NOTE

Private Attorneys General v. "War Profiteers": Applying the False Claims Act to Private Security Contractors in Iraq

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I. INTRODUCTION

What is the effect and reach of American law in a war zone such as Iraq? A recent case, *United States ex rel. DRC, Inc. v. Custer Battles*,[1] has presented an amalgam of apparently conflicting policies and principles that offers some food for thought on one aspect of this admittedly broad question. The case is a civil qui tam action[2] under the False Claims Act (FCA)[3] against an American contractor, Custer Battles, Inc. In the

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1. 376 F. Supp. 2d 617 (E.D. Va. 2005) [hereinafter *Custer Battles*]. This Note focuses on one published opinion from this complicated case. The court has granted defendants' Rule 50 motion, vacating a jury's finding of Custer Battles' liability. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC, 444 F. Supp. 2d 678 (E.D. Va. 2006) [hereinafter *Custer Battles II*]. The court initially put aside the question of whether the Coalition Provisional Authority (CPA) was an American agency for purposes of the False Claims Act (FCA). *Custer Battles*, 376 F. Supp. 2d at 620–23. However, in deciding defendants' post-trial Rule 50 motion, the court found that the CPA was not an American entity—such that a fraudulent act against it would not give rise to FCA liability. *Custer Battles II*, 444 F. Supp. 2d at 679. Unless otherwise noted, this Note will focus on the initial summary judgment decision, *Custer Battles*, 376 F. Supp. 2d at 617.

2. "An 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." BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).

3. 31 U.S.C. § 3729–3812 (2000). The FCA reaches beyond military contracts and often implicates other agencies, especially in the health care field. For a useful summary of the FCA, its provisions, and its scope, see http://www.taf.org/whyfca.htm (last visited February 19, 2007). *See also infra* Part II. For statistics on the frequency and relative success of qui tam actions with respect to

early months after the invasion, Custer Battles defrauded the primarily American led and operated Coalition Provisional Authority (CPA)[4]—the initial governing body in Iraq after the invasion—of millions of dollars by presenting false or inflated invoices to U.S. government officials and by failing to properly perform contracts.[5]

Custer Battles was formed in 1989 and "provide[s] support services to the United States and other governments engaged in wars and conflicts around the globe."[6] The company is an "international business risk consultancy" that "provides objective risk management and security consulting services of the highest quality and within an ethical framework."[7] According to its website, Custer Battles offers an array of security services, including security details and convoys, as well as explosive detection services.[8] The problem in this case, however, is that Custer Battles engaged in fraudulent conduct that cost the CPA millions of dollars for work that was never done.[9] With respect to one of its contracts, for example, Custer Battles used shell companies to falsely charge the CPA for costs never incurred; in another, Custer Battles was accused of fraudulently receiving payment for "services and facilities . . . [that were] never provided to the CPA."[10]

Prior to trial, where the jury found the defendants liable on one of the two contracts at issue,[11] the *Custer Battles* court faced two novel legal questions via a summary judgment motion.[12] First, at the time of Custer Battles' fraudulent activity, was the CPA, in effect, an American agency such that the case would even fall within the reach of the FCA?

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various U.S. agencies over the last several years, see http://www.taf.org/fcastatistics2006.pdf (last visited February 19, 2007).

4. The CPA's origins and institutional nature are discussed in *Custer Battles*, 376 F. Supp. 2d at 620–23. The CPA was "established in Iraq in 2003 to administer and rebuild Iraq during the transition from the overthrown Hussein regime to the new democratic government of Iraq." *Id.* at 618. The earliest public pronouncement of its existence was made by General Tommy R. Franks on April 16, 2003, *id.* at 620; its existence was reaffirmed by the United Nations, *id.* at 621; and although it was "neither created, nor explicitly authorized by Congress," a "substantial majority of the CPA's operating budget was appropriated by Congress," *id.* at 622. *See also supra* note 1 and *infra* note 27.

5. *Custer Battles II*, 444 F. Supp. 2d at 681.

6. *Custer Battles*, 376 F. Supp. 2d at 619.

7. Custer Battles: About Us, http://www.custerbattles.com/aboutus/index.html (last visited February 19, 2007).

8. *Id.*

9. *Custer Battles*, 376 F. Supp. 2d at 619.

10. *Id.*

11. *Custer Battles II*, 444 F. Supp. 2d at 679.

12. The court decided to have separate trials for the two main contracts at issue. *See id.* at 679 n.2. The court has recently granted Custer Battles' motion for summary judgment to dismiss relators' claims with respect to the second trial, involving the "BIAP" contract. U.S. *ex rel.* DRC, Inc. v. Custer Battles, 2007 WL 316839 (E.D. Va. 2007). *See* Dana Hedgpeth, *Judge Clears Contractor of Fraud in Iraq*, WASH. POST, Feb. 7, 2007, at D1.

Second, even if the CPA were subject to the FCA, must the funds used by the CPA to pay contractors have their origin specifically from the American public fisc for the FCA to apply? This Note focuses on the court's answer to the second question: FCA liability is limited to those circumstances in which the U.S. government *itself*, as distinct from the CPA, acquired or otherwise held "title" to the funds that the CPA subsequently used to tender payment.[13]

In applying that holding, the *Custer Battles* court first untangled and explained the various sources of funding the CPA had available to pay contractors in Iraq, not all of which were American in origin.[14] Next, the court analyzed each particular source of funds the CPA actually used to pay Custer Battles for the two security contracts at issue.[15] The court found that two sources of funding used by the CPA to pay Custer Battles came from the U.S. Treasury, while one source's title belonged to the "Iraqi people."[16] In limiting liability for fraud under the FCA to only those sources of funding to which the United States could be said to have title, the *Custer Battles* court relied on precedent that defined "claim" under the FCA as necessarily a drain on the public fisc.[17] Thus, the court limited potential liability for any alleged fraud only to the two sources of funds used by the CPA to pay Custer Battles' contracts in which the United States had actually held title. That decision left untouchable roughly $9 million of the $12 million total funds fraudulently received by Custer Battles, as well as any attendant damages available under the FCA to the government or qui tam plaintiff, because the CPA had substantially used "Iraqi" funds to pay Custer Battles.[18]

This Note will explore both the reasoning and ramifications of the court's opinion to base liability under the FCA solely on a traditionally-defined ownership interest of the U.S. government. The court used a formalistic interpretation of precedent to define what represents a claim under the FCA that developed in cases with highly dissimilar factual

13. *Custer Battles*, 376 F. Supp. 2d at 641.

14. *Id.* at 623–27.

15. *Id.* at 630–32. The first of the two contracts "was for the provision of security, housing, and related facilities and services at the Baghdad International Airport (BIAP)." The second contract "was for security, construction, and operational services to support the Iraqi Currency Exchange (ICE), which was charged with the creation of a new Iraqi currency." This Note will utilize the court's acronyms for the two contracts.

16. *Id.* at 641–46.

17. *Id.* at 636–37 (citing Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999)).

18. *Id.* at 646. For a brief description of the damages available under the FCA for plaintiffs in qui tam actions, see *infra* note 28.

scenarios to the facts and context of the *Custer Battles* case.[19] The court's reliance on case law that defines "claim" under the FCA does not translate well within the context of post-invasion Iraq, and the court did not acknowledge the reality on the ground when it constrained the meaning of "claim," and thereby unfortunately limited the reach of the FCA.[20]

In this unusual case, the court should have looked beyond judicial interpretations of the statutory claim developed from factually dissimilar cases and instead contemplated the policies behind the qui tam provisions of the FCA. The court should have also acknowledged the implications of privatization in the realm of federal agencies and the consequent need for legal accountability in the government's use of private contractors—especially under the chaotic circumstances in Iraq in which government oversight of private contractors is particularly difficult.[21] If the *Custer Battles* court had considered these factors, it would have more broadly interpreted the meaning of "claim" under the FCA, and this broader definition in turn would have facilitated a greater liability for contractors' fraudulent actions in Iraq.

The effect of the court's reasoning is to attach FCA liability in these circumstances only on the pure chance that the CPA happened to use specifically American funds to pay a fraudulent actor, regardless of the CPA's broad possessory discretion to simultaneously and freely spend so-called Iraqi funds.[22] The court's approach ignores the reality that Custer Battles' fraudulent activity substantially harmed American military and political objectives in Iraq.[23] Further, the court's holding undercuts some policy justifications put forward by proponents of privatization because a central justification for the government's delegation of power to private entities assumes a final accountability by government officials for all forms of government-sponsored action, whether actually performed by public or private entities.[24] If the court had applied a broader interpretation, then perhaps other legitimate American interests (for example,

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19. *See* United States v. Cohn, 270 U.S. 339 (1926); United States v. McNinch, 356 U.S. 595 (1958); United States v. Neifert-White Co., 390 U.S. 228 (1968); *see infra* Part IV.

20. *See Custer Battles II*, 444 F. Supp. 2d 678, 686–89 (E.D. Va. 2006) (discussing the nature of the CPA).

21. *See infra* note 44.

22. The CPA had differing levels of discretion in how a particular type of funding would be spent. The level of discretion was based on the source of that funding. *Custer Battles*, 376 F. Supp. 2d at 629; *see infra* Part III. "Iraqi" funds would be disbursed at the "discretion of the [CPA]." *Custer Battles*, 376 F. Supp. 2d at 621 (citing U.N. SCOR, U.N. Doc. S/RES/1483 (May 22, 2003)).

23. *Cf.* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999) (holding, *inter alia*, that the contractor's "underlying fraudulent activity" is not the focus of the FCA, *unless* it relates to a "claim" on government property).

24. *See* Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 324 (2004).

government accountability for the actions of private contractors) would allow the FCA to be used to prevent waste and fraud.

In order to provide context for the *Custer Battles* court's opinion, Part II of this Note generally describes the FCA and the policies behind its qui tam provision, discusses policy rationales behind the use of private security contractors by the U.S. government, and highlights how security contractors like Custer Battles fit into that picture within the reality of present-day Iraq. Part III examines the reasoning of the *Custer Battles* court, and Part IV critiques that reasoning and the application of precedent in this case. Part V proposes an alternative to the court's reasoning which more closely aligns with the interests of the American taxpayer in preventing and punishing fraud. Finally, Part VI looks beyond the specifics of this case and briefly suggests congressional approaches to affirm and fortify the reach of the FCA to all activities performed by security contractors in war zones under American control.

II. QUI TAM PROVISIONS UNDER THE FCA & PRIVATIZATION IN THE DEFENSE DEPARTMENT

The limited scope of this Note does not allow for a full exposition of the development of the various policies and rationales for the use of private contractors by the U.S. Armed Forces. However, to give some context to the *Custer Battles* opinion, this Part will first outline the development of the qui tam provision of the FCA. Next, this Part will briefly describe some rationales for "privatization,"[25] and how those rationales perhaps ring hollow in the context of foreign U.S. military occupations, as is the case in Iraq. Finally, this Part will conclude with a description of how some security contractors like Custer Battles actually operated during the period in which the CPA retained sovereignty[26] over Iraq.

