"Any Other Law-Enforcement Officer": Federal Tort Claims Act § 2680(c)

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INTRODUCTION

In 1946, Congress enacted the Federal Tort Claims Act ("FTCA") to function as a waiver of sovereign immunity by the federal government. Incorporated into the statute itself are several exceptions to the waiver of sovereign immunity. Under one such exception, the United States asserts its right of sovereign immunity in the case of "[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." The § 2680(c) exception has become a subject of controversy among the circuit courts of appeals due to a recent opinion by the Sixth Circuit, which set itself in opposition to all the other circuits.

The controversy concerns the proper interpretation and application of the words "other law-enforcement officer." Does the term apply to all law-enforcement officers acting within their official capacity, or does it apply only to those law-enforcement officers, of whatever variety, who are carrying out activities that are similar in nature to activities routinely performed by tax officials or customs officials? The Sixth Circuit has chosen the latter narrow approach, while other circuits that have ruled on the issue have chosen the former broad interpretation.

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1 The main body of the FTCA is located at 28 U.S.C. § 1346(b), (c) (1988).
3 Id. at 852 ("The Act's broad waiver of sovereign immunity is, however, subject to 13 enumerated exceptions." (citing 28 U.S.C. § 2680(a)-(f), (h)-(n))).
5 Kurinsky v. United States, 33 F.3d 594 (6th Cir. 1994).
7 Kurinsky, 33 F.3d at 597; see also Formula One Motors, Ltd. v. United States, 777 F.2d 822, 825 (2d Cir. 1985) (Oakes, J., concurring); infra notes 96-105 and accompanying text; A-Mark, Inc. v. United States Secret Serv. Dep't, 593 F.2d 849, 850 (9th Cir. 1978) (per curiam) (Tang, J., concurring); infra notes 59-71 and accompanying text.
8 See, e.g., Halverson v. United States, 972 F.2d 654, 656 (5th Cir. 1992), cert. denied, 113 S. Ct. 1297 (1993); Cheney v. United States, 972 F.2d 247 (8th Cir. 1992) (per curiam); Schlabitz v. United States Dep’t of Justice, 924 F.2d 193 (11th Cir. 1991); Ysasi v. Rivkind, 856 F.2d 1520 (Fed. Cir. 1988); United States v. 2,116 Boxes of Boned...
Part I of this Note discusses the historical background of this controversy.\(^9\) Part II analyzes in chronological order federal court rulings concerning the exception.\(^10\) Part III examines in detail \textit{Kurinsky v. United States}, the Sixth Circuit case that created the circuit split.\(^11\) Part IV analyzes the arguments advanced by the Sixth Circuit in \textit{Kurinsky} and explains why the Sixth Circuit's reasoning is unsound.\(^12\) Finally, the Note concludes that the proper interpretation of § 2680(c) is as a broad exception which applies to all law-enforcement officers, regardless of the capacity in which they act.\(^13\)

\[\text{I. BACKGROUND}\]

The principle of sovereign immunity comes from the English common law.\(^14\) Under English law, "the king could do no wrong."\(^15\) In American jurisprudence, that concept translates into immunity for the federal government unless it expressly grants permission for a lawsuit to be brought against it.\(^16\) Until Congress enacted the FTCA in 1946, it granted such permission in the form of private bills.\(^17\) These bills provided individualized permission to sue the United States in the Court of Claims.\(^18\) But the wheels of justice in these cases turned quite slowly,

\begin{footnotesize}
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\item Beef, Weighing Approximately 154,121 Pounds, 726 F.2d 1481 (10th Cir.), cert. denied, Jarboe-Lackey Feedlots, Inc. v. United States, 469 U.S. 825 (1984); United States v. Lockheed L-188 Aircraft, 656 F.2d 390 (9th Cir. 1979).
\item See infra notes 14-24 and accompanying text.
\item See infra notes 25-140 and accompanying text.
\item See infra notes 141-57 and accompanying text.
\item See infra notes 158-74 and accompanying text.
\item See infra p. 731.
\item See Alexander Holtzoff, \textit{The Handling of Tort Claims Against the Federal Government}, 9 LAW \& CONTEMP. PROBS. 311, 311 (1942) (discussing the history of congressional acts which have allowed citizens to sue the federal government in tort and the current mechanisms available for such lawsuits).
\item See Barry R. Goldman, Note, \textit{Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act}, 26 GA. L. REV. 837, 837 & n.1 (1992) (charting the development of the discretionary function exception and analyzing the possible effect recent cases may have on the exception) (citing Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)); see also Dalehite v. United States, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting) ("Surely a statute so long debated [the Federal Tort Claims Act] was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'the king can do no wrong' has not been uprooted . . . .")
\item Holtzoff, \textit{supra} note 14, at 311; see also Goldman, \textit{supra} note 15, at 837-38.
\item Holtzoff, \textit{supra} note 14, at 311; see also Goldman, \textit{supra} note 15, at 837-38.
\item Holtzoff, \textit{supra} note 14, at 312-13.
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and by World War II, the burden on Congress in dealing with these individual cases had become unbearable.\(^9\)

In response to this great burden, Congress enacted the FTCA. The FTCA grants a broad waiver of sovereign immunity yet also codifies a number of exceptions by enumerating the situations in which the federal government will retain the protection of the common law doctrine.\(^{20}\) Section 2680(c) is one of these exceptions.

The first controversy regarding §2680(c) was whether the exception was applicable to damage resulting from not only the fact of detention itself (such as lost rental on detained goods), but also the government’s negligence in regard to those detained goods (such as when goods are damaged while in government custody). Controversy existed as to whether both damage caused by negligence and injury caused by detention itself should be covered. The Supreme Court resolved this issue in *Kosak v. United States* by applying sovereign immunity to both situations.\(^{21}\)

Once this issue was resolved, the controversy regarding the exception’s application to law-enforcement officers other than tax or customs officials still remained. No logical foundation, other than the language of the exception itself, supports the premise that the §2680(c) exception should apply to one group of law-enforcement officials but not to others. In fact, the federal courts that have dealt with this issue have never

\(^9\) See Walter P. Armstrong & Howard Cochrill, *The Federal Tort Claims Bill*, 9 Law & Contemp. Probs. 327, 327 & n.3 (1942) (providing an overview of the proposed Federal Tort Claims Bill, the effects it would have if enacted, and the necessity for its passage); see also Goldman, *supra* note 15, at 838.


