition of a "claim"). To see from a purely statutory standpoint how restitution may be redefined or applied in the FCA context, it is necessary to compare in more detail the new and old definitions of a FCA claim. Prior to the May 2009 FCA revisions, a claim was limited to include:

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (2006). A FCA claim is now significantly expanded to include:

> any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—(i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—(I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded . . . .

31 U.S.C.A. § 3729(b)(2).

146. 562 F.3d 295 (4th Cir. 2009). The court issued its decision on April 10, 2009. *Id.* at 295.

Virginia.[147] Reversing the district court's finding, the court held that all of the false or fraudulent claims presented in the ICE contract qualified under the FCA.[148] The court reasoned that U.S. Government money funded at least a portion of the claims,[149] and that a jury could reasonably conclude that Custer Battles had presented these false claims to U.S. Government officials in compliance with presentment requirements of the FCA.[150] Rejecting the district court's source-of-funds analysis for determining what constitutes a "claim," Judge Niemeyer instead relied on a strictly textual analysis of the FCA.[151] He referred to the FCA's definition of a "claim," currently in force at the time, as "any request or demand . . . for money or property which is made to a . . . grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded."[152] The court therefore reasoned that "[s]o long as '*any portion*' of the claim is or will be funded by U.S. money *given to the grantee*," the claim in its entirety qualified under the Act.[153] In addition, without further elaboration, the court simply concluded that the district court had wrongly determined that Iraqi funds held or administered by the United States could not constitute a claim.[154]

The Fourth Circuit further dismissed the district court's finding that the U.S. Government needed to maintain control over the funds used to pay Custer Battles's claims in order for them to remain U.S. property because it reasoned that the statutory language reveals that the United States does not need to retain control of its funds after giving them to a grantee.[155] Thus, the court again referenced the Act's language, which simply characterizes claims as requests "*made to a . . . grantee, or other recipient*" of U.S. funds.[156] Since the CPA, as a grantee of U.S. money, paid the claims from the DFI, which contained $210 million of U.S. funds, all of the false claims

147. *Id.* at 298.

148. *Id.* at 305.

149. *Id.* at 304.

150. *Id.* at 307.

151. *Id.* at 297, 303.

152. *Id.* at 303 (alteration in original) (internal quotation marks omitted) (quoting 31 U.S.C. § 3729(c) (2006)).

153. *Id.*

154. *Id.* at 303–04. The court simply quoted *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943), for the proposition that the FCA "'does not make the extent of [funds'] safeguard dependent upon the bookkeeping devices used for their distribution.'" *DRC IV*, 562 F.3d at 304 (alteration in original) (quoting *Hess*, 317 U.S. at 544).

155. *DRC IV*, 562 F.3d at 304.

156. *Id.* (alteration in original) (quoting 31 U.S.C. § 3729(c)).

qualified under the FCA.[157] The court further rejected Custer Battles's argument that its contractual language specifically stipulating that "[n]o funds, appropriated or other, of any Coalition country are or will be obligated under this contract" inhibited finding the invoices as "claims" under the Act.[158] It reasoned that a claim is statutorily defined in terms of its provision of U.S. funds, rather than by the contractual obligation of the U.S. Government.[159]

The Fourth Circuit also overruled the district court's requirement that the CPA needed to constitute a U.S. instrumentality to satisfy direct presentment under Section 3729(a)(1) of the Act.[160] Failing to specifically address the instrumentality issue, the court instead concluded that the plaintiff had presented sufficient evidence by which a jury could conclude that U.S. government officials were acting in their official capacity, thereby satisfying direct presentment to the Federal Government under Section 3729(a)(1).[161] The evidence sufficiently demonstrated that the U.S. Army Contracting Agency hired and paid U.S. Government contracting officers and authorized them to administer the ICE contract and to contract on behalf of the United States.[162] The court reasoned that these contracting officers operated in their official capacity as U.S. employees because the U.S. Government paid them to spend U.S. tax dollars, to administer Custer Battles's invoices, and then later to present the invoices to U.S. military officers working in the CPA's financial office.[163] Thus, presentment was satisfied because Custer Battles had first and foremost submitted these invoices to U.S. contracting officers employed by the U.S. military.[164]

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157. *Id.* This $210 million was U.S. money in that the sum constituted funds seized by the U.S. Government from Iraqi bank accounts in addition to U.S. congressionally appropriated funds. *Id.* at 299.

158. *Id.* at 304 (internal quotation marks omitted).

159. *Id.* Custer Battles further claimed on appeal that its invoices did not constitute "claims" because the company was not in privity with the U.S. Government. *Id.* The Fourth Circuit also dismissed this claim and indicated that the U.S. Supreme Court recently rejected this notion when holding that a subcontractor could be liable for submitting a false claim to the principal contractor of the United States. *Id.* (citing Allison Engine Co. v. United States e*x rel.* Sanders, 128 S. Ct. 2123, 2129–30 (2008)).

160. *Id.* at 305–06.

161. *Id.* at 307.

162. *Id.* at 306.

163. *Id.* at 306–07. The court further explained that after U.S. Government contracting officers administered the invoices, they then presented them for approval to consultants, which included a contractor hired by the U.S. Agency for International Development as well as members of the U.S. military. *Id.* at 307. After their approval, the invoices finally reached U.S. military officers assigned to the CPA's financial office for payment. *Id.*

164. *Id.* at 306.

Nevertheless, the court dismissed the district court's implied requirement of presentment under Section 3729(a)(2).[165] It reasoned that according to the recent U.S. Supreme Court case, *Allison Engine Co. v. United States ex rel. Sanders*,[166] Section 3729(a)(2) simply states that the false or fraudulent claim must be "'paid or approved by the Government,'" which is strikingly different from presentment language in Section 3729(a)(1), and which courts should avoid interpreting differently.[167] The court ultimately remanded the case, thereby reversing Custer Battles's grant of judgment as a matter of law as well as the limitation of the relators' claim for damages from the ICE contract.[168]

IV. ANALYSIS

In *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, the Fourth Circuit foreshadowed the continued expansion of FCA liability by ignoring precedent and misinterpreting the original legislative intent of the FCA.[169] The court erroneously held that all false claims presented in the ICE contract qualified under the FCA, concluding that (1) at least a portion of the DFI was funded by the U.S. Government at some point[170] and (2) U.S. contracting officers assigned to the CPA remained U.S. Government employees acting in their official capacity.[171] In so holding, the Fourth Circuit ignored precedent by allowing FCA liability to attach to non-U.S. funds.[172] Moreover, the court failed to properly employ a U.S. instrumentality test by overlooking the numerous factors indicating that the

165. *Id.* at 308.

166. 128 S. Ct. 2123 (2008).