A. The Qui Tam Provision of the False Claims Act

Qui tam actions allow an individual or private entity, called a relator, to sue on behalf of the U.S. government in order to help deter fraud perpetrated against the government.[27] Generally, relators provide

25. "Privatization" as a descriptive term has many usages and connotations; however, for the sake of simplicity, the leading legal definition will suffice: "[t]he act or process of converting a business or industry from governmental ownership or control to private enterprise." BLACK'S LAW DICTIONARY 1214–15 (7th ed. 1999).

26. The CPA transferred sovereignty to Iraq on June 28, 2004. Dexter Filkins, *Transition in Iraq: The Turnover; U.S. Transfers Power to Iraq 2 Days Early*, N.Y. TIMES, June 29, 2004, at A1.

27. A relator is defined as "[t]he real party in interest in whose name a state or an attorney general brings a lawsuit." BLACK'S LAW DICTIONARY 1292 (7th ed. 1999). *See also* 31 U.S.C. § 3730(b) (2000). This designation explains why the Latin phrase "ex relatione" (abbreviated "ex

information to the government without which a contractor's fraudulent claim might not have been detected or successfully prosecuted. Under the FCA, treble damages[28] are available from a contractor who is found to have defrauded the government, and the government and the relator each share in a percentage of those damages.[29] Thus, relators function as private attorneys general, in that they help civilly prosecute fraudulent activity which the Justice Department may not have the information or resources to combat.[30] In the *Custer Battles* case, relators included both separate contractors working with the company and a former employee of Custer Battles.[31]

Qui tam actions have a long common law history, stretching back to the thirteenth century.[32] American use of these actions even precedes the Constitution.[33] Congress codified qui tam actions when it passed the 1863 False Claims Act, which was enacted because the large defense budgets of the Union Army "provided fertile ground for those who would defraud the government."[34] The Union's war effort did not allow for full-fledged prosecution against "widespread fraud" during the Civil War, thus leading Congress to rely on private relators to combat the problem by giving them half of any damages recovered.[35]

During World War II, Congress raised the jurisdictional bar for qui tam actions. Immediately preceding this congressional revision of the FCA, the Supreme Court had generously interpreted the language of the 1863 Act to allow so called "parasitic" relators to proceed with qui tam actions even when they had simply copied information from criminal

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rel." in citation), meaning "by or on the relation of," is utilized in qui tam actions. BLACK'S LAW DICTIONARY 603 (7th ed. 1999).

28. Treble damages in this instance means a defendant is liable for up to three times the amount of the damages sustained by the U.S. government as a result of the fraudulent claim. *See* 31 U.S.C. § 3729(a) (2000) (the fraudulent defendant is liable for a civil penalty as well and the "costs of a civil action brought to recover any such penalty or damages.").

29. *Id.* § 3730(b), (c) & (d).

30. *Id.* The U.S. Justice Department has many options when a qui tam action is filed: it can intervene and take a leading or supporting role in the action; it can let the relator handle the action; or it can move to dismiss the action entirely. The relator's entitlement to a certain percentage of any damages awarded depends on the level of involvement of the U.S. government in litigating the action. *See* John C. Ruhnka and Edward J. Gac, *The "New" False Claims Act*, CPA J. ONLINE (1998), http://www.nysscpa.org/cpajournal/1998/0498/Features/F400498.htm.

31. *Custer Battles*, 376 F. Supp. 2d at 619.

32. Dan L. Hargrove, *Soldiers of Qui Tam Fortune: Do Military Service Members Have Standing to File Qui Tam Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 51 (2004); *see also* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774–78 (2000) (discussing the development of qui tam actions).

33. Hargrove, *supra* note 32, at 52.

34. *Id.* at 53.

35. *Id.* at 54.

indictments.[36] In response, Congress passed a revision of the qui tam provision of the FCA that allowed qui tam actions only when an "honest" relator brought information not already in the government's possession at the time of the suit.[37]

The effect of this amendment made qui tam actions extremely difficult to pursue.[38] For example, some relators who had passed along information to the government, but were then beaten to the courthouse by the Justice Department, were not allowed to bring qui tam actions.[39] In 1986, in the face of mounting evidence of fraud by government contractors, Congress decided to again retool the FCA: Congress specified that federal courts should allow any person to file a qui tam suit who had been an "original source" of the information, regardless of whether that information became public knowledge before the suit was filed.[40] This 1986 version of the FCA qui tam provision is the present controlling statutory language that the *Custer Battles* court analyzed.

The statutory history of the FCA's qui tam provision reflects a seesaw in policy concerns and congressional objectives. On the one hand, the government has always had an interest in preventing fraud by contractors, particularly in the area of defense spending, and in utilizing private individuals in order to accomplish that purpose.[41] Qui tam actions can provide a strong financial incentive for individuals with information of fraudulent activity to come forward. On the other hand, federal agencies like the Department of Defense (DoD), which have grown to rely on private contractors, appear to retain at least an historic suspicion of relators, and many federal agencies offer to contractors the ability to submit to "voluntary internal audit and compliance programs" as perhaps an

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36. *See* Major Deborah L. Collins, *The Qui Tam Relator: A Modern Day Goldilocks Searching For The Just Right Circuit*, 2001-JUN Army Law. 1, 4. Collins notes the following:

> Opportunists also came in the form of *qui tam* relators. The original 1863 FCA *qui tam* provisions did not restrict the sources from which a relator could obtain his information. This allowed would-be relators to use public documents as the basis of their successful suits. This type of suit became known as a "parasitic" suit.

Id. See also United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943) (holding that a litigator's expense in bringing the action was enough to justify "parasitic" actions under the statutory language of the 1863 version of the FCA, even though the relator had in no way helped to uncover the fraudulent activity itself).

37. Hargrove, *supra* note 32, at 58–59 (citing United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1104–05 (7th Cir. 1984)).

38. *Id.* at 60.

39. *Id.*

40. *Id.* at 61. *See* 31 U.S.C. § 3730(e)(4)(A) (2006).

41. Hargrove, *supra* note 32, at 55 ("The 1863 Act and its legislative history emphasized military procurement fraud." (citing Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (codified as amended at 31 U.S.C. §§ 3729-3733 (2000))).

alternative means of governmental oversight.[42] These agencies may see relators more often than not as merely opportunistic competitors: if contractors are too easily forced to defend unwarranted lawsuits because of a "broad" interpretation of the qui tam provision in the FCA, contractors may be less likely to work with the government, which could serve to chill creative and efficient[43] private sector contributions to the efforts and operations of the DoD.[44] Thus, the challenge for Congress and the federal courts is to find the proper balance between these two competing perspectives on the nature of relators and the reach of the FCA.

B. Privatization and the Defense Department

A thorough examination of privatization within the DoD is simply beyond the scope of this Note. However, in order to provide more context for the *Custer Battles* decision, it is necessary to provide a simple sketch of how privatization relies on a theoretical justification of accountability. In the present case, by limiting accountability to a very formal ownership interest, the *Custer Battles* court effectively ignored other U.S. interests that, within the context of foreign military contracts, should fall within the ambit of the qui tam provision of the FCA. The following provides background on one of those governmental interests—accountability for the performance of private contractors in the government's employ.

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42. *See* Ruhnka & Gac, *supra* note 30. The authors note the following:

> Over the past 20 years, from about the time of the Federal Foreign Corrupt Practices Act of 1977, increasing numbers of Federal regulatory, contracting, and enforcement agencies have made a policy decision to encourage voluntary corporate compliance programs that can supplement, or in some cases even replace, intrusive and inflexible agency monitoring, inspection, and reporting requirements for regulated industries . . . . [T]he DOD Voluntary Disclosure Program for defense contractors, jointly administered by the Departments of Defense and Justice . . . recommends that all defense contractors adopt 'a policy of voluntary disclosure as a central part of your corporate integrity program' and suggests that 'early voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of an attitude of contractor integrity even in the wake of potential criminal liability.' Once a contractor is admitted into the DOD program, it can expect its eventual liability from self-reported irregularities will be less than FCA-mandated treble damages.

Id.

43. And "necessary." Private contractors have been an integral part of the logistical and reconstructive efforts of the American military in Iraq. *See Frontline: Private Warriors* (PBS television broadcast June 21, 2005), streaming video *available at* http://www.pbs.org/wgbh/pages/frontline/shows/warriors/view/.

44. For an informative overview of the DoD's recent use of private contractors and attendant problems, see U.S. GOVT. ACCOUNTABILITY OFFICE, GAO-07-145, MILITARY OPERATIONS: HIGH LEVEL DOD ACTION NEEDED TO ADDRESS LONGSTANDING PROBLEMS WITH MANAGEMENT AND OVERSIGHT OF CONTRACTORS SUPPORTING DEPLOYED FORCES (2006), *available at* http://www.gao.gov/new.items/d07145.pdf.

An important rationale for the use of private contractors like Custer Battles by the U.S. government is that public purposes are best performed by a joint effort of government and private entities.[45] During the Cold War, and the accompanying expansion by the United States of the "military-industrial complex,"[46] government reformers looked to the private sector for creativity, technical expertise, and new models of management.[47] The growing reliance on private contractors was seen by these reformers as justified because of the public sector's apparently inherent bureaucratic inertia.[48] Also, reformers perceived that a more robust private sector influence in public affairs would provide a way to counterbalance the unheralded growth in the scope of the federal government by creating a "diffusion of sovereignty."[49]

The present-day basis for this rationale, however, relies principally on two premises, one of which is apparently "political," or practical, and the other which is based in actual administrative policy. The first premise relies on the notion that citizens simultaneously desire a "small" government, but also do not want an actual reduction in government services, so a mixture of the public and private sectors allows the citizenry to conceive of itself as in effect having its cake and eating it too.[50] The second, more theoretical and policy-based premise is an assumption that no matter the size or scope of the private sector's performance of government functions, official government actors demand and enforce actual accountability from contractors that ensures honest and verifiable contract performance.[51] This premise, however, no longer appears justified because there is growing "evidence that the official workforce no longer can be presumed to possess the capacity to account for the Government's

45. Guttman, *supra* note 24, at 326–31.

46. *See* Dwight D. Eisenhower, U.S. President, Farewell Address (Jan. 17, 1961), *available at* http://www.yale.edu/lawweb/avalon/presiden/speeches/eisenhower001.htm.

47. Guttman, *supra* note 24, at 324.

48. *Id.* at 326.

49. *See id.* at 326–27. According to Guttman, some contemporary analysts viewed the mix of public and private interests as a reconstitution of Government. Post-war contracting provided a "new form of federalism" which would "provide both technical expertise and powerful political support for increased federal commitment to national defense and public welfare tasks." However, administrative reformers were aware of the constitutional implications of "blurring the boundaries between public and private" administration and therefore, as was made clear in a 1962 Cabinet report to President Kennedy, it was "axiomatic" that *government* officials must have the ability and competence to account for *all* government work. Reformers were also concerned that competent, skilled federal officials would be enticed into the private sector by higher pay and benefits. *See id.* at 327 n.13.

