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## Using the Federal Tort Claims Act to Remedy Property Damage Following Customs Service Seizures

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## USING THE FEDERAL TORT CLAIMS ACT TO REMEDY PROPERTY DAMAGE FOLLOWING CUSTOMS SERVICE SEIZURES

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The United States Customs Service may seize property as a means of enforcing customs laws.<sup>1</sup> In 1982, for example, the Customs Service confiscated property valued at over \$237 million.<sup>2</sup> Customs officials place this property in storage,<sup>3</sup> where it may remain for a lengthy period of time<sup>4</sup> pending administrative<sup>5</sup> and

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1. The U.S. Customs Service embodies only part of the federal government's seizure powers. Although the Drug Enforcement Administration and the Immigration and Naturalization Service also seize considerable amounts of property, the Customs Service seizes more property than any other federal agency. See COMPTROLLER GENERAL, BETTER CARE AND DISPOSAL OF SEIZED CARS, BOATS, AND PLANES SHOULD SAVE MONEY AND BENEFIT LAW ENFORCEMENT (July 15, 1983) [hereinafter cited as GAO REPORT]. Although this Note focuses on the U.S. Customs Service, the analysis applies equally to seizures by other government agencies.

The customs laws allow for the seizure of many different kinds of property under a variety of circumstances. See, e.g., 19 U.S.C. § 1594 (1976) (allowing seizure to force payment of assessed penalties); 19 U.S.C. § 1595a(a) (1976) (allowing seizure for facilitating the introduction of articles into the United States contrary to law); 21 U.S.C. § 881(a)(1), (4) (1976) (allowing seizure of controlled substances and conveyances used in their transport).

2. In 1982, the Customs Service seized vehicles valued at over \$35 million, aircraft valued at over \$34 million, vessels worth over \$44 million, monetary instruments worth over \$32 million, and miscellaneous general merchandise valued at over \$92 million. U.S. CUSTOMS SERVICE, CUSTOMS U.S.A. 36 (1982) [hereinafter cited as CUSTOMS USA]. Although narcotics seizures totaled nearly \$7 billion, *id.* at 37, recovery for property damage is rarely an issue, because owners seldom attempt to recover these items.

3. 19 U.S.C. § 1605 (1976).

4. The average period of detention was 9 months for vehicles, 17 months for aircraft, and 20 months for vessels. GAO REPORT, *supra* note 1, at 13.

5. 19 U.S.C. § 1618 (1976). The Secretary of the Treasury has authority to forego property forfeiture, as long as the owner was not guilty of willful negligence or intentional violation of customs laws.

The Customs Service has many procedures it follows after a property seizure. The Customs Service first decides whether it has probable cause to seize the property. Most cases have held that, under their factual circumstances, the owner has no right to a pre-seizure hearing or to advance notice of the pending seizure. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (involving Puerto Rican seizure procedure); *United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY*, 501 F.2d 1327, 1329 (5th Cir. 1974) (*per curiam*) (involving forfeiture proceedings under Customs Service regulations). The Customs Service next appraises the value of the property. 19 U.S.C. § 1606 (1976). Written notice of the applicable penalties involved and the pending forfeiture are sent to all interested parties. 19 C.F.R. § 162.31 (1983). The Customs Service then stores the property in the most convenient and appropriate place with due regard to the expense involved. 19 U.S.C. § 1605 (1976). The Customs Service can assess civil penalties against the property owner. 19 U.S.C. § 1592 (1976). Claimants can file a motion for mitigation of the penalties and forfeiture, under which the Secretary of the

judicial<sup>6</sup> decisions regarding the proper disposition of the property. Seized property may be damaged during this detention period.<sup>7</sup> Negligent government handling and misplacement, vandalism, theft, and damage from inadequate storage facilities may all contribute to a decline in the value of the property.<sup>8</sup> Recent increases in the use of seizures as a tool for customs law enforcement have aggravated this problem and will probably cause further problems in the future.<sup>9</sup>

If the government returns seized property to the owner in damaged condition, the owner may suffer a significant loss. Still the majority of courts hold that an owner cannot remedy the damage done to his property,<sup>10</sup> because section 2680(c) of the Federal

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Treasury and sometimes a district officer have power to cancel the forfeiture upon payment of penalties. 19 U.S.C. §§ 1614, 1618 (1976).

6. For property not exceeding \$10,000 in value, the court will declare summary forfeiture if no claim has been received within 20 days after general notice in a local newspaper for three consecutive weeks. 19 U.S.C. §§ 1607, 1609 (1976 & Supp. V 1981); 19 C.F.R. §§ 162.45, 162.47 (1983). When such a claim is filed, the claimant must pay a \$250 bond to cover court costs in case the government prevails. 19 U.S.C. § 1608 (1976), 19 C.F.R. § 162.47 (1983). Whatever the value of the property, the next step is a judicial condemnation procedure, *id.*, in which claimants will have the burden of proof upon a showing by the Customs Service that it had probable cause to seize the property. 19 U.S.C. § 1615 (1976). If the property owner fails to file a claim in time, 19 U.S.C. § 1609 (1976), or if the judicial forfeiture proceeding holds against the owner, the government may dispose of the property as it wishes. If the owner prevails, the government must return the property.

7. For example, the average loss in value of seized conveyances during the period of government detention is \$800 per vehicle, \$37,900 per vessel, and \$42,700 per aircraft. A portion of these losses derives from damage to the property. GAO REPORT, *supra* note 1, at 13.