167. *DRC IV*, 562 F.3d at 308 (quoting 31 U.S.C. § 3729(a)(2)). The court referenced *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002), which stated that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *DRC IV*, 562 F.3d at 307 (citation and internal quotation marks omitted). The court further noted that its conclusion parallels the language of § 3729(a)(1), which "defines liability in terms of the *person* to whom the claim is presented," whereas § 3729(a)(2) defines it based on the "intended *source* of the payment or approval" without a presentment requirement. *Id.*

168. *DRC IV*, 562 F.3d at 309. The court also upheld the district court's prior ruling that Custer Battles had not committed fraud in the inducement on its Airport Contract because it was a fixed price contract that did not stipulate the provision of 138 security personnel. *Id.* at 308–09.

169. *See infra* Part IV.A–C.

170. *DRC IV*, 562 F.3d at 304–05.

171. *Id.* at 307.

172. *See infra* Part IV.A.1.

CPA was its own multinational entity.[173] Finally, the court distorted the FCA's purpose of providing restitution to the U.S. Government.[174] If the Fourth Circuit had sustained the traditional FCA requirements, the court would have avoided the promulgation of an alarming expansion of the FCA.[175] *Custer Battles* therefore exemplifies the continued expansion of the FCA at the price of effectively destroying the vital nexus between the U.S. Treasury and the contractor,[176] creating limitless liability for contractors,[177] and eroding the FCA's original intent of providing restitution, rather than punitive penalties.[178] While the detrimental impact of *Custer Battles* and recent amendments remain premature in FCA litigation, it will likely lead to an unstable contracting environment where there is potentially no end in sight to overarching U.S. Government interests.[179]

A. While the Fourth Circuit Ignored Precedent by Attaching FCA Liability to Non-U.S. Funds, Recent FCA Amendments Now Support Custer Battles *by Extending Liability to Funds that the U.S. Government Lacks Title to and by Effectively Destroying the Vital Nexus Between the U.S. Government and the Contractor*

Ignoring precedent, the Fourth Circuit falsely presumed that FCA liability could attach to Iraqi funds from the DFI simply because the United States previously provided a mere portion of its funding.[180] Consequently, the Fourth Circuit's ruling created further uncertainty among contractors by failing to recognize explicit provisions in the ICE contract regarding the obligation of Iraqi funds.[181] Finally, in light of Congress's promulgation of the new FCA amendments, the end result will be even more uncertainty by allowing non-U.S. funds to apply to FCA claims and by neglecting to provide a clear definition of a "claim" for FCA purposes.[182]

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173. *See infra* Part IV.B.1.
174. *See infra* Part IV.C.1.
175. *See infra* Part IV.A–C.
176. *See infra* Part IV.A.2.
177. *See infra* Part IV.B.2.
178. *See infra* Part IV.C.2.
179. *See infra* Part IV.A–C.
180. *See infra* Part IV.A.1.
181. *See infra* Part IV.A.1.
182. *See infra* Part IV.A.2.

1. The Fourth Circuit Ignored Precedent by Attaching FCA Liability to Non-U.S. Funds

Rather than ignore precedent, the court should have avoided attaching FCA liability to non-U.S. funds, including funds that did not directly derive from the U.S. Treasury, by carefully considering the historical cases of *United States v. Cohn*[183] and *United States v. McNinch*.[184] The court would have then realized that similar to the situation in *Cohn*,[185] the U.S. Government had no *present* claim to the DFI because, at most, the CPA only had administrative control or possession over DFI funds paid to Custer Battles.[186] Such administrative control appears evident given that CPA officials repeatedly assured contractors that the Iraqi Exchange Contract was not a U.S. Government contract and that Coalition member laws did not apply to Iraqi funds, including the DFI.[187] Moreover, by solely considering the definition of a claim under Section 3729(c), which uses the word "provide" in the present tense, the court mistakenly concluded that the minor U.S. funding originally provided to the DFI *in the past* constituted a FCA claim.[188] Instead, the court erroneously overlooked *McNinch*'s requirement that a FCA claim must "'connote[] a demand for [federal] money or for some transfer of public property,'" or cause the Federal Government to "otherwise suffer immediate financial detriment."[189] Yet, because the United States had only provided a portion of funding in the past, rather than directly offering the funds from the U.S. Treasury, it could

183. 270 U.S. 339 (1926).

184. 356 U.S. 595 (1958).

185. *See Cohn*, 270 U.S. at 346 (explaining that there is no assertion of a claim upon or against the Government where non-dutiable merchandise "is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession").

186. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC I*), 376 F. Supp. 2d 617, 646 (E.D. Va. 2005), *rev'd*, 562 F.3d 295 (4th Cir. 2009) (concluding that the CPA only administered the DFI, thereby making the fact scenario analogous to that in *Cohn*). As will be discussed later, however, given that the CPA was not a U.S. instrumentality, the factual scenario is even more distinctively attenuated from that in *Cohn* since an international entity, rather than the U.S. Government, was the administrator of Iraqi funds. *See infra* Part IV.B.1.

187. *DRC I*, 376 F. Supp. 2d at 630–31. In fact, a CPA memorandum stated that "'Iraqi Funds are not subject to the same laws and regulations that apply to funds provided to the [CPA] directly from coalitions [sic] governments.'" *Id.* at 631 (alteration in original) (quoting a CPA memorandum). The company further stated that when it asked to a file a request under the Freedom of Information Act, CPA officials told it that the CPA was not a U.S. agency and that U.S. laws were inapplicable. *Id.* at 630–31.

188. *See DRC IV*, 562 F.3d at 304 (explaining that a claim arises under the FCA where the United States "*provided*" a portion of the money held in the DFI (citation and internal quotation marks omitted)).

189. *McNinch*, 356 U.S. at 599 (quoting United States v. Tieger, 234 F.2d 589, 591 (1956)).

not have been forced to "disburse" its own funding for purposes of the FCA; rather, it was the CPA that immediately surrendered Iraqi funding.[190] The FCA claim should therefore have failed because there was simply not "a sufficiently close nexus between [the grantee and the U.S. Government] such that a loss to the former [was] effectively a loss to the latter."[191]

Furthermore, unlike the situation in *United States ex rel. Marcus v. Hess*,[192] in which contractors were aware of federal involvement and supervision,[193] CPA contract provisions and regulations expressly indicated that funds of Coalition member countries would never be used in awarding CPA contracts.[194] By disregarding the explicit provisions regarding the ICE contract, the court not only ignored precedent, but likely fueled instability and tension in the contracting community by overlooking these specific safeguards in the Iraqi contract that may have in fact attracted contractors who were willing to provide services in an extremely volatile area.[195] Thus, even if hypothetically the CPA actually held the funds as a U.S. instrumentality, the funds implicated in the contract were Iraqi funds—and should have been deemed as such—because there was no close nexus between the U.S. Government and the CPA given the notice provisions explicitly stipulated in the ICE contract.[196] Moreover, the disregard of

190. *See DRC I*, 376 F. Supp. 2d at 646 ("[L]oss of DFI funds as the result of fraud was damage to the property of the Iraqi people. Accordingly, any demands for payment from the DFI were not 'claims' within the meaning of the FCA.").

