Vanderbilt Journal of Transnational Law

Volume 22
Issue 2 *Issue 2 - 1989*

Article 6

1989

Property Damage Claims Against the Customs Service: Are There Adequate Remedies?

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I. INTRODUCTION

On July 31, 1789, the United States Congress, exercising its authority under the new and untested Constitution,[1] created the United States Customs Service to regulate the collection of duties on goods and merchandise imported into the United States.[2] While retaining this regulatory and revenue raising function, the responsibility of the Customs Service has expanded greatly over the last two hundred years.[3] Recognized

1. U.S. CONST. art. 1, § 8, cl. 1.

2. Act of July 4, 1789, ch. 2, 1 Stat. 24. This was the second law passed by the first Congress. In order to realize the revenue raising goals of the Act, Congress subsequently passed the Act of July 31, 1789, ch. 5, 1 Stat. 29, establishing the Customs Service. The revenue raised under the Act is substantial. In 1987, for instance, Customs collected over $14.8 billion in duties. U.S. CUSTOMS SERVICE, CUSTOMS U.S.A.: FISCAL YEAR 1987, at 40 [hereinafter CUSTOMS U.S.A.].

3. U.S. CUSTOMS SERVICE, MISSION AND ORGANIZATION 3 (July 1988) (the Customs Service enforces over 400 laws and regulations) [hereinafter MISSION]; *see, e.g.*, Foreign Trade Zones, 19 U.S.C. § 81a-u (protection of revenue and admission of foreign merchandise into customs territory); Tariff Act of 1930, as amended, 19 U.S.C. §§ 1303-

today as the principal border enforcement agency,[4] the Customs Service is primarily concerned with regulating carriers and persons entering and departing United States ports, enforcing auto safety and emission standards, protecting United States business and labor by enforcing trademark and copyright regulations, coordinating efforts with various federal agencies to prevent the flow of child pornography, and protecting the public and environment from hazardous products.[5] Most important, however, the Customs Service is responsible for the detection and prevention of the smuggling of narcotics and contraband into the United States.[6] Congress has given the Customs Service the means to fulfill these responsibilities by empowering it not only to search individuals and carriers at United States ports and borders,[7] but also to seize and detain

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51 (1982) (levying of duties on goods); Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-82 (1982) (antidumping duties).

4. MISSION, *supra* note 3, at 3.

5. *See, e.g.,* CUSTOMS U.S.A., *supra* note 2, at 3. As an example of the far-reaching responsibilities of the Customs Service, a 1987 Customs undercover operation tracked an illegal shipment of spare missile parts valued at $250,000 through Europe and the Far East to Iran. *Id.* at 12. The defendant, Arif Surrani, unsuccessfully tried to link the shipment to the "Irangate" scandal. *Id.*

6. For an overview of various inspection, control, and enforcement programs, see CUSTOMS U.S.A., *supra* note 2, at 4-12; *see also* U.S. CUSTOMS SERVICE: ACCOMPLISHMENTS 1982-1988 at 1-10 [hereinafter ACCOMPLISHMENTS].

7. The relevant provision states:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act. . . , or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 U.S.C. § 1581(a) (1982); *see also* 19 C.F.R. § 162.6 (1988) (searches of baggage and merchandise).

Customs agents have the authority to conduct these searches without probable cause and without a warrant. *See* United States v. Ramsey, 431 U.S. 606 (1977) (searches are reasonable and do not violate the fourth amendment); *see also* United States v. One (1) 1983 Homemade Vessel Named Barracuda, 625 F. Supp. 893, 898 (S.D. Fla. 1986), *aff'd*, 858 F.2d 643 (1988). For a general discussion on Customs searches of international mail, see Note, *Customs Inspectors and International Mail: To Open or Not to Open?*, 21 VAND. J. TRANSNAT'L L. 773 (1988). For a look at intrusive border searches, see Note, *Intrusive Border Searches: What Protection Remains for the International Traveler Entering the United States after* United States v. Montoya de Hernandez *and Its Progeny?*, 20 VAND. J. TRANSNAT'L L. 551 (1987).

goods from those suspected of violating United States customs laws.[8] In 1987, the Customs Service seized over $740 billion in connection with alleged violations of the customs laws, in addition to narcotics and dangerous drugs valued at over $8.7 billion.[9]

Property carried over the border and commercial goods shipped from abroad may be damaged during these searches and seizures. Property may also be damaged during customs detention pending an administrative or judicial decision.[10] The owners of the seized property may also suffer some minor economic loss as a result of being deprived of the use of their property. However, when seizure, inspection,[11] and detention results in excessive delays in returning the property[12] or when the goods are negligently damaged,[13] destroyed,[14] or lost, the owner may incur a

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8. *See, e.g.*, 19 U.S.C. § 1594 (1982) (authorizing seizures of vessels or vehicles to force payment of penalties); 19 U.S.C. § 1595(a) (1982) (authorizing seizure of property used to facilitate the illegal importation of other goods); 18 U.S.C. § 545 (1982) (civil forfeiture applicable to goods imported contrary to law).

9. CUSTOMS U.S.A., *supra* note 2, at 39-40.

10. *See generally* COMPTROLLER GENERAL, BETTER CARE AND DISPOSAL OF SEIZED CARS, BOATS, AND PLANES SHOULD SAVE MONEY AND BENEFIT LAW ENFORCEMENT (July 1983) (report to the Chairman and House Comm. on Government Operations) [hereinafter GAO REPORT]. The GAO Report focuses on how the lack of care and maintenance of seized property devalues the property for the rightful owner and results in decreased sales returns for the Government. *Id.* at 22. The report observed that "batteries die, engines freeze, seals shrink, and leak oil, salt, air and water corrode metal surfaces, barnacles accumulate on hulls, small animals and birds build nests in aircraft wings, unvented windows crack from heat." *Id.* at 20, 20-22. Among other things, the GAO recommended that Congress establish a "special fund" from which proceeds could be used to maintain and protect the goods. As a response, Congress created the Customs Forfeiture Fund, now codified at 19 U.S.C. § 1613(b) (1982). *See* U.S. CUSTOMS SERVICE, SEIZED PROPERTY HANDBOOK ii (1987) [hereinafter HANDBOOK]. The original fund was established as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, 2054. This part of the Act was repealed by The Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2925 (1986) and recreated by Pub. L. No. 100-71, 101 Stat. 438 (1987).

11. 19 C.F.R. § 151.1 (1988) provides: "The district director shall examine such packages or quantities of merchandise as he deems necessary for the determination of duties and for compliance with the Customs laws and any other laws enforced by the Customs Service."

12. *See, e.g.*, Sarkisian v. United States, 472 F.2d 468 (10th Cir. 1973), *cert. denied*, 414 U.S. 976 (1973) (nine month delay between Customs inspection and filing of forfeiture for antique jewelry).

13. *See, e.g.*, Kosak v. United States, 465 U.S. 848 (1984) (antiques and art objects damaged).

14. *See, e.g.*, Insurance Co. of North America v. United States, 11 Cl. Ct. 1 (1986) (small holes drilled into imported furniture).

substantial and unexpected loss.[15] Despite these economic hardships, neither the courts nor the Government has provided the victims of damaged property with an adequate equitable remedy.

This Note explores the availability of adequate property damage remedies following the United States Supreme Court's decision in *Kosak v. United States*, denying property owners the right to recover under the Federal Tort Claims Act (FTCA).[16] The Note also proposes several alternative remedies, including judicial adjustments to claims brought under the Tucker Act[17] and fifth amendment "takings" clause,[18] tort claims against individual customs officials, and legislative adjustments to the administrative settlement process under the Small Claims Act.[19] Part II of this Note traces the judicial treatment of property damage claims brought against the United States Government under the FTCA, as well as constitutional and contractual sources of relief under the Tucker Act. In addition, Part II explores tort claims against customs officials in their individual capacities. Part III briefly discusses the right of a claimant to petition Congress for private relief legislation. Part IV examines administrative relief through remission and mitigation procedures as well as settlement opportunities under the Small Claims Act. Finally, Part V concludes that the judiciary may make recovery available under an "ad hoc" plaintiff-oriented approach to the fifth amendment "takings" clause. The judiciary could also provide a remedy by relaxing proof standards in *Bivens* actions against customs officials individually. Yet, the better solution to the current lack of adequate remedies would be a legislative increase in the funds available to injured plaintiffs and tightened procedures for administrative settlement under the Small Claims Act.

II. JUDICIAL RELIEF

A. *Recovery Under the Federal Tort Claims Act*

Historically, the doctrine of sovereign immunity barred recovery against the federal government to those who had been injured or suffered loss at the hands of government employees.[20] To reduce the sometimes

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15. *See, e.g.*, Alliance Assurance Co. v. United States, 252 F.2d 529 (2d Cir. 1958) (309 lbs. of English woolens missing); A & D Int'l, Inc. v. United States, 665 F.2d 669 (5th Cir. Unit B 1982) (five packets of gemstones missing from brief case).

16. 465 U.S. 848 (1984).

17. Ch. 359, 24 Stat. 905 (1887) (current version at 28 U.S.C. § 1346(a)(2) (1982)).

18. U.S. CONST. amend. V.

19. Ch. 17, 42 Stat. 1066 (1922) (codified at 31 U.S.C. § 3723 (1982)).

20. The concept of sovereign immunity apparently originated from the maxim "the King can do no wrong." Though the expression originally connoted only that the king

harsh consequences suffered by those injured by the tortious conduct of government employees,[21] Congress provided individuals with relief through enactment of private bills.[22] This congressional relief legislation was frequently criticized for being time consuming, exceeding the scope of legislative duties, and failing to provide adequate relief.[23] The failure of this system to address tort claims effectively eventually led to the erosion of sovereign immunity through the passage of several acts, beginning with the Tucker Act of 1887,[24] which provides that the Govern-

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was not privileged to do wrong, the phrase has been interpreted to mean that the king was incapable of doing wrong. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 & n.2 (1924). *See generally* Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167 (1952).

Several policy arguments support the doctrine of sovereign immunity. These arguments include: (1) that public funds should not be used to compensate private injuries; (2) that public service and safety would be hindered, and resources wasted, if the Government were burdened with excessive claims; (3) that a waiver to liability could expose the Government to endless embarrassment; and (4) that, unlike private enterprise, the Government derives no profit from its activities. *See* James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 614-15 (1955). For an explanation and counter attack to these arguments, see *id.*; *see also* Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977). Bermann poses several good arguments for a system of exclusive governmental liability by analyzing several state codes. *Id.* at 1194.

21. *See* Mikva, *Sovereign Immunity: In a Democracy the Emperor Has No Clothes*, 1966 U. ILL. L.F. 828, 846-48 (advocating the abrogation of sovereign immunity). Criticism of sovereign immunity centers around the notion that it is unfair to allow recovery to individuals injured by government employees when the same individuals, suffering the same injury in similar circumstances, could recover against a private employer. *See, e.g.*, Note, *Governmental Liability for Customs Officials' Negligence:* Kosak v. United States, 67 MINN. L. REV. 1040 (1983) (suggesting this injustice is worked as a result of the Supreme Court's interpretation of 28 U.S.C. § 2680(c) (1982) to preclude claims based on customs officials' negligence in handling property in their possession).

22. These bills, sometimes referred to as "special legislation," were enacted to provide specific relief to individuals injured by governmental employees. Note, *supra*, note 21, at 1042. For a complete discussion of congressional relief through private legislation, see *infra*, Part III.

23. "Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States." REPORT OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS PURSUANT TO H. CON. RES. 18, S. REP. NO. 1011, 79th Cong., 2nd Sess., 25 (1946), H. REP. NO. 1675, 79th Cong., 2d Sess., 25 (1946); *see* Mikva, *supra* note 21, at 839; Note, *Using the Federal Tort Claims Act to Remedy Property Damage Following Customs Service Seizures*, 17 U. MICH. J.L. REF. 83, 85-86 & n.21 (1983) (inefficiencies of the private legislation method included the changing of congressional membership, the inadequate weighing of the merits of each case, investigative burdens, and political pressures, often leading to inconsistent results).

24. Ch. 359, 24 Stat. 905 (1887) (current version at 28 U.S.C. § 1346(a)(2) (1982)).

ment is liable for claims "not sounding in tort," and culminating with the Legislative Reorganization Act of 1946, Title IV of which is the FTCA.[25]

In general, the FTCA waives sovereign immunity in certain situations in which private persons committing the same act would be liable.[26] Section 1346(b), for example, grants jurisdiction to the district courts "for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[27] However, section 2680 provides thirteen exceptions to the FTCA's broad waiver of sovereign immunity.[28] The Government's retention of its immunity under one of these exceptions deprives the federal courts of subject matter jurisdiction to hear the claim.[29] Referred to by some as the "customs" or "detention" exception,[30] section 2680(c) states that the waiver of governmental immunity shall not apply to "[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-en-

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Section 1346(a)(2) gives the district courts original jurisdiction, concurrent with the Court of Claims, for actions not exceeding $10,000. 28 U.S.C. § 1491, also gives the Court of Claims, jurisdiction to hear claims against the United States, "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."