50. *Id.* at 329–30. "Citizens [in the 1980s and 1990s] . . . generally wanted small Government without diminution in governmental functions. To address this inconsistency, new strategies for the reform took hold at home and abroad under banners touting 'reinventing government,' 'public-private partnerships,' 'devolution,' 'privatization,' and 'deregulation.'" *Id.*

51. *Id.* at 324.

operations."[52] Since the reality of the presumption that officials hold private industry accountable for their actions appears empirically suspect, the problems of unaccountability vis-à-vis private contract procurement and oversight by the DoD itself would logically be compounded within the context of a foreign theatre of war, with its attendant uncertainty and danger. This apparent lack of ability by federal officials[53] to adequately maintain accurate and adequate control or oversight of private contractors suggests, among other things, a greater need for a broadly interpreted qui tam provision of the FCA in order to better prevent fraud, and thereby provide a tool to force contractors to act responsibly when they perform government contracts.

Yet over the past few decades, Congress has consistently demanded "personnel ceilings" for federal agencies.[54] These personnel ceilings limit the number of jobs available under the government payroll.[55] In effect, these ceilings *require* a large private sector involvement in public functions.[56] Therefore, if Congress's intent with respect to personnel ceilings affirms a more general approval or acceptance of the benefits of privatization and the status quo, it follows that Congress may not have an overriding interest in legislation that would increase agency accountability at the risk of jeopardizing those benefits.[57] Although this may mean that Congress has delegated the responsibility of oversight and accounting to

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52. *Id.* at 323, 330–31. Guttman notes the following:

> In December 2002, Comptroller General David Walker conceded that he was "not confident that agencies have the ability to effectively manage cost, quality and performance in contracts." The [General Accounting Office's] high-risk list includes contracting at the Department of Defense .... In announcing her departure in September 2003, Office of Federal Procurement Policy Administrator Angela Styles expressed a similar sentiment: "There is still not a lot of oversight in some areas of our contracting system, and I think it will haunt us." .... Continued indicia of oversight deficiencies are easily discovered within agencies performing the Government's most sensitive work.

Id. See also Memorandum from Thomas E. White, Sec'y of the Army, to the Under Secretaries of Defense for Acquisition, Technology & Logistics, Comptroller/CFO, and Personnel & Readiness (Mar. 8, 2002), *available at* http://www.govexec.com/dailyfed/0402/042502white.pdf (noting that, as summarized by Guttman, "Army planners and programmers lack visibility at the Departmental level into the labor and costs associated with the contract work force and of the organizations and missions supported by them.").

53. *See Private Warriors*, *supra* note 43 (interview by Martin Smith with Gen. Paul Kern (Ret.), Army Material Command). *See also* Erik Eckholm, *Reach of War: Procurement; Army Contract Official Critical of Halliburton Pact is Demoted*, N.Y. TIMES, Aug. 29, 2005, at A9.

54. Guttman, *supra* note 24, at 323, 326.

55. *Id.*

56. *Id.*

57. *See 60 Minutes: War Profiteers?* (CBS television broadcast Feb. 12, 2006) (interview by Steve Kroft with Senator Byron Dorgan, suggesting that the present Administration and the 109th Congress had "no interest in aggressive oversight" of private contractors). For an informative perspective on the role of private security contractors in Iraq, and their functional integration with the U.S. military in that environment, see *Private Warriors*, *supra* note 43.

executive branch employees, it may also signal that Congress relies on private attorneys general to play a crucial role in holding contractors accountable for any fraudulent activities. If so, a broadly construed FCA would be in keeping with congressional understandings.

C. Security Contractors in Iraq

So how do security contractors like Custer Battles fit into this picture? There may be legitimate arguments about the private sector's advantageous ability for innovation, especially with regard to its technological expertise, when discussing government contracts with weapons manufacturers or other components producers.[58] However, that particular argument as applied to the security industry is misplaced because it is difficult to imagine how private companies such as Custer Battles could provide more innovative protection of vital interests than the U.S. military itself.

Whether legitimate in theory or not, security contractors have been extensively used by the DoD in Iraq.[59] One political advantage they may provide is that they lessen the need for actual military manpower.[60] The use of private security thus, theoretically, lessens the direct impact of conflict on American soldiers, as well as policymakers, because casualties and organizational costs are absorbed by nonmilitary entities. A related assumption validating the use of private security contractors is that it is more cost-effective for the DoD, or the CPA, to contract out certain security functions in order to allow the military to more flexibly focus on whatever instant, or more severe, conflicts or crises may arise.[61]

On the other hand, a security contractor may have so much discretion in how they perform the contract that the actual performance itself, even if done in good faith, may undercut some of the broader goals of the military. For example, Custer Battles has been accused by former employees of hiring and arming young Kurds (who have "historical resentments against other Iraqis"), as security guards.[62] According to some former American soldiers-turned-employees of Custer Battles, these Kurdish guards "brutalized" Iraqi civilians by firing into cars to apparently alleviate a traffic jam, and otherwise "terrorizing" civilians by

58. *Cf.* Guttman, *supra* note 24, at 326.

59. *See Private Warriors*, *supra* note 43.

60. *See id.* (interview by Martin Smith with Andy Melville, Erinys Security).

61. *See id.* (interview by Martin Smith with Col. John A. Toolan, USMC, discussing how the loss of four private security contactors, who worked for "Blackwater, U.S.A," disrupted the military's policy vis-à-vis the local population in Fallujah). *See also* James Dao et al., *The Struggle for Iraq: Security; Private Guards Take Big Risks, For Right Price*, N.Y. TIMES, Apr. 2, 2004, at A1.

62. Lisa Myers and the NBC Investigative Unit, *U.S. Contractors in Iraq Allege Abuses*, MSNBC, Feb. 17, 2005, http://www.msnbc.msn.com/id/6947745/.

smashing into and shooting up other cars.[63] Given the centuries-old rivalries among ethnic groups in the region, this behavior would seem to lend momentum to an insurgency. Thus, the performance of a government contract[64] by an American security contractor that does not take account of fairly sensitive cultural realities may have deleterious effects on the United States' primary goal of ending the insurgency in Iraq. In essence, the possible rationales of cost-effectiveness and flexibility presumably provided by security contractors in Iraq may be seriously questioned if the actual performance of these contractors helps to fan the flames of violence.[65]

On a broad scale, and based on some of the problems attendant with the use of security contractors in Iraq in situations similar to that in *Custer Battles*,[66] courts should broadly define what fraudulent activities are actionable under the FCA. A broadly construed qui tam provision not only accomplishes the general anti-fraud purposes of the FCA, but is especially welcome in situations like present-day Iraq where the government's ability to supervise or even control contractors is substantially

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63. *Id.* A "trophy" video, supposedly made by ex-employees of a British security firm called Aegis, shows precisely this type of behavior. *See* Sean Rayment, *"Trophy" Video Exposes Private Security Contractors Shooting Up Iraqi Drivers*, Nov. 26, 2005, TELEGRAPH.CO.UK, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/11/27/wirq27.xml&sSheet=/news/2005/11/27/ixworld.html.

64. *Custer Battles*, 376 F. Supp. 2d 617, 630 (E.D. Va. 2005). "Although the two contracts at issue here were both signed on standard U.S. contracting forms, the government concedes that in contrast with typical U.S. military contracts, contracts obligating Vested, Seized, or DFI Funds were not subject to U.S. contracting procedures, whether statutory or regulatory." *Id.*

65. *See Private Warriors*, *supra* note 43 (interview by Martin Smith with P.W. Singer of the Brookings Institute, suggesting that the difficulty of unforeseen circumstances in Iraq often leads private contractors, or their employees, to break their contractual obligations, and that that kind of "flexibility" undercuts the military effort); (interview by Martin Smith with Prof. Steven Schooner, George Washington Univ., pointing to the lack of legal accountability for "cowboy"-type behavior by security contractors in Iraq, and the resulting implications for that lack of accountability on the perceptions of Iraqis); (interview by Martin Smith with Lawrence Peter, Private Security Association (Iraq), Spokesman, conceding the lack of any public accountability or transparency regarding military "reprimands" to security contractors in Iraq).

66. 376 F. Supp. 2d at 619. *See also* Amended Complaint, United States *ex rel* DRC, Inc. v. Custer Battles, No. CV-04-199-A, 2004 WL 3270664 (E.D. Va. 2005). *See also 60 Minutes: War Profiteers?* (CBS television broadcast Feb. 12, 2006) (interview by Steve Kroft with Frank Willis, CPA, Ministry of Transportation (discussing a $2 million cash payment to Custer Battles and how the CPA accounting system in place at the time of the Custer Battles contracts was "non-existent"); (interview by Steve Kroft with British colonel Philip Wilkinson, CPA, Ministry of Finance, discussing the poor "performance" of Custer Battles with respect to its obligations under the ICE contract and suggesting the only way they could have gotten away with their blatant "breach" was because of "high political top cover"); (interview by Steve Kroft with Col. Richard Ballard, former Chief of Security at the Baghdad International Airport, recalling how Custer Battles was contractually obligated under the BIAP contract "to provide sophisticated X-ray equipment" for which they received a cash advance yet never procured). According to the *60 Minutes* report, Custer Battles has nevertheless received over $100 million in government contracts. *Id.*

hampered by pervasive violence. Some deterrent to fraudulent behavior on the part of security contractors is better than none at all. Courts should allow relators, through the apparatus of a broadly applied qui tam provision of the FCA, to help officials detect and prevent the development of an atmosphere of "anything goes" in terms of accountability for contract performance. Prevention of fraud will more likely be accomplished if courts allow qui tam actions based on fraudulent activity within a war zone to move forward if the government functionally possesses or controls the funds used to pay the false claim. Because the uncertainty and danger of a war zone already presents challenges to an effective governmental oversight of contract performance, like the situation existing in *Custer Battles*, a narrowly construed qui tam provision would seem to compound those problems.

To summarize, given the specific purposes and history of the FCA, as well as the difficulties of effective oversight by public officials over private contractors generally and especially in the challenging circumstances of present-day Iraq, courts should favor an interpretation of the FCA that better furthers accountability and oversight of fraudulent actors.

III. THE *CUSTER BATTLES* MEMO OPINION

As Part II suggests, a broad application by federal courts of the qui tam provision of the FCA may seem warranted in circumstances like those in present-day Iraq. First, the context of an active, hostile war zone environment reasonably implies that the formalities of government standard accounting procedures with respect to contractor oversight might not be completely adequate.[67] This situation creates an incentive for unscrupulous contractors to engage in fraud, and leads to a consequent need for a broadly-read qui tam provision.[68] Second, unlike typical FCA cases, a fraud perpetrated on the CPA or similar constituted entities, even if technically non-American ownership interests are involved, could nonetheless hinder American military and political interests. A more broadly applied qui tam provision, at least in these circumstances, would help deter actions by contractors that undercut the general aims of reconstruction. The *Custer Battles* court, however, applied a strained interpretation of precedent to reach an unfortunately narrow construction of the meaning and reach of the FCA. That narrow construction would leave

67. *See Custer Battles*, 376 F. Supp. 2d at 619. *See also* Erik Eckholm, *supra* note 53, at A9 (describing the allegedly politically-motivated demotion of Bunnatine H. Greenhouse, chief overseer of contracts at the Army Corps of Engineers, for her criticism of "a large, noncompetitive contract with the Halliburton Company for work in Iraq").