191. United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 738 (D.C. Cir. 1998). In *Yesudian*, the D.C. Circuit referenced the legislative history of the 1986 amendments and in particular a Senate report, stating that "a false claim is actionable although the claims or false statements were made to a party other than the Government, *if the payment thereon would ultimately result in a loss to the United States*." *Id.* (internal quotation marks omitted) (quoting S. REP. NO. 99-345, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 5275). The *Yesudian* court recognized, however, that while the FCA does not actually include this language, the statute may nonetheless suggest the need for a "sufficiently close nexus" between effects on the grantee and the U.S. Government to impute FCA liability." *Id.*

192. 317 U.S. 537 (1943).

193. *See id.* at 543 (noting that the work in question "was done under constant federal supervision").

194. *DRC I*, 376 F. Supp. 2d at 631.

195. *See generally* Brief of Appellees, United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295 (4th Cir. 2009) (No. 07-1220) (discussing the expectations that contractors had in the ICE contract based on the specific CPA regulations acknowledging that only Iraqi funds would be utilized).

196. *DRC I*, 376 F. Supp. 2d at 631. With explicit regard to § 3729(a)(2) of the FCA, the Court in *Allison Engine* noted the following:

> If a subcontractor or another defendant makes a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false

explicit contract provisions not only expands FCA liability in this case, but also creates challenges for contractors who cannot be certain that contract provisions, which they knowingly read and sign, will be given the utmost respect and adherence in courts.[197] Rather than erroneously expand FCA liability to unknowing contractors who were misled by multiple regulations and statements by the CPA that confirmed the sole obligation of Iraqi funds, the court should have instead realized that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct."[198]

2. *By No Longer Requiring that the U.S. Government Hold Title to Funds Implicated in FCA Suits,* Custer Battles *Facilitated the Adoption of Recent FCA Amendments Whose Dramatic Redefining of a Claim Effectively Destroy the Vital Nexus Between the U.S. Government and the Private Contractor*

Similar to the erroneous reasoning outlined in *Custer Battles*, Congress's revision of the definition of a "claim" for FCA purposes will continue to effectively destroy any proper boundaries of FCA liability by disregarding the necessary nexus between the U.S. Government and the contractor.[199] Undoubtedly, the new definition of a FCA "claim" greatly expands the scope of liability by eliminating the need to implicate funds that came directly from the U.S. Treasury as well as by allowing claims to attach to any federal funding regardless of how far back it dates.[200] In fact, Congress was actually motivated to revise the definition of a claim based on

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> claim "by the Government." In such a situation, the direct link between the false statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability.

128 S. Ct. 2123, 2130 (2008).

While the fraudulent conduct of Custer Battles was indeed wrongful, and the issue of § 3729(a)(2) liability was remanded by the Fourth Circuit in light of *Allison Engine*, it is important to underscore that Custer Battles understood, based on the explicit contract provisions, that it was dealing with Iraqi funds and a separate, multinational entity, rather than the U.S. Government. *See* Brief of Appellees, *supra* note 195, at 32.

197. *See supra* notes 194–196 and accompanying text.

198. *Allison Engine*, 128 S. Ct. at 2130 (internal quotation marks omitted) (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 470 (2006)).

199. *See* Gerard E. Wimberly et al., *The Presentment Requirement Under the False Claims Act: The Impact of* Allison Engine *& the Fraud Enforcement & Recovery Act of 2009* 11 (09-9 Briefing Papers, 2009) (stating that the National Law Journal reports an expansion in the potential liability of companies and institutions that receive federal funds, such as by expanding liability to "subcontracts and subgrantees, effectively overruling *Allison Engine*").

200. *See* 31 U.S.C.A. 3729(b)(2) (West 2009) (providing the new expansive definition of a FCA "claim").

the district court's decision in *Custer Battles* prohibiting the attachment of liability to Iraqi funds.[201] By eliminating traditional FCA analysis in which a court would only apply the FCA to cases where a claim implicated U.S. funds, or funds which the U.S. Government holds title to, the overreach of the FCA is now strikingly limitless.[202] *Custer Battles* will no longer be the "exception" to FCA application by awarding damages to the U.S. Government, despite the absence of a present nexus between the U.S. Government through U.S. funds and the defendant-contractors.[203] Instead, contractors will likely be wary of entering into particular contracts when FCA liability may easily attach to non-U.S. funds.[204] For instance, given that a claim now includes money spent or used "on the Government's behalf or to advance a Government program or interest," there is no end in sight to this statute.[205] The boundaries of the statute are further clouded because the definition of a "Government interest" is unclear.[206] Congress's failure to define what is "on the Government's behalf" or "a Government program or interest" has effectively upheld the disastrous decision reached in *Custer Battles*.[207] What, then, are the limitations, if any, to FCA liability

201. *See* Charles R. Ching et al., *In-house Counsel Beware: The False Claims Act Might Impact Your Business*, 27 ACC DOCKET, Nov. 2009, at 56, 64 (noting that Congress completely rewrote the FCA's definition of a claim as a reactionary solution to the district court's decision in *Custer Battles*).

202. *See* 31 U.S.C.A. § 3729(b)(2)(A) (broadly defining a claim without regard to whether the U.S. Government has actual title to the money claimed).

203. *See* United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 303–04 (4th Cir. 2009) (concluding that a FCA claim is valid even if the U.S. Government only administers or possesses Iraqi funds, as opposed to U.S. funds).

204. *See From Bad to Worse: Changes to False Claims Act Increase Risk to Government Contractors*, HEALTH CARE FRAUD LITIG. REP., Aug. 13, 2009 [hereinafter *Bad to Worse*] (explaining that eliminating the United States' need to have title to the money makes "[t]he potential scope of this provision . . . staggering"). The commentators suggest that "any invoice submitted by a supplier, vendor or subcontractor to another private government contractor or subcontractor could fall under FERA's definition of a 'claim.'" *Id.*

205. 31 U.S.C.A. § 3729(b)(2) (failing to define a "Government interest," yet noting that a claim may include a situation in which the U.S. Government "provides or has provided any portion of the money or property requested or demanded"). Thus, this new definition of a "claim" eliminates any sense of a restrictive timeline or scope of applying the FCA, and instead may implicate various individuals, including subcontractors and suppliers who could unknowingly be held liable for transactions occurring quite some time ago. *See supra* note 204.

206. *See Bad to Worse*, *supra* note 204 (explaining that such ambiguous phrases in the new FCA "will undoubtedly foster extensive litigation").

