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Torts - Federal Tort Claims Act - Section 2680(c) of the FTCA Bars Claims against the United States for Negligent Damage to Property While in the Custody of the Customs Service

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TORTS—FEDERAL TORT CLAIMS ACT—SECTION 2680(c) OF THE FTCA
BARS CLAIMS AGAINST THE UNITED STATES FOR NEGLIGENT
DAMAGE TO PROPERTY WHILE IN THE CUSTODY
OF THE CUSTOMS SERVICE

Kosak v. United States (1982).

On February 28, 1978, pursuant to a search warrant, United States Customs officials entered the home of Joseph Kosak and seized antiques and works of art that they suspected Kosak had brought into the country illegally.¹ Kosak was charged with smuggling goods into the United States² and was prosecuted in the United States District Court for the Eastern District of Pennsylvania, but was found not guilty.³ On June 1, 1979, Customs officials returned the seized items to Kosak in an allegedly damaged condition.⁴ Kosak filed suit for damages in the same district court under the Federal Tort Claims Act (FTCA),⁵ claiming that the negligence of the Customs Service during the period of detention caused the alleged loss.⁶ The district court granted the government's motion to dismiss,⁷ and the United States Court of Appeals for the Third Circuit⁸ affirmed, *holding* that the FTCA,

1. *Kosak v. United States*, 679 F.2d 306, 307 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 722 (1983).

2. *Id.* Kosak was charged with violating 18 U.S.C. § 545 (1976). This section provides criminal penalties for smuggling or "clandestinely introduc[ing] into the United States any merchandise which should have been invoiced, or mak[ing] out or pass[ing] or attempt[ing] to pass, through the custom-house any false, forged, or fraudulent invoice, or other document or paper." *Id.*

3. 679 F.2d at 307.

4. *Id.* Kosak claimed that seventeen different items were damaged or destroyed during detention, including: a nephrite jade incense burner worth \$2,791, an antique ivory Confucious worth \$1,187, and an antique ivory tusk worth \$1,209. Kosak sought a total of \$12,310 in damages. Brief for Appellant at 6, *Kosak v. United States*, 679 F.2d 306 (3d Cir. 1982).

5. 28 U.S.C. §§ 2671-2680 (1976 & Supp. 1980). The FTCA provides in pertinent part: "The United States shall be liable, respecting the provisions of this title related to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." *Id.* § 2674.

6. 679 F.2d at 307. Jurisdiction was based on 28 U.S.C. § 1346(b), which grants the district courts exclusive jurisdiction over claims brought under the FTCA. *See* 28 U.S.C. § 1346(b) (1976).

7. 679 F.2d at 307 n.2. The district court did not specify whether the motion was granted for failure to state a claim upon which relief could be granted, or for lack of subject matter jurisdiction. *Id.* (citing FED. R. CIV. P. 12(b)(1), 12(b)(6)). This failure by the district court did not preclude the Third Circuit from deciding the issue presented because the court found that "no set of facts will support the plaintiff's claim." *Id.*

8. The case was heard before Circuit Judges Aldisert, Weis, and Becker. Judge Aldisert wrote the opinion for the majority, and Judge Weis wrote a dissenting opinion.

which bars claims "arising in respect of . . . the detention of any goods or merchandise by any officer of customs,"⁹ precludes a claim against the United States for negligent damage to property while in the custody of the Customs Service. *Kosak v. United States*, 679 F.2d 306 (3d Cir. 1982).

Traditionally, the government has been protected from suits in tort by the common law doctrine of sovereign immunity.¹⁰ This doctrine, which prohibits the assertion of an otherwise valid cause of action against the government, had its roots in the theory that "the King can do no wrong."¹¹ The government's immunity may be abrogated only if it consents to suit by way of a legislative waiver of immunity¹² and such waivers of immunity are strictly construed.¹³ Historically, the only means of redress for tort claims against the government was a system of private bills in Congress,¹⁴ whereby an aggrieved party petitioned a member of Congress to introduce a bill which would either directly compensate the claimant or open the doors of the appropriate court to the claimant.¹⁵ If a claimant was unsuccessful in getting the bill passed, he was effectively left without a remedy.¹⁶

9. 28 U.S.C. § 2680(c) (1976). This section provides that the government is not liable under the FTCA 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." *Id.*

10. For an overview of the common law doctrine of sovereign immunity, see James, *Tort Liability of Government Units and their Officers*, 22 U. CHI. L. REV. 610 (1955); Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167 (1952).

11. See Parker, *supra* note 10. See also *Kawananakoa v. Polyblank*, 205 U.S. 348, 353 (1907) (no claim can be brought against the sovereign since "there can be no legal right as against the authority that makes the law on which the right depends"); *Cohens v. Virginia*, 19 U.S. 264 (1821) (no suit can be brought against the United States without its consent).

12. See *Dalehite v. United States*, 346 U.S. 15, 30 (1953). In *Dalehite*, the Court stated that any inquiry into the amenability of the federal government to suit "starts from the accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it." *Id.* (footnote omitted). For a discussion of *Dalehite*, see notes 26-31 and accompanying text *infra*.

13. See *Dalehite v. United States*, 346 U.S. 15, 31 (1953). The *Dalehite* Court stated that "decisions have interpreted the [waiver of immunity] to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions." *Id.*

14. For a discussion of the private bill system, see S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946). See also *Feres v. United States*, 340 U.S. 135, 140 (1950) (noting that the number of private bills introduced in Congress steadily increased as the functions of the federal government increased).

15. See S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946). This committee report, which accompanied the FTCA bill, explained that the private bill system "either make[s] a direct appropriation for the payment of the claim or else remit[s] the claimant to suit either in the Court of Claims or in a United States district court." *Id.* For an overview of the development of governmental liability, see Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25); Borchard, *Government Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926-27); Borchard, *Theories of Government Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928).

16. See S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946). Congress observed that this result was unjust "in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace."

In 1946, Congress enacted the Federal Tort Claims Act (FTCA) to abrogate, with certain limitations,¹⁷ the federal government's immunity from tort liability, and to establish the conditions for suits in tort against the government.¹⁸ The FTCA eliminated the private bill system,¹⁹ and made the

Id. The Supreme Court also recognized that the system of private bills led to "capricious results," and concluded that "[t]he primary purpose of the [FTCA] was to extend a remedy to those who had been without." *Feres v. United States*, 340 U.S. 135, 140 (1950).

17. Pub. L. No. 601, § 401, 60 Stat. 842 (1946) (codified at 28 U.S.C. §§ 2671-2680 (1976 & Supp. V 1981)). S. REP. NO. 1400, 79th Cong., 2d Sess. 29 (1946). The FTCA contains procedural limitations to the waiver of sovereign immunity. It requires a claimant to seek administrative relief as a prerequisite to instituting against the government. 28 U.S.C. § 2675(a) (1976). This prerequisite is satisfied when the federal agency makes a final disposition of the claim, or fails to make such a disposition within a six month period. *Id.* The claim subsequently brought in federal court may not request relief for an amount in excess of that sought by administrative remedies unless the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of the original claim. *Id.* § 2675(b).