25. Pub. L. No. 79-601, 60 Stat. 842 (1946) (current version at 28 U.S.C. §§ 1346(b), 2671-80 (1982)).

26. *See, e.g.*, 28 U.S.C. § 2674 (1982) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the manner and to the same extent as a private individual under like circumstances. . . .").

27. 28 U.S.C. § 1346(b) (1982).

28. 28 U.S.C. § 2680(a)-(n) (1982). These sections except from the general waiver of immunity claims such as: the loss or negligent transmission of mail; establishment of a quarantine by the United States; activities of the Panama Canal and Tennessee Valley Authority; fiscal operations of the Treasury; and "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.*

29. 28 U.S.C. § 2680 (1982) ("The provisions of this chapter and section 1346(b) of this title shall not apply to" the thirteen listed exceptions.); *see also* Interfirst Bank Dallas, N.A. v. United States, 769 F.2d 299, 303 (5th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986).

30. Comment, *Section 2680(c) of the FTCA Bars Claims Against the United States for Negligent Damage to Property While in the Custody of Customs Service*; Kosak v. United States , 28 VILL. L. REV. 835, 838 n.22 (1983) (referring to the section as the "customs exception"); *see* 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 256, at 13-5 (1983) (breaking down the claims under section 2680(c) to those relating to the "detention" of goods and those relating to the assessment and collection of goods).

forcement officer."[31]

Prior to the Supreme Court's decision in *Kosak v. United States*,[32] considerable controversy surrounded the interpretation of the "customs exception."[33] Simply put, the question was whether section 2680(c) barred only those claims for consequential damages due to the wrongful seizure and detention of goods by the Customs Service or whether, in addition, section 2680(c) also barred claims for property loss or damage due to the mishandling and carelessness of customs officials.[34]

Tort claims based upon wrongful seizure and detention often arise after the customs authorities seize dominion or control over goods for violations of customs laws.[35] Claimants bringing these actions usually demand both the return of property confiscated during the alleged wrongful seizure and money damages for injury caused by the detention of the goods.[36] Although the owner may raise the issue of the wrongful seizure

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31. 28 U.S.C. § 2680(c) (1982). The discussion of the section 2680(c) exception in connection with other federal agencies appears in this Note for purposes of analogy. Customs cases discussing this narrow issue are few and the other agency cases are instructional. *See infra* note 35.

32. 465 U.S. 848 (1984).

33. 2 L. JAYSON, *supra* note 30, § 256.03, at 13-17; Note, *supra* note 23, at 87.

34. *See* 2 L. JAYSON, *supra* note 30, § 256.03, at 13-17. Section 2680(c) has also been used to bar claims focusing on the improper and wrongful means of assessing and collecting taxes or duties. For instance, the Fifth Circuit recently held section 2680(c) barred a conversion claim by a bank against the IRS. Interfirst Bank Dallas, N.A. v. United States, 769 F.2d 299, 306-08 (5th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). The bank had alleged that the IRS, in collection of delinquent taxes from a taxpayer, wrongfully levied upon accounts receivable of the taxpayer in which the bank had a perfected secured interest. The court held that in order for the bank to prevail it must "overcome a formidable obstacle" in section 2680(c), which exempts from the waiver of immunity "*any* claim arising in respect of the assessment or collection of *any* tax." *Id.* at 306 (quoting 28 U.S.C. § 2680(c)) (emphasis added).

35. United States v. One (1) 1983 Homemade Vessel Named Barracuda, 625 F. Supp. 893 (S.D. Fla. 1986) (seizure of vessel by Customs officials and Coast Guard); United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY, 501 F.2d 1327 (5th Cir. 1974) (seizure of a boat for transporting marijuana); *cf.* United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1984), *cert. denied sub nom.* Jarboe-Lackey Feedlots, Inc. v. United States, 469 U.S. 1068 (1984) (seizure of adulterated meat); United States v. Lockheed L-188 Aircraft, 656 F.2d 390 (9th Cir. 1979) (alleged negligent seizure of an aircraft by FAA for violations of safety regulations).

36. Detention damages typically include depreciation, decline in market value, and loss of use. *See* Kosak v. United States, 465 U.S. 848, 852 (1984); *see, e.g.*, *Custom Boat*, 501 F.2d at 1330; *cf.* Castleberry v. Alcohol, Tobacco & Firearms Div. of the Treasury Dep't of the United States, 530 F.2d 672 (5th Cir. 1976) (owner of automobile seized by Treasury agents for allegedly containing a destructive device brought action for damages and return of the vehicle).

at the judicial forfeiture hearing as an affirmative defense,[37] courts have repeatedly denied separate counterclaims for damages by applying the language of section 2680(c).[38] For instance, in *United States v. One (1) 1972 Wood, 19 Foot Custom Boat, Fl 8443AY*,[39] the Customs Service refused to remit a boat seized for transporting marijuana until the concededly *innocent* owner had paid storage charges for the boat.[40] After

37. *Castleberry*, 530 F.2d at 675 ("[T]he proper place to litigate the legality of the seizure of the automobile is in the forfeiture proceeding and not elsewhere."); *Custom Boat*, 501 F.2d at 1330; *Lockheed*, 656 F.2d at 396.

Judicial forfeiture proceedings are brought as *in rem* actions against the property. *Lockheed*, 656 F.2d at 393; *Barracuda*, 625 F. Supp. at 897. The Government's action, in this context, is both "a claim of forfeiture and an assertion of ownership." Hatzlachh Supply Co. v. United States, 444 U.S. 460, 467 (1980) (Blackmun, J., dissenting); Walker v. United States, 438 F. Supp. 251, 258 (S.D. Ga. 1977). Generally, seizure procedures are governed by 19 U.S.C. §§ 1602-18 (1982). *See generally* Note, *supra* note 23, at 83 n.5. Under the provisions of 19 U.S.C. § 1615 (1982), the Government must establish that the seizing officer had probable cause to take custody of the property. In *Custom Boat*, for example, the court held that the arresting officer had satisfied the Government's burden when he had "detected the odor of marijuana in the boat" and the substance seized from the boat tested positive for marijuana. 501 F.2d at 1329. The burden then shifts to the claimant to prove that the property should not be forfeited. If the claimant cannot satisfy its burden, the property is forfeited.

A claimant can avoid forfeiture by asserting the "innocent-owner" defense. *Barracuda*, 625 F. Supp. at 898-99. To succeed, a claimant must prove by the preponderance of the evidence that "1) they were not involved in the wrongful activity, 2) they were not aware of the wrongful activity, and 3) they had done all that reasonably could be expected to prevent the proscribed use of their property." *Id.* at 898; *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 688-90 (1974) (suggesting the possibility of the defense). *See generally* 19 C.F.R. §§ 171.11-.15 (1988) (filing procedures). Upon the establishment of the defense, payment of a penalty, or remission, the property is usually returned. *See Hatzlachh*, 444 U.S. at 461; *Lockheed*, 656 F.2d at 393. *But see Barracuda*, 625 F. Supp. at 900-01 (despite the innocent owner defense, the court could not deny forfeiture under 19 U.S.C. § 1707 (1982)).

On the other hand, if the court does not uphold the forfeiture, the Government has an implied duty at law to return the goods to the owner. *Hatzlachh*, 444 U.S. at 467 (Blackmun, J., dissenting); *see also* 28 U.S.C. § 2465 (1982).

38. *Lockheed*, 656 F.2d at 397 (barring counterclaim for negligent seizure of the aircraft); *cf.* United States v. One 1951 Cadillac Coupe de Ville, 125 F. Supp. 661, 663 (E.D. Mo. 1954) (barring counterclaim for damages for illegal seizure of auto used in a "policy" racket). *But see* United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372, 1376-77 (11th Cir. 1981) (suggesting that counterclaim would have been allowed if proper procedures were followed).

39. 501 F.2d 1327 (5th Cir. 1974).

40. *Id.* at 1329 (emphasis added). The owner had rented the boat to a third party who was arrested after a Customs' investigation uncovered five burlap bags of marijuana on the boat. *Id.*

the owner refused to pay the storage charges, the Government instituted forfeiture proceedings. The trial court ordered the boat to be forfeited to the United States and at the same time denied the owner his counterclaim for damage to the boat and loss of the boat's service while it was being stored. In affirming the lower court, the United States Court of Appeals for the Fifth Circuit held that section 2680(c) "specifically prohibits the bringing of *any* claim arising from the detention of any goods or merchandise by a customs officer."[41]

The traditional justification for denying recovery for damage alleged in wrongful seizure and detention claims under section 2680(c) rests upon the theory that there are "adequate alternative remedies" available to such wronged claimants.[42] Originally, this rationale appeared directed solely towards tax revenue claims.[43] Courts, however, subsequently ap-

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41. *Id.* at 1330 (emphasis added). Similarly, the Tenth Circuit upheld a lower court's denial of a counterclaim for recoupment of money damages for the diminished value of property during detention. United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1984), *cert. denied sub nom* Jarboe-Lackey Feedlots, Inc. v. United States, 469 U.S. 1068 (1984). In this case, a condemnation action was brought by the Government pursuant to the Meat Inspection Act, 21 U.S.C. §§ 601-95 (1982), alleging adulteration of certain beef owned by the claimant. *Id.* at 1483. Despite finding that the Government failed to prove adulteration, the court held that the claimant's counterclaim was barred by section 2680(c). The court rejected claimant's reasoning that the denial of forfeiture by the court, resulting in the return of the property, also carried an implied authority to compensate the claimant for such property's depreciated value. *Id.* at 1490-91. *But cf.* United States v. One 1965 Chevrolet Impala Convertible, 475 F.2d 882 (6th Cir. 1973) (concluding that the lower court had jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a)(2), both to declare the forfeiture void and to order that the claimant be paid proceeds from the sale of his automobile as well as depreciation on it from the time of seizure to time of sale).

42. 2 L. JAYSON, *supra* note 30, § 256.01, at 13-8; Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation,* 35 GEO. L.J. 1, 45 (1946); Note, *supra* note 23, at 93.

43. *See Tort Claims Against the United States: Hearing on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary,* 76th Cong., 3d Sess. 38 (1940) (testimony of Alexander Holtzoff, Special Assistant to the Attorney General):

> The . . . 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. There are various tax laws providing the machinery for recovering back any tax that has been paid but was not properly owing. There was no purpose in interfering with that machinery.

See also 28 U.S.C. § 1346(a)(1) (1982) (taxpayer can bring suit against the Government "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected").

plied this rationale to other seizure cases.[44] In most wrongful seizure and detention cases, it appears that the adequate "alternative remedy" takes one of two forms. Initially, it was argued that the FTCA should not waive governmental immunity in wrongful seizure claims because the judicial forfeiture process already gives the claimant an existing remedy.[45] In recent years, however, courts have also held that if the claimant prevails on the merits of the forfeiture, he may bring suit against the United States for monetary damages under the Tucker Act.[46] Recently, the same "adequate alternative remedy" theory has also provided part of the justification for denying claims for property loss or damage under section 2680(c).

In *Kosak v. United States*, the Supreme Court invoked both a literal interpretation and the brief legislative history of section 2680(c) in holding that this section precludes recovery against the United States for alleged injuries to property caused by the negligence of customs officials.[47] The holding clearly rejected a line of cases which implied that section 2680(c) barred only claims for consequential damage suffered during a wrongful seizure and detention.

The two principle arguments rejected by the Supreme Court arose from the Second Circuit's decision in *Alliance Assurance Co. v. United States*.[48] In *Alliance*, an insurer and subrogee of the owner of imported goods brought suit against the United States under both the Tucker

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44. *See, e.g.*, Newstead v. United States, 258 F. Supp. 250 (E.D. Mo. 1966) (remedy for seizure of claimant's gun by Treasury agents potentially recoverable administratively under 26 U.S.C. § 7325).

45. *See supra* note 37; Note, *supra* note 23, at 93.

46. *See* Castleberry v. Alcohol, Tobacco & Firearms Div. of the Treasury Dep't of the United States, 530 F.2d 672, 677 (5th Cir. 1976); United States v. One 1965 Chevrolet Impala Convertible, 475 F.2d 882 (6th Cir. 1973). The adequacy of this remedy remains questionable. Should the Government decide to forego the forfeiture process, the claimant conceivably has no way to challenge the legality of the seizure. *See* Note, *supra* note 23, at 88 n.30.