207. *See* Ching et al., *supra* note 201, at 64 (noting that the way Congress sought to effectively overrule the district court's decision in *Custer Battles* was to radically rewrite the definition of a "claim"). In effect, the Fourth Circuit's decision in *Custer Battles* upheld the idea of promoting a "Government interest" by concluding that mere U.S. administration or control over another country's funds nonetheless triggered FCA liability. *DRC IV*, 562 F.3d at 303–04. In fact, it

if a financial nexus dependent on U.S. Government funds is no longer required?[208]

Undoubtedly, the new definition of a "claim" is a wake-up call for contractors, who may find themselves in situations remotely similar to *Custer Battles* in which the contractor is unaware—or even intentionally or unintentionally misled by those whom he contracts with—that the U.S. Government, regardless of not having title to the funds, is involved with the funds in the transaction.[209] The unawareness of contractors engaging in high dollar contracts is a dangerous proposition. A recent study reported that "nearly 80 percent of business executives from a broad array of companies . . . were unfamiliar with the FCA."[210] Thus, since many businesses are unaware of how the FCA works, yet are more likely to be subject to the FCA under the recent amendments, contractor ignorance and unpreparedness will likely become a major concern and frustration in this economy.[211] While this new definition may indeed be "[t]he most-far

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seems plausible that the U.S. Government opined that the administration or holding of these Iraqi funds was indeed within its interest to do so. As noted previously, the Fourth Circuit failed to explain in detail its rationale for concluding that non-U.S. funds administered or held by the U.S. could implicate FCA liability, other than by citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943). *See DRC IV*, 562 F.3d at 304 (noting the proposition that the FCA "does not make the extent of [funds'] safeguard dependent upon the bookkeeping devices used for their distribution"). Yet *Hess* does not adequately support the *Custer Battles* decision in this narrow respect as it was based on an entirely distinct factual background. *See Hess*, 317 U.S. at 543. Unlike in *Custer Battles*, in *Hess* the contractors were fully aware of constant federal involvement and the implication of federal laws. *Id.*

208. *See Bad to Worse*, *supra* note 204 (explaining that now, "the broad and vague terms of the new statute invite any number of novel, tenuous and potentially frivolous theories of FCA liability"). The newly revised definition of a claim is not only drastic for contractors, but also for companies more generally. *See* Ching et al., *supra* note 201, at 57 (noting that companies across the board, not just government contractors, may be liable as a result of the financial crisis). For example, some commentators suggest that "if your company applies for a loan from a bank that has received federal bailout funds or is insured by a recipient of such funds, the FCA may now apply to the loan transaction and you ignore the FCA at your peril." *Id.*

209. *See DRC IV*, 562 F.3d at 304 (holding a contractor liable despite contract provisions that explicitly denied the obligation of U.S. funds). Although the Fourth Circuit crafts an extremely vague distinction between the "obligation" and "provision" of U.S. funds, it is reasonable that Custer Battles, or the average contractor, would not presume, based on this explicit wording, that the FCA could therefore be applicable. *See* Wimberly et al., *supra* note 199, at 12 (advising government contract attorneys "to assume that everyone you are doing business with is a potential recipient of Government funds").

210. Robert T. Rhoad & Matthew T. Fornataro, *A Gathering Storm: The New False Claims Act Amendments and Their Impact on Healthcare Fraud Enforcement*, HEALTH LAW., Aug. 2009, at 14, 14–15.

211. *See id.* at 15 (noting that because many more companies may be implicated in the FCA than in the past, "these entities are also likely ill-equipped to respond if and when potential problems arise").

reaching change in the FCA," commentators suggest that it is unfortunately "among the least noticed."[212]

The drastic changes to the FCA should not be easily overlooked. Several commentators suggest that "[t]he boundless scope of FCA liability provided by FERA was surely designed to increase the volume of cases while decreasing the average length of each individual case."[213] Moreover, the revised definition of a "claim" for FCA purposes "will almost certainly coerce more early settlements by defendants unable to assume the incredible risks posed by an FCA lawsuit."[214] Therefore, while contractors may have thought *Custer Battles* was appalling, the new FCA amendments are likely to be far worse.

B. While the Fourth Circuit Neglected to Employ an Instrumentality Test to Properly Analyze the Presentment Requirement, Congress's Complementary Eradication of Presentment Now Encourages Limitless FCA Liability

By failing to consider the status of the CPA, the Fourth Circuit in *Custer Battles* improperly concluded that Custer Battles had satisfied the FCA's presentment requirement.[215] Failing to apply *Rainwater*'s instrumentality analysis, the court instead found that Custer Battles satisfied presentment.[216] Finally, the recent FCA amendments promulgate the ruling of *Custer Battles* by completely eradicating the presentment requirement, thereby eliminating a necessary filter and creating endless liability.[217]

1. By Neglecting to Employ an Instrumentality Test, the Fourth Circuit Failed to Consider the CPA as a Recognized Multinational Entity

In reaching its result, the Fourth Circuit ignored the factors employed by the Supreme Court in *Rainwater v. United States*[218] to determine whether the entity that received the contract constituted a U.S.

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212. Ching et al., *supra* note 201, at 64.

213. *Bad to Worse*, *supra* note 204.

214. *Id.* The commentators further explain that the "broad and vague terms" of the FCA not only invite frivolous lawsuits, but "remove[] many of the pretrial defenses to liability articulated by the Supreme Court in *Allison Engine*." *Id.*

215. *See infra* Part IV.B.1.

216. *See infra* Part IV.B.1.

217. *See infra* Part IV.B.2.

218. 356 U.S. 590 (1958).

instrumentality, and instead performed an oversimplified analysis.[219] If the Fourth Circuit had carefully considered the *Rainwater* factors, it would have found that unlike the CCC in *Rainwater*, Congress did not create the CPA.[220] Moreover, distinct from the CCC in *Rainwater*, Congress did not deem the CPA a "'wholly owned government corporation,'" nor did the CPA receive "all funds coming and returning to the United States Treasury."[221] In addition, unlike in *Rainwater*, not all officials of the CPA were U.S. employees; thirteen percent of them came from other Coalition countries.[222] Finally, the specific purpose of the CPA was not, at least openly, to promote U.S interests by using the CPA as an "'administrative device'" like the CCC;[223] rather, the CPA's purpose was "to provide security, to allow the delivery of humanitarian aid and to eliminate the weapons of mass destruction" for the sake of Iraqi stability.[224]

While the Fourth Circuit focused on whether U.S. officials were working under their official capacity based on the officials' personal perception of their job and duties,[225] the court should have also carefully considered the origins of the CPA and how it functions according to the perspective of its explicit regulations.[226] In fact, the United Nations per

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219. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 306 (4th Cir. 2009) (finding that U.S contracting officers were working in an official U.S. capacity without considering the CPA's characterization); *see also Rainwater*, 356 U.S. at 591–92 (discussing the various factors used to find that the CCC was a U.S. instrumentality).