68. 31 U.S.C. § 3729–3812 (2000).

untouchable nine million dollars received by Custer Battles for work that was never done.[69]

In this Part, the *Custer Battles* memo opinion will be analyzed in two sections. In the first section, the procedural stance and factual context of the Motion for Summary Judgment will be briefly discussed. The second section will describe the court's conclusions regarding what constitutes a claim under the FCA in these circumstances, and the application of that holding to the facts.

A. Background

The qui tam action in *Custer Battles* centered around two contracts awarded to Custer Battles by the CPA.[70] The first, designated "BIAP" by the court and awarded within weeks of the formation of the CPA,[71] involved "security, housing and related facilities and services at the Baghdad International Airport."[72] The second contract, designated "ICE" by the court, involved "security, construction, and operational services to support the Iraqi Currency Exchange (ICE), which was charged with the creation of a new Iraqi currency to replace the 'old' Iraqi dinars (bearing the face of Saddam Hussein) with 'new' Iraqi dinars."[73]

As previously mentioned, one of the two relators in the case is a former employee of Custer Battles; the other relator is a subcontractor who worked alongside Custer Battles.[74] The relators showed that, with respect to the ICE contract, Custer Battles formed shell company subsidiaries in the Cayman Islands, and included false invoices from those subsidiaries when they presented their "cost-plus" contract[75] claims to

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69. *Custer Battles*, 376 F. Supp. 2d at 647.

70. *Id.* at 619.

71. *Id.* at 629 n.39. *See also 60 Minutes*, *supra* note 57. According to the *60 Minutes* report, Custer Battles was to provide "security" for the civilian activities at the Baghdad International Airport; however, that activity never got underway due to the deteriorating security situation in Iraq during the early months of the invasion, and thereafter Custer Battles provided more of a "gatekeeping" security function at the airport. *Id.* Also, according to "a memo obtained by *60 Minutes*," the "Airport Director of Security" told the CPA that Custer Battles' performance suggested that they were "war profiteers." *Id.*

72. *Custer Battles*, 376 F. Supp. 2d at 619.

73. *Id.*

74. *Id.*

75. A "cost-plus" contract is a "contract in which payment is based on a fixed fee or a percentage added to the actual cost incurred." BLACK'S LAW DICTIONARY 344 (8th ed. 2004). *See* Amended Complaint at 7 ¶ 44, United States *ex rel* DRC, Inc. v. Custer Battles, No. CV-04-199-A, 2004 WL 3270664 (E.D. Va. 2005). *See also* Joseph Neff and Jay Price, *Iraq: Security Contractors in Iraq Pumping Up Costs*, RALEIGH-DURHAM NEWS & OBSERVER, Oct. 24, 2004, *available at* http://www.corpwatch.org/article.php?id=11607 (generally describing the controversies behind the military's use of "cost-plus" contracts in Iraq, especially with respect to Blackwater, U.S.A.).

the CPA.[76] The relators pointed to many acts of over-billing and rather blatant acts of deception by Custer Battles in the performance of the ICE contract, such as painting over used equipment and claiming it to be purchased as new under the government contracts and then subsequently billing the government for the expense.[77] The jury also found that at a meeting between U.S. officials and Custer Battles, a Custer Battles representative accidentally left behind documents detailing the amounts that Custer Battles had overcharged the government.[78] This turn of events led to a moratorium on the awarding of federal contracts to Custer Battles.[79]

B. Summary Judgment Motion

Aside from disputing the factual allegations of the qui tam action, Custer Battles asserted two main legal defenses against the relators' claims.[80] Custer Battles first defense was that the CPA was not a legitimate U.S. government agency and that any fraud drawing upon the CPA's funds were off-limits to qui tam actions under the FCA.[81] The company's second defense was a claim that the funds available to the CPA were to be used only "for the Iraqi people,"[82] and were therefore

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76. *Custer Battles*, 376 F. Supp. 2d at 619. *See also 60 Minutes*, *supra* note 57 (interview by Steve Kroft with Robert Isakson, one of the relators of the present case, describing how Custer Battles approached him two weeks prior to the alleged fraudulent activity and told Mr. Isakson of their plans for "defrauding the United States government.").

77. Amended Complaint at 10 ¶ 70–73, United States *ex rel* DRC, Inc. v. Custer Battles, No. CV-04-199-A, 2004 WL 3270664 (E.D. Va. 2005).

78. *Custer Battles II*, 444 F. Supp. 2d at 681. *See also* Staff of H. Minority Comm. On Government Reform, 109th Cong., *Rebuilding Iraq: U.S. Mismanagement of Iraqi Funds*, at 15–16 (Comm. Print 2005) [hereinafter Minority Report] (quoting statement of Alan Grayson, *An Oversight Hearing on Waste, Fraud and Abuse in U.S. Government Contracting in Iraq*, Senate Democratic Policy Committee (Feb. 14, 2005)), *available at* http://oversight.house.gov/Documents/20050621114229-22109.pdf

79. Minority Report, *supra* note 78 (citing Dept. of the Air Force, *Memorandum in Support of the Suspensions of Custer Battles, LLC et al.* (Sep. 20, 2004)). *See 60 Minutes*, *supra* note 57. According to *60 Minutes*, this moratorium on the awarding of federal contracts to Custer Battles has expired. *Id.*

80. Custer Battles also challenged the FCA claim under a clause of the statute that makes "presentment" to an officer of the U.S. necessary. They argued, in light of the fact that the CPA was the contracting agent in this case, that no presentment to an actual U.S. official had taken place. The court put the issue to the side for later disposition. *See Custer Battles*, 376 F. Supp. 2d at 633, 647–49. After the jury found Custer Battles liable, the court agreed with Custer Battles on this point, and held that no "presentment" within the meaning of the FCA had taken place. *Custer Battles II*, 444 F. Supp. 2d at 683–86.

81. *Custer Battles*, 376 F. Supp. 2d at 633. *See* Custer Battles II, 444 F. Supp. 2d at 678 (holding that the claims in the case of the ICE contract were not presented to an American government employee in official capacity, as required by 31 U.S.C. § 3129(a)(1) (2000)).

82. *Custer Battles*, 376 F. Supp. 2d at 624 n.21 (citing Coalition Provisional Authority, Memorandum No. 4, *Contract and Grant Procedures Applicable to Vesterd* [sic] *and Seized Iraqi Property and the Development Fund for Iraq* 1 (Aug. 19, 2003), *available at* http://www.iraqcoalition.org/regulations).

merely in the possession of the United States (while technically owned by Iraq); thus, American courts would not have jurisdiction under the FCA over false claims paid with so-called Iraqi funds.[83]

1. What Constitutes a Claim Under the FCA?[84]

The court noted judicial precedent that suggested the meaning of "claim" under the FCA should be limited and should not be read as addressing any and all "underlying fraudulent activity" perpetrated on the government.[85] However, the court also acknowledged that subsequent to the development of this precedent, Congress expanded the meaning of "claim" via the 1986 amendments to the FCA by codifying the definition.[86] According to statute, a claim under the FCA is "any request or demand . . . for money or property which is made to a contractor . . . if the [United States] provides any portion of the money or property . . . or if the [United States] will reimburse such contractor . . . for any portion of the money or property which is requested or demanded."[87]

Despite the 1986 congressional amendment to the FCA, the court determined that due to the unusual circumstances of this particular qui tam action, the statutory definition of claim must be read in light of previous judicial precedent defining it.[88] The court reached this conclusion by noting that the term "provides" in the statutory definition of "claim" could be read broadly to include "any demand that causes the government to [merely] disburse resources within its legal *possession*," or it could be read narrowly, such that "provides," when read in conjunction with "reimburse," would suggest that the money claimed by the contractor must be "the government's money."[89] According to the court, because the statutory language alone did not preclude either interpretation the "judicially well-defined" understanding of 'claim' that had developed prior to 1986 would dictate the outcome.[90]

In short, the court's examination of the prior case history led it to determine that a claim under the FCA must draw on the U.S. "public fisc," and as such, must actually be U.S. government property. In other words, the court determined that the U.S. government must have legal

83. *Id.* at 638 n.61.

84. This question will be explored much further in Part IV. This part of the Note will simply chronicle the court's approach.

85. *Custer Battles*, 376 F. Supp. 2d at 635 (citing Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999)).

86. *Id. See* 31 U.S.C. § 3729(c) (2000).

87. *Id.*

88. *Custer Battles*, 376 F. Supp. 2d at 636.

89. *Id.* at 636 (emphasis added).

90. *Id.*

title to the funds used to pay an allegedly fraudulent contractor for the FCA to apply.[91] The court stated, "it is the *ownership* of each of [the various types of funding used to pay Custer Battles] that is ultimately relevant to the FCA analysis, not the use to which the owner put the funds."[92] As a result, the court proceeded to scrutinize each source of funding that the CPA had actually used to pay Custer Battles' contracts.

2. Did the United States Have Title to Each Source of Funds Used to Pay Custer Battles?

The CPA tendered payment to Custer Battles for the BIAP and ICE contracts from multiple sources of funding. Notably, the CPA used no funds actually appropriated by Congress to pay the allegedly fraudulent claims made by Custer Battles.[93] However, the CPA used three other sources of funding to disburse payments to Custer Battles.

The first source of funding came from what are called "Vested Funds." Vested Funds are comprised of properties frozen by the U.S. government where the property was within the United States and owned by "hostile" foreign entities.[94] Under federal law, the President may confiscate these assets when hostile entities attack or are otherwise militarily engaged with the United States.[95] Under the statute granting the President this power, confiscation vests title to the properties in "any agency or person the President designates."[96] In 2003, President Bush utilized this power to confiscate frozen Iraqi assets and vested those assets in the U.S. Treasury. Most of the $2.1 billion worth of these frozen assets was converted into cash and shipped to Iraq "in the form of shrink-wrapped pallets of U.S. bills."[97]

"Seized Funds" made up the second source of funding the CPA used towards its contractual obligations. These funds were simply "found and seized by Coalition Forces in Iraq as an occupying force in accordance with the laws and usages of war . . . ."[98] The President delegated authority to seize these assets;[99] they were placed in the custody of the

91. *Id.* at 636–37.

92. *Id.* at 624 (emphasis added).

93. *Id.* at 623.

94. *Id.* at 624.

95. *Id.*; *see* 50 U.S.C. § 1702(a)(1)(c) (2000).

96. *Custer Battles*, 376 F. Supp. 2d at 624.

97. *Id.* at 625; *see also* Minority Report, *supra* note 78, at 10–13.

98. *Custer Battles*, 376 F. Supp. 2d at 626.

99. According to the court, the President, in a memo to Secretary of Defense Rumsfeld, stated that these funds should only be used to "assist the Iraqi people and support the reconstruction of Iraq." *Id.* at 626 n.29 (citing Memorandum from President George W. Bush to Secretary of Defense Rumsfeld (Apr. 30, 2003)).