8. Much of the loss in value is due to the long periods of storage (e.g., 9 months for vehicles, 17 months for aircraft, 20 months for vessels) brought about by delays in the judicial forfeiture process and an occasional inability to resell quickly the large number of items seized. As a result of these long periods of detention, depreciation often proves an additional factor in the total loss in value of property such as conveyances. *Id.* Inadequate maintenance and storage also contribute to such losses. *Id.* at 20.

9. *Id.* at 6-8.

10. *Kosak v. United States*, 679 F.2d 306 (3d Cir. 1982) (holding that FTCA § 2680(c) bars a claim asserting Customs Service negligence in damaging art objects during their detention), *cert. granted*, 103 S. Ct. 722 (1983) (No. 82-618); *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372 (11th Cir. 1981) (holding that § 2680(c) bars claim asserting negligent damage attributable to the Customs Service during the detention of an airplane); *United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY*, 501 F.2d 1327 (5th Cir. 1974) (barring a boat owner's counterclaim for physical damages allegedly inflicted during the period of the boat's detention); *Walker v. United States*, 438 F. Supp. 251 (D. Ga. 1977) (holding that § 2680(c) barred a claim against the federal government for physical damages a plane suffered during detention); *S. Schonfeld Co. v. S.S. Akra Tenaron*, 363 F. Supp. 1220 (D.S.C. 1973) (barring a remedy to a claim alleging Food and Drug Administration negligence in damaging a ship's cargo during detention); *Hatzlachh Supply Co. v. United States*, 579 F.2d 617 (Ct. Cl. 1978) (holding that § 2680(c) provided persuasive authority to bar a claim for failure to return the full lot of goods seized), *vacated per curiam*, 444 U.S. 460 (1980). *But see A & D Int'l, Inc. v. United States*, 665 F.2d 669 (5th Cir. 1982) (allowing recovery for gemstones lost after they had been left with a Customs official for appraisal); *A-Mark, Inc. v. United States Secret Service Dept of Treasury*, 593 F.2d 849 (9th Cir. 1978) (holding that § 2680(c) precludes only those claims resulting

Tort Claims Act<sup>11</sup> (FTCA) immunizes the federal government from "any claim arising in respect of . . . the detention of goods."<sup>12</sup> The majority interpretation, however, conflicts with the policy considerations underlying the FTCA. Therefore, this Note argues that courts should interpret the FTCA to allow claimants to recover for detention-related property damage.

Part I of this Note explains the general application of the FTCA to tort claims asserted against the federal government. Part II demonstrates the inadequacy of current judicial arguments regarding the adjudication of detention-related property damage claims under section 2680(c). Part III presents the policy considerations behind the FTCA and concludes that those considerations allow courts to interpret the Act to cover detention-related property damage claims.

### I. AN OVERVIEW OF THE FTCA

The FTCA, enacted in 1946, generally allows claimants to sue the federal government for the torts of its employees.<sup>13</sup> This judicial remedy replaced the unsatisfactory procedure whereby tort claimants had to pursue their remedy against the government by presenting a private bill in Congress pleading for special relief.<sup>14</sup> The Act generally purports to render the federal government "liable . . . in the same manner and to the same extent as a private individual under like circumstances,"<sup>15</sup> even though important procedural differences still exist between a suit against the government and a suit against an individual.<sup>16</sup> The government has been held liable under the FTCA for

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from the detention itself, and not those claims resulting from negligent handling of the property in the course of detention); *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958) (allowing recovery for property lost by a Customs official after it had been removed to a warehouse for inspection).

11. 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2401-2402, 2411-2412, 2671-2672, 2674-2680 (1976 & Supp. V 1981). See *infra* notes 15-24 and accompanying text for a description of how the Act affects tort claims asserted against the federal government and its agencies.

12. The full text of 28 U.S.C. § 2680(c) states that "[Government tort immunity shall be retained for] [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer."

13. 28 U.S.C. § 1346(b) (1976) provides that district courts have jurisdiction to hear money damage claims based on negligent or wrongful acts or omissions of government employees acting within the scope of their employment.

14. Private bills are those introduced in the Congress usually pleading for relief of a single individual's grievance. Private bills must survive the same procedure and avoid the same obstacles as general Congressional bills. For more detailed discussion on the private bill procedure, see Gellhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1 (1955); Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966).

15. 28 U.S.C. § 2674 (1976).

16. The claimant cannot bring an FTCA suit to the courts until the claimant has filed a

common torts, such as for damage arising from automobile accidents.<sup>17</sup> In addition, the Supreme Court has indicated that the government could be liable for more unusual torts, such as negligence in fighting a forest fire<sup>18</sup> or causing a shipwreck by failing to maintain a government-run lighthouse.<sup>19</sup>

In addition, an FTCA suit is a much more limited cause of action than a suit against a private individual, because Congress has not consented to tort liability for certain government activities. Section 2680 of the Act lists thirteen exceptions to the general rule that tort claims can be brought against government officials.<sup>20</sup> If any one of these exceptions applies, the government retains tort immunity and the claimants may only pursue a governmental remedy through legislative private bill relief.<sup>21</sup>

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claim with the tortfeasor government agency and that agency has denied the claim. 28 U.S.C. § 2675 (1976). In addition, FTCA suits do not allow for prejudgment interest or punitive damages. 28 U.S.C. § 2674 (1976). Finally, special statutes of limitations apply to FTCA suits: recovery in the courts is barred unless the claimant files the administrative claim within two years after the cause of action accrues and files the judicial complaint within six years after the claim arises. 28 U.S.C. § 2401 (1976).

17. Claims involving government vehicle accidents comprise most of the actions brought under the FTCA. 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 219.02 (1983).