47. 465 U.S. 848 (1984). In *Kosak*, the petitioners' art collection was seized by the Customs Service for alleged smuggling violations. After the petitioner was acquitted, the goods were returned to him pursuant to a petition filed for relief from forfeiture. Petitioner then filed an administrative complaint alleging that the goods had been damaged while in possession of the Customs Service. In affirming the district court, the Third Circuit held that section 2680(c) fails to provide a clear relinquishment of governmental immunity from property damage suits. Thus, the court concluded section 2680(c) shields the Government from "all claims arising out of the detention of goods by customs officers and does not purport to distinguish among types of harm." 679 F.2d 306, 308 (3d Cir. 1982), *quoted in Kosak*, 465 U.S. at 851.

48. 252 F.2d 529 (2d Cir. 1958).

Act,[49] (for breach of an implied contract of bailment) and the FTCA (for value of English woolens lost while in possession of the Customs Service). The Second Circuit gave two principal reasons for rejecting the Government's argument that section 2680(c) prohibits both wrongful seizure and property damage claims. First, the court examined prior holdings under the exception and concluded that section 2680(c) is normally used only to preclude actions based upon wrongful seizures.[50] Second, the court reasoned that if Congress had intended to bar actions based on the negligent handling of goods, it would have specifically stated this.[51] The court reached this conclusion by comparing the language in section 2680(c) with the language in section 2680(b), which bars claims "arising out of the loss, miscarriage, or negligent transmission" of mail by the Postal Service.[52] Thus, the court reasoned, if Congress had wished to bar negligent actions with respect to customs officials, it would have used similar language in section 2680(c).[53]

Writing for the Court in *Kosak*, Justice Marshall clearly rejected the rationale of *Alliance*, stating that the contrast between the language in section 2680(b) and in section 2680(c) merely suggests, "if anything, that

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49. The application and importance of the Tucker Act in *Alliance* is explored more completely below. *See infra* notes 155-57 and accompanying text.

50. *Alliance*, 252 F.2d at 534 (citing Jones v. Federal Bureau of Investigation, 139 F. Supp. 38, 39 (D. Md. 1956) and United States v. One 1951 Cadillac Coupe de Ville, 125 F. Supp. 661 (E.D. Mo. 1954)).

51. *Id.*

52. 28 U.S.C. § 2680(b) (1982).

53. *Alliance*, 252 F.2d at 534. Several courts subsequently embraced the *Alliance* interpretation. In A-Mark v. United States Secret Service, 593 F.2d 849 (9th Cir. 1978), appellant sought recovery from the Government under the FTCA for damage to a "brilliant, uncirculated and semi-prooflike" coin entrusted to treasury officials for authentication. Following *Alliance*, the Ninth Circuit agreed with the appellant that section 2680(c) "reaches only those claims asserting injury as a result of the fact of detention itself where the propriety of the detention is at issue, and does not reach claims where the injury is asserted to result from negligent handling of property in the course of detention." *Id.* at 850. The Fifth Circuit in A & D Int'l, Inc. v. United States, 665 F.2d 669, 673 (5th Cir. 1982), also held that the section 2680(c) exception does not cover claims "alleging carelessness in the handling of . . . property." *A & D Int'l* involved an action against the Customs Service and a brokerage firm to recover the loss of gemstones. *Id.* at 670. The court distinguished this case from its earlier holding in United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY, 501 F.2d 1327 (5th Cir. 1974). Accordingly, the court held that *A & D Int'l* involved a claim for negligent handling of property whereas the claim in *Custom Boat* was one relating to the *incidents* or detention of the wrongful seizure, "clearly the type of suit which is excepted by 28 U.S.C. § 2680(c)." *Id.*

Congress intended the former to be *less* encompassing than the latter."[54] Instead, Justice Marshall adopted the theory urged by some lower courts[55] that the plain and ordinary language of section 2680(c) fails to distinguish claims for wrongful seizures from those for property damage.[56] To Justice Marshall and these courts, absent clear congressional intent to the contrary, section 2680(c) must bar both types of claims. Consequently, these courts have prohibited claims against the Government for the negligence of its employees in the handling of a cargo of canned tomatoes,[57] in the storage of a plane used to smuggle marijuana,[58] and in the failure to prevent the theft and vandalization of

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54. 465 U.S. at 855 (in original emphasis). *Contra Kosak*, 679 F.2d at 309, (Weiss, J., dissenting). Judge Weiss, in comparing the language of section 2680(c) with other FTCA exceptions, read the phrase "in respect of" as the equivalent of "as regards" to infer that "the statutory exception is directed to the fact of detention itself" and not to property damage claims. *Id.* at 310. *But see* Note, *supra* note 23, at 89 & n.40 (rejecting Weiss' argument on the ground that evidence supports a finding that the language difference was purely unintentional).

55. *See* 465 U.S. at 855; *see, e.g.,* Hatzlachh Supply Co. v. United States, 579 F.2d 617, 621 (Ct. Cl. 1978) (Congress specifically and explicitly rejected *any* tort liability for *any* claim arising with respect to a customs detention); S. Schonfeld Co. v. SS Akra Tenaron, 363 F. Supp. 1220, 1223 (D.S.C. 1973) ("[T]here 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.").

56. The Supreme Court had its first opportunity to solve the dispute over the scope of section 2680(c) in Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) (per curiam), but it declined to settle the issue. In *Hatzlachh*, the Court was faced with the question of whether section 2680(c) precluded a claim under the Tucker Act for breach of an implied contract of bailment. Petitioners' imported camera supplies were seized by the Customs Service and forfeited for customs violations. After the petitioners paid a $40,000 penalty, the goods were returned, but more than $165,000 worth of equipment allegedly was missing. *Id.* at 461. The Court of Claims earlier held that because section 2680(c) would prevent this loss from being recoverable under a tort claim, it would be "a trespass on congressional prerogatives for this court now to hold that, by seizing subject to forfeiture certain merchandise, the Government assented to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole." 579 F.2d at 621. Accordingly, the Court of Claims denied recovery under the petitioner's theory.

The Supreme Court, however, rejected this argument, holding that section 2680(c) does not omit or otherwise affect immunity waivers contained in the Tucker Act. 444 U.S. at 462-63. The Court also rejected the United States argument that the contractual remedy should be rejected because individual officers are subject to personal liability and because 28 U.S.C. § 2006 (1982) provides that the judgment will be paid by the United States upon showing of probable cause for the seizure. *Id.* at 465-66. For more on section 2006 and individual tort liability, see *infra* notes 194-209 and accompanying text.

57. *Schonfeld*, 363 F. Supp. 1220.

58. United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981).

equipment on a vessel seized for violations of immigration laws.[59]

Justice Marshall's opinion also cited the three major rationales for the enumerated exceptions as direct support for the Court's holding that Congress never intended to waive immunity from suits alleging damage to detained property: (1) the threat of disruptive damage suits; (2) the avoidance of the Government's exposure to fraudulent claims; and (3) the availability of adequate alternative remedies.[60] According to Justice Marshall, the fear that numerous damage suits could stagnate Customs Service enforcement, coupled with the fact that inadequate monitoring systems could encourage fraudulent claims, led Congress to decide not to relinquish immunity.[61] Moreover, Justice Marshall reasoned that the evidentiary requirements associated with negligence suits against officials and suits brought under the Tucker Act by way of an implied contract of bailment helped to reduce the potential for fraudulent claims and to provide the claimant with an adequate alternative remedy.[62]

Justice Stevens' dissent argued that the majority's focus on the legislative history and purposes of the FTCA were misplaced.[63] First, he attacked the Court's reliance on the views of one of the original drafters of section 2680(c) for support of the FTCA's legislative history.[64] Next, he criticized the majority's focus on the "general purposes" for creating the exceptions in the FTCA. Justice Stevens argued that the focus, if any, should be on the general purpose of the Act, which was to cure the inadequacies of the existing remedies.[65] Furthermore, he answered the Court's concerns about administrative burdens and fraudulent claims by stating that these arguments are "properly addressed to Congress, not to this Court."[66]

The Supreme Court's holding in *Kosak* foreclosed the imposition of

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59. Romanach v. United States, 579 F. Supp. 1017 (D.P.R. 1984).

60. 465 U.S. at 858.

61. *Id.* at 859-60

62. *Id.* at 860-62. Justice Marshall felt that the requirement that an owner of damaged property prove the existence of an implied-in-fact contract helped "screen out" fraudulent claims. Similarly, he argued that the burden on the owner to prove negligence on the part of an official, combined with the indemnity provisions of section 2006, both in themselves deterrents to enforcement by the Customs Service, may have also deterred Congress from extending the owner a remedy under the FTCA. *Id.* at 861-62 n.24.

63. *Id.* at 862-69.

64. Justice Stevens claims that there was no evidence supporting congressional reliance on the "Holtzoff Report." *Id.* at 863-64. Apparently Judge Alexander Holtzoff was one of the principal proponents of the FTCA and the first to draft section 2680(c). *Id.* at 856.

65. *Id.* at 865-66.

66. *Id.* at 869.

governmental liability under section 2680(c), recognizing that claimants may be denied an effective remedy for all types of detention-related property damage.[67] Expanding on this notion, the United States Court of Appeals for the Fifth Circuit held in two recent cases that the section 2680(c) exception will apply even when there is no other judicial or administrative remedy.[68]

Since *Kosak*, courts have broadened the scope of section 2680(c) under the "incidents of detention." In *Formula One Motors, Ltd. v. United States*,[69] the Second Circuit held that the "destruction" of a car detained by Drug Enforcement Administration agents was sufficiently akin to the "detention" of goods to preclude recovery under section 2680(c).[70] This holding could be logically extended to also exclude claims for goods damaged while searched at the border. Though the officers technically "detain" the goods momentarily, the conduct of the officers is arguably "sufficiently akin to the functions carried out by Customs officials to place the agents' conduct within the scope of section 2680(c)."[71] The exception has even barred a claim for damages when the Customs Service, after storing the goods for over a year, sold the claimant's goods at a public auction without giving the required notice to the importer.[72]

Nonetheless, it may be premature to conclude that the *Kosak* holding, in effect, denies claimants any recourse. The Tucker Act provides two

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67. *Id.* at 862.

68. Interfirst Bank Dallas, N.A. v. United States, 769 F.2d 299, 307-08 (5th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); Solus Ocean Systems, Inc. v. United States Customs Service, 777 F.2d 326, 328 (5th Cir. 1985).

69. 777 F.2d 822 (2d Cir. 1985).

70. While searching a $66,000, 1971 Mercedes Benz convertible for narcotics, agents of the Drug Enforcement Administration, "allegedly disassembled the car so completely and damaged so many parts as to render the vehicle effectively destroyed." *Id.* at 823. No drugs were found. *Id.* at 824.

71. *Id.* at 824. The argument was raised in the Government's brief in *Kosak*. A cork pagoda was broken during a search of Kosak's home pursuant to a valid warrant. Counsel for the United States argued that although the pagaoda was broken during the search to see what items fell within the warrant, the item was "detained" for purposes of section 2680(c). Brief for the United States, Kosak v. United States, 465 U.S. 848 (1984), (No. 82-618) (available on LEXIS, Genfed Library, Briefs File). The Supreme Court did not address this specific situation. Yet, there is nothing in the language of section 2680(c) that suggests negligence at the border should be treated differently then negligence during the search of a commercial shipment detained by Customs. *See id.*

72. *Solus*, 777 F.2d at 327. Notice is required to be given to the importer thirty days prior to the date of sale under 19 C.F.R. § 127.24 (1988). The court recognized the Customs Service's power to sell goods in order to pay for storage costs. However, the court also recognized that its holding implied that there was no private right of action to force the Customs Service to follow their own regulations. 777 F.2d at 328.

possible avenues of recovery. *Kosak* did not alter the Court's earlier opinion in *Hatzlachh Supply Co. v. United States*, which left open the possibility of a recovery under the Tucker Act if the owner of the detained property can establish the existence of an implied-in-fact contract of bailment with the Customs Service.[73] Furthermore, a fifth amendment suit based upon either an "unconstitutional taking" or deprivation of property without "due process" may exist either independently or under the Tucker Act, provided that the claimant can prove the unlawful nature of the seizure.[74] Additionally, a *Bivens* or common law remedy may be available against an individual customs official if the plaintiff can prove egregious conduct by the particular official in the handling of the goods.[75] This Note next analyzes recent attempts to recover under these theories in an effort to discover whether *Kosak* and its progeny have indeed foreclosed any possibility of judicial relief for detention-related property damage.