U.S. Army in Kuwait,[100] and they consisted of almost $1 billion in currency as well as various other non-financial items.[101] As the court suggested, the "laws and usages of war" would dictate that title would vest in the occupying force.[102] In light of the President's "delegation," it appears any title in Seized Funds was claimed by the United States. In *Custer Battles*, "the entire $16.8 million BIAP contract price was paid [to Custer Battles] with Vested and Seized Funds."[103]

In addition to legally-recognized title of these two sources of funding having been vested in the United States, the court noted that the DoD exercised some "involvement and oversight" over the CPA with respect to the management and accounting of Vested and Seized Funds.[104] This involvement included two principal processes: (1) the DoD[105] had to approve the allocation of "funding authority" as requested by the CPA, and (2) the U.S. Army actually disbursed these funds to contractors upon CPA certification.[106] In essence, the court seemed to suggest that Vested and Seized Funds could both legitimately be described as American funds through the designation of legal title as well as the statutory oversight by the DoD and the U.S. Army with respect to management and accounting.

In contrast, the final source of funding used by the CPA, the Development Fund for Iraq (DFI), only required CPA approval for expenditure; no DoD or Office of Management and Budget "oversight" was involved.[107] The DFI "was established through the coordinated effort of the United Nations and the CPA to fund relief and reconstruction efforts in Iraq.[108] The DFI included, among other things, funds from the U.N. "Oil for Food" program and revenues from export sales of Iraqi oil.[109] In addition to differences in the management and accounting of DFI funds, the court also asserted the DFI's distinction from Vested & Seized Funds by noting that "while the DFI was administered by the CPA and the

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 647.

104. *Id.* at 627.

105. *Id.* at 628. According to the court, "both the Office of Management and Budget (OMB) and the [DoD Comptroller] were required to approve each funding request from Vested or Seized Funds before the money could be allocated for use by the CPA." *Id.*

106. *Id.* at 629. Note the court's specific reference to the U.S. *proprietary* interest adhering to the Army's relatively conspicuous involvement with disbursement of Vested and Seized Funds, in contrast to the third source of funding, the Development Fund for Iraq [DFI], discussed *infra.*

107. *Id.* at 645 (under provisions of U.N. Resolution 1483, the CPA "was required to consult with the 'Iraqi interim administration.'").

108. *Id.* at 626.

109. *Id.* at 626.

corpus of the account was held at the Federal Reserve Bank of New York, it was recorded on the books of the Central Bank of Iraq."[110]

On a more fundamental level, the court noted several reasons why the United States did not have title to the DFI funds. First, the court distinguished DFI funds from the other funds the CPA had used to pay Custer Battles:

> Unlike Vested Funds, funds in the DFI did not vest in the U.S. Treasury. And unlike Seized Funds, the funds in the DFI could not be used or wasted to further the interests of the Unites States. Instead, all of the funds in the DFI either came directly from Iraqi sources or became Iraqi funds upon donation to the DFI.[111]

The court also pointed out that the founding provisions of the DFI were contained in a United Nations resolution, which made "clear that, from its inception, the DFI was Iraqi money, administered for a time by the CPA, but strictly on behalf of the people of Iraq."[112] Further, this resolution directed that, despite the corpus of the DFI being located at the Federal Reserve Bank of New York, it would be held there as a "state bank account by the Central Bank of Iraq."[113] The fund was only to be used for "purposes benefiting [sic] the people of Iraq."[114] According to the court:

> In sum, a request for payment from the DFI was not a demand for payment from U.S. government money that caused financial loss to the federal fisc. Instead, loss 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.[115]

Therefore, because there was no direct economic loss to the U.S. government, and because the court found that claims under the FCA would only attach to funds to which the United States has title, Custer Battles was not liable under the FCA for any fraudulent claims which had been paid from DFI funds.[116] Custer Battles' motion for summary judgment was partially granted: only false claims, or percentages of false claims, paid from Vested or Seized Funds would be subject to liability under the

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110. *Id.*

111. *Id.* at 645.

112. *Id.* (citing U.N. SCOR, U.N. Doc. S/RES/1483 ¶ 14 (May 23, 2003)).

113. *Id.*

114. *Id.* On whether the CBI was actually "independent" from the CPA, see Steven H. Hanke, *Dinar Plans*, CATO INSTITUTE, July 21, 2003, http://www.cato.org/research/articles/hanke-030721.html; *see also* Ed Harriman, *So Mr. Bremer, where did all the money go?*, GUARDIAN UNLIMITED, July 7, 2005, http://www.guardian.co.uk/Iraq/Story/0,2763,1522983,00.html.

115. *Custer Battles*, 376 F. Supp. 2d at 646.

116. *Id.*

FCA. The bottom line: Custer Battles would not be liable for nearly $9 million of the $12 million ICE contract price because the CPA drew that portion of the payment from the DFI.[117]

IV. A CRITICAL LOOK AT THE COURT'S REASONING

As described in Part III, the *Custer Battles* court relied on previous cases to determine that in order to bring a qui tam action under the FCA, the false claim must have been drawn from sources of funding to which the United States has formal title. The court's interpretation is reasonable; however, this Part suggests that the court should have pursued a path more conscious of the reality on the ground, so to speak. As discussed below, the court looked only to precedent defining what a claim is and unconvincingly characterized those prior holdings. As a result, the court awkwardly applied formal distinctions in a context that demanded a more flexible interpretation of precedent.

Ultimately, the court's decision allows qui tam defendants a seemingly favorable roll of the dice in circumstances where a government agency or entity, in tendering payment for its contractual obligations, merely "administers"[118] formally-non-U.S. funds to defense contractors. As discussed in Part V, the court should have held that a fraudulent claim that is subject to liability under the FCA may be defined in terms of a reduction from funds in the possession of the Unites States.

A. Judicial Precedent and the Meaning of "Claim" Under the FCA

The *Custer Battles* court relied exclusively on a number of cases that discuss the nature of a false claim for purposes of the FCA. This section will discuss the actual holding from each Supreme Court case that the *Custer Battles* court relied on to reach its conclusion and then compare each holding to how the *Custer Battles* court framed each of those decisions. The policies and interpretations that the *Custer Battles* court adopted and based on previous cases bear a tenuous relation to the facts of the case. However, in order to frame the issue, the statutory language of the FCA's qui tam provision and the statutory definition of *claim* must first be analyzed.

117. *Id.* at 647.
118. *Id.* at 646.

1. The Statutory Language

Both the relators and defendants in *Custer Battles* mainly focused their attention on 31 U.S.C. § 3729(a)(1).[119] Under the heading "Liability for certain acts," that section of the FCA reads:

> Any person who . . . knowingly presents, or causes 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 . . . is liable [for civil penalties up to $10, 000 and treble damages].[120]

The *Custer Battles* court interpreted the statute as requiring three elements: "(i) a 'claim' (ii) that is [either] 'knowingly... false or fraudulent,' and (iii) 'presented to an officer or employee of the United States' for payment or approval."[121] The court noted that the facts which would determine whether any claim made by Custer Battles met the "false or fraudulent" element were "vigorously disputed," and the court left resolution of that element for a later proceeding.[122] To determine whether the "claim" element had been met, the court looked first to the statutory definition within the FCA. According to the statute, a claim is:

> [A]ny request or demand . . . for money or property which is made to a contractor . . . 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 . . . for any portion of the money requested or demanded.[123]

The court began by focusing the meaning of "provides." The relators had argued that if the United States (through the CPA) "administered" funds which were used to pay Custer Battles' BIAP and ICE contract claims, then *regardless* of the funds' ownership, the term "provides" would encompass the CPA's administration of "Iraqi" funds and FCA liability would attach for any claims drawn from those funds.[124] Custer Battles, on the other hand, maintained that "provides" and

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119. *See id.* at 634. The parties also argued over subsections (a)(2) & (a)(3) of this provision, but the court found that an analysis under (a)(1) was dispositive to the claims before it. *Id.*; *see* U.S. *ex. rel.* Totten v. Bombardier Corp., 380 F.3d 488 (2004) (holding that § 3729(a)(2) has a "presentment" requirement similar to (a)(1), even though the language of (a)(2) does not include the language found in (a)(1)). For criticism of the reasoning in *Totten*, see Mark Labaton, *Whistle Stop: A Split Among Federal Courts Means that Chief Justice Roberts May Have an Opportunity to Revisit His 2004 Decision Limiting Whistle Blower Suits*, 29 L.A. LAW. 25 (2006).

120. 31 U.S.C. § 3729(a)(1) (2000).

121. *Custer Battles*, 376 F. Supp. 2d at 634. The court also mentioned a circuit split on whether there should be a judicially imposed element that the false claim be "material." *See id.* at 634 n.54.

122. *Id.* at 635.

123. *Id.* (quoting 31 U.S.C. § 3729(c) (2000)).

124. *Id.*

"reimburse" necessarily implied that the FCA only applies with respect to the "government's money."[125] As described previously, the court found that despite the "recent" 1986 statutory amendments defining claim,[126] both interpretations were plausible because "the term 'provide' is capacious enough to accommodate both arguments" and "neither is obviously correct."[127] As a result, the court looked to the "judicially well-defined" meaning of claim that had developed prior to the 1986 congressional explanation of its meaning via 31 U.S.C. § 3729(c).[128]

2. Judicial Precedent Defining "Claim"

The *Custer Battles* court, in its characterization of the holdings of the three principal cases that it relied on to define the scope of "claim,"[129] placed great emphasis on the proposition that the precedent of what claim meant under the FCA had, over the course of judicial development of that meaning, been restricted to government property; that is, property in which it could be said that the government had some sort of ownership interest, even if indirect.[130] In contrast, the court distinguished cases where FCA liability was absent because those cases involved claims upon a government interest that was clearly only possessory.[131] The court's observation of a bright line of mutual exclusivity between ownership and possession as a deciding factor in establishing whether a claim

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125. *Id.*; *see also id.* at 635 n.55 (the U.S. government suggested in its brief that the definition of claim should be applied broadly to include "any request for money or property from resources 'in which [the government] has an interest.'").

126. *See* Pub. L. No. 99-562, §2(7), 100 Stat. 3153 (1986) (codified at 31 U.S.C. § 3729(c) (2000)).

127. *Custer Battles*, 376 F. Supp. 2d at 636.

128. *Id.*; *see also id.* at 636 n.57 (citing CoStar Group, Inc. v. LoopNet, Inc. 373 F.3d 544, 553 (4th Cir. 2004) (holding that when Congress codifies a common law principle, common law remains a "valuable touchstone" for interpretation of the statute, unless Congress explicitly states that it intends to supplant common law)).

129. United States v. Neifert-White, 390 U.S. 228 (1968); United States v. McNinch, 356 U.S. 595 (1958); United States v. Cohn, 270 U.S. 339 (1926).

130. *Custer Battles*, 376 F. Supp. 2d at 634–41.

131. *Id.* The *Custer Battles* court principally relied on the following lower court cases for the supposition that precedent established that a claim under the FCA *must* comprise government-*owned* property: United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 499 (D.C. Cir. 2004) (holding, *inter alia*, that the fraudulent claim presented to Amtrak, as merely a federal "grantee" and not an actual government entity, does not give rise to liability under the FCA because payment comes from funds already granted to Amtrak and the FCA is limited to instances where "the Government indirectly or directly provides the funds and suffers the loss [hereinafter Totten II]; Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176 (3rd Cir. 2001) (finding, in a pro se qui tam action, that the submission of inflated legal bills for approval by the U.S. Bankruptcy Court did not violate the FCA, because the government itself was not a creditor in any of the bankruptcy estates); and Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) (interpreting 31 U.S.C. § 3729(c) as requiring a claim upon the government fisc for liability to attach (citing to *McNinch*, 356 U.S. at 595)). *See also* 31 U.S.C.A. § 3729 (2003), Notes of Decision 81–130.

would raise FCA sanctions certainly works, at least in the sense that the cases cited suggest a pattern.