\(^{21}\) 465 U.S. 848, 854 (1984). *Kosak* involved detention of a serviceman’s art collection by customs officials upon his return to the United States from duty in Guam. *Id.* at 849. These government actors were obviously customs officials acting in a customs capacity. The issue in the case was whether the waiver of immunity applied to damages due to negligence as well as to losses incident to the fact of detention. *Id.* at 851-52. Resolving a split among the circuits, the Supreme Court held that the exception to waiver of sovereign immunity applied across the board, whether the injury was the result of negligence or the result of the fact of detention itself. *Id.* at 854; *see also* United States v. $149,345 U.S. Currency, 747 F.2d 1278, 1283 (9th Cir. 1984) ("The counterclaim also falls outside the Federal Tort Claims Act because the alleged injury arises from the detention of the money itself . . . ."). In a footnote, the Court addressed for the first time the applicability of the exception to other law-enforcement officers. *Kosak*, 465 U.S. at 852 n.6. Due to the inadequacy of the facts of the case for decision on that issue, the Court expressly declined to discuss it further. The facts were inadequate in that the officials involved were customs officers, a category mentioned specifically in the §2680(c) exception. *Id.*
advanced any policy justification for such a distinction. The courts have focused their discussion solely on statutory construction.

While correct, the majority view concerning the application of § 2680(c) — that sovereign immunity covers the detention of goods by all law-enforcement officers — represents a historical judicial bias in favor of sovereign immunity. The Sixth Circuit's minority approach set forth in Kurinsky, on the other hand, may be motivated by modern judicial activism. The Sixth Circuit, believing that the Kosak Court focused on the detention-versus-damage issue and thus sidestepped the issue of how broadly § 2680(c) should be read, may be attempting to limit that holding's application. However, Kurinsky is wrongly decided and should be reversed by the Supreme Court.

II. FEDERAL COURT TREATMENT

The first case to deal with the breadth of § 2680(c) arose in 1952, just four years after passage of the FTCA. Chambers v. United States involved a seizure by the Alcohol Tax Unit of the Treasury Department. The plaintiff alleged that Treasury agents wrongfully seized several cases of liquor that belonged to her under a search warrant that had been issued against her husband. She filed suit against the government under the FTCA, alleging a loss of $1194.95.

The Kansas District Court held that the loss fell within the § 2680(c) exception to the waiver of sovereign immunity. In so holding, the court stated: "Assuming for present purposes, although not deciding, that the

22 See, e.g., Kurinsky v. United States, 33 F.3d 594 (6th Cir. 1994); Halverson v. United States, 972 F.2d 654 (5th Cir. 1992), cert. denied, 113 S. Ct. 1297 (1993); Formula One Motors, Ltd. v. United States, 777 F.2d 822 (2d Cir. 1985); A-Mark, Inc. v. United States Secret Serv. Dep't, 593 F.2d 849, 850 (9th Cir. 1978) (per curiam) (Tang, J., concurring).

23 See, e.g., Halverson, 972 F.2d at 656; Cheney v. United States, 972 F.2d 247 (8th Cir. 1992) (per curiam); Schlaebitz v. United States Dep't of Justice, 924 F.2d 193 (11th Cir. 1991); Ysasi v. Rivkind, 856 F.2d 1520 (Fed. Cir. 1988); United States v. 2,116 Boxes of Boned Beef, Weighing Approximately 154,121 Pounds, 726 F.2d 1481 (10th Cir.), cert. denied, Jarboe-Lackey Feedlots, Inc. v. United States, 469 U.S. 825 (1984); United States v. Lockheed L-188 Aircraft, 656 F.2d 390 (9th Cir. 1979).

24 Kurinsky, 33 F.3d at 596 ("[T]he Supreme Court has refused to determine whether § 2680(c) applies where the officers who detained the property were not customs or tax officials and were not acting in a customs or tax capacity." (citing Kosak, 465 U.S. at 852 n.6)).


26 Id. at 602.

27 Id.
alleged acts were non-discretionary, still plaintiff cannot recover. Her claim arises out of 'the detention of ... goods or merchandise by ... law-enforcement officer' and hence is within § 2680(c).” The ellipses, part of the text of the opinion, indicate the disjointed construction that the court gave the statute. It appears that the court did not consider the phrase "any other law-enforcement officer" to be related in any way to the words "tax" and "customs," which the court omitted from the quotation. Consequently, the court had no trouble applying the exception.

Four years later, the Maryland District Court confronted the issue of the breadth of the exception's application in Jones v. FBI. In a colorful pro se complaint, the plaintiff alleged, inter alia, that FBI agents illegally took his family's property with the "intent to convert said property to their own use." The court interpreted this "point" along with two others as follows:

Points One, Five and Seven allege the taking by special agents of the Federal Bureau of Investigation and others and the conversion "to their own use" of property of plaintiff and his family. If plaintiff intends to charge a detention of the property by the agents in the exercise of their duties, the claims are excepted from the provisions of the Tort Claims Act by sec. 2680(c).

As the above excerpt indicates, the court found no requirement that the FBI agents' duties entail anything in the nature of tax or customs activities in order for a claim to fall within the § 2680(c) exception. The court merely required that, for the exception to apply, the property be detained by the agents in execution of their normal duties.

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28 Id. at 602-03.
30 See Chambers, 107 F. Supp. at 602-03.
32 Id. at 40. Plaintiff contended:
   Special Agents of the F.B.I., along with two other unidentified men and Mr. Chew, Mgr. of Motel "66", did, then and there, illegally, feloniously and without legal process, steal, rob and carry away more than 40 pieces of property, belonging to Plaintiff and his family, with intent to convert said property to their own use.
33 Id. at 42.
34 Id. Interestingly, the opinion also made no mention of the items allegedly taken.
In the following year, 1957, the Seventh Circuit lent its support to the majority approach in *United States v. 1500 Cases, More or Less*. This case in admiralty concerned the seizure of cans of tomato paste from railroad cars by agents of the FDA. Lengthy litigation ensued over whether the tomato paste was adulterated. Reversing in part in the first of two appellate court decisions, the circuit court found that only some of the paste was adulterated. Meanwhile, the cans of paste were stored in Crooks Terminal Warehouse in Chicago. The United States paid the charges for the storage during the time of detention but refused to pay certain pre-seizure charges demanded by the claimant. The circuit court explained how the charges were incurred:

The pre-seizure charges arose from unloading the railroad cars and moving the cartons of tomato paste to a place of storage in the terminal warehouse. This was done on orders of the Campbell Soup Company to whom the shipments had been directed, and who had refused to accept delivery after learning the Food and Drug Administration desired to obtain samples for laboratory analysis.

Using a "but for" analysis, the district court found that the FDA had ordered the cans held at the warehouse by recommending them for detention. But for that embargo of the goods, the charges would not have been incurred. Thus, the district court required the FDA to pay those pre-seizure storage costs.

Basing its decision on 28 U.S.C. § 2680(c), the Seventh Circuit reversed the district court’s award of damages in the second appellate decision. The FDA agents were acting in neither a customs nor a tax capacity. They could only have been included in the § 2680(c) exception.