B. *Recovery Under the Tucker Act*

The Tucker Act, which permits claims against the United States "founded either upon the Constitution . . . or upon any express or implied contract with the United States,"[76] may arguably offer claimants two potential avenues of relief for detention-related property damage. Because the Tucker Act is jurisdictional only, claimants must assert a substantive right enforceable against the United States.[77] After their claims for detention-related and negligent property damage were denied in forfeiture proceedings,[78] several property owners have attempted to obtain relief "founded upon the Constitution" under either the compensable taking[79] or due process[80] clauses of the fifth amendment.[81] Alternatively, owners of damaged property have tried to prevail under an "implied" contractual theory. Essentially derived from the holdings in

73. 444 U.S. 460 (1980); *see supra* note 56.

74. *See infra* Part II, B, 1.

75. *See Kosak*, 465 U.S. 848, 860-61 & n.24.

76. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1982).

77. United States v. Testan, 424 U.S. 392, 398 (1976).

78. *See supra* notes 38-41 and accompanying text.

79. The fifth amendment provides that "no person shall . . . [have] private property . . . taken for public use, without just compensation." U.S. CONST. amend. V.

80. The fifth amendment also provides in pertinent part that, "no person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

81. *See, e.g.*, Castleberry v. Alcohol, Tobacco & Firearms Div. of the Treasury Dep't of the United States, 530 F.2d 672, 677 n.8 (5th Cir. 1976).

Alliance and *Hatzlachh*, these claims assert an implied contract of bailment with the Government which permits recovery for breach of contract when the Government damages or fails to return the goods.[82]

1. The Fifth Amendment: Claims Founded Upon the Constitution

Parties generally bring actions based on "takings" of property against the Government pursuant to the fifth amendment which provides that private property shall not "be taken for public use, without just compensation."[83] Traditionally, the enforcement of "regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens," has not constituted a compensable taking.[84] Courts view regulatory enforcement as a noncompensable exercise of the Government's police power, distinguishable from a taking of property for the benefit of public use.[85] Consequently, courts have denied recovery under a "taking" theory in order to further the Government's regulatory enforcement prerogative.[86] The Supreme Court upheld the constitutionality of a forfeiture statute that authorized the "taking" of private property without just compensation.[87] As a matter of principle, the Court stated that for-

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82. *See infra* notes 138-93 and accompanying text.

83. *See* Note, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 876 (1956). Originally, there was considerable controversy surrounding whether or not the phrase "founded upon the Constitution" provided an independent substantive right based on constitutional guaranties or whether the claim for a "taking" needed to be in the form of a contract right for purposes of jurisdiction under the Tucker Act. *See generally id.* at 876-81; Silberman v. United States, 71 F. Supp. 895 (D. Mass. 1947) (finding an "implied" promise to pay for the taking). Recent cases seem to suggest that a claimant may proceed directly under the fifth amendment. *See, e.g.*, LaChance v. United States, 15 Cl. Ct. 127 (1988).

84. Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl. Ct. 329, 338-39 (1985) (citations omitted).

85. *Id.*

86. *See, e.g.*, Meserey v. United States, 447 F. Supp 548 (D. Nev. 1977). In *Meserey*, the court denied recovery to a claimant for detention of homeopathic drugs under the authority of the Federal Food, Drug and Cosmetic Act. The court held that Congress had the power "to determine what articles of merchandise may be imported into this country and terms upon which a right to import may be exercised." *Id.* at 553 (quoting Sugarman v. Forbragd, 267 F. Supp. 817, 825 (N.D. Cal. 1967), *aff'd*, 405 F.2d 1189, *cert. denied*, 395 U.S. 960 (1969)). The claimant was told that he could either export the articles to the country of origin or have them destroyed. *Id.* at 554.

87. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). In upholding a Puerto Rican statute that provided for seizure without notice and forfeiture of vessels involved in transporting contraband, the Court stated: "Forfeiture of conveyances that

feiture process helps further the deterrence purpose of underlying criminal statutes.[88] Subsequent courts have denied "taking" claims for money damages where camera supplies were seized for suspected violations of customs laws,[89] where potentially adulterated beef was seized pursuant to a condemnation action,[90] and where a boat was forfeited after being used to transport controlled substances.[91] A recent Court of Claims decision rejected a traveler's just compensation claim for return of $49,000 seized by the Drug Enforcement Agency. The court held that when the seizure and forfeiture are in the course of normal regulatory procedures, no compensable "taking" has occurred.[92] The fact that the owner may be innocent of any wrongdoing seems to have little effect on the outcome.[93]

State court "takings" decisions support the result reached in these cases. Several states have rejected the theory that damages flowing from an intentional regulatory practice constitute a "taking" for public use.[94] These courts hold that lawsuits for "takings" based on unintentional actions of state employees during the course of regulatory enforcement are merely negligence suits against officials for which a waiver of sovereign

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have been used—and may be used again—in violation of narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Id.* at 686-87.

88. *Id.* "A forfeiture is clearly a penalty for a criminal offense." Jaekel v. United States, 304 F. Supp. 993, 997 (S.D.N.Y. 1969) (quoting Compton v. United States, 377 F.2d 408, 411 (8th Cir. 1967)).

89. Hatzlachh Supply Co. v. United States, 579 F.2d 617, 619 (Cl. Ct. 1978).

90. *Jarboe-Lackey Feedlots*, 7 Cl. Ct. at 339.

91. United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY, 501 F.2d 1327 (5th Cir. 1974).

92. LaChance v. United States, 15 Cl. Ct. 127 (1988) (plaintiff exhausted all available administrative attempts to have the money returned).

93. *See* Note, *supra* note 23, at 87 n.29 (discussing the implications of the "innocent owner" defense); Simons v. United States 497 F.2d 1046, 1049 (9th Cir. 1974) (rejecting the "innocent owner" defense); *Custom Boat*, 501 F.2d at 1329 (refusing to remit the boat to the "innocent" owner until storage charges paid); *cf.* Annotation, *Seizure of Property as Evidence in Criminal Prosecution on Investigation as Compensable Taking*, 44 A.L.R. 4th 366 (1986) (innocent owners of property seized for criminal evidence have a "public duty" to provide evidence regardless of the financial burden). *But see* United States v. One (1) 1983 Homemade Vessel Named Barracuda, 625 F. Supp. 893 (S.D. Fla. 1986).

94. *See, e.g.*, McNeil v. Montague, 124 Cal. App. 2d 325, 268 P.2d 497 (1954) (damage caused by fire spreading plan not property taken for public use); Angelle v. State, 212 La. 1069, 34 So. 2d 321 (1948) (unintentional destruction resulting from state department of agriculture spraying plan not compensable taking); Rogers v. Tattnall County, 29 Ga. App. 779, 116 S.E. 545 (1923) (negligence of officer causing death of cattle).

immunity is necessary.[95]

A more plaintiff-oriented approach to Supreme Court compensable takings cases may alter this result. Recent Supreme Court cases have relied on "ad hoc, factual inquiries into the circumstances of each particular case" in determining whether a compensable "taking" has occurred under the fifth amendment.[96] Although this analysis is admittedly ad hoc, the Supreme Court has generally identified two specific areas of inquiry.[97]

First, courts should look at the character of the government's action.[98] They determine whether the government activity is pursuant to a justifiable regulatory program or whether it is an unintended physical invasion of the owner's property.[99] Second, courts should analyze the economic impact of the government action on the owner's property. A factor considered under this inquiry is any reduction in property value from either permanent or temporary government use.[100] In particular, courts should look at the "investment-backed expectation" of the owner.[101] A closer look at these standards may reveal an avenue of relief for owners of property damaged or lost while in the custody of the Customs Service.

The Supreme Court has traditionally drawn a distinction in its "takings" analysis between government activity that is more akin to a physical invasion and acts taken pursuant to a regulatory program. In general, it may not constitute a compensable "taking" where the Government acts to protect the health and safety of the public.[102] For example, the Government may destroy infectious trees[103] or condemn structures.[104] On the other hand, certain government actions or a combination of actions, even without intention, may "entail such an actual in-

95. *See, e.g.*, Houston v. State, 98 Wis. 481, 74 N.W. 111 (1898); *see supra* note 94.

96. Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. 1018, 1026 (1986).

97. The Court in *Connolly* actually mentioned three factors. For purposes of analysis herein, the economic impact and interference with investment back expectations are treated as one. *See generally* Annotation, *Supreme Court's Views as to What Constitutes "Taking," Within the Meaning of Fifth Amendment's Prohibition Against Taking of Private Property for Public Use Without Just Compensation*, 89 L. Ed. 2d 977 (1988).

98. *Connolly*, 106 S. Ct. at 1026; Annotation, *supra* note 97, at 984.

99. *Connolly*, 106 S.Ct. at 1026; Annotation, *supra* note 97, at 984; *see infra* note 105 and accompanying text.

100. *See* Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl. Ct. 329, 338 (1985) (listing cases supporting temporary government "takings").

101. *Connolly*, 106 S. Ct. at 1027.

102. First English Evangelical Lutheran Church v. Los Angeles, 107 S. Ct. 2378, 2391 n.4 (1987) (O'Connor, J., dissenting).

103. Miller v. Schoene, 276 U.S. 272 (1928).

104. *First English*, 107 S. Ct. at 2391 (O'Connor, J., dissenting).

vasion of private property rights that a constitutional taking must be implied."[105] Destruction of fixtures and equipment in a temporary taking of a building,[106] and damage and destruction to buildings surrounded by a Navy gunnery[107] are examples of physical invasions.

However, the Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[108] may have effectively blurred the distinction between regulatory and physical invasion "takings" analysis. Analogizing to several physical invasions cases, the Court held in *First English* that a landowner may recover damages for a "temporary" regulatory taking.[109] The holding seems to suggest that regulatory takings no longer deserve a presumption against compensation. Hence, while it is generally recognized that customs seizures are "takings" pursuant to a regulatory policy, they may not be noncompensable takings *per se*, even if taken temporarily.

Under the economic impact analysis, the complete destruction or damage to the goods may also violate a standard of justice and fairness.[110] The Supreme Court has held that the unforeseen and substantial impact of some government action may warrant the redistribution of the costs from the individual to the public.[111] Arguably, the destruction of a $66,000 automobile during a search for narcotics[112] or the pilferage of $165,000 worth of camera supplies while in the custody of the Customs Service would meet this standard.[113]

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105. Eyherabide v. United States, 345 F.2d 565, 567 (Ct. Cl. 1965) (combination of government actions effectively constituted a "taking" of plaintiff's property).

106. United States v. General Motors Corp., 323 U.S. 373, 384 (1945) ("destruction is tantamount to taking").

107. *Eyherabide*, 345 F.2d at 567.

108. 107 S. Ct. 2378 (1987).

109. *Id.* at 2387-88. Justice O'Connor's dissent illustrates this point. *Id.* at 2391-94.

110. Andrus v. Allard, 444 U.S. 51, 65 (1979); Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984).

111. *Kirby Forest*, 467 U.S. at 14.

112. Formula One Motors, Ltd. v. United States, 777 F.2d 882 (2d Cir. 1985).

113. In Hatzlachh Supply Co. v. United States, 444 U.S. 460, 461 (1980), the Court of Claims originally denied Hatzlachh's claim under the fifth amendment, citing as authority Huerta v. United States, 548 F.2d 343 (1977), *cert. denied*, 434 U.S. 828 (1977). In *Huerta*, the plaintiff alleged that salvage equipment left at a naval base had been "pilfered" by persons on the base. *Id.* at 348. The court held that the facts failed to show which persons were responsible for the damage. The dissent, on the other hand, found merit in the plaintiff's claim. Finding that the Government had retained the materials to its benefit and had provided inadequate efforts to protect the property, the dissent concluded that the pilferers had impliedly made the Government responsible for the loss. *Id.* at 348-49. In support of this argument, it has been recognized that where the Government encroachment makes the benefit of private property available to a third party,

Given the recent "ad hoc" approach to government takings, it would appear that a plaintiff-oriented interpretation of the Supreme Court's criteria could give owners of property damaged or lost while in the custody of the Customs Service a cognizable claim for a compensable "taking." In a number of cases, courts have held the damage or loss of personal property to be a substantial injury,[114] and have recognized the seizure[115] or forfeiture of personal property[116] by the Government to be a deprivation of the owner's domination over the property. If some of the property returned was either damaged or missing, the Customs Service's intentional search, seizure, and detention conceivably permanently deprives the owner of the property's use.[117]

Courts have also read the Tucker Act to encompass an action based upon the fifth amendment due process clause.[118] Essentially, the claim here is the same as that under the "takings" clause: that the Government's search, seizure,[119] or forfeiture process was unconstitutional. Courts have recognized Tucker Act claims under the fifth amendment for the return of fines and costs based on unconstitutional forfeitures.

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rather than to itself, there are still grounds for a compensable "taking." *See, e.g., Eyherabide*, 345 F.2d at 570.

114. *See* Causby v. United States, 109 Ct. Cl. 768 (1948) (taking by flight easement resulting in destruction of personal property).