The FTCA also contains substantive limitations. The FTCA expressly excepts several classes of claims from the waiver of immunity. *Id.* § 2680. The waiver also extends only to cases involving a loss caused by an employee of the government "acting within the scope of his office or employment" in situations in which "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id.* § 1346(b) (1976). There has been some debate as to the proper construction of the "scope of employment" provision. *See, e.g., Frazier v. United States*, 412 F.2d 22 (6th Cir. 1969) (government employee driving to a house which he was considering purchasing pursuant to transfer by government employer was acting for his own benefit and not within the scope of employment); *United States v. Taylor*, 236 F.2d 649 (6th Cir. 1956), *cert. dismissed*, 355 U.S. 801 (1957) (government employee may be acting within the scope of his employment while undertaking a personal project if it is undertaken in the general course of carrying out employer's business). *See also Watkins v. United States*, 462 F. Supp. 980 (D. Ga. 1977), *aff'd*, 587 F.2d 279 (5th Cir. 1979) (state law applies to question of whether government employee is acting within the scope of employment).

18. *See* 28 U.S.C. §§ 2671-2680 (1976 & Supp. 1980). Proposed tort claims bills were considered by Congress for nearly thirty years prior to passage of the FTCA. *See Dalehite v. United States*, 346 U.S. 15, 24 (1953). For a brief discussion of the form of these earlier bills and the problems they encountered in Congress, *see* S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946).

The immunity of the government had been waived in areas other than tort prior to passage of the FTCA. *E.g., Patent Infringement Act of 1910*, 35 U.S.C. § 68 (1946) (repealed 1948); *Suits in Admiralty Act of 1920*, 46 U.S.C. § 741 (1976).

The government has been subject to suit in contract since the Court of Claims Act of 1855, 10 Stat. 612 (amended 12 Stat. 765 (1863)). In 1887, the Tucker Act was passed, giving United States district courts jurisdiction concurrent with that of the Court of Claims for claims founded "upon any express or implied contract with the United States" or for other claims "not sounding in tort." Tucker Act, ch. 359, 49 Stat. 505-08 (1887) (codified as amended at 28 U.S.C. § 1346(a) (1976 & Supp. V 1981)). The Tucker Act is strictly a jurisdictional statute vesting jurisdiction in the federal courts to hear contract claims that exist against the government, and does not create new substantive rights. *See United States v. Testan*, 424 U.S. 392, 398 (1976).

It is well settled that only suits based on contracts implied in fact, rather than those implied in law, are cognizable under the Tucker Act. *See, e.g., Hatzlachh Supply v. United States*, 444 U.S. 460, 465 (1980); *United States v. Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217 (1926). An implied in fact contract is one which is "manifested by conduct." J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 1-12

government liable in tort "in the same manner and to the same extent as a private individual under like circumstances."²⁰ The FTCA's waiver of governmental immunity, however, is qualified by several express exceptions,²¹ including the "customs exception" of section 2680(c) which bars claims "arising in respect of . . . the detention of any goods or merchandise by any officer of customs."²²

(1977). State law prevails in claims based upon implied contracts. *Hungate v. United States*, 627 F.2d 60, 61 (8th Cir. 1980).

Some courts, including the Supreme Court, have recognized recovery in cases involving the detention of goods by the Customs Service based on an implied contract theory. *See Hatzlachh Supply v. United States*, 444 U.S. 460 (1980); *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958). These courts reasoned that an implied bailment contract is created when goods are placed in the custody of the Custom Service. The destruction or loss of those goods by customs agents constitutes a breach of the contract. *See* 444 U.S. at 465; 252 F.2d at 534.

In addition to conferring jurisdiction on the district courts and the Court of Claims over contract suits against the government, the Tucker Act also gave those courts jurisdiction over claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1346(a)(2) (1976) (amended 1978). *See Lee v. Blumenthal*, 588 F.2d 1281, 1282 (9th Cir. 1979).

19. S. REP. NO. 1400, 79th Cong., 2d Sess. 29 (1946). Abolishment of the private bill system was apparently a major motivation in the passage of the FTCA. *See id.* The legislative history of the FTCA is replete with references to the burden which the private bill system placed on Congress. *See, e.g.*, S. REP. NO. 1400, 79th Cong., 2d Sess. 30-31 (1946); H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2 (1945).

20. 28 U.S.C. § 2674 (1976). For the pertinent provisions of § 2674, see note 5 *supra*. There is some conflict as to whether the effect of this waiver of immunity creates new rights of action, or whether it is strictly limited to situations in which a cause of action is available against a private person. The majority of courts have held that the FTCA "did not create new causes of action where none existed before, nor did it foist novel and unprecedented liabilities upon the federal government." *Builders Corp. of Am. v. United States*, 320 F.2d 425, 426 (9th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964). *See also National Mfg. Co. v. United States*, 210 F.2d 263, 277 (8th Cir.), *cert. denied*, 374 U.S. 967 (1954); *Reed v. Hadden*, 473 F. Supp. 658, 659-60 (D. Colo. 1979); *Sawyer v. United States*, 465 F. Supp. 282, 285 (E.D. Va. 1978).

However, in the same year as the Ninth Circuit's *Builder's Corp.* decision, the Supreme Court noted in dictum that "[t]he Act extends to novel and unprecedented forms of liability as well." *United States v. Muniz*, 374 U.S. 150, 159 (1963).

This conflict seems to arise primarily in situations in which the allegedly tortious act is one in which private persons or corporations do not generally engage. For example, the Supreme Court was faced with a claim under the FTCA based on the allegedly negligent operation of a lighthouse by the government. *See Indiana Towing Co. v. United States*, 350 U.S. 61, 62 (1955). The government urged the Court to read § 2674 to exclude liability for negligence in the performance of activities which private persons do not perform. *Id.* at 64. The Court rejected this reasoning as being "self-defeating" to the FTCA. *Id.* at 65-69.

21. For the express exceptions to the FTCA's waiver of immunity, see 28 U.S.C. § 2680 (1976).

22. *Id.* § 2680(c) (1976). The term "customs exception" is used herein for purposes of identification only, the exception not being limited to employees of the Customs Service, but also extending to the detention of goods by "any other law enforcement officer." *Id.* *See A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849 (9th Cir. 1978) (customs exception issue involved detention of goods by officers of the United States Secret Service); notes 42-46 and accompanying text *infra*. *See also S. Schonfeld Co. v. SS Akra Tenaron*, 363 F. Supp. 1220 (D.S.C. 1973) (applying the

The legislative history of the customs exception to the FTCA is sparse,²³ and does not expressly address the question of its applicability to suits for negligence occurring during the detention of goods.²⁴ However, the committee report which accompanied the bill states that the express exceptions encompass "claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available."²⁵

In *Dalehite v. United States*²⁶ the Supreme Court engaged in an over-all interpretation of the FTCA and its exceptions, although without expressly addressing the customs exception.²⁷ Acknowledging that "no action lies against the United States unless the legislature has authorized it,"²⁸ the Court recognized that the exceptions to that waiver must be given their "due regard."²⁹ The Court interpreted the scheme of the FTCA to require the

customs exception in case involving detention of goods by officers of the Food and Drug Administration); notes 56-60 and accompanying text *infra*.