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*See generally id.*

32 249 F.2d 382 (7th Cir. 1957). This case is one of several forfeiture cases in which the government brought suit against contraband itself or against instrumentalities of illegal activity, rather than against the owners of the contraband or instrumentalities.

35 *Id.* at 383.

37 *Id.*

38 *1500 Cases*, 249 F.2d at 383.

39 *Id.*

40 *Id.*

41 *Id.* at 384.
to the waiver of sovereign immunity as law-enforcement officers generally, as they were merely enforcing the provisions of the Federal Food, Drug, and Cosmetic Act.\textsuperscript{42}

The first Sixth Circuit case on this issue came in 1962 with Van Buskirk \textit{v. United States}.\textsuperscript{43} FBI agents arrested Van Buskirk for “a scheme to defraud.”\textsuperscript{44} At the time of his arrest, the agents seized “\$6,999.63, six pieces of luggage, a diamond ring and a watch”\textsuperscript{45} and turned those items over to a United States Deputy Marshal in Arkansas, where the arrest occurred.\textsuperscript{46}

The Department of Justice refused the request to release the property made by Van Buskirk’s lawyer, who had been assigned the property after detention. The Department, replying by letter, indicated that the ownership of the property was in question and “that the property may already have been assigned to an attorney in Little Rock.”\textsuperscript{47} The letter contained no indication that the United States made any claim to the property seized.\textsuperscript{48} The court held not only that the § 2680(c) exception would bar the claim, but also that the FTCA did not even apply:

\begin{quote}
[W]e must conclude that the effect of Section 2680 is to withdraw the consent of the United States [sic] to be sued where the claim is based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, or upon the detention of goods by a law-enforcement officer. Although plaintiffs argue with some plausibility to the contrary, we are of the opinion that subsection (c) is not confined to activities of Government officers in connection with taxes and customs duties. In any event, on the facts alleged, we do not believe that a case is made out under either section, since the property hasn’t been injured or lost in the one case, and since there has been no conversion or basis for a tort action against the United States in the other.\textsuperscript{49}
\end{quote}

\begin{footnotes}
\textsuperscript{43} 206 F. Supp. 553 (E.D. Tenn. 1962).
\textsuperscript{44} \textit{Id.} at 554. The FBI contended that Van Buskirk had violated a federal statute relating to stolen property. \textit{Id.} See 18 U.S.C. § 2314 (1988 & Supp. 1990) (providing the current version of the related statute).
\textsuperscript{45} \textit{Van Buskirk}, 206 F. Supp. at 554.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 554-55.
\textsuperscript{49} \textit{Id.} at 556 (citations omitted). Although the court held that neither § 1346(b), which relates to money damages, nor § 2674, which also relates to tort claims, applied here, the court noted that the plaintiffs’ argument had some “plausibility” to it. \textit{Van
While the discussion of § 2680(c) could rightly be characterized as dicta since the court held that the FTCA itself did not apply, this case marked the first basis for an argument against broad application of the exception to all law-enforcement officers. According to the court, the plaintiffs' position that the exception applies only to "activities of Government officers in connection with taxes and custom duties" was somewhat defensible. Appropriately, this idea of limiting the application of the § 2680(c) exception came from the Sixth Circuit, which thirty years later would revisit the "plausibility" of such a position.

After Van Buskirk, the § 2680(c) issue went into dormancy as a settled issue of law. Consequently, thirteen years later, when the Idaho District Court was asked to apply the exception in United States v. Articles of Food, that court followed the party line without much discussion. In Articles of Food, FDA agents seized several hundred cases of Clover Club Golden Potato Chips due to allegedly false and misleading labeling. The United States filed a forfeiture proceeding against the cases of potato chips, and Clover Club Food Company intervened, claiming the cases. Clover Club brought a counterclaim under the Tucker Act and moved to amend the counterclaim to include an action based on the FTCA. Clover Club argued that the § 2680(c) exception to the waiver of sovereign immunity should not apply — not because the FDA agents were not acting in a tax or customs capacity, but because the damages sought were not due to the detention of the cases of potato chips.
chips. Clover Club claimed that the damage was caused by the seizure of the chips, not their detention, a distinction without a difference according to the court. The parties and the court apparently assumed it was settled that the exception applied to the FDA agents, even though they were not acting in a tax or customs capacity. The court ultimately ruled that Clover Club's "counterclaim [was] barred by 28 U.S.C. § 2680(c)."  

Three years later the Ninth Circuit decided *A-Mark, Inc. v. United States Secret Service Department*. This case is important because its concurring opinion provides the first example of a judicial argument in favor of a limited application of § 2680(c). *A-Mark* involved the seizure and detention of a rare silver dollar by the United States Treasury Department. The plaintiff had submitted the coin to the Treasury Department for authentication. Treasury experts found that it was authentic except for a counterfeit mint mark. On this basis, the Secret Service kept the coin "pending investigation." When it was returned to the plaintiff, the silver dollar was allegedly severely damaged, and this damage provided the basis for the lawsuit.

The majority opinion dismissed the claim based on a construction of § 2680(c) that allowed claims for damage which occurred as a result of the detention itself but not for damage which resulted from negligence. Since the damage resulted from negligence, the court found that the § 2680(c) exception did not apply and consequently remanded the case for trial.

Judge Tang, in a concurring opinion, reached the same result by limiting the scope of the § 2680(c) exception to law-enforcement officials acting in a tax or customs capacity. According to Tang, the exception

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57 *Id.* The court never even considered whether a distinction exists between the position of an FDA official and the position of a law-enforcement officer acting in a tax or customs capacity as discussed in § 2680(c).

58 *Articles of Food*, 67 F.R.D. at 425.

59 593 F.2d 849 (9th Cir. 1978) (per curiam).

60 *Id.* at 850 (Tang, J., concurring) (arguing that application of § 2680(c) should be limited to law-enforcement officers acting in a tax or customs capacity).

61 The silver dollar was valued by the plaintiff at $29,000. *Id.* at 849.

62 *Id.*

63 *Id.* at 849-50.

64 *Id.* at 850. The Secret Service detained the coin in order to determine if it had been fraudulently altered, mutilated, or falsified "in violation of 18 U.S.C. § 311." *Id.*

65 *Id.* at 849.

66 *Id.* at 850. The Supreme Court later rejected this view in *Kosak*. See supra note 21 and accompanying text.

67 *A-Mark*, 593 F.2d at 850.