115. Yokum v. United States, 208 Ct. Cl. 972, 974-75 (1975), *cert. denied*, 429 U.S. 820 (1976).

116. Walker v. United States, 438 F. Supp. 251, 258 (S.D. Ga. 1977).

117. Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl. Ct. 329, 338 (1985); *see also* Kessler v. United States, 3 Cl. Ct. 123, 124 (1983) (if the Government ceases to hold property as a mere custodian, a "taking" may occur).

118. United States v. One 1965 Chevrolet Impala Convertible, 475 F.2d 882, 886 (6th Cir. 1973). (28 U.S.C. § 1346(a)(2) gives jurisdiction to the district courts to hear fifth amendment claims) (citing United States v. United States Coin & Currency, 401 U.S. 715 (1971)).

U.S. Coin & Currency held that the fifth amendment privilege may be invoked in the forfeiture proceedings. The Court reached this conclusion after deciding that, when viewed in their entirety, the forfeiture statutes are only intended to penalize an *individual* for criminal activity. Justice Harlan commented, "[F]rom the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct." 401 U.S. at 718. As a result, the fifth amendment privilege against self-incrimination would be applicable.

119. Claims brought under the fourth amendment for unreasonable search and seizure have generally failed since there is no warrant or probable cause requirement when the claimant is searched at the border. *See* United States v. Ramsey, 431 U.S. 606 (1977); *see also* United States v. One (1) 1983 Homemade Vessel Named Barracuda, 625 F. Supp. 893 (S.D. Fla. 1986).

Litigants have asserted successful claims against the Government, arguing that property was seized or forfeited without adequate notice,[120] and that excessive governmental delays in filing for forfeiture amounted to an unconstitutional application of the forfeiture statutes.[121] Potential remedies for these claims include the return of seized merchandise[122] and recovery of fines and penalties,[123] damages equal to the value of the property seized,[124] and depreciation costs arising during the unlawful detention.[125] In *United States v. One 1965 Chevrolet Impala Convertible*,[126] the United States Court of Appeals for the Sixth Circuit upheld a lower court's decision ordering the Government to pay the owner of an improperly forfeited vehicle the proceeds from the sale of the vehicle along with depreciation costs from the time of its seizure to the time of the sale. The court held that denial of this recovery would constitute "a penalty, the exaction of which [is] constitutionally impermissible."[127] Hence, it would not seem precocious to conclude that a similar "due process" claim could be asserted where the Government loses and fails to return goods pursuant to the finding of an unlawful seizure or forfeiture.[128] Similarly, at least one author has suggested that if recovery is permitted for depreciation, the same should be allowed when the property is returned damaged.[129]

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120. *See* United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 394, 397 (9th Cir. 1979) (recognizing the potential for a Tucker Act claim). *Contra* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (holding notice need not be given in exigent circumstances).

121. United States v. Vertol H21C Reg. No. N8540, 545 F.2d 648, 651 (9th Cir. 1976); Sarkisian v. United States, 472 F.2d 468 (10th Cir. 1976) (nine month delay in commencing forfeiture found to be an unconstitutional application of the relevant statutes), *cert. denied*, 414 U.S. 976 (1974); *see also* Castleberry v. Alcohol, Tobacco & Firearms Div. of the Treasury Dep't of the United States, 530 F.2d 672, 677 n.8 (5th Cir. 1976) (remedy may be available if the Customs Service should delay unnecessarily in seeking forfeiture).

122. United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972).

123. *See Vertol*, 545 F.2d at 651.

124. Jaekel v. United States, 304 F. Supp. 993 (S.D.N.Y. 1969) (value of automobile unlawfully forfeited deemed recoverable).

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

126. *Id.*

127. *Id.* at 886 (citing *U.S. Coin & Currency*, 401 U.S. at 715).

128. *See, e.g.*, Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) (alleging $165,220.50 worth of camera supplies "pilfered").

129. *See* Note, *supra* note 23, at 95; *see also* United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372, 1376 (11th Cir. 1981); United States v. One (1) 1972

While this method of recovery seems appealing, the "due process" claim is severely restricted in its applicability. Procedurally, the due process claim only appears relevant if the Government files for forfeiture.[130] Still, it is not clear whether the due process violation should be asserted in a separate action under the Tucker Act only after a claimant prevails at the forfeiture proceeding or whether a claim will be permitted as a defense or counterclaim in the forfeiture proceeding itself.[131] If the claimant successfully asserts the unconstitutionality of the seizure as an affirmative defense to the forfeiture, the property is merely returned to the claimant and there may be no recovery for depreciation.[132] If the claimant proceeds under a separate action for damages under the Tucker Act, the court would be without jurisdiction if the claim "sounded in tort" because the Tucker Act gives the court jurisdiction only for claims founded upon the Constitution or implied or express contracts with the Government.[133] Additionally, the property owner must limit claims to the district court. Several claims courts have refused to hear due process claims on the ground that the fifth amendment does not obligate the United States to pay money damages.[134] Since the claims court jurisdiction extends only to claims in which money damages are mandated, the courts will be without jurisdiction to hear fifth amendment claims.[135] The plaintiff's damages claim would have to be limited to the $10,000 jurisdictional limit of the district courts under the Tucker Act.[136] Finally, should the claim be successful, the claimant's recovery may yet be limited

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Wood 19 Foot Custom Boat, FL 8443AY, 501 F.2d 1327, 1330 (5th Cir. 1974). Both *Douglas* and *Custom Boat*, recognize that a Tucker Act claim for unconstitutional forfeiture and damages may have merit. In *Douglas*, customs officials had assured a plane owner that appropriate measures were being taken to protect an aircraft in storage. 662 F.2d at 1374 n.4. In *Custom Boat*, the court said that the boat owners claim for damage and loss of service could be addressed in a Tucker Act claim. 501 F.2d at 1330.

130. Note, *supra* note 23, at 95; *see Douglas A-26B Aircraft*, 662 F.2d at 1377 (allowing counterclaim). *Compare* United States v. Vertol H21C Reg. No. N8540, 545 F.2d 648 (9th Cir. 1976) *with* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). The applicability of a due process claim for inadequate notice prior to seizure will often depend on the "exigent" circumstances.

131. For a discussion on the split of authority, see United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 393-97 (9th Cir. 1979).

132. *See Lockheed*, 656 F.2d at 396.

133. *Id.*

134. Cabrera v. United States, 10 Cl. Ct. 219, 221-22 (1986); Shaw v. United States, 8 Cl. Ct. 796, 800 (1985).

135. United States v. Testan, 424 U.S. 392, 397-98; Shaw v. United States, 8 Cl. Ct. 796, 800 (1985).

136. 28 U.S.C. § 1346(a)(2) (1982).

if "it appears that there was reasonable cause for the seizure."[137]

2. Bailment: Claims Founded Upon Implied-in-Fact Contracts

The decisions reached in *Alliance*,[138] *Hatzlachh*,[139] and *Kosak*[140] inevitably left open the possibility of a recovery against the United States founded upon a theory of an implied-in-fact contract of bailment. The Tucker Act extends jurisdiction to both district courts and claims courts to hear and render judgment upon any monetary claim against the Government "founded . . . upon any express or implied contracts."[141] A claim under this theory would allege that the Customs Service breached an express or implied "promise, representation or statement that the goods will be guarded or carefully handled"[142] when the goods were lost or returned in a damaged condition.

There are two predominant policy reasons for the extensive waiver of governmental immunity in contract under the Tucker Act.[143] First, the availability of a remedy for breach will encourage individuals to contract with the Government.[144] Second, the Government in this circumstance

137. 28 U.S.C. § 2465 (1982). This section allows the court, upon a finding of probable cause, to issue a certificate precluding the claimant from recovering court costs and other costs incident to the seizure. United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1491 (10th Cir. 1984) (reasonable seizure of alleged adulterated beef); Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl. Ct. 329, 336-337 (1985) (holding "costs" do not apply to diminished value of the property); United States v. One 1949 GMC Truck, 104 F. Supp. 34, 37 (E.D. Va. 1950).

138. *See supra* notes 48-53 and accompanying text.

139. *See supra* note 56 and accompanying text.

140. *See supra* notes 47-66 and accompanying text.

141. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1982).

142. Hatzlachh Supply Co. v. United States, 579 F.2d 617, 621 (Ct. Cl. 1978).

143. Originally, Congress enacted the Tucker Act as a response to the inefficient means of handling private relief legislation, *see supra* notes 20-25 and accompanying text, and only provided jurisdiction to bring a suit against the Government under a "takings" analysis. The Government could be attributed with the expansion of jurisdiction to contract rights under the premise that a "takings" action could only be maintained if there was a promise by the Government to make just compensation for the property taken. Hill v. United States, 149 U.S. 593 (1893). Because the Constitution could not theoretically create a new right of action, and the Tucker Act did not confer jurisdiction over actions in tort, the plaintiff was forced to sue under contract. *See* Note, *supra* note 83, at 876.

144. *See* Note, *supra* note 83, at 876. While the waiver may have initially led to an increase in parties willing to contract with the Government, current confusion over the inconsistent application of the doctrines of implied-in-law contracts and implied-in-fact contracts may severely constrain this phenomenon. *See* Note, *Dealing with a Not-So-Benevolent Uncle: Implied Contracts with Federal Government Agencies*, 37 STAN. L.

will not be exposed to the unforeseen and unlimited liabilities commonly associated with a waiver of tort immunity.[145] Courts initially applied these implied contract actions in early "takings" cases, reasoning that the Government intended to recompense owners for the "taking" rather than to violate its constitutional duty to compensate under the fifth amendment.[146]

While the Tucker Act extends jurisdiction to contracts implied-in-fact, it does not do the same for those implied-in-law.[147] A contractual relationship created by implication of law imposes a duty of restitution on the party sued in order to prevent that party's unjust enrichment.[148] The rationale for excluding implied-in-law contracts stems from the fear that this recovery infringes on the retention of tort immunity.[149] An implied-in-fact contract, on the other hand, is created when the parties' intent to contract is "inferred as a matter of reason or justice from the acts or conduct of the parties."[150]

Although these contracts are commonly regulated by federal contract law,[151] the implied-in-fact contract must possess all the same key elements of an express contract: mutuality of intent to contract, an offer and acceptance, consideration, and authority to contract.[152] With respect to a custom's detention-bailment relationship, the intent and the offer and acceptance elements "must show an agreement based upon a meeting of

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REV. 1367, 1381 (1985).

145. Note, *supra* note 83, at 876. *See generally* James, *supra* note 20. This appears to be consistent with the maintenance of some governmental immunity.

146. Note, *supra* note 83, at 876-77.

147. United States v. Minnesota Mutual Investment Co., 271 U.S. 212, 217 (1926); Hatzlachh Supply Co. v. United States, 7 Cl. Ct. 743, 749 (1985).

148. Collins v. United States, 532 F.2d 1344, 1351 (Ct. Cl. 1976); Note, *supra* note 144, at 1374-75 ("The sole purpose of a contract implied in law is to create a remedy."). The Tucker Act exclusion of jurisdiction to contracts in law is criticized for allowing a government agency to profit at the expense of the private party, especially where no remedy exists under the FTCA. Note, *supra* note 83, at 882; *see* Note, *supra* note 144, at 1375.

149. Note, *supra* note 83, at 882.

150. Prudential Ins. Co. of America v. United States, 801 F.2d 1295, 1297 (F. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *see* Note, *supra* note 144, at 1372-73.

151. There are numerous exceptions to the maxim that government contracts are treated the same as those under general contract law. For example, the Government often uses the doctrines of apparent authority and sovereign immunity as affirmative defenses to deny the contractual capacity of the federal agency that purports to act, or is perceived as acting, on behalf of the United States. Note, *supra* note 144, at 1379-81; Note, *supra* note 83, at 884-87.