18. *See, e.g., Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

19. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

20. 28 U.S.C. § 2680 (1976). These exceptions bar a judicial recovery for claims based on government performance of a discretionary function or exercise of due care in the execution of a statute, negligent handling of the U.S. mail, collection of revenue and the detention of property by law enforcement officials, admiralty claims, operation of the Trading with the Enemy Act, imposition of a federal quarantine, certain specific intentional torts committed by government employees, operation of the Treasury Department, combatant activities of the armed forces, a cause of action arising in a foreign country, activities of the Tennessee Valley Authority, activities of the Panama Canal Company, and activities of federal land banks.

21. *See Comment, The Federal Tort Claims Act*, 56 *YALE L.J.* 534, 544 n.67 (1947); *see also supra* note 14. The ineffectiveness of legislative private bills motivated the creation of the FTCA as the primary remedy for federal government torts.

Private bill tort claim adjudication proved unsatisfactory to Congress because of the burden entailed in investigating and disposing of these claims. The government's increased use of vehicles and the general growth of government exposed it to an ever-expanding range and quantity of tort claims by the mid-twentieth century. *See generally* 1 L. JAYSON, *supra* note 17, §§ 52, 58.

Private bill tort claim adjudication also proved unsatisfactory to tort claimants. *See id.* § 58. The burden imposed upon Congress in adjudicating these tort claims precluded an adequate weighing of the merits of each issue. 67 *CONG. REC.* 4756 (1926) (statement of Senator Means). Case-by-case deliberation, combined with a changing Congressional membership, resulted in a lack of consistency and uniformity. H.R. REP. NO. 667, 69th Cong., 1st Sess. 3 (1926). Moreover, Congress lacked the fact-finding ability necessary for proper claim adjudication. *Id.* at 14 (Supplementary Report of Rep. Cellar). In addition, claimants had a remedy in Congress as a matter of grace, not as a matter of right, and claims were subject to the whims of Congress, or even of a single Congressman. *Id.* at 13-14 (Supplementary Report of Rep. Cellar). Finally, Congressmen making the decisions were subject to political pressures and dealing. *See, e.g., Organization of Congress: Hearings on H.R. Con. Res. 18 Before the Joint Comm. on the Organization of Congress*, 79th Cong., 1st Sess. 66-67 (1946) (testimony of Rep. Kefauver) (describing a \$5,000 claim compromised to \$500 because of the impending adjournment of Congress, and also stating that strong ties with political figures tended to give certain claimants more satisfactory results);

Concerning the condition of goods following seizure, section 2680(c)<sup>22</sup> provides the most important of these specific exceptions. That provision bars claims arising out of the detention of goods and collection of taxes. The exceptions contained in section 2680 immunize the government from prosecution even for the negligent performance of nondiscretionary acts.<sup>23</sup> Therefore, under the exception for property detention found in section 2680(c), the government would be immune from liability for even flagrant negligence in nondiscretionary acts, such as negligent handling of seized property.<sup>24</sup>

## II. PRESENT TREATMENT OF CLAIMS ARISING OUT OF THE DETENTION OF GOODS

A majority of courts have held that section 2680(c) bars both property damage and conversion claims, while a minority have limited the bar to conversion claims, allowing a remedy for simple property loss or damage.<sup>25</sup> Persons bringing conversion claims allege that the government wrongfully detained property and refused to return it to the owner.<sup>26</sup> Plaintiffs with property damage claims allege that the government returned the seized property in damaged condition or lost it.<sup>27</sup> Conversion claims are distinguishable from property damage claims chiefly on the ground that the conversion includes a challenge that the government wrongfully seized the property,<sup>28</sup> while in property damage claims that determination has already been decided.<sup>29</sup> In many prop-

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*General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims, 72d Cong., 1st Sess. 6 (1932) (testimony of Rep. Collins).*

22. 28 U.S.C. § 2680(c) (1976).

23. See Comment, *supra* note 21, at 545-46 ("These provisions extend beyond the first exception [§ 2680(a)] because, having no qualifying phrases, they cover even gross negligence in performing a ministerial duty.").

24. Acts associated with postseizure property storage have been held to be nondiscretionary. *Ritter v. Castellini*, 173 N.J. Super. 509, 513-14, 414 A.2d 614, 616-17 (1980).

25. See cases cited *supra* note 10.

26. Conversion is defined as "an action done intentionally, that is, for the purpose of dealing with the chattel in such a way that if there be an outstanding inconsistent property interest in it, the same will be invaded." 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 210, at 126 (1956); see also *Catania v. Garage De Le Paix, Inc.*, 542 S.W.2d 239, 241 (Tex. Civ. App. 1976).

27. For examples of property damage claims, see *supra* note 10.

28. See *supra* note 26 and accompanying text.

29. The government's right to seize is usually adjudicated at the forfeiture proceeding. The judicial forfeiture proceeding is one in rem against the property. Theoretically, the sole issue is whether that property was used in violation of Customs laws. If the Customs Service cannot prove that it had probable cause to confiscate the property, claimants will have the property returned to them. 19 U.S.C. § 1615 (1976). Even if there existed probable cause for the seizure, claimants can recover their property if they can show that the property was not actually used in violation of customs laws. *Id.*

Several Supreme Court cases have also considered whether the harshness of in rem proceedings should be mitigated by allowing owners the "innocent owner" defense — that they could not

erty damage cases, the issue of the government's right to seize has become moot.<sup>30</sup>

### A. Arguments in Favor of Government Immunity for Property Damage Claims

Most of the decisions holding the government immune from property damage claims have looked no further than the language of section 2680(c) in so holding.<sup>31</sup> They have not gone beyond the language to advance any further theory as to congressional intentions in enacting the FTCA. For example, in *Kosak v. United States*,<sup>32</sup> the court argued that it must follow the ordinary language of a statute absent a clearly expressed legislative intention to the contrary.<sup>33</sup> The court suggested that, because the ordinary language of section 2680(c) "does not purport to distinguish among types of harm," it presumptively bars both property damage claims and conversion claims, and that any contrary conclusion would require a clear showing that Congress intended that effect.<sup>34</sup> The court, however, did not look to congressional