However, the court's analysis disregarded the gray area in between ownership and possession that the CPA's freedom of administrative with the DFI funds would suggest. Of the cases where the government was found to merely have possession of the property to which a claim was made, none suggest the level of governmental interest or involvement in the claimed property present in *Custer Battles*. Yet the court apparently felt bound by precedent, and despite the lack of factual parallels, it supported its own holding by its translation and characterization of the delineating principle supposedly followed in the three major Supreme Court cases that interpret the definition of "claim" under the FCA. This section will look more closely at those three cases.

a. United States v. Cohn[132]

Cohn was a 1926 case that arose under an earlier version of the FCA wherein the Court found that a false claim for cigars in the possession of U.S. Customs officials was not a claim within the ambit of the FCA.[133] The cigars were actually owned by a third party in the Philippines, but a Chicago businessman knowingly and fraudulently gained possession of them.[134] The false claim for cigars was not a claim against the government because the relevant provision of the then-controlling version of the FCA related "solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant."[135] Thus, the government could not assert a "right" to the cigars (nor could the claimant presumably assert a "right" against the government in the event of its refusal of the fraudulent claim), and a claim under the FCA would not include merchandise "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."[136]

Realistically, the *Cohn* holding may only say that a temporary possessory interest by the government in "property" cannot constitute the kind of government interest which would be subject to a false claim under the 1926 version of the FCA. In fact, the Court specifically addressed

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132. 270 U.S. at 339.

133. The Court relied on the implications resulting from criminal penalties under the FCA statute at that time, U.S. Penal Code, § 35 (as amended by Act, Oct. 23, 1918, *codified at* 18 U.S.C. §§ 286, 287, 641, 1001, 1022–24, 1361 (2000)).

134. *Cohn*, 270 U.S. at 343–44. The FCA once had both criminal and civil enforcement remedies, and it is that version of the FCA that the *Cohn* Court interpreted. *See id.* at 341 n.1.

135. *Id.* at 345–46.

136. *Id.* at 346.

the earlier-FCA statutory provision by concluding that the indictment did not show any intent on the part of Cohn to defraud the government of its own property.[137]

The *Custer Battles* court tried to use *Cohn* to establish a principle that would justify its holding, characterizing the decision in an interesting manner:

> Thus, the Supreme Court's holding in *Cohn* may be summarized this way: a request for resources from the government does not constitute a claim when the government acts only as custodian or bailee of a third-party's property. Instead, a 'claim' must be a request for *government* funds or property, *i.e.*, a 'call on the government fisc.'[138]

This characterization stretches the holding of *Cohn* to fit the court's understanding of later, lower-court precedent that developed with respect to the meaning of "claim."[139] The court's broad characterization of the holding as standing for a principle means that the U.S. government must act as more than a custodian or bailee with respect to "resources" for the (present) FCA to be applicable. As the court stated, "no case has held . . . that the FCA is so broad as to reach not only false claims presented for *government* property, but to claims for any property in the government's possession, even if the government is *only* a custodian, bailee, or administrator of the property."[140]

Whether, in a doctrinal sense, cigars should be the same as "resources" seems dubious, especially when the resources at issue in *Custer Battles* go to the heart of a vital U.S. interest—reconstruction of Iraq. Though the court's application of *Cohn* may be accurate in a formal sense, and may fit into the court's limitation on what constitutes a 'claim,' the CPA, with a power to form contracts based substantially on the possession of approximately $20 billion of DFI funds,[141] should not realistically be considered only a "bailee." "Administrator" certainly seems a more apt description for the CPA—even assuming a true independent ownership of DFI funds by the Central Bank of Iraq or the "Iraqi people."[142] The facts of *Cohn* do not reasonably compare to the level and breadth of administration exercised by the CPA as discussed in *Custer Battles*. Thus, the court's characterization of *Cohn*, although technically

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137. *Id.* at 347.

138. *Custer Battles*, 376 F. Supp. 2d at 636–37 (quoting Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999) (emphasis in original)).

139. *See supra* note 131.

140. *Custer Battles*, 376 F. Supp. 2d. at 636 (second emphasis added).

141. *Id.* at 627 n.36.

142. *See* Hanke, *supra* note 114.

consistent with its holding, seems forced to fit within the formal parameters of later lower-court precedent. Perhaps sensing the malleability of this foundation, the court utilized another Supreme Court case to buttress its understanding of the supposed principle of *Cohn*: the U.S. government must own the resources fraudulently obtained by a false claim before the FCA is applicable.[143]

b. United States v. McNinch[144]

The *Custer Battles* court pointed to an "implicit affirmation" of the government-ownership principle in a 1958 case that involved a complaint by the federal government that defendants had caused a bank to present false applications for credit insurance to the Federal Housing Administration (FHA).[145] The issue in *McNinch* was whether false claims under the FCA include a fraudulent application for credit insurance supplied by the FHA, a federal agency, with a bank as an intervening agent between the defendants and the FHA.[146] The *McNinch* Court noted that the phrase "claim against the Government" from the FCA's statutory language[147] was a part of "the provisions of a *criminal statute* . . . [that] must be carefully restricted . . . not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions."[148] In this light, the Court found that "sensational congressional investigations" had greatly informed the notion that the original purpose behind the FCA was inextricably linked to the prevention of a "plundering of the public treasury" especially with respect to private contracts of "the sale of provisions and munitions to the War Department."[149] The Court seemed to suggest that an application for credit, because it was not factually similar to a

143. *Custer Battles*, 376 F. Supp. 2d at 637.

144. 356 U.S. 595 (1958).

145. *Id.* at 596–97.

146. *Id.* at 597.

147. *Id.* at 598 n.5 (citing Rainwater v. U.S. 356 U.S. 590, 592 n.8 (1958) (discussing how the original FCA statute possessed both criminal and civil sanctions). The FCA itself no longer carries criminal penalties, although the "underlying fraudulent activity" may give rise to liability under other statutes. *See* 31 U.S.C. §§ 3729(a), 3730(a) (2000). *See also* 31 U.S.C.A. § 3730 n.249 (2003).

148. *McNinch*, 356 U.S. at 598 (emphasis added). *Cf. Custer Battles*, 376 F. Supp. 2d at 638 (discussing how the "expansion" of the meaning of "claim" via the 1986 amendment to the FCA, and its legislative history, did not show legislative intent to include government payments of "non-federal" funds (*See* S.Rep. No. 99-345, at 21 (1986), codified at 31 U.S.C. § 3729(c))). However, as this Note argues, the 1986 FCA amendment, as well as its legislative history, simply do not necessarily *preclude* an interpretation of § 3729(c) to allow for liability under the circumstances in *Custer Battles*.

149. *McNinch*, 356 U.S. at 599–600.

War Department contract, did not fit within the ambit of the purpose of the FCA, and thus would not constitute a false claim.[150]

In *McNinch*, in reference to the difference between the facts before it and the congressional purpose behind the FCA, the Court asserted that the "[FCA] was not designed to reach every kind of fraud practiced on the Government."[151] Because an application for credit insurance could be seen to fit inside a broad meaning of the term "claim," the Court in *McNinch* narrowed the meaning of "claim" by focusing on the congressional purpose behind the FCA to prevent fraud on the War Department.[152] Also, the *McNinch* Court did indeed somewhat affirm *Cohn* by quoting a relevant passage from that opinion in a footnote:

> [I]t is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant.[153]

This passage may be read to support the *Custer Battles* court's contention that the *McNinch* opinion is in harmony with *Cohn*. Specifically, the FCA is only meant to address those claims that give rise to a "right" against the government, and presumably rights can only arise if the government itself, from its own funds, is legally obligated to tender payment to the claimant. However, within the context of the circumstances in *Custer Battles*, this interpretation does not seem to be a necessary one. The phrase "a claim upon or against" from the earlier version of the FCA, as interpreted in *Cohn* and subsequently referred to by the Court in *McNinch* in the above-quoted footnote, does not appear in 31 U.S.C. § 3729(a)(1), which is the provision of the present version of the FCA controlling the *Custer Battles* court's inquiry.[154] The Supreme Court in *McNinch* was also explicitly conscious of the fact that it was "construing the provisions of a criminal statute."[155] Comparatively, the *Custer Battles*

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150. *Id.* at 599.

151. *Id.*

152. *Id.* at 599–600.

153. *Id.* at 600 n.10 (quoting *Cohn*, 270 U.S. 339, 345–46 (1926)).

154. Nor does this language appear in the statutory definition of claim. *See* 31 U.S.C. § 3729(c) (2000).

155. *Compare McNinch*, 356 U.S. at 598, *with Custer Battles*, 376 F. Supp. 2d at 637 n.59. The *Custer Battles* court noted the following:

> *Cohn* and *McNinch* were interpreting an earlier version of the FCA that imposed both criminal and civil sanctions. And while criminal statutes are usually given a more restrictive reading, the holdings in these cases regarding the definition of "claim" are still relevant here because *this interpretation is not dependent on a restrictive reading of the term*

action is simply a civil qui tam action in which the relators and the government seek only monetary damages; the modern-day FCA does not itself carry criminal penalties, and this in turn may suggest that perhaps the *Custer Battles* court should have adopted a broader interpretive stance.[156]

A plausible reading of the *McNinch* citation to *Cohn*, and what it represents in terms of precedent, should include not only the nature of the specific legal question before the Court in *McNinch*, but also the *McNinch* Court's narrow interpretive approach to the FCA because of its criminal provisions.[157] In the context of those facts, the *McNinch* Court simply looked to *Cohn* to buttress its assertion that "an application for credit insurance does not fairly come within the scope that Congress intended the Act to have."[158] Thus, *McNinch* does not necessarily lead to the proposition that all disbursements in response to false claims must arise from funds owned by the United States. Neither the facts nor the context of the case necessitate that reading.

Interestingly, the *Custer Battles* court also recast the reasoning of *McNinch* to achieve an affirmation of the government-ownership principle supposedly announced in *Cohn*. According to the court:

> [I]n United States v. McNinch . . . the Supreme Court ruled that a "claim" is a "demand for money or for some transfer of public property" that requires the government to disburse public funds or to "otherwise suffer immediate financial detriment."[159]

Note, however, the original passage from *McNinch*:

> In normal usage or understanding an application for credit insurance would hardly be thought of as a "claim against the government." As the Court of Appeals for the Third Circuit said in this same context, "the conception of a claim against the government *normally* connotes a demand for money *or* for some transfer of public property."[160] In agreeing to insure a home improvement loan the FHA *disburses no funds nor does it otherwise suffer immediate financial detriment.* It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any.[161]

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and because the FCA *has always been read broadly*, even before it was amended to impose only civil liability.

Id. (emphasis added).