220. United States ex rel. DRC, Inc. v. Custer Battles, LLC (DRC II), 444 F. Supp. 2d 678, 688 (E.D. Va. 2006), rev'd, 562 F.3d 295 (4th Cir. 2009). Rather, the establishment of the CPA was announced by U.S. General Tommy R. Franks in his "Freedom Message to the Iraqi People." United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC I*), 376 F. Supp. 2d 617, 620 (E.D. Va. 2005). Not only did Congress not create the CPA, but General Franks's message "was not followed by any formal document or order establishing the CPA or defining its legal responsibilities." *Id.*; *see also supra* note 14.

221. *Id.* (quoting and citing *Rainwater*, 356 U.S. at 591–92).

222. *Id.*

223. *Id.* (quoting *Rainwater*, 356 U.S. at 592).

224. *DRC I*, 376 F. Supp. 2d at 620 (internal quotation marks omitted) (quoting U.S. General Tommy R. Franks's "Freedom Message to the Iraqi People" from April 16, 2003).

225. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 306–07 (4th Cir. 2009). The Fourth Circuit's analysis of the personnel's official working capacity, which can be characterized as a "person test," rather than the actual character of the entity employing the personnel is not only unusual, but would be inapplicable to situations that do not involve U.S. government personnel acting simultaneously as employees of a grantee and the U.S. government. John T. Boese, Defending False Claims Act Cases: Recent Decisions and Developments, *available at* http://www.healthlawyers.org/Events/Programs/Materials/Documents/AM09/boese.pdf.

226. *See generally DRC I*, 376 F. Supp. 2d at 621–23 (discussing the CPA's creation and entity obligations, as well as the U.N. viewpoint of the CPA vis-à-vis U.N. Resolution 1483).

U.N. Security Council Resolution 1483 recognized the CPA as an entity through which the Coalition member countries acted "as occupying powers under unified command" and were called "to promote the welfare of the Iraqi people through the effective administration of the territory."[227] Thus, as a whole, the CPA appears analogous to Amtrak's organic statute in *United States ex rel. Totten v. Bombardier Corp.* (*Totten II*),[228] which specifically negates the entity as a U.S. instrumentality, since here the U.N. Security Council Resolution characterized the CPA not as a U.S. instrumentality, but rather as a distinct entity under "unified command."[229] Undoubtedly, this unique multinational coalition cannot be reconciled with a simple determination that federal employees assigned to the CPA satisfied the presentment requirement without actually considering the entity's status itself.

In fact, the court's decision to include a non-U.S. instrumentality within the scope of FCA liability not only disregarded precedent, but may likely have been a result of the political pressure to remedy contract fraud in Iraq.[230] Subsequent to the district court's decision in *Custer Battles*, the Senate Judiciary Committee held a hearing on FCA revisions, where the Committee's harsh critique of *Custer Battles* emphasized a need to revise the Act, particularly because the U.S. Government had spent so many federal dollars in Iraq.[231] Thus, the Fourth Circuit's decision constituted an

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227. S.C. Res. 1483, pmbl. & ¶ 4, U.N. Doc. S/RES/1483 (May 22, 2003).

228. *See* 380 F.3d 488, 491 (D.C. Cir. 2004).

229. S.C. Res. 1483, *supra* note 227, pmbl.

230. *See The False Claims Correction Act*, *supra* note 79, at 2–3. During this session, Chairman Leahy stated the following:

> In light of the politicization of the Justice Department, many wonder whether it has resisted pursuing certain false claims cases for political reasons—most notably those involving contracting fraud related to the war in Iraq and Afghanistan. . . . [T]he Justice Department participated in only five settlements involving contracting fraud in Iraq and Afghanistan, recovered a mere $16 million—less than two tenths of 1 percent of the overall total. . . . [S]ince 2002, our Government has spent nearly $500 billion on the wars in Iraq and Afghanistan, and billions of taxpayers' dollars have been lost to fraud, waste, and abuse. They ought to be recovering that, not protecting favorite contractors or politically connected people who are bilking the taxpayers.

Id.

Naturally, one must then wonder if the Justice Department adamantly pursued this unique case as a result of political pressure, rather than because the case satisfied the statutory and judicial requirements of the FCA at the time. *See* Brief of Appellees, *supra* note 195, at 16 (noting that the U.S. Government's appeal is a novel attempt to make the FCA apply to an international body that was not created for the United States' benefit).

231. *See The False Claims Correction Act*, *supra* note 79, at 4 (statement of Sen. Arlen Specter, Member, S. Comm. on the Judiciary) ("[I]n the *Custer Battles* case, to deny a claim because it was the Coalition Provisional Authority in Iraq, an international entity that got so much

unduly harsh blow to contractors by dismantling traditional FCA interpretation for a unique international situation in which the United States had its hands tied in a volatile region with numerous political and financial investments at stake.[232] Overall, despite structural similarities between the CPA in *Custer Battles* and Amtrak in *Totten II*, the Fourth Circuit in *Custer Battles* failed to consider the *Rainwater* factors, unlike the *Totten II* court,[233] and thus reached the opposite result from that in *Totten II*.[234]

While there is certainly a need to combat contract fraud in Iraq, particularly where millions of dollars are at stake, failing to apply a proper instrumentality test to the CPA, a distinctive international entity, was an unfair way of seeking justice in Iraq.[235] In fact, these unique types of entities that characterize Amtrak and the CPA represent "less than one-tenth of 1 percent of all False Claims Act cases."[236] Moreover, given that the CPA no longer existed at the time *Custer Battles* was decided, the court should have refrained from judicial activism for the sake of a unique international situation, rather than with the adverse consequence of affecting contractor assurances.[237] Given the rarity of FCA cases in which U.S. Government personnel may appear to act simultaneously as grantees and U.S. government employees, the Fourth Circuit should not have twisted FCA interpretations of presentment and U.S. instrumentalities to fit this one peculiar case.[238]

2. *Complementing* Custer Battles*'s Disregard for Properly Assessing Presentment, Congress's Complete Eradication of*

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of the money from the United States, those are really Federal dollars, and there really ought to be a way to encourage this kind of action.").

232. *See id.* at 8 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (discussing the large scale investment of the United States in Iraq).

233. *See Totten II*, 380 F.3d at 492 (discussing *Rainwater*).

234. *See* United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 306–07 (4th Cir. 2009) (analyzing the presentment requirement, but failing to employ the instrumentality test utilized in *Rainwater* and referenced in *Totten II*).

235. *See generally The False Claims Act Correction Act*, *supra* note 79.

236. *Id.* at 31–32 (statement of John T. Boese, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP).