152. *Prudential*, 801 F.2d at 1297; Baltimore & O.R.R. v. United States, 261 U.S. 592 (1923).

the minds that can be inferred, as a fact, from the conduct of the parties under existing circumstances which manifests their tacit understanding."[153] Additionally, the claimant must prove the elements of a bailment. A bailment is said to arise when an owner, while retaining title, delivers goods or personal property to another, either for deposit or particular use upon an express or implied contract that provides a return of the goods to the owner or subsequent disposition of the property in accordance with the owner's directions.[154]

The leading case supporting recovery for lost or damaged property against the Government under an implied contract is *Alliance Assurance Co. v. United States.*[155] The court in *Alliance* found an implied-in-fact contract of bailment through an "implied promise" of the Customs Service to return goods to the lawful owner *after* an inspection at the customs house to determine if the goods were properly declared in the invoice. This "implied promise" was essentially inferred from claim tickets issued by the Customs Service to the owner; the tickets were "designed to restore the goods to the owner."[156] When the tickets were presented, the officials were unable to locate the goods. The court, analogizing to the situation in which the recompensation rationale under the "taking" theory is applied, found an action for breach of an implied duty to use due care during the time of the bailment. The court also found that the confidence and trust placed in the bailee and the fact that the bailment was for the exclusive benefit of the Government supplied sufficient consideration for the implied agreement.[157]

While courts have found implied-in-fact contracts in numerous situations,[158] decisions that support the *Alliance* rationale are virtually nonexistent. Although the Supreme Court in *Hatzlachh* alluded to the possibility of finding an implied-in-fact contract, on remand the Claims Court failed to find that one existed.[159] Perhaps this failure resulted from the

153. Prevado Village Partnership v. United States, 3 Cl. Ct. 219, 224 (1983); Hatzlachh Supply Co. v. United States, 7 Cl. Ct. 743, 748 (1985).

154. Lionberger v. United States, 371 F.2d 831, 840 (Ct. Cl. 1967).

155. 252 F.2d 529 (2d Cir. 1958).

156. *Id.* at 532.

157. *Id.* at 533 (citing Seigal v. Spear & Co., 234 N.Y. 479, 138 N.E. 414, 416 (1923)).

158. *See, e.g.*, Walsh v. United States, 672 F.2d 746 (9th Cir. 1982) (negligent maintenance of a highway easement); Algonac Mfg. Co. v. United States, 428 F.2d 1241 (Ct. Cl. 1970), *supplemented*, 458 F.2d 1373 (Ct. Cl. 1983) (storage of goods); Pacific Maritime Ass'n v. United States, 108 F. Supp. 603 (Ct. Cl. 1952) (payment of gratuitous services).

159. Hatzlachh Supply Co. v. United States, 7 Cl. Ct. 743, 749-50 (1985).

approach taken by the property owners in *Hatzlachh*, which differed to a large extent from the approach taken in *Alliance*.

In *Hatzlachh*, customs officials seized and forfeited a shipment of camera supplies under 19 U.S.C. section 1592.[160] The Department of Treasury granted a remission of the forfeiture upon payment of $40,000 in penalties. Hatzlachh made the payment and the customs officials released the supplies. Hatzlachh filed a complaint alleging that over $165,000 worth of the supplies were "pilfered" while in the Government's custody.[161] In an attempt to establish an implied-in-fact contract of bailment with the Government, Hatzlachh relied on the statutory context of customs forfeiture and detention procedure and the Treasury Department's decision to remit the forfeiture.[162] According to Hatzlachh, 19 U.S.C. section 1605 placed the goods in the custody of the Customs Service "to await disposition according to the law."[163] Further, Hatzlachh argued that 28 U.S.C. section 2465 placed the Customs Service under a specific duty to return the goods if the petitioner prevailed on the forfeiture actions.[164] Hatzlachh concluded from these sections that the Treasury's decision to remit the goods after payment of a penalty was an "explicit promise to redeliver them" that "gave rise to an implied and (apparently) a retroactively effective, 'promise to use due care during the term of the bailment'."[165] The court rejected this notion, holding that the Customs Service's "forcible and unilateral acts of seizing the goods and declaring them forfeited for violations of customs laws. . . [and] the 'existing circumstances' nonetheless clearly negated any notion of a 'tacit understanding' to an implied in fact contract of bailment with respect to those seized goods."[166]

The Claims Court made two other interesting and important findings. First, despite not finding an implied-in-fact contract, the court did find that the Customs Service failed to exercise due care.[167] In particular, the Customs Service failed to request larger storage facilities from the warehouse owner, and failed to assign a security guard to protect the goods

160. *Id.* at 745.

161. *Id.* at 746.

162. Brief for Plaintiff, Hatzlachh Supply Co. v. United States, 7 Cl. Ct. 743 (1985), (No. 78-1175) (available on LEXIS, Genfed Library, Briefs File).

163. *Id.*; 19 U.S.C. § 1605 (1982).

164. Brief for Plaintiff, *supra* note 162; *see also Hatzlachh*, 579 F.2d at 619 (Ct. Cl. 1978).

165. *Hatzlachh*, 7 Cl. Ct. at 748.

166. *Id.* at 749-50.

167. *Id.* at 753-54 (had the court found a bailment relationship, the Customs Service would have been liable).

when the Customs Service was fully aware supplies were continually pilfered.[168] Upon a showing that the property owner did not originally violate any customs laws and that the Government benefited from the seizure, a possible cognizable claim under a plaintiff-oriented "takings" theory arises.[169] Moreover, if the Customs Service unconstitutionally forfeited the property, then a remedy may be available under the due process clause.[170] Furthermore, equity could argue for the breach of an implied-in-law contract to prevent the Government from further wrongdoing.[171] Success under these theories unfortunately would hinge on establishing that the Government "benefit[ed]" from its actions. In the case of "pilfered" goods, this would require a showing of who the "pilferers" were, thus lifting the liability from the Government.[172] Likewise, exaggerated damages does not help a claimant's credibility. It is conceivable that the court was affected by its finding that Hatzlachh suffered only slightly over $4,000 in damages, not the $165,000 alleged in his complaint.[173]

The few cases that find an implied-in-fact obligation on the Government do so on the basis of written or express evidence that tends to show an intent to be bound.[174] In *Bielass v. New England Safe Systems Inc.*,[175] owners of household goods, sold at a public auction without notice by the Customs Service, brought an action against a private storage company (Safe Systems) and the United States for damages resulting from the sale. The owner alleged that Safe Systems had arranged on his behalf to have the Customs Service store his goods while he was in the process of moving back to the United States from West Germany. Apparently due to the lack of proper documentation, the Customs Service thought the goods were "unclaimed or abandoned." After the goods had remained in storage for over a year, the Customs Service sold the goods at public auction. The district court denied summary judgment for the Government, holding that a reasonable jury could infer that either the

168. *Id.* at 753.

169. *See supra* notes 83-117 and accompanying text.

170. *See supra* notes 118-37 and accompanying text.

171. *See supra* notes 147-50 and accompanying text.

172. *See infra* Part II, C.

173. *Hatzlachh*, 7 Cl. Ct. at 754-55 & n.34. The court found testimony of the plaintiff's president unpersuasive and without any probative value.

174. *See, e.g.*, Algonac, 428 F.2d 1241 (Ct. Cl. 1970) (contract dispute between a government contractor and the army led to a claim for storage costs for materials needed for the contracts); Walsh v. United States, 672 F.2d 746 (9th Cir. 1982) (court found a duty to maintain the property from the language of the deed).

175. 617 F. Supp. 682 (D. Mass. 1985).

owner or Safe Systems, acting on behalf of the owner, reached at least a tacit understanding with the Customs Service that the Customs Service would place the owner's belongings in a warehouse and not sell them without prior notice. In reaching its decision, the court relied on evidence of several contacts between Safe Systems and the Customs Service.[176] The contacts were described as regarding "storage charges on behalf of the plaintiff."[177] The court also acknowledged that the Customs Service's failure to follow its own notice regulation may have led to the unfortunate incident.[178]

Notwithstanding this conclusion in *Safe Systems,* the weight of authority opposes the finding of an implied-in-fact contract of bailment in property detention situations.[179] A majority of courts reject the bailment theory because the claimant fails to establish both the requisite elements of bailment and contract. In a bailment relationship, the property owner must maintain title in the transferred property.[180] When the Customs Service forcibly seizes or forfeits the property, it usurps a "right to title, subject only to judicial determination."[181] The bailment relationship does not arise due to this transfer of title. Consequently, the court can not reasonably impose an obligation on the Government to care for property

176. *Id.* at 685.

177. *Id.* at 685 (quoting from plaintiff's answers).

178. *Id.* at 686.

179. Insurance Co. of North America v. United States, 11 Cl. Ct. 1 (1986); Cabrera v. United States, 10 Cl. Ct. 219 (1986); Hatzlachh Supply Co. v. United States, 7 Cl. Ct. 743 (1985).

180. *See supra* note 154 and accompanying text.

181. Walker v. United States, 438 F. Supp. 251, 258 (S.D. Ga. 1977). On remand, the Claims Court in *Hatzlachh* expanded this notion. The Government argued that a section 1592 seizure was an act that amounted to an effective transfer of title to the United States. The court did not accept this conclusion, but it did say the act was enough to give the United States "unperfected" title to the property and therefore grounds arose to deny the bailment relationship. On the other hand, it is questionable whether title is ever transferred when goods are damaged during inspection at the border. *Walker*, 438 F. Supp. at 258 ("An inspection and a seizure are two different things, creating two different relationships."). In *Alliance Assurance Co. v. United States*, for example, the goods were being checked against the invoice and were not seized for customs violations. 252 F.2d. 529, 531 (2d Cir. 1958). However, consistent with the Claims Court holding in *Hatzlachh*, the goods were inspected pursuant to statutory requirements. *Id.* ("Imported merchandise . . . shall not be delivered from customs custody . . . until it has been inspected, examined, or appraised and is reported by the appropriate customs officer to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States. . . ." 19 U.S.C. § 1499 (1982)). An inspection at the border is also pursuant to statutory authority. *See* 19 U.S.C. § 1581(a) (1982).

in its custody.[182] This same rationale also destroys any notion of meeting of the minds or tacit understanding between the parties. Likewise, since seizure and detention of the owner's property is done under the authority of law, any attempt to establish a free and voluntary bargain or implied promise of "due care" seems baseless.[183] Seizure and detention under statutory authority also preclude a finding of consideration to validate the contract.[184]

The facts of *Alliance* also elucidate the lack of the other implied contract elements. Since *Alliance* was an inspection case, one may infer that the offer and acceptance accompanied the transfer of the claim tickets. Unfortunately, no receipt system exists that is analogous to the tickets in *Alliance* when the Customs Service seizes goods for alleged violations of customs laws.[185]

Finally, federal contract law will only bind the Government in contract if the federal agency has actual authority to make the promise, representation, or statement.[186] The Government cannot be bound to an implied contract by apparent authority.[187] Courts have been unable to find facts that evince a promise carefully to handle an owner's property made by a government official with proper authorization.[188]

Outside the specific facts surrounding *Alliance*, or possibly the express evidence of intent in *Bielass*, the theory of an implied-in-fact contract of bailment fails to provide the victims of detention-related property dam-

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182. A similar conclusion was reached in Note, *supra* note 23, at 95; *see also* Comment, *Imported Goods and Negligence by Customs Officials: The Liability of the Crown*—Zien v. The Queen, 1986 LLOYD'S MAR. COM. L.Q. 430, 423 (Canadian authorities also hold that when the Crown holds goods pending payment of a duty no bailment relationship arises).

183. *Hatzlachh*, 7 Cl. Ct. at 749.

184. *Cf.* Insurance Co. of North America v. United States, 11 Cl. Ct. 1, 4-5 (1986) (statements that funds were available for inspection is not a promise to pay); *see also* Cabrera v. United States, 10 Cl. Ct. 219, 221 (1986) (plaintiff filling out forms according to statute not consideration).

185. *Cf. Cabrera*, 10 Cl. Ct. 221 (administrative forms do not evidence meeting of minds). *But see* LaChance v. United States, 15 Cl. Ct. 127, 128, 130 (1988) (DEA officials gave plaintiff a "receipt" for seizing $49,000 in cash, although plaintiff failed properly to allege a contract claim).

186. *Hatzlachh*, 7 Cl. Ct. at 745; *Shaw*, 8 Cl. Ct. at 799; *see* Note, *supra* note 83, at 885; Note, *supra* note 144, at 1378 (arguing for the applicability of apparent authority to government controls).

187. *See* Note, *supra* note 83, at 884; Note, *supra* note 144, at 1389.

188. Traditional theory claims that any attempt to bind the Government by apparent authority will destroy any evidence of mutual assent to contract. Note, *supra* note 83, at 885. *Contra* Note, *supra* note 144, at 1389-90 (calling for the abolition of this affirmative defense if the agent has induced the party to contract).

age with an adequate remedy. The apparent flaws in the theory have led many to suggest that if any recovery is permitted in these situations, it is not under an implied-in-fact contract, but rather under one implied-in-law.[189] This conclusion is doctrinally consistent with the denial recovery rationale under the FTCA. Requiring the owner to prove the elements of contract and bailment not only will "screen out" fraudulent claims but also prevent the impediment of the Government's enforcement systems.[190] In fact, several courts suggest that an underlying rationale for denying recovery under this theory is the "congressional policy of exempting Customs from liability against tort claims arising out of detention of goods."[191] It is logically and legislatively inconsistent to allow recovery in contract under the same set of facts for which recovery is denied in tort.[192] According to one court, finding an implied-in-fact contract in these circumstances would "judicially allow by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front."[193]

C. *Personal Liability of Customs Officials*

Neither the absence nor the availability of a suit against the Government affects the long-standing practice of holding customs officials liable in their individual capacities for improper performance of their duties.[194] This remains true even without the statutory indemnification provided in either 28 U.S.C. section 2006, or section 2465.[195] Courts have permitted

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189. *See supra* note 147; *see also* Hatzlachh Supply Co. v. United States, 444 U.S. 460, 467 (1980) (Blackmun, J., dissenting); *Shaw*, 8 Cl. Ct. at 799; *Cabrera*, 10 Cl. Ct. at 221 (suggesting that if the plaintiff's property were unnecessarily subjected to forfeiture the remedy would be one at law).