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reasonably know their property was being used in violation of the law. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (suggesting that the innocent owner defense might be constitutionally mandated in government forfeiture cases). Most decisions, however, acknowledge the harsh results to an innocent owner but hold the defense inapplicable in forfeiture cases involving federal statutes. *See, e.g., United States v. One Ford Coupe Automobile*, 272 U.S. 321, 333 (1926); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 512 (1921). *Calero-Toledo* appears to stand for the proposition that if the innocent owner does everything within his power to prevent the property's unlawful use, then the defense should be considered valid. 416 U.S. at 690.

30. The rightfulness of the government's seizure will be made moot if the Customs Service opts to forego the property's forfeiture.

For administrative relief of forfeitures, Customs Service regulations provide that the property will be returned if the owner can convince the Customs Service that the property was not used in violation of law. 19 C.F.R. § 171.31 (1983) (stating that the claim of forfeiture will be cancelled if the act or omission forming the basis of the claim did not occur). Again, as in judicial proceedings, *supra* note 29, the effectiveness of asserting the "innocent owner" defense is not clear. It appears to be at least a factor in Customs Service remittance decisions, because 19 C.F.R. § 171.13 (1983) requires that an owner asserting his innocence present evidence attesting to that fact. The succeeding provisions concerned with adjudicating claims, however, do not address the consequences of that defense. The problem for property owners under Customs Service remittance procedure is that the Service can return the property under the condition that the owner agree to accept the property "as is," thereby foregoing all liability for negligently incurred detention-related property damage.

31. *See, e.g., Hatzlachh Supply Co. v. United States*, 579 F.2d 617 (Ct. Cl. 1978), *vacated per curiam*, 444 U.S. 460 (1980); *United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY*, 501 F.2d 1327 (5th Cir. 1974) (*per curiam*); *S. Schonfeld Co. v. S.S. Akra Tenaron*, 363 F. Supp. 1220 (D.S.C. 1973).

32. 679 F.2d 306 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 722 (1983) (No. 82-618).

33. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), *cited in American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) and *Kosak v. United States*, 679 F.2d at 308.

34. 679 F.2d at 308.

intention in order to determine the proper interpretation of section 2680(c); instead it summarily concluded that no contrary intention existed.<sup>35</sup>

### *B. Arguments in Favor of Remedying Property Damage Claims*

Courts have offered two principal arguments supporting property damage remedies. The first compares the wording of section 2680(c) with that of section 2680(b). Section 2680(b) bars all claims "arising out of the loss, miscarriage, or negligent transmission" of mail by the Postal Service.<sup>36</sup> Courts have argued that if Congress had intended for section 2680(c) to bar property damage claims, Congress would have written that section using the specific language found in the directly preceding provision, section 2680(b).<sup>37</sup> Nevertheless, although the detailed language of section 2680(b) more explicitly reveals the congressional intention to bar property damage claims, the more encompassing language of section 2680(c) could express the same congressional intention for Customs cases. Thus, this argument raises only a possible distinction in section 2680(c) between property damage and conversion claims; it does not show that Congress intended for that distinction to be decisive.

The second argument compares the wording of section 2680(c) with the other FTCA exceptions.<sup>38</sup> This argument notes that section 2680(c) is the only FTCA exception that uses the phrase "arising in respect of," while all the others are phrased "arising out of" various government activities. This argument then emphasizes that "arising in respect of" is a more restrictive phrase than "arising out of," and that section 2680(c) should therefore be narrowly interpreted, allowing remedy for property damage claims.<sup>39</sup> Again, this argument raises only the possibility of a distinction; it does not establish that Congress intended for the difference in language to be significant. In fact, the evidence indicates that the difference in language was unintentional.<sup>40</sup>

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35. *Id.*

36. 28 U.S.C. § 2680(b) (1976).

37. See *Kosak v. United States*, 679 F.2d 306, 310 (3d Cir. 1982) (Weis, J., dissenting), *cert. granted*, 103 S. Ct. 722 (1983) (No. 82-618); *A & D Int'l, Inc. v. United States*, 665 F.2d 669, 672 (5th Cir. 1982); *A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849, 850 (9th Cir. 1978); *Alliance Assurance Co. v. United States*, 252 F.2d 529, 534 (2d Cir. 1958).

38. See *Kosak v. United States*, 679 F.2d 306, 310 (3d Cir. 1982) (Weis, J., dissenting), *cert. granted*, 103 S. Ct. 722 (1983) (No. 82-618).

39. *Id.*; see also Comment, *Governmental Liability for Customs Officials' Negligence: Kosak v. United States*, 67 *MINN. L. REV.* 1040, 1054 (1983).

40. Committee reports summarized § 2680(c) as barring all claims *arising out of* the detention of property. See, e.g., S. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946). Other committee reports use similar or identical language. H.R. REP. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. REP. No. 1196, 77th Cong., 2d Sess. 7 (1942); H.R. REP. No. 2245, 77th Cong., 2d Sess. 10 (1942).

Scrutiny of the language of section 2680(c) and the surrounding exceptions has not provided courts with a clear answer to the question of whether the FTCA covers negligent storage and maintenance of seized goods by customs officials. A more detailed investigation of the federal tort process is required. The considerations underlying the coverage and exceptions to the FTCA reveal that property damages arising out of detention of goods should be cognizable despite section 2680(c).