23. See S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946). the entire treatment of the "exceptions" portion of the FTCA constituted one brief paragraph in the committee report which accompanied the bill which basically restates the statute's enumerated exceptions. *Id.* The customs exception specifically is treated simply by rewording its provisions to read "these exceptions cover claims arising out of . . . the detention of goods by customs officers." *Id.*

24. See *id.*

25. See S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946). For a discussion of the suggested relevance of this language to suits for negligent damage to property during detention, see notes 94-100 and accompanying text *infra*.

26. 346 U.S. 15 (1953), *affg*, 197 F.2d 771 (5th Cir. 1951). *Dalehite* involved a wrongful death action brought under the FTCA for the death of Henry G. Dalehite caused by the explosion of a government-produced supply of aluminum nitrate based fertilizer. 346 U.S. at 17. The claim alleged that the government was negligent in adopting the fertilizer program as a whole, in the control of the program, and in the failure to warn of the dangerous nature of the fertilizer. 197 F.2d at 773. The district court originally granted relief, but the Fifth Circuit reversed. *Id.* at 781. On grant of certiorari, the Supreme Court affirmed the decision of the court of appeals, holding that the claim was barred by § 2680(a) of the FTCA, which excludes from the waiver of the FTCA "any claim based upon . . . the exercise or performance or the failure to perform a discretionary function . . . whether or not the discretion involved be abused." 346 U.S. at 35-37. For the Court's interpretation of § 2680(a), see note 27 *infra*.

27. 346 U.S. at 30-36. The Court provided a detailed analysis of § 2680(a) of the FTCA, and concluded that the conduct of the government attacked in the suit fell within the discretionary functions of the government. *Id.* at 37-42. The Court noted that the acts of subordinate government employees in carrying out discretionary decisions of governmental officials were also exempt under § 2680(a). *Id.* at 36.

28. 346 U.S. at 30. See also *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); *United States v. Orleans*, 425 U.S. 807, 814 (1976); *Feres v. United States*, 340 U.S. 135, 141 (1950); *United States v. Shaw*, 309 U.S. 495, 500 (1940). For a general discussion of the scope and history of the FTCA, see notes 17-22 and accompanying text *supra*.

29. 346 U.S. at 31. The Court stated that the role of a court in applying the FTCA as a whole was to give the statute a reading which "carr[ies] out the legislative purpose of allowing suits against the Government for negligence with due regard for the statutory exceptions to that policy." *Id.*

“clear relinquishment of sovereign immunity” in order for a claim to lie against the United States,³⁰ and stated that Congress never intended to relinquish immunity to claims that “affected the governmental functions.”³¹

Among the courts that have addressed the customs exception specifically, there is a conflict as to whether that exception was intended to exclude from the waiver of immunity claims based on damage to property during detention due to the negligence of Customs employees, or whether that exception was only intended to encompass claims based on damage from the fact of the detention itself.³² In *Alliance Assurance Co. v. United States*,³³ the Second Circuit was faced with a claim that a shipment of imported goods mysteriously disappeared while being detained by the Customs Service for routine inspection and valuation.³⁴ The insurer subrogee brought suit under the FTCA to recover the value of the lost goods.³⁵ The Second Circuit held that the district court had jurisdiction over the claim under the FTCA,³⁶

30. *Id.* The Supreme Court has expressed the rule requiring clear relinquishment of sovereign immunity on other occasions. See, e.g., *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, three members of the armed forces were injured while on active duty, by the alleged negligence of others in the armed forces. *Id.* at 136-37. The Court reasoned that since a system of compensation for those injured in the armed forces already existed in the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. § 501 (1976 & Supp. IV 1980), the FTCA was not intended as a waiver for those claims. *Id.* at 145-46. See also *United States v. Spelar*, 338 U.S. 217 (1949) (§ 2680(c) of the FTCA barred a claim against the United States for injuries incurred while plaintiff was on a United States military base over which the sovereignty of the United States did not extend).

31. 346 U.S. at 32. See also S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946) (exceptions section includes “claims which relate to certain governmental functions which should be free from the threat of damage suit, or for which adequate remedies are already available.”)

32. For a summary of the split among the courts on the scope of section 2680(c) at the time *Kosak* was decided, see 679 F.2d at 307-08 n.3. See also notes 33-60 and accompanying text *infra*.

33. 252 F.2d 529 (2d Cir. 1958).

34. *Id.* at 531. The imported goods consisted of English woolens with a stipulated value of \$2,460.59. *Id.* A duty of \$708.25 was paid upon entry, and the goods were transferred to public stores for inspection by Customs officials pursuant to 19 U.S.C. § 1499 (1976), to ascertain if the goods were in fact of the quantity and value declared by importer upon entry. 252 F.2d at 531.

The woolens disappeared from the public stores where they had been consigned. *Id.* The district court found that the manner in which the goods disappeared “remains a mystery.” *Alliance Assurance Co. v. United States*, 146 F. Supp. 118, 123 (S.D.N.Y. 1956).

35. 252 F.2d at 531. A cause of action was also claimed under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976 & Supp. V 1981) for breach of an implied bailment contract. *Id.* For a discussion of the possibility of a Tucker Act remedy, see note 18 *supra*. The Second Circuit also reversed the district court's decision that there was no jurisdiction under the Tucker Act. The court held that the government impliedly promised to use “due care during the term of bailment” thus creating an implied-in-fact bailment contract. 252 F.2d at 532-33. For cases which distinguish implied-in-law and implied-in-fact contracts, see *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939); *United States v. Minnesota Mut. Inv. Co.*, 271 U.S. 212 (1926).

36. 252 F.2d at 533. The district court found that the plaintiff failed to prove negligence and entered judgment for the government. 146 F. Supp. at 123-24. The

and that the claim was not barred by the customs exception.³⁷ The *Alliance* court reasoned that the probable purpose of the customs exception was to “prohibit actions for conversion arising from a denial by the customs authorities . . . of another’s immediate right of dominion or control over goods” during detention.³⁸ In support of its position that the customs exception was not intended to bar claims based on negligence, but only those based on conversion, the court stressed that the language of the immediately preceding exception³⁹ expressly bars actions “arising out of the loss, miscarriage, or negligent transmission” of mail.⁴⁰ Had Congress intended to bar negligence suits against the Customs Service in situations such as this, the *Alliance* court reasoned, it would have done so expressly, as it had done with the postal exception.⁴¹

The *Alliance* court’s reasoning was subsequently adopted by the Ninth Circuit in *A-Mark, Inc. v. United States Secret Service*.⁴² In *A-Mark*, the plaintiff brought suit claiming that a rare silver coin was damaged during detention by the United States Secret Service.⁴³ The district court dismissed the plain-

district court held that the customs exception to the FTCA did not bar the claim, reasoning that the Customs Service “could not detain goods which had disappeared.” *Id.* at 122. The Second Circuit agreed with this reasoning “in theory.” 252 F.2d at 534.