237. *Id.* at 32 (warning that Congress should wait to expand and overhaul the FCA "beyond its roots to every aspect of the American economy simply to fix two almost unique cases [*Custer Battles* and *Totten II*] that the Supreme Court may fix for us").

238. *See* Boese, *supra* note 225 (noting that cases where an individual is both an employee of the U.S. government and a grantee are rare, such that "the Fourth Circuit's person test may not extend subsection (a)(1) liability in cases that do not involve this unusual circumstance" (internal quotation marks omitted)).

Presentment to the U.S. Government Now Encourages Limitless FCA Liability

Following *Custer Battles*'s distortion of a proper presentment analysis, Congress completely eliminated the requirement of presentment to the U.S. Government with the consequence of potentially limitless FCA liability.[239] Despite the rarity of an employee potentially wearing "two hats—that of an employee of a grantee and the U.S. government simultaneously,"[240] thus making presentment difficult to prove, Congress's complete overhaul of the requirement now eliminates a vital restraint on the FCA's scope.[241] While in the past the presentment requirement, as well as the other FCA provisions, may have effectively acted as a check to prevent the FCA from becoming a "general all-purpose antifraud statute,"[242] there will likely be a tsunami of timely and consuming litigation involving the most discrete, insular cases of insignificant federal funding attached to grantees who were presented with allegedly false or fraudulent claims.[243] Without direct presentment as a defense, government contract attorneys and the companies they represent will essentially have to relearn the statute and prepare for a battle in court with fewer defense weapons in their arsenal.[244]

C. *While the Fourth Circuit's Holding in* Custer Battles *Distorted the Purpose of Providing Restitution to the U.S. Government, New FCA Amendments Supplement the Detrimental Impact of* Custer Battles *by Further Eroding the Original FCA Intent*

Rather than perform an overly simplified statutory analysis of the FCA, the Fourth Circuit should have considered how its holding convoluted

239. *See Bad to Worse*, *supra* note 204 (noting in general "[t]he boundless scope of FCA liability provided by FERA").

240. Boese, *supra* note 225.

241. *See* Wimberly et al., *supra* note 199, at 11 (noting that the FCA expansion will likely lead to an increase in FCA suits coupled with the dramatic increase in the number of federal grants due to Congress's stimulus package).

242. *Id.* at 7.

243. *See Bad to Worse*, *supra* note 204 (commenting that the new amendments were meant "to increase the volume of cases while decreasing the average length of each individual case" with the consequence of admitting "novel, tenuous, and potentially frivolous theories of FCA liability").

244. *See* Wimberly et al., *supra* note 199, at 12 (advising government contract attorneys to educate contractors that FCA liability can attach to any situation of misrepresentation in the supply chain, and that one should fully document all communications regarding contract performance since "[t]he further down the supply chain your company is, the more likely you will not know that the ultimate contract is with the U.S. Government").

the Act's purpose of providing restitution to the U.S. Government.[245] By attaching FCA liability in this context, the court awarded damages to the U.S. Government despite the fact that the Iraqi people, not the U.S. Government, suffered the true economic loss.[246] While *Custer Battles* left the door open for potential quadruple liability in FCA suits, recent FCA amendments solidify this fear by continuing to erode the Act's original restitutive purpose.[247]

1. The Fourth Circuit's Holding in Custer Battles *Distorted the Purpose of Providing Restitution to the U.S. Government*

The court's decision distorted the restitutive purpose of the Act because it attached FCA liability to Custer Battles despite the fact that the company never requested U.S. funds.[248] Unlike the Act's original purpose of combating contract fraud *directed against* the U.S. Government, particularly in the defense contractor context, the court ignored statutory intent by applying the FCA "to a temporary international entity created for the benefit of another country."[249] Moreover, the Fourth Circuit judicially revised the FCA by its erroneous interpretation, when it should have instead deferred any revisions to Congress.[250] As previously noted, legislative history reveals that Congress, not the courts, created and subsequently revised the FCA during a time of war.[251] Instead of rewriting the Act on its own for the sake of political satisfaction, the court should have waited for Congress to revise the FCA if it believed such alteration was necessary.[252]

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245. *See infra* Part IV.C.1.

246. *See infra* Part IV.C.1.

247. *See infra* Part IV.C.1–2.

248. *See* United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC I*), 376 F. Supp. 2d 617, 631 n.45 (E.D. Va. 2005), *rev'd*, 562 F.3d 295 (4th Cir. 2009) (noting that all CPA contracts for amounts exceeding $5000 stated the following in regard to the source of funds: "The obligation under this contract is made with Iraqi funds . . . . No funds, appropriated or other, of any Coalition country are or will be obligated under this contract." (internal quotation marks omitted) (quoting a CPA memorandum)). Furthermore, only two to three percent of DFI funds were Vested Funds, or former U.S. property. *Id.* at 647 n.83.

249. Brief of Appellees, *supra* note 195, at 16.

250. *See* S. REP. NO. 99-345, at 8, 10–12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273, 5275–77 (discussing defense contracting fraud during the Civil War and World War II and how Congress played the dominant role in combating such fraud through its creation and statutory revision of the FCA).

251. *Id.* at 10–12.

252. *See, e.g.*, *id.* (reporting that when Congress disapproved of the Supreme Court's 1943 *Marcus v. Hess* decision regarding the ability of relators to bring in information that they did not personally discover, Congress rewrote the statute so that courts could prohibit relators from using

Given that the U.S. Government did not suffer any potential or actual economic loss, the Fourth Circuit failed to consider the precedential value of *United States ex rel. Marcus v. Hess*[253] and *United States v. Neifert-White Co.*,[254] and instead supported a punitive *qui tam* action where there was no need to make the U.S. Government whole.[255] Ignoring the unique circumstance of Custer Battles operating in Iraq after the recent U.S. invasion and creation of the CPA, a recognized international body, the Fourth Circuit invariably supported the U.S. Government's contention that the FCA no longer simply employs a restitutive aim in recovering serious damages against the U.S. Government fisc, but may include "any request for money or property from resources 'in which [the government] has an interest.'"[256] Thus, the court disregarded the traditional notion set forth in *United States v. McNinch* that not every alleged fraud against the U.S. Government should be subject to FCA liability.[257] The *Custer Battles* ruling therefore reflects a gross, judicial expansion of the FCA beyond its original legislative intent.[258]

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information in the U.S. Government's possession when bringing a FCA suit, unless the relator was in fact the original source).

253. 317 U.S. 537 (1943).

254. 390 U.S. 228 (1968).