### III. UNDERLYING POLICY CONSIDERATIONS FOR CLAIMS ARISING OUT OF THE DETENTION OF GOODS

Section 2680(c), like the other specific FTCA exceptions, extends government immunity beyond the discretionary function protections of section 2680(a).<sup>41</sup> The Act's legislative history reveals two policy considerations used in formulating these specific exceptions. First, Congress intended to bar claims challenging certain governmental activities that should be free from the impending threat of damage suits.<sup>42</sup> This justification resembles that used to explain the discretionary function exception in section 2680(a).<sup>43</sup> Second, the availability of adequate alternative remedies would bar any tort claim.<sup>44</sup> Despite ambiguity in the legislative history, the latter justification seems to underlie section 2680(c).<sup>45</sup> Neither justification, however, supports interpreting section

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41. Section 2680(a) immunizes the government from tort liability for all harm arising out of the exercise of a discretionary functions. 28 U.S.C. § 2680(a) (1976). Judicial interpretation of the term "discretionary function" has concerned the distinction between "planning" and "operational" decisions. "Planning" decisions, those relating to whether, when, and where to act, are discretionary. "Operational" decisions, those relating to how to act, are not considered discretionary. See Ogden, *Entity Liability Under the Federal Tort Claims Act: An Analysis and a Proposal for Changes in the Law*, 15 U.C.D. L. REV. 907, 938 (1982); see also *Indian Towing, Inc. v. United States*, 350 U.S. 61, 69 (1955) (concluding that the decision whether to operate a lighthouse is discretionary, but daily operation of a lighthouse is not); *American Exch. Bank v. United States*, 257 F.2d 938 (7th Cir. 1958) (holding that designing a building is discretionary, but failing to provide handrails on outside steps is not); *Bulloch v. United States*, 133 F. Supp. 885 (D. Utah 1953) (holding that deciding whether to test atomic bomb is discretionary, but negligence in the testing procedure is not).

The FTCA immunizes discretionary decisions from liability because the threat of potential liability could hinder objective decision making and interfere with effective government operation. Comment, *supra* note 21, at 545.

42. See *supra* note 40.

43. See *supra* note 41.

44. See *supra* note 40.

45. Most of the committee reports simply present the two policy considerations and state that together they justify the presence of the specific FTCA exceptions. They do not detail which policy consideration supports which exception. See *supra* note 40.

The existence of two separate exceptions in § 2680(c) increases the confusion. Section 2680(c) exempts the government from liability for wrongful tax collection and for property detention. One committee memorandum justifies both § 2680(c) exclusions by the adequate alternative remedy theory by stating that alternative remedies existed for recovering wrongful tax payments. *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm.*

2680(c) to bar recovery for property damage claims. The existence of alternative remedies justifies denial of an FTCA remedy for conversion claims but not claims for property damage.

### A. The "Impending Liability" Rationale

The "impending liability" rationale immunizes both the discretionary and nondiscretionary acts of the government if exposure to threats of suit and liability would disrupt effective government operation.<sup>46</sup> As reflected in the discretionary function exception of section 2680(a), nondiscretionary government acts generally do not enjoy immunity.<sup>47</sup> By using the "impending liability" rationale, Congress acknowledged that effective government operation could also be disrupted if nondiscretionary acts could lead to governmental liability.

Congress used this rationale to justify barring claims challenging government acts in the handling of mail<sup>48</sup> and in the operation of the Treasury Department.<sup>49</sup> In the case of mail delivery, the number of potential suits and the likelihood of consequential damages justify immunity for nondiscretionary acts.<sup>50</sup> The potential liability could therefore far exceed the value of the goods handled.<sup>51</sup> Similarly, regarding

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*on the Judiciary*, 76th Cong., 3d Sess. 38 (1940) (testimony of Alexander Holtzoff) [hereinafter cited as *Tort Claims Hearings*]. This interpretation implies that the adequate alternative remedy rationale also justified the detention of goods. The Supreme Court has followed this interpretation. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 463-64 (1980) (per curiam); see also *L. JAYSON*, *supra* note 17, § 256.01 (explaining that Congress was satisfied that "adequate remedies are already available" for claims of this kind).

46. See *supra* note 41 for the same argument as applied to discretionary acts.

47. *Id.*

48. These claims are barred by 28 U.S.C. § 2680(b) (1976). In justifying this remedial bar, Mr. Holtzoff stated that "[I]t would be intolerable, of course, if in any case of loss or delay the Government could be sued for damages." *Tort Claims Hearings*, *supra* note 45, at 38 (testimony of Alexander Holtzoff). This is a rephrasing of the "impending liability" rationale because it implies that governmental mail service would be disrupted by such claims. Mail users also could protect themselves by procuring insurance. This fact also justified the exception. See *Tort Claims Hearings*, *supra* note 45, at 38 (testimony of Alexander Holtzoff).

49. These claims are barred by 28 U.S.C. § 2680(i) (1976). The legislative history reveals that this exception was part of the FTCA because it seemed "proper and desirable to the framers of the bill." *Tort Claims Hearings*, *supra* note 45, at 39 (testimony of Alexander Holtzoff). This is another aspect of the "impending liability" rationale. For a similar conclusion, see *L. JAYSON*, *supra* note 17, § 261.

50. See Comment, *supra* note 21, at 545. Since the United States Postal Service handled approximately 110 billion pieces of mail in 1981, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83, at 554 chart 931 (103d ed. 1982), the sheer number of suits that could arise from these transactions would be astronomical; see also Ogden, *supra* note 41, at 916-17 & n.57 (listing types of potential consequential damages arising out of mail claims). A claim likely to arise often occurs when contractual arrangements are made through the mail and one of the letters is lost or delayed, preventing the contract's formation. Either party would have a right to sue for lost profits or damages incurred in reliance that the contract was operational.