37. 252 F.2d at 533-34. The court reversed the finding of the district court that plaintiff had failed to prove the negligence of the government. *Id.* at 534-36. The court found that the government was a bailee of the goods and that, once loss was established, there arose a presumption of negligence against the bailee. *Id.* at 534. The bailee, according to the court, bore the burden of proving by a preponderance of the evidence that the loss was caused by an event beyond its control. *Id.* at 536. The Second Circuit concluded that the government’s inability to explain the disappearance did not satisfy this burden. *Id.*

38. *Id.* at 534. Judge Moore, writing for the court, stated that the customs exception to the FTCA was “normally used to bar actions based upon the illegal seizure of goods.” *Id.* (citing *Jones v. FBI*, 139 F. Supp. 38 (D. Md. 1956); *United States v. One 1951 Cadillac Coupe DeVille*, 125 F. Supp. 661 (E.D. Mo. 1954)).

39. *See* 28 U.S.C. § 2680(b) (1976) (excluding from the waiver of immunity claims “arising out of the loss, miscarriage, or negligent transmission” of the mail).

40. 252 F.2d at 534 (quoting 28 U.S.C. § 2680(b) (1976)). Judge Moore stated that the express mention of negligence in § 2680(b) was the “best evidence” in support of his conclusion that § 2680(c) was not intended to encompass negligence claims. *Id.*

41. *Id.* The court referred to the postal exception in § 2680(b) as a “general absolution from carelessness in handling property belonging to others.” *Id.* Because of the absence of any reference to negligence in § 2680(c), the court stated that the “conclusion is inescapable” that Congress intended no such general immunity to apply to the Customs Service. *Id.*

42. 593 F.2d 849 (9th Cir. 1978) (per curiam), *rev’g*, 428 F. Supp. 138 (C.D. Cal. 1977).

43. 593 F.2d at 849. On April 14, 1976, the president of A-Mark, Inc. submitted a coin to the Secret Service for authentication. At that time the coin was numismatically graded as “Brilliant, Uncirculated, and Semi-Proof Like.” *Id.* The Secret Service transferred the coin to the Office of the Bureau of the Mint which, in August, 1971, opined that the coin was genuine but that the mint mark had been altered. *Id.* at 850. The Secret Service then detained the coin pending investigation into possible violations of 18 U.S.C. § 331 (1976) (mutilation, diminution, and falsification of

tiff's complaint under the customs exception of the FTCA,⁴⁴ but the Ninth Circuit reversed,⁴⁵ adopting the language and reasoning of the *Alliance* court that the exception bars "only those claims asserting injury as a result of the fact of detention itself."⁴⁶

Recently, the Fifth Circuit also adopted the *Alliance* court's interpretation of the FTCA in *A & D International, Inc. v. United States*,⁴⁷ where gems were lost while purportedly locked in a Customs Service safe.⁴⁸ The Fifth

coins) and 18 U.S.C. § 492 (1976) (forfeiture of counterfeit paraphernalia). 428 F. Supp. 138, 139.

Upon request by the plaintiff, the coin was examined by an independent examiner on January 31, 1972, who declared the coin and the mint mark to be genuine. *Id.* at 139. At the time of this examination the coin was undamaged. *Id.* Thereafter the coin was again examined by the Bureau of the Mint, again found to be altered, and again detained by the Secret Service. *Id.* The coin was later returned to the plaintiff with notice that any attempt by him to sell or transfer the coin without full disclosure would be deemed fraudulent. *Id.* The plaintiff alleged that the coin was in damaged condition when returned to him. *Id.* at 138.

44. 593 F.2d at 849. The customs exception to the FTCA is applicable to claims against the United States Secret Service by virtue of the "any other law enforcement officer" language of the section. See 28 U.S.C. § 2680(c) (1976). For a discussion of the use of the term "customs exception," see note 22 *supra*.

The district court dismissed the claim against the government on the ground that damage could only have occurred during the period of detention, and therefore § 2680(c) precluded the claim. 428 F. Supp. at 140. The district court disagreed with the Second Circuit's reasoning in *Alliance v. United States*, stating that the *Alliance* decision was "not in accord with the terms of [§ 2680(c)]." *Id.*

45. 593 F.2d at 850. Judge Tang concurred in the result, but stated that a better analysis of the case was that § 2680(c) did not apply to the case at bar since the coin was not being detained within the context of customs or tax activities. *Id.* (Tang, J., concurring). Judge Tang reasoned that the "any other law enforcement officer" language of § 2680(c) should be read to include only officers detaining goods for customs or tax purposes. *Id.* at 851 (Tang, J., concurring).

46. *Id.* at 850. The Ninth Circuit quoted the *Alliance* opinion in its entirety with respect to the purpose and scope of § 2680(c). *Id.* The court also adopted verbatim the *Alliance* court's treatment of the § 2680(b) postal exception. *Id.* For a discussion of the *Alliance* opinion, see notes 33-41 and accompanying text *supra*.

47. 665 F.2d 669 (5th Cir. 1982). *But see* *United States v. One (1) 1972 Wood, 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974). In *Custom Boat*, a claim was made against the United States under the FTCA by the owner of a boat which had been used by the boat's lessee to transport marijuana. *Id.* at 1329. The boat was seized from the lessee by Customs officials, who agreed to return the boat to the innocent owner upon the payment of a \$400 storage charge. *Id.* The owner refused to pay, and the government instituted forfeiture proceedings. *Id.* The owner then counterclaimed under the FTCA for damage to the boat and loss of service during detention. *Id.* at 1330. The Fifth Circuit affirmed the denial of the counterclaim, on the ground that § 2680 specifically prohibits the bringing of any claim arising from the detention of any goods or merchandise by a customs officer. *Id.*

In *A & D International*, the Fifth Circuit distinguished *Custom Boat* by stressing that in the earlier case the plaintiff was "challenging the propriety of the storage charge as applied to him, an innocent party." 665 F.2d at 673. However, since the claim in *Custom Boat* also sought redress for "damage to the boat" during detention, this distinction is somewhat unclear. See 501 F.2d at 1330.

48. 665 F.2d at 670-71.