156. *See supra* note 155.

157. *McNinch*, 356 U.S. at 597–98.

158. *Id.* at 599.

159. *Custer Battles*, 376 F. Supp. 2d at 637.

160. United States v. Tieger, 234 F.2d 589, 591 (3rd Cir. 1956) (emphasis added).

161. *McNinch*, 356 U.S. at 598–99 (emphasis added).

The *Custer Battles* court could have distinguished its facts from *McNinch* by simply pointing out that the CPA "disbursed funds," whereas the FHA did not. Instead, the court focused on the "suffer . . . financial detriment" clause from the above-quoted passage to affirm the *Cohn* "principle" that the FCA requires the government to own the funds that a false claim draws upon.[162] This assertion is technically consistent with other holdings from federal courts analyzing what constitutes a claim under the FCA.[163] However, when the *Custer Battles* court cited *McNinch*, it inserted the word "public" between "disbursed" and "funds."[164] This insertion suggests that the court did not want to acknowledge what seems apparent: *McNinch* itself provides limited guidance to the issue in *Custer Battles*, even though *McNinch* can be framed similarly to the later lower court precedent defining "claim" under the FCA. The court ignored a much more important implication of the *McNinch* decision—that the original congressional purpose behind the FCA, to prevent fraud upon the War Department,[165] would not be served by an overly formalistic interpretation of the statutory language.

c. Unites States v. Neifert-White Co.[166]

The third principal case relied on by the *Custer Battles* court involved a grain storage bin dealer who purposely overstated prices for his bins on his customers' invoices.[167] His customers, seeking loans, then presented the inflated invoices to the Commodity Credit Corporation (CCC), a federal agency, which by regulation could only cover up to a maximum of eighty percent of the purchase price.[168] Thus, if granted by the CCC, the fraudulently inflated price would allow customers to receive more than eighty percent of the actual price paid to the dealer. Subsequently, the United States charged the dealer under the FCA. The Supreme Court reversed the lower court's determination that an application for a CCC loan was not a claim under the FCA because it was not "for payment of obligation owed by the government."[169] The Court held that "the [FCA] should not be given [a] narrow reading" because it "reaches beyond 'claims' *which might be legally enforced*, to *all* fraudulent attempts to cause the Government to pay out sums of money."[170] At

162. *Custer Battles*, 376 F. Supp. 2d at 637.
163. *See* cases cited *supra* note 131 and accompanying text.
164. *Custer Battles*, 376 F. Supp. 2d at 637 (emphasis added).
165. *See supra* Part II.A.
166. 390 U.S. 228 (1968).
167. *Id.* at 230.
168. *Id.* at 230.
169. *Id.* at 229, 233.
170. *Id.* at 233.

first blush, this statement would seem to allow FCA liability for fraudulent contractors in Iraq, as the CPA "paid out" sums of money to Custer Battles.

The *Custer Battles* court, however, read the language from *Neifert-White* as an affirmation that only claims that involve the Government's actual money fall within the meaning of "claim" under the FCA. In fact, the court openly inserted "own" between "its" and "money" in its description of how the Court in *Neifert-White* distinguished its facts from *Cohn*:

> *Neifert-White* does not stand for the proposition that any request that induces the government to write a check or to hand over money is a "claim." Instead, consistent with *Cohn*, it holds that a "claim" is any fraudulent attempt to cause the government to part with its *own* money.[171]

The court used this language to argue that the *Neifert-White* Court distinguished *Cohn* from its facts because *Cohn* involved the United States as a "bailee of goods that did not belong to the Unites States," whereas the loan applications in *Neifert-White* "involve[d] a false claim for government property, even if the grantee had no legal right or 'claim' to the loan."[172] However, the original language from *Neifert-White* also suggests that the Court noted that the government was merely acting as a "bailee" in *Cohn* and that is why *Cohn* did not control its decision.[173] Again, this language from *Neifert-White* fits within the lower-court precedent that has, in the intervening years, come to define a claim as necessarily involving government property. However, that language by itself also does not necessarily eliminate a situation such as exists in *Custer Battles*, in which formal title may not exist, but the CPA's use and reliance on "Iraqi" funds could suggest that the government paid for contracts with what it both considered, and was in effect, "its own" money.[174]

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171. *Custer Battles*, 376 F. Supp. 2d 617, 637 (2005). *Cf. Neifert White*, 390 U.S. at 231.

172. *Custer Battles*, 376 F. Supp. 2d at 637.

173. *See Neifert-White*, 390 U.S. at 231.

174. The *Neifert-White* decision discusses *McNinch*:

> This Court held [in *McNinch*] that since FHA 'disburses no funds nor does it otherwise suffer immediate financial detriment,'. . . the transaction was not within the ambit of the [FCA]. The Court emphasized the distinction between contracts of insurance against loss such as those involved in McNinch, and transactions in which the United States pays or lends money. For purposes of the present case, we need not reconsider the validity of this distinction. It is sufficient to note that the instant case involves a false statement made with the purpose and effect of inducing the Government immediately to part with money.

Id. at 232. Notice the last sentence and how its precise language could easily allow liability to attach under the FCA with respect to the facts of *Custer Battles* or, on the other hand, how its language could fit within the *Custer Battles* court's understanding of precedent defining claim.

Perhaps the court should have noted more language from *Neifert-White* in criticizing the storage bin dealer's reliance on the narrow conception of "claim" under *Cohn*: "The language in [*Cohn*] upon which [the storage bin dealer] relies cannot be taken as a decision upon a point which the facts of the case did not present."[175] Analogously, the question on the facts before the *Neifert-White* Court was whether a fraudulent loan application utilizing "inflated" prices on invoices constituted a claim under the FCA. The question was not whether the government, having paid out money, actually had to prove ownership of that money. Again, similar to its understanding of *Cohn* and *McNinch*, the *Custer Battles* court's use of the holding from *Neifert-White* seems only partly relevant to the precise issue before it.

In conclusion, several questions might be asked with respect to the court's use of *Cohn*, *McNinch*, and *Neifert-White* to argue that the FCA does not apply to false claims involving funds from the "Iraqi owned" DFI. Should a fraudulent claim for cigars realistically be described as a request for "resources"? In this case, is it even remotely accurate to describe the CPA as merely a "custodian" or "bailee"? Does *McNinch* really dictate a denial of FCA liability in an instance where a government agency[176] "administers" non-U.S. funds? Does "administer" even appropriately or fully describe the CPA's use of the DFI in tendering payment to security contractors performing vital U.S. interests in Iraq? And finally, did the "Iraqi people" or the Central Bank of Iraq actually own the DFI funds in anything more than a nominal sense? The court did not answer or address these questions through its use of *Cohn*, *McNinch*, and *Neifert-White*. It followed precedent at the expense of a realistic appraisal of the issue before it.

V. BETTER POLICY ALTERNATIVES

The three Supreme Court cases used by the *Custer Battles* court fail to convincingly preclude liability for claims presented to the CPA that drew upon funds in the possession of the government. A better approach would have been to first provide a summary and history of the three Supreme Court cases and how the circuit courts have translated and developed the accurate holdings of those cases.[177] The *Custer Battles* court should have acknowledged the debatable applicability of precedent to the unusual facts of the case before it and looked beyond simple formal ownership interest categories. Under the FCA, a claim should be defined

175. *Id.* at 231.

176. The *Custer Battles* court later determined that the CPA was not an American agency for purposes of the FCA. *Custer Battles II*, 444 F. Supp. 2d 678 (E.D. Va. 2006). *See supra* note 1.

177. *See supra* Part IV.

by also considering the following: (1) the general policies behind the FCA, as well as the policies behind the use of qui tam actions within the FCA; (2) the implications of the intended congressional statutory expansion of "claim" in 1986; and most importantly, (3) the nature of the CPA, the CPA's use of the DFI, and the environment in which the contracts were performed. If the court had pursued its analysis with these factors as a guide, it would have likely held that a "mere" formal possession by the CPA of the DFI source of funding fell within the scope of liability intended by the FCA. Any contractor presenting a false claim to the CPA, regardless of the title of the funds used to pay that claim, should be liable in American courts for fraudulent activity that results in a disbursal of funds. And, even if the three Supreme Court cases discussed above in Part IV do establish that qui tam actions are only available when the government has formal title to the money used to pay a false claim, an exception in cases of possession should nevertheless be made in these or similar circumstances.

First, if the court had found Custer Battles liable for its fraudulent activity in this case, regardless of whether that activity resulted in a draw specifically upon the U.S. Treasury or the DFI, the court would have acted more consistently with the purposes behind the FCA and its qui tam provision. Qui tam actions are specifically intended to prevent fraud by allowing private attorneys general to act in the defense of the taxpayers' interest.[178] The FCA originated as a response to widespread fraud and abuse by contractors during the Civil War and Congress has, within the last twenty years, expanded the reach of the FCA.[179] Thus, because the acts committed by Custer Battles in Iraq corresponded so directly to the reasons behind the statute, any interpretation of case law that cuts the other way should be suspicious. The *Custer Battles* court did not properly appreciate the differences between the Supreme Court cases it relied upon and the facts before it. For example, if the defendant in *Cohn* had simultaneously defrauded the government of ammunition crucial to properly fight a war, and some of the ammunition was "owned" while some of it was merely "possessed," it is difficult to envision the *Cohn* Court allowing an FCA claim only for the ammunition to which the government had a formal "right." *Cohn*, properly read, applies when the government acts as a bailee temporarily holding merchandise for a third party, and not when the government is utilizing a possessory interest to further its own vital interests. In this context, a purposive and

178. *See supra* Part II.A.

179. *See supra* Part II.A.; *see generally supra* notes 27–37 and accompanying text; *see* Ruhnka, *supra* note 30.

historical analysis of qui tam actions strongly suggests liability for "the underlying fraudulent activity."[180]

Secondly, a plain language reading of the statute that defines "claim" suggests liability for Custer Battles for the totality of its "fraudulent activity." As discussed above, "claim" is statutorily defined as a request "for money . . . if the [United States] provides *any portion* of the money . . ., or if the [United States] will reimburse [a] contractor . . . for *any portion* of the money . . . which is requested or demanded."[181] The court correctly noted that the definition *can* be read either consistently with the precedent defining "claim," or not; however, the definition was written long after the three Supreme Court cases cited by the court were decided, and the United States (through the CPA) certainly provided a portion of the money that Custer Battles made fraudulent demands for. The proper reading of this statute would allow FCA liability for "fraudulent activity" when the United States provides a significant portion of the money used to pay a claim. Even if title is still a dispositive factor, however, a plain reading of the statute should allow for liability in circumstances where the same activity causes the United States to simultaneously pay with money both "owned" and "possessed." That interpretation seems more aligned with congressional and taxpayers' interests. Maintaining formalist distinctions, as the *Custer Battles* court did, allows Custer Battles to escape liability for so-called Iraqi funds[182]—funds which could have been honestly spent and utilized by the CPA. The funds received by Custer Battles, regardless of legal title, would probably have saved an equal amount of funding from direct congressional appropriations and outlays from the U.S. Treasury, if those "Iraqi" funds would have been available for legitimate ends. The court should have simply held that a disbursal of funds by the government with an intent to further a governmental interest would better fit the statutory language defining claim.