68 *Id.* at 850-51 (Tang, J., concurring).
should only apply when law-enforcement officers (regardless of variety) are involved in activities that are similar in nature to those activities traditionally carried out by tax or customs officials. In his view "a better rationale is to read § 2680(c) as covering only those detentions which occur within the context of customs and tax activities." Judge Tang reached this conclusion by employing the following statutory construction:

[Section] 2680(c) contains parallel clauses which cover "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." (emphasis added). The clauses both dwell exclusively on customs and taxes, except for the final reference to other law-enforcement officers. The "any other law-enforcement officer" phrase should be viewed as Congress' recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes.

In other words, Tang viewed the structure of the provision as evidence that Congress meant to provide exceptions to the FTCA's general waiver of sovereign immunity only for tax and customs activities, regardless of the character of the government agency involved. However, since these Treasury officials were not engaged in tax or customs activities, Tang agreed with the majority that the § 2680(c) exception did not apply.

Tang's concurrence in A-Mark, however, was not met with enthusiasm in his own circuit or elsewhere. In fact, a year later, when the Ninth Circuit ruled directly on the proper application of § 2680(c) in a case involving agents of the Federal Aviation Administration ("FAA"), Tang's contrary view was relegated to a footnote.

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69 Id. at 850-51 (Tang, J., concurring) (emphasis added) ("The governmental function of assessing and collecting customs duties necessarily requires some period of detention when the imported item is inspected for purposes of evaluation. A similar situation often arises when property must be levied against for tax purposes. It follows that where the ultimate act of assessing the tax or duty is rendered exempt, the incidental activity of detention must also be protected.").

70 Id. at 851 (Tang, J., concurring).

71 Id. (Tang, J., concurring). Again, this instance is the first occasion the idea was given any real respect, and it did not carry the day.

72 Id. (Tang, J., concurring).

73 United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 397 n.17 (9th Cir. 1979).
The facts of United States v. Lockheed L-188 Aircraft were somewhat complicated. International Air Leases, Inc. ("IAL") leased the aircraft named in the lawsuit to a company called Air Houston Corporation. Air Houston, in turn, subleased the aircraft to Air Flow with IAL's consent. The aircraft was seized once by agents of the FAA and again by a United States Marshal, and it was released when IAL posted a $25,000 bond. IAL, as owner of the aircraft, was the only party to challenge the seizure; it brought an action against the United States under the Tucker Act. When that counterclaim was dismissed because the claim constituted a tort action, which is not permitted under the Tucker Act, IAL sought to amend its complaint to include a cause of action under the FTCA. The government, citing the immunity provided by § 2680(c), argued against the motion. The circuit court found in favor of the government and affirmed the denial of the plaintiff's motion for leave to amend the complaint. The court explained:

IAL responds that this is not an action involving customs or taxes and therefore the exception does not apply. Section 2680(c), however, does not apply solely to loss from detention of goods by tax or customs officers, but includes actions by "any other law enforcement officer." The seizure of IAL's aircraft by FAA officials appears to fall within the exception.

Again, the court dismissed Judge Tang's construction of § 2860(c) as presented in A-Mark, relegating his opinion to a footnote.

Five years later, Tang's view fared even worse, as it elicited no mention at all. Instead, the Tenth Circuit in United States v. 2,116 Boxes

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74 Id. at 392.
75 Id. at 393. The bond "replaced the aircraft as the res of the in rem action." Id.
76 Id.; see supra note 55 and accompanying text.
77 Lockheed, 656 F.2d at 394.

In the Tucker Act, the government consented to be sued in district court in civil actions or claims against the United States:
not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id. at 393-94 (quoting 28 U.S.C. § 1346(a)(2) (1976) (emphasis added)).
78 Id. at 397.
79 Id.
80 Id.
81 See supra notes 59-71 and accompanying text.
82 Lockheed, 656 F.2d at 397 n.17.
of Boned Beef, Weighing Approximately 154,121 Pounds lent its support to what had become the standard interpretation of § 2680(c). In that case, the USDA, after observing evidence of the use of diethylstilbestrol in the animals, seized 273 beef carcasses owned by a company called Jarboe-Lackey. This practice, according to the USDA, constituted adulteration under the Federal Meat Inspection Act. When the district court ruled against the USDA, Jarboe-Lackey filed a counterclaim for damages under the FTCA. Citing United States v. Lockheed L-188 and United States v. 1500 Cases, More or Less, the Tenth Circuit rejected Jarboe-Lackey’s claim:

The United States . . . has not waived its immunity to liability with respect to claims arising from the “detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.” This express reservation of sovereign immunity requires dismissal of appellant’s first count.

Although the case involved neither tax nor customs officials or activities, the court used what had become conventional statutory interpretation and applied the exception of § 2680(c) to USDA inspectors carrying out their normal duties.

In 1984, the Ninth Circuit decided United States v. $149,345 U.S. Currency, a case involving seizure of drug money. The owners of the money were lawyers and claimed that the money was not for drugs but was a retainer from an unnamed client. In a prior civil case against the government for the return of the funds, one attorney, asserting attorney-client privilege, had refused to release the name of the client to the court. The judge, finding that the identity of the client was not privileged, had then dismissed the civil lawsuit as a sanction.

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84 Diethylstilbestrol is a “growth promotant in animals [which] leaves potentially carcinogenic residues in edible portions of meat.” Id. at 1484.
86 Boned Beef, 726 F.2d at 1484.
87 656 F.2d 390 (9th Cir. 1979); see supra notes 73-82 and accompanying text.
88 249 F.2d 382 (7th Cir. 1957); see supra notes 35-42 and accompanying text.
89 Boned Beef, 726 F.2d at 1491 (citations omitted).
90 747 F.2d 1278, 1279 (9th Cir. 1984).
91 Id. at 1278.
92 Id. at 1279.
93 Id.
In this forfeiture action by the government, the attorneys asserted an interest in the funds, and one counterclaimed for $5000. The Ninth Circuit dismissed their claims, ruling that the issue of ownership was barred by res judicata by virtue of the prior civil lawsuit. The court nevertheless expounded that the counterclaim would be barred anyway by the § 2680(c) exception.  

_Formula One Motors, Ltd. v. United States_ is not directly on point, but it is one of the most important cases in this line because of the logical acrobatics the Second Circuit had to go through to decide the issue on the basis of the § 2680(c) exception. Judge Tang's concurrence in _A-Mark_ had begun to generate debate at last.