Circuit held that jurisdiction was proper under the FTCA,⁴⁹ finding the *Alliance* rationale with respect to the customs exception to be "persuasive."⁵⁰

In contrast to the *Alliance* approach, the Eleventh Circuit, in *United States v. One Douglas A-26B Aircraft*,⁵¹ found that the FTCA did not provide a remedy for damage that occurred to an airplane while it was held by customs officials.⁵² While the Eleventh Circuit did not expressly state that the customs exception precluded the plaintiff's claim,⁵³ both the precedent re-

49. *Id.* at 672. The issue of jurisdiction under the FTCA was not challenged at the district court level. *Id.* Rather, judgment for the government was based on plaintiff's failure to meet his burden of proving that negligence of the government was the proximate cause of the loss. *Id.* It was only on the appellate level that the United States asserted the defense of lack of a claim under the FTCA based upon § 2680(c). *Id.*

50. *Id.* On the district court level, both parties argued their case on a theory of an implied-in-fact contract of bailment. *Id.* at 673. The district court judge, however, decided the case utilizing a tort analysis, finding no negligence on the part of the government. *Id.* In a section of the opinion headed "A Case of Negligent Tort or Contract Bailment—A Distinction Without a Difference?" the Fifth Circuit stressed that since the "[p]laintiff did not prove the existence of a bailment and negligence analysis fits comfortably within the [FTCA] and provides a proper disposition of this case" it was not necessary on appeal to decide whether the claim was properly brought under the FTCA rather than the Tucker Act. *Id.* at 674. For a discussion of the Tucker Act remedy, see note 18 *supra*.

51. 662 F.2d 1372 (11th Cir. 1981). In *Douglas*, the appellant's aircraft was seized and detained for a lengthy period by Customs officials. The owner obtained a court order compelling the government to either institute forfeiture proceedings or release the aircraft. *Id.* at 1373-74. The aircraft was returned, but in a damaged condition. *Id.* at 1373. Relief was sought in the form of a post-judgment remedy for a writ of assistance pursuant to FED. R. CIV. P. 70 (Judgment for Specific Acts) and for relief from or modification of the judgment pursuant to FED. R. CIV. P. 60(b) (Relief from Judgment or Order). *Id.* at 1373-74. The owner sought to have the order compelling return of the aircraft amended to read that it be returned "in an airworthy condition." *Id.* at 1373. The Eleventh Circuit affirmed the district court's denial of relief under FED. R. CIV. P. 70 on the grounds that that rule was intended to apply only to cases in which the parties did not "comply with orders to perform specific acts." *Id.* at 1374 (quoting 12 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE, CIVIL § 302 (1973)). Since the appellant did not claim noncompliance with the order, both courts found Rule 70 to be inapplicable. *Id.* The district court denied the petition under FED. R. CIV. P. 60(b), which provides relief from a final judgment on the basis of fraud or misrepresentation, on the grounds that appellant did not meet the burden of proving fraud "by clear and convincing evidence." *Id.* The Eleventh Circuit stated that it was not required to resolve the issue of fraud or misrepresentation since claims for affirmative relief beyond the reopening of a judgment must be asserted in a new and independent suit and the issue was thus beyond the scope of Rule 60(b). *Id.* at 1377 (citing *United States v. One 1967 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1356 (5th Cir. 1972); *Bishop v. United States*, 266 F.2d 657, 659 (5th Cir. 1959)).

52. *Id.* at 1376. The Eleventh Circuit seemed to follow a prior decision of the Fifth Circuit. *Id.* See *United States v. One (1) Wood 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974). *Custom Boat* held that § 2680(c) barred recovery under the FTCA for damage to property during detention due to the negligence of Customs employees, but recognized the availability of a remedy under the Tucker Act. See *id.* at 1330. For a discussion of *Custom Boat*, see note 47 *supra*.

53. See 662 F.2d at 1376. The court held that the plaintiff had to proceed under the Tucker Act to recover. The court did not expressly state its grounds for holding

lied upon by the court⁵⁴ and the result reached strongly imply that it considered the customs exception to preclude the claim.⁵⁵

The view that the customs exception to the FTCA bars claims for negligent damage to property which occurs during detention was clearly adopted by the United States District Court for the District of South Carolina in *S. Schonfeld Co., Inc. v. SS Akra Tenaron*.⁵⁶ In *Schonfeld*, the plaintiff claimed that its imported cargo was damaged by the negligent handling of employees of the Pure Food and Drug Administration during detention.⁵⁷ Dismissing the negligence claim against the government, the district court expressly rejected the *Alliance* approach stating that "there is nothing in the language of the statute to indicate that erroneous seizure in the inception should be distinguished from improper retention or negligent handling of goods properly seized at the outset."⁵⁸ The court found the *Alliance* court's distinction between actions for conversion and actions for negligence⁵⁹ to be "artificial" since the FTCA "specifically bars 'any claim' arising out of the detention of

that the claim should have been brought under the Tucker Act. *Id.* Though the court clearly relied on *Custom Boat*, it is not clear whether it relied on *Custom Boat's* interpretation of § 2680(c), or whether it relied on the facts of the case at bar being so closely related to those in *Custom Boat* as to clearly place the claim under the Tucker Act. *Id.* For a discussion of the facts of *Custom Boat*, and the Fifth Circuit's application of § 2680(c) in that case, see note 47 *supra*.

54. 662 F.2d at 1376. For a discussion of the Eleventh Circuit's reliance on the Fifth Circuit's decision in *Custom Boat*, see notes 52-53 *supra*. For a discussion of the facts of *Custom Boat*, see note 47 *supra*.

55. See 662 F.2d at 1338. In affirming the district court's dismissal of the motions under FED. R. CIV. P. 70 & 60(b), the court of appeals reached the same result as if it had expressly stated that the claim was barred by § 2680(c) of the FTCA. See note 51 *supra*.

56. 363 F. Supp. 1220 (D.S.C. 1973).

57. *Id.* at 1220-21. The imported cargo consisted of 2700 cartons of canned tomatoes imported from Spain. *Id.* at 1220. The tomatoes were inspected by agents of the Pure Food and Drug Administration (FDA) upon entry at Charleston, South Carolina, at which time a portion of the shipment was found to be damaged and unfit for consumption. *Id.* The plaintiff alleged that through the negligent segregation of the shipment by the FDA, the entire cargo was destroyed rather than only that portion originally found to be damaged. *Id.* at 1221.

58. *Id.* at 1223. The government based its motion to dismiss on two exceptions to the FTCA—§ 2680(a) and § 2680(c). *Id.* at 1221. Section 2680(a) provides in pertinent part that the FTCA does not apply to claims based upon the exercise of "a discretionary function . . . , whether or not the discretion involved be abused." *Id.* (quoting 28 U.S.C. § 2680(a) (1976)). The court held that § 2680(a) did not bar the claim since the conduct complained of occurred after the government had exercised its discretion and had proceeded to act on the matter. *Id.* The court found, however, that the claim was barred by § 2680(c). *Id.* at 1223.

59. *Id.* For a discussion of the distinction drawn by the Second Circuit in *Alliance* between actions for conversion and those for negligence, see notes 38-41 and accompanying text *supra*.