Finally, the precedent utilized by the court simply does not dictate a definitive result one way or the other in these circumstances. The CPA could not be accurately described as merely a "bailee" or "custodian" of the DFI.[183] Custer Battles repeatedly made fraudulent claims against the CPA.[184] If title to the funds is the only dispositive factor, then the court's guiding rationale, or principle, that the FCA was not designed to prevent

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180. *Cf. Custer Battles*, 376 F. Supp. 2d 617, 635 (citing Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999)).

181. 31 U.S.C. § 3729(c) (2000) (emphasis added).

182. *See supra* notes 107–114 and accompanying text.

183. *See supra* Part IV.

184. *Custer Battles II*, 444 F. Supp. 2d 678, 680–81 (E.D. Va. 2006).

all "underlying fraudulent activity"[185] against the government, seems oddly placed. As a result of the court's holding, Custer Battles (or other fraudulent actors with similar arrangements involving the CPA) will be punished in some instances of fraud and not in others *even though the conduct, the parties, and the transactions involved were the same.*[186] Thus, the same "underlying fraudulent activity" simultaneously does and does not allow a claim.

Under the *Custer Battles* court's reasoning, two contractors both presenting identically false claims to the CPA for the same type of contracted work, would have different FCA liabilities based solely on the source of funding chosen by the CPA from which to tender payment. Tenuous formal distinctions leading to these sorts of scattershot effects suggest a formulation of the law too inconsistent to justifiably stand for the intent of Congress. Any precedent leading to different liabilities in this scenario is ripe for clarification or revision.

The *Custer Battles* court should have held that in cases where a fraudulent contractor presents false claims to a government agency that is involved in the "administration" or "disbursal" of funds *which are clearly spent to further a vital government interest*, then those claims must fall within the terms of the FCA. This limited holding is not inconsistent with the above precedent defining "claim,"[187] even under the *Custer Battles* court's interpretation. This broader holding would equally prohibit all fraudulent claims by contractors such as Custer Battles, unless the CPA had been disbursing funds in a particular circumstance only on behalf and under the direction of a distinctly Iraqi, and non-American, interest. That holding would also suggest a more realistic understanding of "interest" as encompassing more than a direct formal financial detriment on the U.S. Treasury.[188] In fact, because the American government (in the form of the CPA)[189] and the post-invasion Iraqi government had virtually the same functional identity at the time of the contracts,[190] a distinction based on title that assumes at a fundamental level a

185. *Custer Battles*, 376 F. Supp. 2d. at 635 (citing *Harrison*, 176 F.3d at 785).

186. The CPA generally used cost-plus contracts in the early months of the occupation of Iraq. *See supra* note 75.

187. *See supra* Part IV.

188. American "interests" that include financial consequence in Iraq that should fall within the sphere of the FCA could encompass more than mere "financial detriments" directly or indirectly to the "public fisc." The term "financial detriment," though, could include the additional "indirect" costs to American taxpayers, that is, higher appropriations from Congress resulting from waste and fraud of other sources of funding as a result of fraud by contractors.

189. *But see Custer Battles II*, 444 F. Supp. 2d at 688–89 (determining that, despite prevalent American personnel and operations support and control, the CPA was an "international" entity not subject to the FCA).

190. *See Custer Battles*, 376 F. Supp. 2d at 629 n.39.

difference in interests between the two entities is formalism without substance. The relationship between the CPA and the Iraqi people at the time of the contracts was paternal; Custer Battles went through no vetting process by a non-CPA official,[191] nor was there any meaningful review of the BIAP and ICE contracts by distinctly Iraqi representatives.[192] Describing the DFI as "belonging" to the Iraqi people is simple political sloganeering, and its basis as a matter of law based on these facts is suspect.[193]

The purposes behind the FCA and its qui tam provision, the plain reading of the statutory definition of claim, and the context of the situation presented by the facts of *Custer Battles* all suggest a broader interpretation of what sort of claims will be justiciable under the FCA than the court was willing to undertake. In fairness, however, the court was confronted with a particularly unusual situation with far-reaching ramifications that were political as well as legal, domestic as well as international. Further, the court may have felt compelled to limit Custer Battles' liability in these circumstances in light of the murkiness of the legal status of the CPA itself.[194] Perhaps the court sensed a danger in the effect of an overbroad interpretation of the FCA upon the other political branches of the government, at least in the sensitive context of planning and contracting around the very dangerous and hostile contingencies in Iraq immediately after the fall of Saddam Hussein. In any event, regardless of the court's premises, Congress should, in response to this holding, clarify exactly when a claim will give rise to liability under the FCA.

VI. CONGRESSIONAL RESPONSES AND CONCLUSION

The issues that confront lawmakers regarding the use of private contractors in Iraq are many. With respect to private security contractors and their prevalent activities in theatres of war, Congress should reinspect its broader premises for privatization and how those premises fall short in the context of modern-day Iraq. Of course, the interplay of Congress and the Executive Branch in formulating policy with respect to troop levels and deployment strategies in war zones dictates the level of private contractor involvement.[195] A long term rethinking on the part of both the legislative and the executive branches of the perhaps idealized benefits of privatization in the security arena, as well as its very real political and military drawbacks, will likely provide a more coherent, and

191. *Id.* at 627.
192. *Id.* at 628–29.
193. *See supra* note 114.
194. *See supra* note 190.
195. *See generally supra* Part II.A.

publicly accountable, view of performance and expenditure of funds in the pursuit of security functions in hostile foreign environments.[196]

With respect to the FCA, Congress should specify that when an American agency (or "international" agency led and/or principally operated by American personnel)[197] disburses *any* funds to further any American interest, those funds fit within the purview of the FCA's qui tam provision. This broad notion of "claim" under the FCA would only apply in limited circumstances—analogous to the circumstances in *Custer Battles*—yet it would carry the benefit of protecting millions of dollars which would have otherwise been available to further the essential prerogatives of the U.S. military or diplomatic officials through judicial action. Congress should amend the FCA so that possession of funds (especially if possession is only encumbered in its dispersal of those funds by vague international law formalities and political designations) would give rise to liability under the FCA when: (1) a claim falsely or fraudulently draws upon those funds, and (2) the agency is tendering payment with those funds for contracts with American contractors that (3) furthers an American interest, whether that interest be financial, military, political, or otherwise. Mere "possession," as opposed to "ownership" in its formalized sense of *title*, should not be the dispositive factor when courts analyze whether FCA liability attaches for claims made in situations as in *Custer Battles*.

Notwithstanding the suggestion for an expansion of the meaning of "claim," Congress should, at the very least, protect the present form of the FCA qui tam provision. Recently, Senator Charles "Chuck" Grassley and Representative James Sensenbrenner exhorted their colleagues to maintain the present incentives for "whistleblowers" under the FCA's qui tam provision; this exhortation was in response to a concerted effort by certain lobbying groups to scale back the FCA's statutory language.[198]

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196. On January 4, 2007, Senator Patrick Leahy introduced the "War Profiteering Prevention Act of 2007," S.119, 110th Cong. § 1–2 (2007). The Act amends the federal code to prohibit profiteering and fraud involving a contract or the provision of goods or services in connection with a war, military action, or relief or reconstruction activities within U.S. jurisdiction (including making materially false statements or representations or materially overvaluing any good or service with the specific intent to make excessive profit). The Library of Congress, Thomas.gov, http://thomas.loc.gov/cgi-bin/query/z?c110:S.119 (last visited Feb. 8, 2007). The Act also sets penalties for violations, including up to twenty years' imprisonment and a fine of the greater of $1 million or twice the gross profits or other proceeds. *Id.* The proposed bill makes criminal sanctions available, and does not specifically mention or amend sections of the U.S. Code that correspond to the FCA. *Id.*

197. *See Custer Battles*, 376 F. Supp. 2d at 622–23.

198. *See* Powell Goldstein, LLP, "Client Alert" (Apr. 15, 2005), http://www.pogolaw.com/files/news-alerts/1612/Grassley,+Sensenbrenner+_08.05.pdf. The website states the following:

> In a June 14 [2005] letter to certain members of Congress, a coalition of seven conservative [healthcare provider] groups urged Congress to consider amending the FCA to limit

Senator Grassley, the principal architect of the 1986 amendments of the FCA's qui tam provisions, is a vital force in Congress, seeking to uphold the present form of the qui tam provision, and he appears to be dedicated to a strong FCA.[199] Certainly, with respect to the virtually non-existent accounting mechanisms in place in the early months of the CPA's Iraqi reconstruction efforts,[200] a strongly worded and broadly interpreted qui tam provision would allow for perhaps the only real deterrent against contractors who may defraud the government of vital funds in foreign war zones, whether those funds are owned or possessed by the government.

Finally, in light of the inherent government oversight deficiencies and challenges in theatres of war, there are signs that the DoD is also less than fully committed to institutional oversight *per se*.[201] Thus, whether that decision has been political, or whether it is compelled by lack of resources or other reasons, a strongly worded and broadly applied statutory definition of claim under the FCA's qui tam provision will provide courts and relators greater oversight of both fraudulent expenditures as well as wasteful expenditures which bear a causal relationship to increased appropriations of the public fisc. A more broadly phrased and defined claim in the FCA would also close the escape hatch provided by the analysis of the *Custer Battles* court and eliminate the unwarranted

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> the incentives for whistleblowers . . . . In particular, the letter urged that (i) a whistleblower must have engaged in documented efforts to remedy the fraud that is the subject of the FCA action in order to be eligible to share in the recovery, (ii) the rewards and legal fees for whistleblowers and their attorneys be capped at $1 million and (iii) any funds recovered in FCA cases must be returned to the agency that was defrauded and not contributed to the Department of Justice enforcement budget or the U.S. Treasury. The letter asserts that the *qui tam* provisions of the FCA could encourage fraud by incentivizing potential whistleblowers to allow fraudulent schemes to fester, and that the risk of exclusion from federal health care programs forces providers to accept large settlements to avoid prosecution under the FCA . . . . On July 29 [2005], Senator Charles Grassley (the author of the 1986 *qui tam* provisions) and Representative James Sensenbrenner sent a letter urging their colleagues in Congress to preserve the existing provisions of the FCA and "the public/private partnerships created by the act." The letter notes that "an effort has begun to destroy the whistleblower and public/private partnership provisions of the [FCA] by limiting the incentives the act provides for whistleblowers to come forward and use the act" and asserts that the proposed reforms "will make it impossible to mobilize private resources to fight fraud." In fact, Grassley has this year authored legislation and chaired hearings targeted at ensuring the federal government is utilizing the FCA (including its *qui tam* provisions) to maximum effectiveness.

Id.

199. *See id.*

200. *See supra* Part II.C.

201. *See* Eckholm, *supra* note 53. Some Members of Congress may also be less than concerned with full oversight and accountability for contract procurement policy. *See* David S. Cloud, *Military Contractor Pleads Guilty to Bribery*, N.Y. TIMES, Feb. 25, 2006, at A11 (contractor plead guilty to bribing or attempting to bribe three Members of Congress).

good fortune of fraudulent American contractors who happen to have been paid by nominally non-American funds.