The case involved a 1971 Mercedes Benz convertible that Formula One had imported from Italy. Upon the automobile's arrival, DEA agents seized it in order to conduct a thorough search for narcotics. Formula One alleged that the extensive search completely destroyed the car and brought a lawsuit against the government under the FTCA. The government countered with the § 2680(c) exception: "In the Government's view, section 2680(c) applies to damages incurred in the course of any search and seizure undertaken by any law enforcement officer." The court, not persuaded that § 2680(c) should be read so broadly, stated:

The terms of the statute, construed in light of the doctrine of _ejusdem generis_, might suggest a more narrow reading. First, it can be argued that the "detention" to which section 2680(c) applies is not every physical seizure preliminary to a search but only a possession effected

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94 _Id._ at 1283.
95 _Id._ The court articulated the intent of the exception: "to limit governmental liability for improper seizures and to restrict claimants to the statutory procedures of the forfeiture laws." _Id._ (citing _A-Mark, Inc. v. United States Secret Serv. Dep't_, 593 F.2d 849, 850 (9th Cir. 1978) (per curiam)).
96 777 F.2d 822 (2d Cir. 1985) (holding that the detention of an automobile by DEA agents falls within the § 2680(c) exception).
97 _A-Mark_, 593 F.2d at 850-51 (Tang, J., concurring) (stating that § 2680(c) should be limited to detention by law-enforcement officials acting in a tax or customs capacity); see _supra_ notes 69-71 and accompanying text.
98 _Formula One_, 777 F.2d at 822-23.
99 _Id._ at 823.
100 _Id._
101 _Id._ (emphasis added).
102 The doctrine of _ejusdem generis_ is discussed _infra_ notes 145-47 and accompanying text.
in the course of assessing or collecting any tax or customs duty. Second, it might also be thought that the specification of "any officer of customs or excise" followed by "any other law-enforcement officer" implies that other law enforcement officers are covered only when their actions are in aid of customs or excise functions of the Government. 103

The above language, however, was dicta; the court, following prior circuit court rulings, went on to find that the actions of the DEA agents were sufficiently similar to the functions normally carried out by customs agents to warrant application of the immunity allowed by § 2680(c). 104

In a concurring opinion, Judge Oakes expressed his unequivocal position that the § 2680(c) exception applies to law-enforcement officers acting only in a tax or customs capacity. He nevertheless agreed with the majority's holding, since he was of the opinion that DEA agents "acting in a border or customs search seeking to uncover contraband are the 'other' law enforcement officers Congress envisaged." 105

A federal district court in Florida decided Milburn v. United States in 1986. 106 In a cloak-and-dagger episode, several individuals arranged to have a Piper Aztec aircraft commandeered from the possession of authorities in the Turks and Caicos Islands, who had seized it as forfeited because of its alleged involvement in drug activity. 107 Shortly after the individuals returned with the aircraft to Fort Lauderdale, the local police seized it as stolen property and notified the FBI. 108 The U.S. Marshal Service impounded the plane and later returned it to authorities of the Turks and Caicos Islands. 109 Considering the "plain language of the statute," the court held that the § 2680(c) exception barred the plaintiffs' claim against the United States for damages caused by the detention of the aircraft. 110

103 Formula One, 777 F.2d at 823 (footnote added).
104 Id. at 823-24 (adopting the approach taken by the Seventh, Ninth, and Tenth Circuits "that section 2680(c) applies to detentions beyond the context of customs duties and taxes").
105 Id. at 825 (Oakes, J., concurring).
107 Id. at 1523.
108 Id.
109 Id. at 1523-24.
110 Id. at 1524-25. The court noted: "When the F.B.I. and the Marshal Service found and seized the stolen plane, they were involved in precisely the type of activity that is exempted from liability by 28 U.S.C. § 2680(c)." Id. at 1525. The court also cited United States v. $149,345 U.S. Currency, 747 F.2d 1278 (9th Cir. 1984), as support for finding
Although the Federal Circuit in *Ysasi v. Rivkind* had a similar opportunity to dodge the issue of the potential applicability of § 2680(c) to law-enforcement officials acting outside of tax or customs functions as the Second Circuit had in *Formula One*, the court ruled in favor of a broad interpretation. In that case, Lauro T. Ysasi had used his truck to transport his brother, an illegal alien, from Texas to Florida in violation of immigration laws. Border patrol agents seized his truck pursuant to 8 U.S.C. § 1324(b). When the INS remitted the truck to GMAC, the primary lien holder on the vehicle, Ysasi sued the INS for damages under the FTCA. The INS, predictably, argued in favor of application of the § 2680(c) exception to the general waiver of sovereign immunity under the FTCA. The appellate court upheld the district court's interpretation of § 2680(c), which favored a broad reading of the statute. Consequently, the court found that "Ysasi's FTCA claim was barred by section 2680(c) . . ." The court did buttress its holding, however, with a comparison of INS and customs functions:

Furthermore, 8 U.S.C. § 1324(b)(3) directs that all provisions of law relating to seizures for violation of the customs laws shall apply to

"that actions of law-enforcement agents other than customs officials are exempt from liability under 28 U.S.C. § 2680(c)." *Id.* at 1524-25.

111 *856 F.2d* 1520, 1524 (Fed. Cir. 1988) (basing the decision on Eleventh Circuit law and holding that seizures for customs violations fall within the § 2680(c) exception).

112 See *supra* note 104 and accompanying text. The Federal Circuit in *Ysasi* could have ruled that the Immigration and Naturalization Service ("INS") was acting in a customs capacity and thus avoided the issue as to whether § 2680(c) is applicable to all law-enforcement officers. Instead, the court first ruled on the applicability of § 2680(c) and then compared INS operations with customs activities.

113 *Ysasi*, 856 F.2d at 1522; *see* 8 U.S.C. § 1324(a)(2) (1982) ("Any person . . . who . . . transports or moves . . . within the United States by means of transportation or otherwise, in furtherance of such violation of law . . . any alien . . . shall be guilty of a felony . . .").

114 *Ysasi*, 856 F.2d at 1522; *see* 8 U.S.C. § 1324(b) (1982) (allowing the government to seize vehicles used in violation of 8 U.S.C. § 1324(a)).

115 *Ysasi*, 856 F.2d at 1522-23.

116 *Id.* at 1523.

117 *Id.* at 1525.

118 *Id.* The court stated:

We agree with the district court that the clear weight of authority favors the government's position. . . . Certainly the government's broad reading of the section comports with the report, the Kosak opinion and the plain language of the statute, whereas Ysasi's interpretation would render the phrase "or any other law enforcement officer" surplusage.

*Id.* at 1524. For the report mentioned in the above quotation, see Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill 16* (1931).
seizures under section 1324(b)(1), indicating the similarity of the violations of law here to violations of customs laws. We, therefore, agree with the district court that seizures pursuant to section 1324(b)(1) are "sufficiently akin to the functions carried out by Customs officials to place the agents’ conduct within the scope of section 2680(c)."\(^{119}\)

Regardless of the additional support provided by the similarity of functions involved, which may not appear in other cases involving the § 2680(c) issue, this opinion represents a positive ruling in favor of broad application of the § 2680(c) exception to all law-enforcement officers acting in any official capacity.