51. See Ogden, *supra* note 41, at 916-17 & n.57. Professor Ogden argues that consequential

Treasury Department operations, potentially immense liability and widespread damages justify the nondiscretionary immunity.<sup>52</sup> Treasury Department operations affect nationwide problems such as inflation and unemployment, and even simple errors in execution could create potentially unlimited damages all across the country.<sup>53</sup>

Neither property damage nor conversion detention claims involve such problems for the government. They will arise far less frequently than mail handling claims simply because of the difference in the numbers of goods involved.<sup>54</sup> Detention claims also will not create the potentially staggering levels of liability that Treasury Department claims would generate, because nondiscretionary detention acts affect only the property's owner, and liability will generally be limited to the value of the property being handled.<sup>55</sup> Therefore, the cost of remedying detention claims will not disrupt effective property detention.<sup>56</sup> Thus, government immunity for detention claims can be justified only for claims for which adequate alternative remedies exist.

### B. "Adequate Alternative Remedy" Rationale

Congress justified some of the FTCA exceptions based on the presence of "adequate alternative remedies."<sup>57</sup> Congress did not, however, design

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damages arising out of postal claims would potentially cause the liability to outweigh the value of the mailed items.

52. See Comment, *supra* note 21, at 545-46; Ogden, *supra* note 41, at 924-25.

53. The economic consequences of Treasury Department activities could include "increased unemployment that results from government anti-inflation policies, increased inflation caused by government policies to stimulate a recessionary economy, and disparate effects on industries such as housing, when the government tinkers with interest rates and the money supply. Monetary liability for these consequences could be staggering." Ogden, *supra* note 41, at 924.

54. In 1981, the U.S. Postal Service handled roughly 110 billion pieces of mail. See *supra* note 50. In contrast, the U.S. Customs Service in the same year made 49,000 seizures of general property and 22,000 seizures of narcotics and dangerous drugs. CUSTOMS USA, *supra* note 2, at 36-37.

55. Detention claims might assert consequential damages in addition to the value of the seized property, presumably for damages generated by being denied the use of the property during the period of its detention. These additional damages should be small because they can be mitigated by securing a replacement for the seized property during its detention.

56. The biggest problem for the Customs Service in their detention of seized property has been the enormous backlog of property in their storage facilities. Due to the large number of recent seizures, see GAO REPORT, *supra* note 1, at 6-8, and the long period of time in which the property must be detained, see *supra* note 4 and accompanying text, government agencies have occasionally been forced to halt seizures because they had no place to store additional property. GAO REPORT, *supra* note 1, at 47-54. Under these circumstances, placing government liability on discretionary detention acts might cause additional interference with effective government operation. This effect would only be a slight one, however, as the major interference comes from the backlog in seized property, not from liability for property damage caused during detention. The General Accounting Office has made several suggestions to Congress that would allow Customs to clear out their storage areas and expedite the forfeiture process. *Id.* at 55-61.

57. See *supra* text accompanying note 44.

the Act to deny claimants a remedy for every claim cognizable under a separate statute.<sup>58</sup> Rather, Congress wished to retain particular existing procedures for handling some of these claims. For example, Congress justified the denial of an FTCA remedy for claims arising out of the collection of taxes<sup>59</sup> on the basis that “[t]here are various tax laws providing the machinery for recovering back any tax that has been paid but was not properly owing. There was no purpose in interfering with that machinery.”<sup>60</sup> The question remains as to which procedures Congress considered sufficiently important to warrant this denial.

1. *Conversion claims*— Conversion claims, in essence, present wrongful seizure claims<sup>61</sup> and thus constitute little more than a claim demanding the return of the property to its owner.<sup>62</sup> At the judicial forfeiture hearing during the seizure process, the owner can raise the issues of the wrongfulness of the seizure and the right to recover the property.<sup>63</sup> A suit against the United States under the FTCA should not address these issues, because the forfeiture process already contains procedures for adjudicating these claims.

The legislative history indicates that Congress not only intended to bar FTCA detention-related conversion claims in this manner, but also that these were the only claims Congress intended to so bar. Congress justified section 2680(c) on the grounds that alternative means existed for “recovering back any tax that has been paid but was not properly owing.”<sup>64</sup> Section 2680(c) immunizes the government from liability for its acts arising out of the detention of goods *and* tax collection.<sup>65</sup> Just as procedures already existed for recovering wrongly paid taxes, the judicial forfeiture proceeding offered a means for recovering wrongly seized property.<sup>66</sup> Thus, in adopting section 2680(c), Congress intended to bar only those claims aimed at recovering seized property — conversion claims.

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58. See 1 L. JAYSON, *supra* note 17, § 72. Claims which fall within the FTCA and are compensable under another statute are not put to an election of remedies or subject to a doctrine of exclusiveness. Recovery is available under either statute.

59. See 28 U.S.C. § 2680(c) (1976).

60. *Tort Claims Hearings*, *supra* note 45, at 38 (testimony of Alexander Holtzoff), cited in *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 463-64 (1980) (per curiam).

61. See *supra* notes 26 & 28 and accompanying text.

62. Because the FTCA remedy only allows suits to recover money damages, claimants using the Act to recover on a conversion claim cannot force the government to return the property. 28 U.S.C. § 1346(b) (1976).

63. See, e.g., *Castleberry v. Alcohol, Tobacco & Firearms Div. of Treasury Dep't of United States*, 530 F.2d 672, 675, 677 (5th Cir. 1976). For a description of the judicial forfeiture process and the relevant issues therein, see *supra* note 29.