The *Schonfeld* court stressed that there was no practical difference between claims arising from the fact of detention and those arising from negligence, since the detained goods would be "equally unavailable to a claimant if they are padlocked in a customs house, or if they are physically destroyed." 363 F. Supp. at 1223.

goods."⁶⁰

Although in *Hatzlachh Supply v. United States*,⁶¹ the United States Supreme Court recognized the split among jurisdictions as to the correct interpretation of the customs exception, the Court did not resolve the issue.⁶² The *Hatzlachh* Court found a valid claim under the Tucker Act on an implied contract theory and held that the customs exception could not be used as a bar to claims brought solely under the Tucker Act,⁶³ and therefore found it to be unnecessary to determine the scope of the exception.⁶⁴

Against this background, the Third Circuit began its discussion of governmental liability for negligent damage to goods in the possession of the

60. 363 F. Supp. at 1223. The *Schonfeld* court was emphatic in its rejection of *Alliance*, which it termed "an anomaly." *Id.* The focus of the court was on the "end result" to a claimant from the loss of property due to seizure by Customs officials, and it saw no difference in the results of "loss from the fact of detention" and "loss from negligence during detention." *Id.*

61. 444 U.S. 460 (1980) (per curiam). In *Hatzlachh*, the petitioner's imported camera supplies were seized and detained by the Customs Service. *Id.* at 461. When the goods were eventually returned to the petitioner he claimed that merchandise valued at \$165,000 was missing, and brought suit under the Tucker Act for breach of an implied contract of bailment. *Id.* For a discussion of the Tucker Act, see note 18 *supra*. The Court of Claims granted the government's motion for summary judgment, on the grounds that since § 2680(c) of the FTCA barred the claim in tort, the claimant should not be permitted to get around that bar by phrasing the claim as one sounding in contract. 444 U.S. at 462.

62. 444 U.S. at 462-63 n.3. The Supreme Court summarized the split among the jurisdictions, as it existed at that time, as follows:

A-Mark, Inc. v. United States Secret Service and *Alliance Assurance Co. v. United States*, it is said, permit recovery under the Tort Claims Act for the loss of goods detained by customs officers; whereas this case, *United States v. One (1) 1972 Wood, 19 Foot Custom Boat*, and *S. Schonfeld v. S.S. Akan Tenaron* construe § 2680(c) to except such losses from the Tort Claims Act.

Id. (citations omitted).

The Supreme Court read the Fifth Circuit's *Custom Boat* opinion to construe § 2680(c) as a bar to claims for negligent loss of property, while the Fifth Circuit itself later read that case differently in *A & D International*. See 665 F.2d at 672 n.2, 673. For a discussion of the Fifth Circuit's characterization of its opinions in *Custom Boat* and *A & D International*, see note 47 *supra*.

63. 444 U.S. at 462-63. The Court held that § 2680(c) did not "limit or otherwise affect immunity waivers contained in . . . the Tucker Act." *Id.* at 463. The Court stated that "neither the existence of a tort remedy nor the lack of one is relevant to determining whether there is a [cause of action under] the Tucker Act." *Id.* at 466.

64. *Id.* at 462-63 n.3. Justice Blackmun filed a dissenting opinion which focused on the distinction between implied-in-law contracts and implied-in-fact contracts. *Id.* at 466-67 (Blackmun, J., dissenting). Justice Blackmun stated that the waiver of immunity in the Tucker Act extends only to those contracts implied in fact. *Id.* at 467 (Blackmun, J., dissenting). He saw the contract in *Hatzlachh* as one implied in law, and therefore, outside the scope of the Tucker Act. Therefore, according to Judge Blackmun, the Court of Claims did not have subject matter jurisdiction over the claim. *Id.* For other cases which draw a distinction between implied-in-law and implied-in-fact contracts, see *United States v. Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217 (1926); *Merritt v. United States*, 267 U.S. 338, 340-41 (1925); *Sutton v. United States*, 256 U.S. 575, 581 (1920); *Tempel v. United States*, 248 U.S. 121, 129 (1918).

Customs Service.⁶⁵ The Third Circuit acknowledged the divergence among federal courts on the *Kosak* issue, stating that the conflict stems from the phrase "arising from the detention of goods" in section 2680(c).⁶⁶ Noting that the Second Circuit in *Alliance* found the statutory language to bar only actions for conversion and not actions for negligence,⁶⁷ the Third Circuit rejected this construction and disagreed with the *Alliance* court's dependence upon the fact that the immediately preceding exception in the FTCA expressly includes negligent conduct.⁶⁸ The Third Circuit, in *Kosak*, found that the *Alliance* court's reasoning was defective in that it ignored the clear language⁶⁹ and legislative intent behind⁷⁰ the statute and ignored the direction of the Supreme Court to strictly interpret statutory exceptions to sovereign immunity.⁷¹

The Third Circuit maintained that the clear language of the section "covers all claims arising out of detention of goods by customs officers and does not purport to distinguish among types of harm."⁷²

The court then turned to the legislative history of section 2680(c) and found that it revealed "no clearly expressed legislative intention contrary" to the statutory language.⁷³ Observing that the legislative history provides only a "brief statement" referring to the FTCA exceptions,⁷⁴ the court found nothing in the legislative materials to support an interpretation that the "ex-

65. 679 F.2d at 308. Because the Third Circuit had not previously addressed the issue at bar, appellant invited the court to adopt the interpretation of § 2680(c) enunciated by the Second Circuit in *Alliance* which allowed the claim under the FTCA. *Id.* at 307. For a discussion of the *Alliance* opinion, see notes 33-41 and accompanying text *supra*.

66. 679 F.2d at 307-08. For the text of § 2680(c), see note 9 *supra*.

67. 679 F.2d at 308. The Third Circuit stated that in reaching its decision the *Alliance* court had "speculated" as to the scope of § 2680(c). *Id.*

68. *Id.* The Third Circuit expressly rejected the reasoning adopted by the *Alliance* court that if Congress had intended § 2680(c) to include negligence actions it would have expressly provided so, as it had done in § 2680(b). *Id.*

69. *Id.* at 308. For the language of § 2680(c), see note 9 *supra*.

70. 679 F.2d at 308. For a discussion of the legislative history of § 2680(c), see notes 23-25 and accompanying text *supra*.

71. 679 F.2d at 308 (citing *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534, 1537 (1982)) (footnote omitted).

As did the Supreme Court in *Hatzlachh*, the Third Circuit characterized the Fifth Circuit's *Custom Boat* opinion as being in conflict with *Alliance*. *Id.* For the Supreme Court's summary of the split of authority on the scope of § 2680(c), see note 62 *supra*.

The Third Circuit stated that the Fifth Circuit's distinction of *Custom Boat* and *A & D International* "appears to us to be based upon a misreading of the earlier case." 679 F.2d at 307 n.3. For a discussion of these decisions, see note 47 and accompanying text *supra*.