\textit{Ysasi} was decided by the Federal Circuit on the basis of Eleventh Circuit law.\(^{120}\) Three years later, the Eleventh Circuit itself ruled on the issue in \textit{Schlaebitz v. United States Department of Justice}.\(^{21}\) In \textit{Schlaebitz}, U.S. Marshals arrested the plaintiff upon his arrival in the United States after deportation from Grand Cayman Island. The Marshals proceeded to confiscate eleven pieces of luggage that the plaintiff valued at $11,000.\(^{122}\) According to the Justice Department, the luggage was later turned over to a third party; Schlaebitz disputed this contention.\(^{123}\) He brought a lawsuit, proceeding pro se, for $11,000 in damages under the FTCA.\(^{124}\) Citing previous cases addressing this issue,\(^{125}\) the court followed their approach. The \textit{Schlaebitz} court acknowledged: "The circuits that have addressed the issue . . . all agree that ‘other law-enforcement officer’ may include officers in other agencies performing their proper duties . . . . As the \textit{Ysasi} court stated, this interpretation comports well with both the \textit{Kosak} opinion and the purpose of the

\(^{119}\) \textit{Ysasi}, 856 F.2d at 1525.


\(^{121}\) 924 F.2d 193 (11th Cir. 1991) (holding that the detention of goods by U.S. Marshals acting within their legal authority falls under the § 2680(c) exception).

\(^{122}\) \textit{Id}. at 193-94.

\(^{123}\) \textit{Id}. at 194.

\(^{124}\) \textit{Id}.

\(^{125}\) \textit{Id}. The Court cited \textit{Ysasi}, see supra notes 111-20 and accompanying text, \textit{Formula One}, see supra notes 96-105 and accompanying text, \textit{Boned Beef}, see supra notes 83-89 and accompanying text, and \textit{Milburn}, see supra notes 106-10 and accompanying text.
Thus, the court dismissed Schlaebitz's claim as it found that § 2680(c) exempts the government from liability in such cases. The influence of Judge Tang's concurrence in *A-Mark* cannot be emphasized too strongly. Once that view was treated with respect in *Formula One*, it gave plaintiffs ammunition to challenge the § 2680(c) exception in *Ysasi* and *Schlaebitz*, and it forced the judges in those cases to reopen for debate a heretofore seemingly settled rule of law.

*Cheney v. United States*, on the other hand, is an interesting case, if only for the plaintiff's artful argument against the application of the § 2680(c) exception and an enigmatic two-sentence dissent. In *Cheney*, federal drug task force agents seized the contents of a safe-deposit box owned jointly by Thomas Cheney and Stephanie Oberbroeckling. The box contained a car title certificate that Cheney claimed to own. Cheney had left the vehicle to which the certificate applied at a storage facility and had told the storage facility to release the car to anyone holding the title certificate. The agents delivered the title to Oberbroeckling and informed her of the agreement. Oberbroeckling retrieved the car, and it was destroyed while in her possession. Cheney brought an action under the FTCA, alleging that the United States was liable for the loss of the car because the agents released the title certificate to Oberbroeckling.

The district court applied the § 2680(c) exception based on the detention of the certificate. Cheney argued that since the car itself was never detained by the government, the exception did not apply. Perhaps this argument is the one to which Judge Gibson referred in his dissent: "I am not convinced that the 1976 Datsun 280Z is 'goods or merchandise' within the meaning of 28 U.S.C. § 2680(c)."

126 Schlaebitz, 924 F.2d at 194-95 (citations omitted).

127 Id. at 195 ("Here there is no contention that the Marshalls [sic] were not acting within their lawful authority. The Tort Claims Act specifically exempts any claim based on the detention of goods by law enforcement officers in the performance of their lawful duties.").

128 *A-Mark, Inc. v. United States Secret Serv. Dep't*, 593 F.2d 849, 850-51 (9th Cir. 1978) (per curiam) (Tang, J., concurring); see supra notes 69-70 and accompanying text.

129 *Formula One Motors, Ltd. v. United States*, 777 F.2d 822, 823 (2d Cir. 1985); see supra notes 96-105 and accompanying text.

130 972 F.2d 247-48 (8th Cir. 1992) (per curiam) (holding that the detention of a car title certificate falls within the § 2680(c) exception when the car is later damaged as a result of releasing the car title certificate to a third party).

131 Id. at 248.

132 Id.

133 Id. at 249 (Gibson, J., dissenting).
the court held that the damage arose "in respect of" the detention of the certificate of title and therefore fell within the limits of the exception. The court did not debate the scope of the exception but rather assumed that § 2680(c) is a "broad exception to the FTCA's general waiver of sovereign immunity in cases arising out of the detention of property by law enforcement officers."

The Fifth Circuit's first ruling on the issue, *Halverson v. United States*, is also the latest to find in favor of a broad application of the § 2680(c) exception, but the court's analysis adds nothing to the debate. *Halverson* involved detention of personal property by agents of the INS. Pursuant to an arrest for possession of cocaine, the plaintiff was stopped at an immigration checkpoint in Texas. Ronald Halverson, a passenger in the car, claimed that his property was lost due to improper inventory procedures implemented by the INS agents. In knee-jerk fashion, the Fifth Circuit, apparently afraid to break ranks with its sister circuits, applied the § 2680(c) exception to the case and upheld the district court's dismissal of the action for lack of subject matter jurisdiction. And with that ruling, the stage was set for the renegade circuit.

III. THE CONTROVERSY

Enter the Sixth Circuit and *Kurinsky v. United States*. *Kurinsky* involved an FBI seizure of equipment used in the violation of cable television and wire fraud laws. Andrew Kurinsky alleged that some equipment was lost, some was damaged, and some items not unique to the cable industry were seized. For these reasons, Kurinsky brought three

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135 *Cheney*, 972 F.2d at 248-49.
136 *Id.* at 248.
137 972 F.2d 654, 656 (5th Cir. 1992) (finding that "§ 2680(c) exempts from the FTCA's waiver of sovereign immunity any claim based on the detention of goods by any federal law enforcement officers in the performance of their lawful duties"), *cert. denied*, 113 S. Ct. 1297 (1993).
138 *Id.* at 655.
139 *Id.*
140 *Id.* at 656 ("We find persuasive the reasoning of the other circuits, not to mention the plain language of § 2680(c) . . . ").
141 33 F.3d 594, 598 (6th Cir. 1994) (concluding that § 2680(c) applies only to the detention of goods by an official acting in a "tax or customs capacity").
142 *Id.* at 595. The property was seized pursuant to statutes prohibiting the unauthorized reception of cable services and relating to wire fraud. See 47 U.S.C. § 553(a)(2) (1988) and 18 U.S.C. § 1343 (Supp. 1990) respectively, for the current versions of the relevant statutes discussed.
counts pursuant to the FTCA.\footnote{143} The government invoked the § 2680(c) exception as a bar to liability.\footnote{144}