190. *See* Kosak v. United States, 465 U.S. 848, 461 & n.24 (1984).

191. *See, e.g.*, Walker v. United States, 438 F. Supp. 251, 259 (S.D. Ga. 1977).

192. Several courts have recognized this inconsistency. For example, the Fifth Circuit in A & D Int'l, Inc. v. United States, 665 F.2d 669 (5th Cir. 1982), noticed the factual similarity under the heading, "A Case of Negligent Tort or Contract Bailment—A Distinction Without a Difference?" *Id.* at 673.

193. Hatzlachh Supply Co. v. United States, 579 F.2d 617, 621 (Ct. Cl. 1978); *Walker*, 438 F. Supp. at 259 (if this is the law, "it is an even bigger ass than Mr. Bumble supposed").

194. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944). In *Hatzlachh Supply Co. v. United States,* the Supreme Court held that the existence of a contractual remedy was not inconsistent with an action against customs officials individually. 444 U.S. 460, 465-66 (1980). Likewise, the Supreme Court in *Kosak* held denial of recovery under section 2680(c) was consistent with adequate alternative remedies such as suits against individual customs officials. Kosak v. United States, 465 U.S. 848, 860-61 (1984).

195. 28 U.S.C. § 2465 (1982) is generally intended to prevent prosecutions against

claims against individual officers in cases involving wrongful seizure or detention (conversion) of goods,[196] negligent handling of property,[197] and failure to institute judicial forfeiture proceedings promptly.[198]

Remedies for these actions have been based on the requisite showing of either a common law tort or constitutional violation. Common law actions are typically brought under a theory of negligence or conversion resulting from a breach of bailment. Thus, a court held a customs collector personally liable for conversion where one of his subordinates delivered a shipment of pimentoes to one not entitled to possession.[199] Similarly, a court awarded costs and nominal damages where the detention of goods by the collector of customs was unduly delayed.[200]

Until recently, common law suits were successful despite the scope of official immunity.[201] The doctrine of absolute official immunity has been

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government officers in cases where property is seized pursuant to an act of Congress but forfeiture fails. If the judge certifies that reasonable cause exists for the seizure, then the claimant's recovery is limited to costs payable by the Government and the officer is exempt from any personal liability. *Id.*

28 U.S.C. § 2006 (1982) provides that the United States Treasury pays any judgments against an officer while in performance of his duties upon the issuance of a certificate of probable cause or when the court certifies that the officer was following orders. *Id.* Section 2006 has been treated as a possible remedy for loss or injury to property while in the custody of the customs collector. *See* Agnew v. Haymes, 141 F. 631 (4th Cir. 1905). According to the court in *Agnew*, if the property was lost or damaged through the negligence of the officer, the officer is personally liable. *Id.* at 639. On the other hand, if the damage results through no fault of the officer, the owner of the property can still collect for the damage against the officer personally, but the Government could issue a certificate providing for the recovery to be paid from the United States Treasury. *Id.* These indemnity statutes historically grew out of complications with the collection of taxes and duties. In order to curb the unfavorable practice of customs collectors retaining large sums of money for indemnity, Congress passed legislation obligating the Government to pay judgments recovered against collectors while in the course of their duties. *See* Note, *supra* note 83, at 838-40.

196. Truth Seeker Co. v. Durning, 147 F.2d 54 (2d Cir. 1945) (illegal detention of books for the duration of World War II).

197. Nakasheff v. Continental Ins. Co., 89 F. Supp. 87 (S.D.N.Y. 1950) (defendant filed a third party action against a customs collector for the loss of goods).

198. State Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974) (action brought by ship charterer for return of seized goods and damages due to his inability to deliver goods to importers); *see also* Seguin v. Eide, 645 F.2d 804 (9th Cir. 1981), *vacated*, 462 U.S. 1101 (1983).

199. Conklin v. Newton, 34 F.2d 612 (2d Cir. 1929).

200. *Truth Seeker Co.*, 147 F.2d at 54. Further, the court held that the return of goods did not serve as a complete defense but only to mitigate damages. *Id.* at 56.

201. *See* Westfall v. Erwin, 108 S. Ct. 580 (1988) (issue of material fact as to whether official immunity barred state tort law claim).

judicially weakened, and applies only where the challenged conduct is "within the outer perimeter" of the officials duties and discretionary in nature.[202] In response to the erosion of this doctrine, Congress enacted the Federal Employee Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act).[203] The Liability Reform Act provides that upon certification by the Attorney General that the employee was acting "within the scope of his office or employment at the time of the incident out of which the claim arose," the action shall be deemed against the United States and not the individual official.[204] This makes the United States vicariously liable for common law negligence of its employees, however, the officer remains personally liable for egregious misconduct.[205] Under the Liability Reform Act, the United States would enjoy the statutory exceptions to the FTCA including section 2680(c).[206]

The Liability Reform Act is untested, yet it seems to pose severe limitations for common law actions brought against Customs Officials. Additionally, a major problem with common law tort actions is that customs officers are generally not liable for acts of their subordinates.[207] Thus, the plaintiff will not recover unless he can prove egregious misconduct against the specific individual who lost or damaged his goods.[208] Even if the claimant can show a violation of a federal statute or regulation, the action fails unless it is shown that the officer breached a common law duty owed to the claimant.[209]

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202. *Id.* at 582, 585.

203. Pub. L. No. 100-694, 102 Stat. 4563 (1988) [hereinafter Liability Reform Act].

204. *Id.* § 6 (to be codified at 28 U.S.C. § 2679(d)(1)).

205. 1988 U.S. CODE CONG. & ADMIN. NEWS (No. 10B) 5949.

206. Liability Reform Act, *supra* note 203, § 6 (to be codified at 28 U.S.C. § 2679(d)(4)); 1988 U.S. CODE CONG. & ADMIN. NEWS (No. 108) 5949-50.

207. James, *supra* note 20, at 636. Also note that a customs official may be liable for negligence in supervision or selection of employees. *Id.* at 636 n.163.

208. Kosak v. United States, 465 U.S. 848, 860-61 (1984); *see also* Note, *supra* note 23, at 96.

209. Geo. Byers Sons, Inc. v. East Europe Import Export, Inc., 463 F. Supp. 135 (D. Md. 1979). The court granted summary judgment for customs officials where an importer alleged that the officials negligently admitted into commerce motorcycles that did not bear proper certificates of compliance with federal safety standards. To hold officials responsible for negligent performance of their statutory duty, the importers had to show that they were in the class designed to be protected by the legislation and that the harm they suffered was the type the statute protected against. The court held that the importers failed to meet this test and, absent any state common law duty owed the importers, the officials were not liable. *Id.* at 138-39; *see also* Castleberry v. Alcohol Tobacco & Firearms Div. of the Treasury Dep't of United States, 530 F.2d 672, 674 (5th Cir. 1976) (proper action could be brought against officials as individuals in state court under "replevin, detinue, or perhaps trover"); Nakasheff v. Continental Ins. Co., 89 F.

Since the Liability Reform Act is inapplicable to civil actions brought for a violation of the constitution,[210] a plaintiff may bring an alternative action against a federal official for violation of the plaintiff's constitutional rights.[211] The United States Court of Appeals for the Fourth Circuit, in *States Marine Lines, Inc. v. Shultz*,[212] extended the *Bivens* rationale to actions based on first amendment due process property interests. In *States Marine Lines*, the plaintiff alleged a violation of the fifth amendment against customs agents who, without a warrant, seized cargo from the plaintiff's vessel valued at $39,619.45. The District Director of Customs refused to return the cargo until the penalties for statutory violations were paid. According to the court, since the Supreme Court permitted an action under 42 U.S.C. section 1983 against state officials based on a claim of deprivation of property without due process of law, the same right to sue is permissible under the fifth amendment against federal officials.[213]

Although some argue that the *Bivens* action is superior to an action under the Tucker Act and the fifth amendment "just compensation" and

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Supp. 87, 89 (S.D.N.Y. 1950) (quoting Judge Learned Hand). *But cf.* Bielass v. New England Safe System, Inc., 617 F. Supp. 682 (D. Mass. 1985) (evidence of the Customs Service's failure to comply with its own regulations considered).

210. Liability Reform Act, *supra* note 203, § 6 (to be codified at 28 U.S.C. § 2679(b)(2)); 1988 U.S. CODE CONG. & ADMIN. NEWS (No. 108) 5949-50.

211. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); *see* Comment, *Unreasonable Search and Seizure Gives a Right of Action for Damages Against Federal Narcotics Agents*: Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), 33 OHIO ST. L.J. 205 (1972).

212. 498 F.2d 1146 (4th Cir. 1974).

213. *Id.* at 1157. In sum, the court stated:

> To permit a party to sue for the alleged deprivation of his property without due process of law by persons acting under color of state law and not permit a suit for damages against a federal officer for identical acts in violation of the identical provisions in the Fifth Amendment can only be justified, if at all, by the fact that Congress specifically recognized the potential liability of state officers for their allegedly unconstitutional acts in 42 U.S.C. § 1983. But, in light of the court's decision in *Bivens*, the fact that Congress has not specifically recognized a cause of action for damages against federal officers is no longer an obstacle preventing federal courts from fashioning a damage remedy, where appropriate, directly from the Constitution.

On relevant collateral issues the court held that neither the FTCA nor the section 2006 or section 2465 indemnity provisions precluded a suit against the officers individually. *Id.* at 1149-51. The court further held that the case fell within the exception to the sovereign immunity doctrine because the manner in which the defendants exercised their duties may have violated the fifth amendment. *Id.* at 1151.

"due process" clauses,[214] the *Bivens* action is similarly restricted. The *Bivens* action provides for a jury trial and carries a greater deterrent effect against governmental officers, yet its scope appears limited to delays in instituting forfeiture proceedings and thus restricted to damage remedies associated with detention (*i.e.*, loss of use, depreciation).[215] Additionally, "special factors" may counsel hesitation in applying a *Bivens* action. The individual officer charged with the violation must not occupy a "status" such that a judgment against him will "significantly impair his ability to perform public functions."[216] Additionally, the claimant must demonstrate the lack of an effective alternative remedy.[217]

A claimant bringing a *Bivens* action also will likely encounter the doctrine of official immunity. When federal executive officials exercising discretion violate constitutional rights they are entitled only to qualified immunity, as compared with the absolute immunity defense to common law tort claims.[218] The qualified immunity rule will protect customs agents,

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214. Weiss v. Lehman, 642 F.2d 265, 267-68 (9th Cir. 1981), *vacated* 454 U.S. 807 (1982); Seguin v. Eide, 645 F.2d at 804, 811 (9th Cir. 1981), *vacated*, 463 U.S. 1101 (1983).

215. *See, e.g.*, *Seguin*, 645 F.2d at 804; *Shultz*, 498 F.2d at 1146 (damages for charter's inability to deliver goods). The precedential value of *Seguin* was lessened somewhat after the Supreme Court's holding in United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 55 (1983). The Court in *Currency* held that an eighteen month delay in instituting forfeiture proceedings was justified on the basis of a balancing test. 461 U.S. at 569. The *Seguin* court found a district director liable for a four and one-half month delay. Though vacated, *Seguin* offers authority that a district director can be liable despite official immunity, where the official "actually know[s] or should know that an action violates someone's constitutional rights." *Seguin*, 645 F.2d at 809.

Moreover, until recently, using the *Shultz* analogy with section 1983 actions may have provided a claim under the fifth amendment where due process was violated by a negligent act of an official. *See* Parratt v. Taylor, 451 U.S. 527, 536-37 (1981) (loss of prisoner's hobby kit, "even though negligently caused, amount to a due process violation"). However, the Supreme Court in Daniels v. Williams, 106 S. Ct. 662 (1986), specifically overruled *Parratt* to the extent that a due process violation could be alleged based upon a negligent act.