64. See *supra* note 60.

65. See *supra* note 12.

66. See *Castleberry v. Alcohol, Tobacco & Firearms Div. of Treasury Dep't of United States*, 530 F.2d 672, 674-75, 677 (5th Cir. 1976) (citing *In re Behrens*, 39 F.2d 561, 563 (2d Cir. 1930); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9 (1817)).

2. *Property damage claims*— Unlike conversion claims, no adequate alternative remedy exists for detention-related property damage claims. The judicial forfeiture proceeding, which provides the alternative remedy for conversion claims, cannot remedy property damage claims. In such an in rem proceeding, a court can only return the property to the owner.<sup>67</sup> It cannot award recovery for property damage occurring during detention.<sup>68</sup>

No other available alternative remedy can compensate for detention-related property damage. Claimants could conceivably recover for property damage inflicted by the government under two separate provisions of the Tucker Act<sup>69</sup> or in a suit against individual customs officers. Still, none of these possibilities offer an adequate remedy, because recovery is either limited to specific fact situations or is unlikely in any circumstance. Also, no evidence indicates that Congress intended these remedies to preclude an FTCA remedy.

a. *Suit under the Tucker Act*— One provision of the Tucker Act allows the government to be sued on contract claims.<sup>70</sup> In *Alliance Assurance Co. v. United States*,<sup>71</sup> a detention-related property damage claim was brought against the government under a Tucker Act implied contract of bailment. The court, in allowing the claim, held that the government impliedly contracted to act as a bailee when it seized property, thereby undertaking a duty to treat the property with reasonable care.<sup>72</sup> Such a theory may justify a remedy in situations where a customs official merely stages a routine inspection of property and negligently damages it.<sup>73</sup> For the great majority of cases, however, the theory can-

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67. The sole object of the forfeiture proceeding is to determine whether the seizure was rightful. *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 318 (1818); 36 AM. JUR. 2D, *Forfeitures and Penalties* § 47 (1968). If the seizure was wrongful, the property is to be returned to the owner. *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) at 315. An in rem proceeding is a proceeding to determine the right in specific property. *Zellen v. Second New Haven Bank*, 454 F. Supp. 1359, 1363 (D. Conn. 1978); *Robertson v. Department of Defense*, 402 F. Supp. 1342, 1345 (D.D.C. 1975). Accordingly, the court can only order the property's disposition. Awarding the owner damages for losses sustained during the seizure would involve questions of the rights and powers of individuals and branches of government, hence it would become an in personam inquiry, see *Shuford v. Anderson*, 352 F.2d 755, 759 (10th Cir. 1965), over which in rem jurisdiction does not apply.

68. Even if the claimant might theoretically be able to assert counterclaims for property damage at the judicial forfeiture proceeding, the claimant will seldom know of such damage or its extent at the time of this proceeding because the government still holds the property.

69. 28 U.S.C. § 1346(a)(2) (1976). The Tucker Act allows recovery against the United States for claims based on the application of a law of Congress that causes harm to the claimant, and for contractual recoveries against the government.

70. *Id.*

71. 252 F.2d 529 (2d Cir. 1958).

72. *Id.* at 532-33.

73. *Id.* (holding that the actions of the parties exhibited the presence of an implied-in-fact contract remediable under the Tucker Act). *But see* Wall & Childres, *The Law of Restitution and the Federal Government*, 66 NW. L. REV. 587, 617-18 (1971) (criticizing the *Alliance* court for finding an implied-in-fact contract, when the actual intent of the parties indicated that there was only an implied-in-law contract).

not justify a remedy, because the government usually seizes property outright under a claim of rightful ownership.<sup>74</sup> Thus, under these circumstances, a court could not reasonably imply a contract to care for another's property.<sup>75</sup>

The Tucker Act might conceivably provide another basis for property damage recovery. In addition to providing a remedy against the government for contract claims, the Tucker Act also imposes government liability for unconstitutional application of a law.<sup>76</sup> If a claimant can prove the unlawful nature of the seizure at the judicial forfeiture proceeding,<sup>77</sup> he has the right to have the property returned. The claimant also can then recover under the Tucker Act any depreciation the property underwent during detention.<sup>78</sup> Otherwise, the loss in value represents an unlawful penalty assessed through an unconstitutional seizure.<sup>79</sup> Although no case has held that a claimant can recover for detention-related property damage rather than depreciation under this theory, the extension seems logical. Unfortunately, the claimant can only employ such a Tucker Act recovery after prevailing at the judicial forfeiture proceeding; the Act would not help a claimant who merely received the property in damaged condition when the Customs Service decided to forego the property's forfeiture.<sup>80</sup>

Both types of Tucker Act recoveries for property detentions therefore provide inadequate remedies, because they are limited to specific fact situations and may not be applicable to detention property damage. In addition, the Tucker Act is not the sort of remedy Congress intended to preclude an FTCA remedy. Indeed, the FTCA's remedies generally complement the Tucker Act's remedies.<sup>81</sup>

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74. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 467 (1980) (Blackmun, J., dissenting); *United States v. Stowell*, 133 U.S. 1, 16-17 (1890); *Provimi, Inc. v. United States*, 680 F.2d 111, 113 (Ct. Cl. 1982); *Walker v. United States*, 438 F. Supp. 251, 258-59 (D. Ga. 1977).

75. *See, e.g., Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 467 (1980) (Blackmun, J., dissenting); *Walker v. United States*, 438 F. Supp. 251, 258-59 (D. Ga. 1977).

76. 28 U.S.C. § 1346(a)(2) (1976).

77. For a discussion of the issues raised in judicial forfeiture proceedings, see *supra* note 29.

78. *United States v. One 1965 Chevrolet Impala Convertible*, 475 F.2d 882 (6th Cir. 1973).