The court took issue with the government’s reading of the statute for several different reasons. First, the doctrine of ejusdem generis was referenced in conjunction with the doctrine of noscitur a sociis.\footnote{145} Ejusdem generis is a rule of statutory construction whereby a general term is interpreted as limited by the specific terms listed with it.\footnote{146} This simplistic explanation could be the reason for the holding.\footnote{147}

Noscitur a sociis was described by the court as a construction whereby “a general term is interpreted within the context of the accompanying words ‘to avoid the giving of unintended breadth to the Acts of Congress.’”\footnote{148} This definition seems to pose more questions than it answers.\footnote{149} Basically, the court used these two tools of construction to determine that the general phrase “any other law-enforcement officer” is delimited by the specific terms “tax” and “customs” used in the same provision.\footnote{150}

\footnote{Kurinsky, 33 F.3d at 595.}
\footnote{Id. at 595-96.}
\footnote{Id. at 596-97.}
\footnote{2A Norman J. Singer, Sutherland Statutes and Statutory Construction § 47.17 (5th ed. 1992). The Kurinsky court explained the concept in a footnote: This term is defined in Black’s Law Dictionary 464 (5th ed. 1979) as follows: Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the “ejusdem generis rule” is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention. 33 F.3d at 596 n.2.}
\footnote{Ejusdem generis is discussed in more detail infra notes 166-68 and accompanying text.}
\footnote{Kurinsky, 33 F.3d at 597 (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)). The court again gave more detail in a footnote: Black’s Law Dictionary . . . defines this term as follows: It is known from its associates. The meaning of a word is or may be known from the accompanying words. Under the doctrine of “noscitur a sociis,” the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it. Id. at 597 n.3.}
\footnote{Noscitur a sociis is discussed in more detail infra note 162 and accompanying text.}
\footnote{Kurinsky, 33 F.3d at 597 (“Here, the specific terms ‘tax’ and ‘customs duty’ indicate}
The court also noted a distinction between the words "seizure" and "detention" used in § 2680(c). Though lengthy, the court's interpretation is included in its entirety so that the illogical connection made by the court between the definitions of the words and the interpretation of the phrase "any other law-enforcement officer" can be demonstrated:

Significantly, Congress chose to use the word "detention" instead of the word "seizure." A detention is generally associated with a period of temporary custody or delay. It carries no connotation of permanent custody, nor does it necessarily suggest an adversarial interest insofar as ownership is concerned. It is a term often associated with an ongoing investigation. A seizure, on the other hand, must be viewed as a term of art in this context. BLACK'S LAW DICTIONARY 1219 (5th ed. 1979) defines seizure as "[t]he act of taking possession of property, e.g., for a violation of law or by virtue of an execution." In common with a "detention," a "seizure" may be temporary and involve the goods of another; however, a seizure has an "after-the-fact" quality not associated with a detention. When goods are seized pursuant to a lawful search, their relevance to a legal proceeding already has been predetermined. Similarly, if goods are seized pursuant to an execution or forfeiture, there is no intention to return. The seizure is adversarial to the ownership interest of the person from whom the property is seized. Had Congress intended to except from the reach of the FTCA damages arising out of seizures, we believe it would have said so. Instead, Congress elected to use the word detention, and to be consistent with this language, § 2680(c) must be read as only applying to law enforcement officers engaged in activities with a nexus to the collection of taxes or customs duties.\[123\]

The court's leap between the final two sentences of the passage is puzzling. How does the use of the word "detention" rather than "seizure" have anything to do with how the phrase "any other law-enforcement officer" is interpreted? Agents of the DEA can detain as well as seize goods—so can FBI agents and tax and customs officials for that matter. The distinction between "detention" and "seizure," as used in the statute and applied to the case, is actually a separate ground for deciding the case. In other words, because the FBI agents seized the cable television

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that Congress was concerned with those detentions, however they might arise, occurring within the context of tax and customs activities.

\[123\] \textit{Id.}

\[124\] \textit{Id.}
equipment rather than detaining it, the activity did not fall within the exception for the "detention of any goods or merchandise by . . . any other law-enforcement officer."\footnote{153}

The court next turned to a portion of the legislative history previously trumpeted by both sides of the debate. The court quoted a Senate Report to the Legislative Reorganization Act of 1946\footnote{154} and Alexander Holtzoff, the individual credited with drafting the FTCA and who appeared before a Senate subcommittee considering the FTCA.\footnote{155} The report "makes no mention whatsoever of an exemption for any and all seizures by law-enforcement officers."\footnote{156} In his remarks to the Senate subcommittee, Holtzoff phrased his understanding of the thrust of the exception: "[the § 2680(c) exception] relates to claims 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."\footnote{157} Holtzoff's phraseology, then, seems to support limiting the scope of the exception, which is the Sixth Circuit's position.

IV. WHO'S RIGHT?

Has the Sixth Circuit made its case? It relied on three arguments in support of its holding: the doctrines of ejusdem generis\footnote{158} and noscitur a sociis,\footnote{159} a distinction between the terms "detention" and "seizure,"\footnote{160} and the legislative history of the Act.\footnote{161} First, ejusdem generis is a specific form of the more general concept, noscitur a sociis.\footnote{162} Second, the argument as to the distinction between the terms "detention"
and "seizure" actually constitutes a separate ground for the ruling and is therefore irrelevant to the issue regarding the application of the § 2680(c) exception to all law-enforcement officers.\footnote{163 See supra notes 151-53 and accompanying text.}

Moreover, the legislative history of the provision is sparse and seemingly contradictory. While the quotation by Alexander Holtzoff cited in Kurinsky\footnote{164 See supra note 155 and accompanying text.} seems to support the Sixth Circuit interpretation, a previous quotation by Holtzoff supports the other circuits: ""The additional proviso has special reference to the detention of imported goods in appraisers’ warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like.""\footnote{165 Kosak v. United States, 465 U.S. 848, 856 (1984) (finding no distinction between damage due to negligent detention of goods and damage due to the fact of detention itself under the § 2680(c) exception) (quoting Holtzoff, supra note 118); see also supra note 21 (discussing Kosak).}

The structure of this sentence does not indicate a nexus between the tax or customs and application of the exception to law-enforcement officers in general. It supports a "laundry list" reading of unrelated items. Consequently, the legislative history must be dismissed as inconclusive.