72. 679 F.2d at 308.

73. *Id.* For a discussion of the legislative history of § 2680(c), see notes 23-25 and accompanying text *supra*.

74. 679 F.2d at 308. The court stated that the section-by-section analysis of the FTCA contained in the committee report which accompanied the FTCA bill in Congress provides only that the exceptions were meant to include certain governmental functions which should be free from the threat of suit, or those functions for which a

emption was to be restricted to claims in conversion."⁷⁵

Noting that "sovereign immunity is the rule, and that legislative departures from the rule must be strictly construed,"⁷⁶ the court maintained that absent a clear relinquishment of immunity in any given case, the "rule" of immunity must apply.⁷⁷ The language of section 2680(c) which barred "any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs"⁷⁸ did not, in the Third Circuit's view, clearly relinquish immunity to negligence suits in the context of customs detentions.⁷⁹ The Third Circuit concluded that since the suit arose from the detention of goods by Customs officials, it was barred regardless of whether it arose in negligence or conversion.⁸⁰

Dissenting from the opinion of the court, Judge Weis expressed the view that the majority decision results in an anomaly which Congress did not intend.⁸¹ The dissent observed that under the majority's view, a traveler whose property was damaged by Customs officers during inspection at a port of entry would have a cause of action under the FTCA, while the same traveler would be without a remedy if the property were damaged during detention.⁸² Conceding that a strict construction of the FTCA's waiver of immunity is required, Judge Weis argued that exceptions to the general

remedy is already available to an injured party. *Id.* (citing S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946)).

75. *Id.* at 308.

76. *Id.* at 308-09 (citing *Dalehite v. United States*, 346 U.S. 15 (1953)).

77. 679 F.2d at 309 (quoting *Dalehite v. United States*, 346 U.S. at 31).

78. 28 U.S.C. § 2680(c) (1976). For pertinent provisions of § 2680(c), see note 9 *supra*.

79. 679 F.2d at 309 (citing *Builders Corp. of Am. v. United States*, 320 F.2d 425 (9th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964)). *Builders Corp.* involved a suit against the government for losses incurred by the plaintiff in relation to a project to build housing for the military. 320 F.2d at 426 n.2. The government asserted that the claim was barred by § 2680(a) of the FTCA since the challenged conduct was discretionary in nature. *Id.* at 428 (quoting *Dalehite v. United States*, 346 U.S. at 35-36). The Ninth Circuit affirmed the district court's judgment for the government, stating that "the exceptions to the FTCA are not to be nullified through judicial interpretation, since Congress clearly delineated the areas in which it did not intend to forfeit its immunity from suit." *Id.* at 426.

80. 679 F.2d at 309. The court's reference here to conversion was clearly an allusion to the Second Circuit's analysis in *Alliance*. For a discussion of the Second Circuit's analysis in *Alliance*, see notes 33-41 and accompanying text *supra*.

81. 679 F.2d at 309 (Weis, J., dissenting). Judge Weis stated that Congress did not intend to give the Customs Service "a license to harm property while it is being detained." *Id.*

82. *Id.* Judge Weis stated that the plaintiff in *Kosak* had the right to expect that either his property would be returned by the government, or that he would be paid damages. *Id.*

The dissent commented that the FTCA was a response to the "injustice" which sovereign immunity had worked on citizens injured in person or property by negligent government employees. *Id.* The dissent continued that, even under a narrow construction, the claim in *Kosak* was "plainly the type that Congress intended the government to recompense." *Id.* Judge Weis likened the structure of the FTCA's general waiver followed by specific exceptions to that of an insurance policy "which

waiver should be limited to their terms.⁸³ He drew a sharp distinction between the statutory language “in respect of” and the terms “arising out of” or “during.”⁸⁴ The dissenting judge stated that the statutory language was not broad enough to encompass claims for damage occurring “during” detention, but rather that it only encompassed claims arising from the fact of detention.⁸⁵ He also agreed with the *Alliance* court’s observation that had Congress intended to bar claims based on the negligence of Customs officials, it would have done so expressly, as it did in the preceding postal exception.⁸⁶ Judge Weis also noted with approval the Ninth Circuit’s decision in *A-Mark*,⁸⁷ and criticized the decisions holding that section 2680(c) bars claims for negligence as analyzing neither the “language [n]or policy of [the section] before coming to their conclusions.”⁸⁸

Reviewing the opinion of the court, it is submitted that the Third Circuit’s holding in *Kosak* effectuates a reasonable interpretation of section 2680(c).⁸⁹ It is submitted, however, that the statutory language is in fact ambiguous, and that the court therefore placed far too much emphasis on

initially grants coverage in broad terms and then refines it by a series of exclusions.”
Id.

83. *Id.* Judge Weis stated that the purpose of strictly construing the FTCA’s waiver “is served once the outer limits of the government’s liability are demarcated.” *Id.* at 309-10 (Weis, J., dissenting). Once the “outer limits” are defined, Judge Weis believed that the specific exceptions to the waiver should be “limited to their terms” and construed narrowly in favor of the injured citizen. *Id.* at 310 (Weis, J., dissenting).

84. *Id.* Judge Weis apparently drew this semantic distinction in response to the district court’s misquote of § 2680(c) in *Schonfeld*. See *id.* (quoting *S. Schonfeld Co. v. SS Akra Tenaron*, 363 F. Supp. 1220, 1223 (D.S.C. 1973)). In *Schonfeld*, the court referred to § 2680(c) as excluding any claims “arising out of” the detention of goods by Customs officials. 363 F. Supp. at 1223. Judge Weis stated that the difference between the language used by the court in *Schonfeld* and the term “arising in respect of” which appears in section 2680(c) was a “subtle but nevertheless significant distinction.” 679 F.2d at 310 (Weis, J., dissenting). For a discussion of *Schonfeld*, see notes 56-60 and accompanying text *supra*.

85. 679 F.2d at 310 (Weis, J., dissenting). Judge Weis cited the dictionary definition of “in respect of” to support his semantic argument. *Id.* That term is defined as “as to: as regards: insofar as concerns: with respect to.” *Id.* (quoting WEBSTER’S THIRD INTERNATIONAL NEW DICTIONARY 1934 (1968)).

86. *Id.* The dissent stated that the government could detain the plaintiff’s property under the Customs statutes “without liability for damages which might be caused by the denial of possession,” but that the government had to compensate “the harm it did to the property while it was being detained.” *Id.*

87. *Id.* (citing *A-Mark, Inc. v. United States*, 593 F.2d 849 (9th Cir. 1978)). For a discussion of the *A-Mark* decision, see notes 42-46 and accompanying text *supra*.

88. 679 F.2d at 310 (Weis, J., dissenting). Judge Weis found it noteworthy that although the Supreme Court did not resolve the issue of the scope of § 2680(c) in *Hatzlachh v. United States*, the Court did reverse the decision of the Court of Claims which relied in part upon an expansive interpretation of § 2680(c) in line with that adopted by the majority in *Kosak*. *Id.* For a discussion of *Hatzlachh*, see notes 61-64 and accompanying text *supra*.