79. *Id.* at 886 (citing *United States v. United States Coin & Currency*, 401 U.S. 715 (1971)).

80. For example, *Kosak v. United States* involved such a fact situation. *Kosak* was arrested for suspected smuggling operations, and the Customs Service seized his collection of art and antiques. He was later acquitted of the criminal charges, and the Customs Service agreed to return the property. The property, however, was returned in damaged condition, amounting to over \$12,000 in damages. *Kosak* could not take advantage of the Tucker Act's provisions because no judicial forfeiture proceeding had occurred to determine whether the Customs Service had acted unconstitutionally.

81. *See Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 462-63 (1980) (per curiam). The Court stated that § 2680(c) "does not limit or otherwise affect immunity waivers contained in other statutes such as the Tucker Act," and "it appears that in exempting from the Tort Claims Act those claims described in § 2680(c), Congress did not further intend to disturb other existing statutory remedies."

b. *Suit against a customs official individually*— If a suit against the federal government has been barred, the claimant may have an alternative remedy against the individual officer responsible for the negligence.<sup>82</sup> For example, claimants have prevailed in actions against district directors<sup>83</sup> of the Customs Service for delays in instituting judicial forfeiture proceedings.<sup>84</sup> No suit has ever been brought against an individual Customs official for detention-related property damage possibly because a claimant would not know which officer actually lost or damaged the property.<sup>85</sup> Unlike the delay cases, in which a statutory mandate requires Customs Service district directors to use reasonable speed in instituting the property forfeiture,<sup>86</sup> no Customs official has a statutory responsibility to ensure the secure storage of property.<sup>87</sup> A claim against district directors would not be likely to succeed. A remedy sought against an official at any higher level would be deemed a suit against the federal government,<sup>88</sup> and section 2680(c) of the FTCA would bar such a remedy. Moreover, a suit against an individual official would produce a much greater chilling effect on government operation than would holding the government itself liable.<sup>89</sup>

The “adequate alternative remedy” theory thus fails to justify de-

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82. With a few notable exceptions, the FTCA’s granting of a remedy against the government does not preclude a suit against the responsible government officer individually. These exceptions are for cases involving a government employee driver involved in a traffic accident, for cases involving malpractice claims, and for cases involving swine flu immunization. See 1 L. JAYSON, *supra* note 17, §§ 175.03-04.

83. The United States Custom Service has divided the country into seven regions and further subdivided the regions into a total of 45 districts. CUSTOMS USA, *supra* note 2, at 5. The district director is the senior Customs official in each district. *Id.* at 19.

84. See, e.g., *States Marine Lines Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974); cf. *Seguin v. Eide*, 645 F.2d 804 (9th Cir. 1981), *vacated*, 103 S. Ct. 2446 (1983). *Seguin v. Eide* was vacated in light of *United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in United States Currency*, 103 S. Ct. 2005 (1983), which held that a fifteen month delay in instituting the forfeiture was not unreasonable. *Seguin* held that a four-and-a-half month administrative delay was unreasonable and held the district director liable for damages. District directors could be held liable for delays in the forfeiture process, but the delay would have to be a significant one.

85. Even the Customs Service itself might not know who individually caused the property damage or misplacement. See, e.g., *Alliance Assurance Co. v. United States*, 252 F.2d 529, 531 (2d Cir. 1958) (“the manner in which they [the seized goods] have vanished remains a mystery”) (quoting *Allied Assurance Co. v. United States*, 146 F. Supp. 118, 123 (1956)). Therefore, the chance of the original owner knowing what happened during storage is even more remote.

86. See *supra* note 84. In both *Schultz* and *Seguin*, a statutory directive gave the district director of Customs responsibility for proceeding with the forfeiture without delay. 28 U.S.C. §§ 1602-1604 (1976).

87. In fact, none of the Customs Service statutes or regulations require the property to be securely stored at all. 19 U.S.C. § 1605 (1976), which comes the closest to imposing a duty on the Customs Service, requires only that customs officials shall store the property in a place which is convenient and at an appropriate cost.

88. See, e.g., *Castleberry v. Alcohol, Tobacco & Firearms Div. of Treasury Dep’t of United States*, 530 F.2d 672, 674 (5th Cir. 1976).

89. See, e.g., Berman, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1187 (1977); Ogdén, *supra* note 41, at 921, 941.

nying an FTCA remedy to detention-related property damage claims. These property damage claims are not remediable at the forfeiture proceeding, and no other remedies offer adequate compensation. Hence, the majority interpretation of section 2680(c) has changed a congressional attempt to avoid duplicate remedies for detention claims into a mechanism for completely denying detention-related property damage claims.

#### IV. CONCLUSION

The FTCA's policy considerations distinguish between property damage claims and conversion claims. The policy considerations underlying the FTCA's exceptions reveal two intentions: to avoid subjecting the federal government to the threat of liability and to protect certain existing adequate alternative remedies. The "impending liability" rationale does not justify barring either conversion or property damage detention claims. The "adequate alternative remedy" rationale justifies barring an FTCA remedy for conversion claims, but not for property damage claims. An adequate alternative remedy exists for conversion claims in the form of the judicial forfeiture proceeding. In contrast, property damage claims are not remediable at the forfeiture proceeding, and no other remedy is adequate for these claims. Hence, when Congress enacted section 2680(c) of the FTCA, barring all claims arising out of the detention of goods, it intended to bar only conversion claims. Other claims, such as property damage claims, should be remediable under the FTCA, because a contrary holding would produce the unintended effect of leaving most detention-related property damage claimants without any judicial remedy.

—*Richard F. Neidhardt*