255. *See Hess*, 317 U.S. at 551–52 (concluding that the FCA's purpose is "to provide for restitution to the government of money taken from it by fraud . . . to make sure that the government would be made completely whole"); *see also Neifert-White*, 390 U.S. at 232 (noting that the original FCA was meant to target fraud that "might result in financial loss to the Government"). As *Yesudian* opined in dicta, "there must be a sufficiently close nexus between the two such that a loss to the former is effectively a loss to the latter." United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 738 (D.C. Cir. 1998). There was no true economic loss on the part of the U.S. Treasury, however, and thus no nexus, since the DFI received funding from multiple sources, not just U.S. funds, including Iraq petroleum profits, surplus funds from the Oil for Food Program, and "international donations and deposits from the United States and other countries of Iraqi assets frozen by these countries during the 1990's." United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC I*), 376 F. Supp. 2d 617, 627 n.36 (E.D. Va. 2005), *rev'd*, 562 F.3d 295 (4th Cir. 2009) (citing the sources of funding that comprised the DFI).

256. *DRC I*, 376 F. Supp. 2d at 635 n.55 (alteration in original) (citation omitted). Interestingly enough, the wording in the Government's argument in *Custer Battles* was tracked in the FCA's new definition of a "claim." *See* 31 U.S.C.A. 3729(b)(2)(ii) (West 2009) (defining a claim as including when "the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest").

257. 356 U.S. 595, 599 (1958).

258. *See The False Claims Act Correction Act*, *supra* note 79, at 31 (statement of John T. Boese, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP) ("If you basically make a false claim to any person or entity who receives Federal money, if that is your definition, then you are expanding the False Claims Act far beyond its roots. The roots of the False Claims Act are that we are out to remedy fraud on the Federal Government.").

Quadruple liability is one potential effect of dismantling the traditional purpose of the FCA by exceeding the scope of restitution.[259] As *Totten II* aptly predicted, failing to employ traditional FCA analysis, as the Fourth Circuit did in *Custer Battles*, may encourage a punitive result where "a grantee could presumably bring suit and obtain a recovery for itself, in addition to the treble damages the [U.S.] Government and the relator divvy up under the Act."[260] In *Custer Battles*, the court's simplistic finding of presentment despite the fact that the defendants had submitted the claims to the CPA, a non-U.S. government entity,[261] potentially encouraged any recipient of federal funds to sue under the FCA to obtain its own personal recovery in light of such lax interpretations of the FCA.[262] Furthermore, without close adherence to the FCA's purpose of restitution, *Custer Battles* illustrated that the FCA could be practically boundless by attaching FCA liability to any grantee, no matter the amount or connection with the funds, as long as the entity has received some federal funding in the distant past.[263] This redundant liability and strained nexus between the U.S. Government and the grantee is certainly not what the FCA originally intended when desiring to protect the U.S. Government.[264]

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259. *See* United States *ex rel.* Totten v. Bombardier Corp. (*Totten II*), 380 F.3d 488, 496 (D.C. Cir. 2004) (noting that altering the FCA interpretation of "presentment" can lead to "quadruple liability" and that "a court's attempt to correct a statute can often create new problems").

260. *Id.* (discussing this as a possibility if presentment is not strictly applied in the FCA context).

261. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 306 (4th Cir. 2009).

262. *See* Wimberly et al., *supra* note 199, at 11 (noting that the Fourth Circuit "left the door open to liability despite that [the claim] was made to an entity other than the U.S. Government"). As the district court aptly noted, even after a decision was reached in the FCA suit, Iraq's presumed independent claim would in fact result in quadruple liability. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC I*), 376 F. Supp. 2d 617, 639 n.62 (E.D. Va. 2005), *rev'd*, 562 F.3d 295 (4th Cir. 2009).

263. *See Totten II*, 380 F.3d at 496 (warning that a loose interpretation of the FCA could lead to boundless application of the Act).

264. *See* Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 183 (3d Cir. 2001) (quoting United States *ex rel.* Pogue v. Am. Healthcorp, Inc., 914 F. Supp. 1507, 1512 (M.D. Tenn. 1996)); *see also The False Claims Act Correction Act*, *supra* note 79, at 31 (statement of John T. Boese, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP). Mr. Boese noted the following regarding Justice Breyer's concerns during oral arguments of a FCA suit:

> Justice Breyer realized something that I think is very important to this entire argument, which is, when you talk about Government money because of Government contracts, Government grants, and Government programs, Government money is endemic in the American economy. There is virtually no entity that would not have some Government money. And if a fraud on an entity . . . which received some Government money becomes a violation of the False Claims Act, there is no end to the statute.

Id.

Unfortunately, the most drastic consequence of the Fourth Circuit's ruling is that it fails to compensate the actual damaged party, the Iraqi people.[265] Established by U.N. Security Council Resolution 1483, the DFI was intended to fulfill the economic and humanitarian needs of the Iraqi people.[266] Custer Battles's fraud seriously damaged Iraq, which lost funding from its DFI, and yet the Iraqi Government will receive no payment or compensation from the FCA suit.[267] Consequently, in disregarding the warnings of *Yesudian* and *Totten II*, the heightened risk of liability will likely create contractor uncertainty and may even deter contractors from pursuing complex bids particularly where multiple actors are involved.[268]

The Fourth Circuit's overhaul of the FCA's restitutive purpose encourages recovery where the U.S. Government provided a small portion of funding to a grantee that maintains little or no connection with the U.S. Government.[269] Unlike the typical Medicare or Medicaid program in which the State receives significant federal money and regulation,[270] here only two to three percent of the DFI that paid Custer Battles originally came directly from the U.S. Treasury.[271] Moreover, unlike in the Medicare or Medicaid context, the U.S. Government did not play *any* role in subsequently reimbursing the contractor for invoices from the DFI.[272] Certainly, such characteristics do not encompass the serious damage that Congress intended the FCA to address.

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265. *DRC I*, 376 F. Supp. 2d at 639 n.62 (noting that if the FCA claim involves Iraqi funds, then Iraq is the entity sustaining the damages, not the U.S. Government). Indeed, Iraq was the entity bearing the damages as they were Iraqi funds. *See supra* Part IV.A.1.

266. S.C. Res. 1483, *supra* note 227, ¶ 14. Resolution 1483 further directed independent public accountants, approved by the International Advisory and Monitoring Board of the DFI, to audit the DFI. *Id.* ¶ 12.

267. *DRC I*, 376 F. Supp. 2d at 639 n.62.

268. *See* Brief of Appellees, *supra* note 195, at 13 n.4 (emphasizing that the CPA's Standard Contract and Grant Procedures only permitted the use of CPA funds, which were defined as Iraqi funds, and not U.S. appropriated funds).

269. *See* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 735 (D.C. Cir. 1998) (noting that FCA liability would not likely be appropriate "where there is little likelihood that any of a defendant's money actually came from the federal grant, or where there is little continuing contact between the grantee and the government once the grant is made").

270. *See supra* Part II.C.1.

271. *DRC I*, 376 F. Supp. 2d at 647 n.83.

272. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 299 (4th Cir. 2009) (explaining that the CPA was responsible for paying Custer Battles).

2. *The New FCA Amendments Supplement the Detrimental Impact of* Custer Battles *and Further Erode the Original FCA Intent of Providing Restitution*

In light of politicians' criticisms of the district court's ruling in *Custer Battles*,[273] Congress has gone even further in distorting and confusing the Act's purpose of restitution through its recent amendments.[274] The effect has been the strong likelihood of transforming the Act into an "all-purpose antifraud statute," which the Supreme Court has historically been wary to endorse.[275] While some have argued that the elimination of the requirement that a contractor actually intend to defraud the Federal Government pursuant to Section 3729(a)(2) was necessary to sustain the viability of FCA suits involving Medicare and Medicaid, a relator could still win a Medicaid suit, for example, by showing the defendant's intent for the state Medicaid program to rely on the false statement in order to obtain federal reimbursement.[276] In fact, relators have done so for decades.[277] Thus, a plaintiff may successfully argue that "health care providers and others submitting a Medicare claim are fully aware that, while they are submitting a claim to a contractor, the claims are ultimately paid by Medicare."[278] It is this awareness that therefore honors the traditional

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273. *See The False Claims Correction Act*, *supra* note 79, at 4 (statement of Sen. Arlen Specter, Member, S. Comm. on the Judiciary) (expressing frustration over the district court's decision in light of the extensive amount of federal money spent in Iraq).

274. *Compare* 31 U.S.C. § 3729 (2006) (requiring presentment to the U.S. Government, minimally defining a claim, and implicitly mandating an intent to defraud the U.S. Government by "get[ting] a false or fraudulent claim paid or approved by the Government"), *with* 31 U.S.C.A. § 3729 (West 2009) (eliminating the requirement of presentment to the U.S. Government, extensively rewriting the definition of a "claim," and removing *Allison Engine*'s "intent requirement"). Indeed, attorney John T. Boese, an FCA expert, noted the great expansion of the FCA as well as the fact that the lack of clear language may cause interpretative problems. Boese, *supra* note 225. Mr. Boese further quoted Senator Kyle's concern that the new FCA amendments should not target "any garden-variety dispute between a general contractor and a subcontractor simply because the general receives some federal money." *Id.* (internal quotation marks omitted).

275. *See* Allison Engine Co., Inc. v. United States *ex rel.* Sanders, 128 S. Ct. 2123, 2130 (2008) ("Recognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute."). Part of the reason why the Court was wary to adopt such a statute was that it would eliminate the direct link between the U.S. Government and the false or fraudulent claim. *Id.*

276. CONG. RESEARCH SERV., THE FALSE CLAIMS ACT, THE *ALLISON ENGINE* DECISION, AND POSSIBLE EFFECTS ON HEALTHCARE ENFORCEMENT 6 (2008), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-10818:1.

277. *See id.* at 2 (reporting that in Fiscal Year 2007, the U.S. Government received $2 billion in FCA recovery, and that more than seventy-five percent of the recoveries came from health care entities).

278. *See id.* at 5.

intent to restitute the U.S. Government for its own financial losses, rather than unnecessarily expand the FCA.[279]

Moreover, the political pressure surrounding the approval of these recent FCA amendments is strikingly dissimilar from the distinctive international situation in *Custer Battles*. Congress passed these FCA amendments during a period of increased federal funding under the umbrella of FERA, which itself was designed "to improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs."[280] Fueled by the American people's anger and frustration over the Nation's leading financial institutions, Congress strengthened the long-lasting impact of the *Custer Battles* ruling.[281] As some commentators have noted, "While the nominal targets of the recent amendments to the FCA are the financial institutions receiving stimulus funds and other federal assistance, the traditional defendants in FCA litigation, government contractors, will feel the brunt of this sweeping legislation."[282] While Congress may have passed this legislation with the intent to further support the *Custer Battles* ruling as well as to limit the fraudulent character of prominent financial institutions, both of these situations are (hopefully) only ephemeral in context. If the FCA amendments are here to stay, there will be no limit to targeting government contractors, and hence no limit to expanding the FCA into a punitive, all-purpose antifraud statute.[283]

V. CONCLUSION

In *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, the Fourth Circuit erroneously held that all false claims presented in the ICE contract

279. Unlike in the Medicare or Medicaid context, the situation in *Custer Battles* is highly distinguishable because, despite its poor behavior, Custer Battles was reasonable to believe that U.S. funds were not involved. *See supra* note 248. While technically the Fourth Circuit's decision remanded the issue of § 3729(a)(2) liability with the assumption that *Allison Engine* would control, the recent FCA amendments, if applied retrospectively, may hold Custer Battles liable under this provision despite its lack of intent to defraud the U.S. Government since it assumed it was "defrauding" the CPA. *See* United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*DRC IV*), 562 F.3d 295, 308–09 (4th Cir. 2009) (remanding the case to resolve subsequent issues, including the liability of Custer Battles under § 3729(a)(2)).

280. Wimberley et al., *supra* note 199, at 6 (citation and internal quotation marks omitted).

281. *See Bad to Worse*, *supra* note 204 (commenting that "the collapse of the nation's preeminent financial institutions provided all the ammunition needed for proponents of expansive FCA liability").

282. *Id.*

283. *See id.* (discussing how "government contractors . . . now face punitive liability never before contemplated by the FCA").

qualified under the FCA because of the following: (1) the United States contributed a portion of the funds held by the DFI,[284] and (2) a jury could reasonably find that U.S. Government contracting officers assigned to the CPA remained U.S. employees acting in their official capacity.[285] In so holding, the Fourth Circuit disregarded precedent by attaching FCA liability to non-U.S. funds.[286] By neglecting to employ an instrumentality test, the court failed to realize that the CPA, as a non-U.S. instrumentality, was incapable of satisfying the FCA's presentment requirement.[287] Consequently, the court distorted the restitutive purpose of the FCA.[288] If the Fourth Circuit had sustained the traditional interpretation and applicability of the FCA, the court would have avoided a ruthless expansion of the FCA, later approved by Congress's provocation from *Custer Battles* to pass the recent FCA amendments.[289] The impact of *Custer Battles* will therefore endure in light of Congress's destruction of a meaningful nexus between the U.S. Government and its contractor,[290] the creation of endless liability,[291] and the erosion of the Act's original restitutive intent.[292]

284. *DRC IV*, 562 F.3d at 304–05.
285. *Id*. at 308.
286. *See supra* Part IV.A.1.
287. *See supra* Part IV.B.1.
288. *See supra* Part IV.C.1.
289. *See supra* Part IV.A–C.
290. *See supra* Part IV.A.2.
291. *See supra* Part IV.B.2.
292. *See supra* Part IV.C.2.