89. For the relevant language of § 2680(c), see note 9 *supra*. For a discussion of the Third Circuit’s opinion, see notes 65-80 and accompanying text *supra*.

the "clear language" of the statute.⁹⁰ It is clear however, that the court was correct in finding no guidance in the legislative history of the FTCA in interpreting the language of section 2680(c).⁹¹ Because the language is ambiguous and the legislature silent as to the scope of the language, it is suggested that the court in *Kosak* was free to adopt its own interpretation of the section within the established rules of statutory construction,⁹² and that its interpretation was well within the bounds of reasonableness.⁹³

While the legislative history of section 2680(c) does not aid in clarifying the language of the section, it does provide some affirmative support for the result reached by the Third Circuit in *Kosak*, and the *Kosak* court missed the opportunity to strengthen its holding by ignoring it.⁹⁴ The committee report which accompanied the Tort Claims bill in Congress stated that the exceptions to the FTCA's waiver were intended to include claims "for which adequate remedies [were] already available."⁹⁵ It is suggested that since the

90. For a discussion of the court's reliance on the "clear language" of § 2680(c), see note 72 and accompanying text *supra*. In dissent, Judge Weis was equally convinced that the statutory language was clear. See 679 F.2d at 309-310 (Weis, J., dissenting). However, Judge Weis determined that the language did not encompass negligence during detention. *Id.* at 310 (Weis, J., dissenting).

91. For a discussion of the Third Circuit's interpretation of the legislative history of § 2680(c), see notes 73-75 and accompanying text *supra*.

The legislative history of § 2680(c) merely restates the statutory language, without commenting on the scope of that language. See S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946).

92. For a discussion of the established rules of statutory construction concerning the FTCA, see notes 26-31 and accompanying text *supra*. The Supreme Court has stated that the FTCA must clearly relinquish immunity for an action to lie against the government, and that the exceptions to the waiver of immunity must be given their "due regard." *Dalehite v. United States*, 346 U.S. 15, 31 (1953).

93. It is submitted that the Third Circuit was overly critical of the Second Circuit's decision in *Alliance*. See 679 F.2d at 308. Since the Second Circuit was aided in interpreting the statute only to the extent to which the *Kosak* court was, it is suggested that the Second Circuit violated neither the clear language nor the legislative history of the statute, as the *Kosak* court claimed. See *id.* It is submitted that the *Alliance* court construed § 2680(c) in a manner which was also within the bounds of reasonableness. For a discussion of *Alliance*, see notes 33-41 and accompanying text *supra*.

94. See 679 F.2d at 308. It is suggested that the Third Circuit's analysis of the legislative history proceeded upon the assumption that the statutory language was unambiguous. See *id.* It is submitted that the court was correct in finding no "clearly expressed legislative intention" of any kind. *Id.* However, it is submitted that the assumption from which the court began its analysis of the legislative history was erroneous, and that the legislative search was therefore meaningless. Since the court considered the statutory language unambiguous, it was looking for "clearly expressed legislative intention" contrary to "the ordinary meaning of the words used [in the statute]." *Id.* Because of the sparcity of the legislative history of § 2680(c), there was no chance of the court finding such a clear expression of legislative intention. It is submitted that the court would have made a more meaningful legislative search had it proceeded from the assumption that the statutory language was in fact ambiguous, thereby looking for more subtle indications of legislative intention than those "clearly expressed." For a discussion of the Third Circuit's use of the legislative history of Section 2680(c), see notes 73-75 and accompanying text *supra*.

95. S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946). The legislative history

Tucker Act⁹⁶ pre-dated the FTCA,⁹⁷ it is possible that Congress considered the type of claim presented in *Kosak* as one which was already afforded an adequate remedy and thus was intended to be excluded from the general waiver.⁹⁸ Indeed, the Supreme Court, in *Hatzlachh Supply v. United States*, ultimately recognized a remedy for damage to property during detention by Customs officials under the Tucker Act, albeit not until long after the passage of the FTCA.⁹⁹ It is suggested that the Third Circuit could have used this analysis to strengthen its decision.¹⁰⁰

Until the Supreme Court resolves the dispute as to the scope of section 2680(c) of the FTCA, the courts of appeals will surely remain divided. In resolving the issue, it is suggested that the Supreme Court acknowledge the ambiguity of the statute and decide the issue on the basis of a balance of the interests involved,¹⁰¹ the rules that it has established concerning construction of the FTCA, and the availability of an existing remedy, rather than on the basis of an imparted "clear meaning" of ambiguous language.

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indicates that in enacting the FTCA, Congress was seeking a "uniform system" for the resolution of tort claims against the government. *Id.* at 31. Since the Supreme Court in *Hatzlachh v. United States* recognized a claim under the Tucker Act for suits arising from the same facts as those in *Kosak*, it is submitted that the uniformity desired by Congress would be better achieved through the Third Circuit's interpretation of § 2680(c).

For further discussion of the legislative history of § 2680(c), see notes 23-25 and accompanying text *supra*.

96. 28 U.S.C. § 1346(a) (1976 & Supp. V 1981). For a discussion of the possibility of a Tucker Act remedy, see notes 18 & 63 *supra*.

97. Compare Federal Tort Claims Act, Pub. L. No. 601, § 401, 60 Stat. 842 (enacted 1946) with Tucker Act, ch. 359, 49 Stat. 505 (enacted 1887).

98. In its analysis of the legislative materials on § 2680(c), the Third Circuit acknowledged this passage from the committee report, but it did not connect it with the possibility of an available remedy under the Tucker Act. See 679 F.2d at 308 (quoting S. REP. NO. 1400, 79th Cong., 2d Sess. at 33). It is suggested that the failure of the Third Circuit to make the proposed analysis possibly stems from its initial erroneous conclusion that the statutory language was unambiguous. Had the court proceeded in its legislative search looking for other than "clearly expressed legislative intention" and looked instead for more subtle indications of legislative intention, it is submitted that the search would have been more meaningful. Had the court proceeded from the assumption that the statutory language was ambiguous, it is submitted that it may have discovered some of the subtle indications of legislative intent discussed herein.

For a discussion of this aspect of the Third Circuit's analysis, see note 94 *supra*.

99. 444 U.S. 460, 466 (1980). For a discussion of *Hatzlachh*, see notes 61-64 and accompanying text *supra*.

100. It is submitted that the suggested analysis would provide a more concrete basis of support for its holding than the reliance on the "clear language" of an ambiguous statute.

101. It is suggested that in attempting to resolve the conflict, the Supreme Court weigh the interest of the private citizens having a right to recover damages for property negligently damaged while in the custody of Customs officials against the government's interest in having its Customs employees conducting their duties energetically without being inhibited by the threat of a law suit.