The doctrine of ejusdem generis, moreover, is a convention of statutory construction whereby general terms listed with specific terms are interpreted as delimited by those specific terms.\footnote{166 2A SINGER, supra note 146, § 47.17.} The goal is to limit surplusage. If the general term is inclusive of the specific terms listed, then the specific terms are completely unnecessary. If, on the other hand, the specific terms are all-inclusive, no need to include a general term exists. Ejusdem generis is a method for finding the balance between these two extremes in order to give meaning to every word in a statute.\footnote{167 Id. § 47.18; see Maier v. Patterson, 511 F. Supp. 436, 444 n.9 (E.D. Pa. 1981)}

According to general principles of statutory construction, five criteria must be present before ejusdem generis can operate:

(1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.\footnote{168 Id.}
The second requirement is not met in the present case. A list including customs and excise does not suggest a class at all, except perhaps that of all law-enforcement officers. No nexus exists between the collectors of excise taxes and customs officials which suggests that Congress had any intention of indicating a class by their enumeration. Excise officials collect taxes, while customs officials collect customs duties. Both are involved in the collection of revenue, a fact which would seemingly limit the scope of the term "law-enforcement officer" to those situations in which a government official is engaged in a revenue-collecting function.¹⁶⁹

However, customs officials are also saddled with the responsibility of ensuring that contraband such as drugs do not cross the border. This function is similar to that performed by DEA agents. Customs officials also ensure that illegal aliens are not permitted to cross the border.¹⁷⁰

(defined the concept of ejusdem generis).

¹⁶⁹ This argument would be appealing if § 2680(c) did not specifically name "officers of customs" and "officers of excise." Customs officials do a variety of things other than merely collect "tax-like" revenues. The duties of excise officers, whatever they may be, need not be delved into since the diversity of the duties performed by customs officers prevents the application of ejusdem generis. See supra note 167 and accompanying text.

¹⁷⁰ The duties of customs officers are as follows:

The United States Customs Service collects the revenue from imports and enforces customs and related laws and also administers the Tariff Act of 1930, as amended, and other customs laws. Some of the responsibilities which the Customs Service is specifically charged with are as follows: properly assessing and collecting customs duties, excise taxes, fees, and penalties due on imported merchandise; interdicting and seizing contraband, including narcotics and illegal drugs; processing persons, carriers, cargo, and mail into and out of the United States; administering certain navigation laws; detecting and apprehending persons engaged in fraudulent practices designed to circumvent customs and related laws; protecting American business and labor by enforcing statutes and regulations such as the Anti-dumping Act; countervailing duty; copyright, patent, and trademark provisions; quotas; and marking requirements for imported merchandise.

BLACK'S LAW DICTIONARY 386 (6th ed. 1990). A definition of "excise tax" is as follows:

A tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. A tax on the manufacture, sale, or use of goods or on the carrying on of an occupation or activity, or a tax on the transfer of property. In current usage the term has been extended to include various license fees and practically every internal revenue tax except the income tax (e.g., federal alcohol and tobacco excise taxes, I.R.C. § 5001 et seq.).

Id. at 563 (citations omitted). Given the Sixth Circuit's penchant for using Black's Law Dictionary to support its positions, it seems that a perusal of these passages would have indicated such a diversity in the activities of a customs officer, and, on the other hand, such specificity with regard to the duties of an "officer . . . of excise," that the doctrine
This job is similar to that of a border patrol officer. Excise officials do none of these things. As the functions of excise officials and customs officials tend toward dissimilarity, the applicability of ejusdem generis becomes more tenuous. The dissimilarity is sufficient at least to bring the applicability of the doctrine into question.

Consider what the state of the case law would be regarding this list if “customs” and “excise” had not been included. The issues would revolve around whether customs officials and excise officials were “law-enforcement officers” under this exception. More likely, the government litigators may not have had the presence of mind to include customs officers and tax collectors with F.B.I. agents and DEA agents as law-enforcement officers and hence proper subjects of the § 2680(c) exception. Structuring the exception as it did, Congress expanded its possible applications rather than limiting them.\textsuperscript{171}

As ample room for debate exists, the benefit of the doubt ought to fall in favor of the government. The government can only be sued when it gives its consent by clear legislative act.\textsuperscript{172} Given the amount of judicial disagreement and confusion over the proper application of § 2680(c), the grant of consent can be called anything but clear. Thus, sovereign immunity should bar lawsuits against the United States for damage caused by detention of goods by any law-enforcement officer.

The judicial acrobatics engaged in by the Sixth Circuit to support its minority approach are difficult even for legal scholars to follow. Clearly the doctrine of ejusdem generis has its place in statutory construction; however, in general, statutes are to be understood in the normal sense of the words used in them.\textsuperscript{173} Detention of goods by any other law-enforcement officer is straightforward enough. Furthermore, the legislative inactivity in response to over forty years of judicial interpretation supports the well-entrenched position of the majority of the circuits on this issue. Since no public policy has been offered in support of its limitation and since statutory construction and case law support broad application of the § 2680(c) exception,\textsuperscript{174} the U.S. Supreme Court

\textsuperscript{171} See supra note 112 and accompanying text.

\textsuperscript{172} See Van Buskirk v. United States, 206 F. Supp. 553, 554 (E.D. Tenn. 1962) (concluding that the federal government cannot “be sued without its consent”).


\textsuperscript{174} See Halverson v. United States, 972 F.2d 654 (5th Cir. 1992), cert. denied, 113 S. Ct. 1297 (1993); Cheney v. United States 972 F.2d 247 (8th Cir. 1992) (per curiam); Schlaebitz v. United States Dep't of Justice, 924 F.2d 193 (11th Cir. 1991); Yssasi v. Rivkind, 856 F.2d 520 (Fed. Cir. 1988); Formula One Motors, Ltd. v. United States, 777 F.2d 822 (2d Cir. 1985); United States v. 2,116 Boxes of Boned Beef, Weighing
should grant certiorari on this issue and resolve it contrary to the minority position of the Sixth Circuit in Kurinsky v. United States.

CONCLUSION

The Sixth Circuit has seen fit to rule in opposition to its sister circuits on the scope of the application of § 2680(c) of the FTCA. Other courts ruling on this issue have broadly interpreted this exception to the FTCA waiver of sovereign immunity to apply to all law-enforcement officers. The lone Sixth Circuit has interpreted the exception more narrowly to apply only to those law-enforcement officials acting in a tax or customs capacity. The Sixth Circuit reached this conclusion primarily on the basis of a misapplication of the statutory construction principle of ejusdem generis. Since the specific terms are not indicative of a particular class, ejusdem generis does not apply and should not be used to overturn more than forty years of legislative and U.S. Supreme Court silence in the face of the alternate interpretation. An overly restrictive reading of the § 2680(c) exception to the FTCA’s general waiver of sovereign immunity is clearly not warranted given that sovereign immunity is not waived except by a clearly expressed intent by the government to do so.

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