216. *Weiss*, 642 F.2d at 267; *see* Butz v. Economou, 438 U.S. 478, 507 (1978). This criteria is consistent with the general rule of sovereign immunity as laid out by the Supreme Court in *Dugan v. Rank*, 372 U.S. 609, 620 (1963). If the judgment affects the Treasury, interferes with public administration, or restrains government action, the suit is probably against the sovereign. *Shultz*, 498 F.2d at 1150; *see also* Castleberry v. Alcohol Tobacoo & Firearms Div. of the Treasury Dep't of the United States, 530 F.2d 672, 674 (5th Cir. 1976).

217. Carlson v. Greene, 446 U.S. 14, 18-19 (1980). This standard is easily met, given the purpose of this Note.

218. *Butz*, 438 U.S. at 507. The Liability Reform Act was enacted to directly over-

as employees of the Treasury Department, from damage actions where "(1) at the time and in the light of all of the circumstances there existed reasonable grounds for their belief that the action they took was appropriate, and (2) the agents acted in good faith."[219] The rule implies that the defense may not be available where the officer acts unreasonably or negligently in the performance of his duties.[220] Finally, a *Bivens* action may also encounter similar proof problems facing common law tort claims.[221]

Aside from the immunity and proof problems, the policy question as to whether courts should hold officials personally liable for improper performance of their duties is often debated. Some courts argue that the deterrence of negligent or unconstitutional acts is enhanced when recovery is against the individual officers.[222] This is particularly true in cases of gross negligence or willful misconduct.[223] Proponents of personal liability argue that personal liability of Customs Service agents satisfies the elements of retribution and personal fault. They argue that even if courts require indemnification by the United States, an administrative disciplinary system including fines, suspensions, or reimbursement satisfies society's demand that individuals answer personally for egregious conduct.[224]

Conversely, opponents argue that the deterrent effect may inhibit the willingness of officials to implement vigorous enforcement policies.[225] Furthermore, official immunity works to deny a remedy completely, and the absence of vicarious liability only permits recovery against financially weak individuals.[226] As a result, this remedy leaves the compensatory goal of tort litigation unsolved.

Given these drawbacks, holding customs officials personally liable for their actions still may be the only judicial remedy available to property damage victims. The remedy is consistent with the holding in *Kosak.*

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rule *Westfall v. Erwin.* Liability Reform Act, *supra* note 203, at § 2(a)(7).

219. Shelton v. United States Customs Service, 565 F.2d 1140, 1141 (9th Cir. 1977).

220. *See Seguin,* 645 F.2d at 810; *Shultz,* 498 F.2d at 1158-59.

221. *See supra* notes 207-09 and accompanying text.

222. *Seguin,* 645 F.2d at 811; *Weiss,* 642 F.2d at 267.

223. *See* Bermann, *supra* note 20, at 1197.

224. *See id.* at 1197-99. Though Bermann argues for a strong administrative enforcement scheme when the Government has exclusive liability for the torts of its officers, the same conclusion possibly is reached when the Government is forced to pay out extraordinary sums of money under one of the indemnity statutes, such as 28 U.S.C. §§ 2006, 2465 (1982).

225. *See* Liability Reform Act, *supra* note 203, at § 2(a)(5)-(6).

226. *Id.* at § 2(a)(b); 1988 U.S. CODE CONG. & ADMIN. NEWS (No. 10B) 5946-47; *see* James, *supra* note 20, at 639.

There the Court reasoned that the existence of this remedy, coupled with the indemnity statutes, supported their interpretation of section 2680(c).[227] However, the Liability Reform Act's limitation on common law tort claims leaves the plaintiff with only a *Bivens* action for recovery. As such, the Court should be more willing to recognize official misconduct involving the supervision of employees.[228] If the property owner can show that the damage resulted from an official's wrongful supervision or authorization, liability should attach to that official.[229] Thus, when a Customs Service officer fails, for example, to request larger storage facilities or extra security to guard goods, a plaintiff should prevail without having to show which official set the cargo out in the rain or pilfered the containers.[230] Liability should likewise extend to an official who wrongfully authorizes an extensive search, during which a car is dismantled and rendered inoperable.[231] Consequently, as the Government argued in *Kosak*, parties should be allowed to bring suits against the relevant district directors.[232]

III. LEGISLATIVE RELIEF

Despite the possibility that no remedy exists against the Government under the FTCA or Tucker Act, the claimant may, as a last resort,[233] petition a member of Congress to introduce a private bill of relief.[234] A private bill is a means reserved by Congress to provide or facilitate a

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227. *See supra* note 62 and accompanying text.

228. *See Kosak*, 465 U.S. at 848, 860-66 & n.23.

229. *See supra* notes 207-08 and accompanying text.

230. Hatzlachh Supply Co. v. United States, 7 Cl. Ct. 743, 751-55 (1985); *see supra* notes 167-68 and accompanying text.

231. *See* Formula One Motors, Ltd. v. United States, 777 F.2d 822 (2d Cir. 1985). The court alluded to the potential of liability on the part of the officers, citing *Bivens*. *Id.* at 824.

232. *Kosak*, 465 U.S. 848, 861 n.23.

233. 1 L. JAYSON, *supra* note 30, § 21.01, at 1-160 to 161. The House of Representatives, for example, has rules prohibiting consideration of bills until all administrative and judicial remedies are exhausted. *Id.*; *see* CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 349 (3d ed. 1982) [hereinafter CONGRESSIONAL QUARTERLY].

234. 1 L. JAYSON, *supra* note 30, § 21.01, at 1-161. CONGRESSIONAL QUARTERLY, *supra* note 233, at 355; Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 AM. L. REV. 595, 598 (1976). The claimant should note that enlisting the support of a local congressman will probably cost a fee. *See generally* Gelhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1 (1958) (overview of procedure); Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966).

remedy for one or several specified individuals.[235] While the FTCA has replaced much of the need for the private bill system, Congress still entertains bills for payment of private claims against the Government.[236]

Congress derives its authority to act on private claims from article I, section 8, clause 1 of the Constitution which provides that "Congress shall have Power . . . to pay the Debts . . . of the United States."[237] The Supreme Court interprets this clause as giving Congress the power to satisfy "debts" owed by the nation to those individuals whose claims arise out of "equitable" principles and are not recoverable in a court of law.[238] Relief for these claims is often considered part of the Government's broad moral responsibility to create "equitable law" where the inflexible application of the governing law leaves an individual without remedy.[239] Although these claims often show a close connection between the Government and the injury, it is difficult to determine the actual degree of closeness Congress requires.[240]

Claims for private relief against the Government have also taken the form of tort and contract claims falling outside the scope of the FTCA.[241] These frequently concern wrongful or negligent acts committed by government agents.[242] Congress may satisfy these "debts" through various forms of relief, including the direct payment of funds to the claimant.[243] For example, a claimant was awarded a sum of money

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235. *See, e.g.*, 1 L. JAYSON, *supra* note 30, § 21.01 at 1-158.3; CONGRESSIONAL QUARTERLY, *supra* note 233, at 349, 351.

236. CONGRESSIONAL QUARTERLY, *supra* note 233, at 349; *see* Note, *supra* note 234, at 1696-97.

237. U.S. CONST. art. I, § 8, cl. 1.

238. United States v. Realty Co., 163 U.S. 427, 440-41 (1896).

239. Glosser, *supra* note 234, at 596; *see also* Note, *supra* note 234, at 1697 ("Recovery may also be allowed when a claim is factually very close to those allowed under an existing statutory scheme."); *cf.* Shane v. United States, 3 Cl. Ct. 294, 304 (1983) (referring to congressional reference legislation).

240. Note, *supra* note 234, at 1697-98; Glosser, *supra* note 234, at 617-25.

241. Note, *supra* note 234, at 1696-97; Note, *supra* note 23, at 88; CONGRESSIONAL QUARTERLY, *supra* note 233, at 352.

242. Note, *supra* note 234, at 1696-97; *see infra* note 245.

243. The form of private relief is wholly within the discretion of Congress. It may waive the statute of limitations; confer jurisdiction on a federal court; authorize a government official to hear and settle claims; and remove or increase an agency's settlement authority. 1 L. JAYSON, *supra* note 30, § 21.01, at 1-158.3 to 160. For example, Congress permitted suit against the Government, pursuant to Priv. L. No. 87-200, 75 Stat. 830 (1961), for a 7-year-old boy who severely burned himself when he came in contact with high-voltage wires at a government transformer station. Taylor v. United States, 242 F. Supp. 759 (E.D. Va. 1965); *see also* Mizokami v. United States, 414 F.2d 1375 (Ct. Cl. 1969) (private law conferring jurisdiction on Court of Claims for damages due

when her auto was seriously damaged in a collision with an army truck.[244] No relief was available under the FTCA because the driver was not acting within the scope of his employment at the time of the accident.[245]

Once the claimant enlists the support of a representative or senator and the private bill has been introduced, Congress has two options. First, Congress may enact the bill in a similar fashion to public laws; after committee consideration, it must pass both the House and Senate and be signed by the President.[246] Second, Congress may, through congressional reference legislation, pass a resolution in either chamber that refers the bill to the chief judge of the Claims Court for a determination of the facts and appropriate remedy.[247]

Congressional reference legislation requires the assigned hearing officer to determine factual conclusions, whether the claim is legal, equitable, or a gratuity, and the amount, if any, owed by the Government.[248] With a few exceptions, the procedures before the hearing officer generally follow the rules applicable in a federal court.[249] A panel reviews the hearing officer's findings and the chief judge transmits the panel's decision back to the congressional chamber that originally referred the claim to the court.[250] Congress rarely disagrees with the recommendations of the hearing officer.[251]

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to FDA error).

Congress may also refer the claim to the United States Claims Court through the use of congressional reference legislation. *See infra* notes 248-55 and accompanying text; 28 U.S.C. §§ 1492, 2509 (1982).

244. Priv. L. No. 87-552, 76 Stat. 1359 (1962).

245. *Id.*

246. CONGRESSIONAL QUARTERLY, *supra* note 233, at 349, 355-58; Glosser, *supra* note 234, at 628.

247. Congress enacted the congressional reference statutes (codified at 28 U.S.C. §§ 1492, 2509 (1982)) to avoid spending too much time on private bills. Glosser, *supra* note 234, at 598-99 & n.18. While Glosser's article makes reference to "commissioners," the congressional reference statute was amended in 1982 to change "commissioner's" to "hearing officer." Pub. L. No. 97-164, § 139(h)(1)-(2), 96 Stat. 42-43 (1982); CONGRESSIONAL QUARTERLY, *supra* note 233, at 358-59 (referring to "commissioners").

248. 28 U.S.C. § 2509(c) (1982) ("The hearing officer to whom a congressional reference case is assigned . . . shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant."); *see* Glosser, *supra* note 234, at 608.

249. Glosser, *supra* note 234, at 605-08.

250. 28 U.S.C. § 2509(d)-(e) (1982); Glosser, *supra* note 234, at 610-12.

251. Glosser, *supra* note 234, at 627; *see, e.g.*, Shane v. United States, 3 Cl. Ct. 294, 302 (1983).

The reference to the "equitable claim" in section 2509 traditionally is interpreted to signify the moral principles of right and justice used to justify ordinary private bills.[252] Some hearing officers, however, abandon this approach and instead adopt a substantive law interpretation, utilizing the concept of fault and analogizing the claim to legal claims against private parties.[253] In *Shane v. United States*,[254] for example, a congressional reference case arose out of the Department of Housing and Urban Development's denial of Federal Housing Administration mortgage insurance to the claimant based on a United States Air Force classification of the claimant's property as located in a restrictive noise zone. In determining whether the claimant had an equitable claim against the Government for negligent classification, the hearing officer held that the claimant must show that "1) the government committed a negligent or wrongful act, and 2) this act caused damage to the claimant."[255]

Despite congressional efforts to streamline procedures for investigating claims,[256] the private bill route is problematic insofar as the success of the claim depends on many factors.[257] With this in mind, one commentator provides suggestions to smooth the path.[258] Procedurally, the claimant is reminded to exhaust all administrative and judicial remedies, including FTCA avenues;[259] to prepare a detailed statement of facts, damages, and jurisdiction; and to develop correspondence or personal contact with the agency involved, prior to scheduling a conference with

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252. *Shane*, 3 Cl. Ct. at 304; *see also* Rumley v. United States, 169 Ct. Cl. 100, 111 (1965); Town of Kure Beach v. United States, 168 Ct. Cl. 597, 613 (1964) (equitable claim based on moral and equitable considerations).

253. Glosser, *supra* note 234, at 620-22.

254. 3 Cl. Ct. 294 (1983).

255. *Id.* at 304 (claimant failed to make out an equitable claim under these proof criteria).

256. CONGRESSIONAL QUARTERLY, *supra* note 233, at 358.

257. These factors include whether the claim is meritorious; whether there is strong sympathy for the claimant; the sufficiency of evidence; whether there is agency opposition; and whether the legislative sponsor pursues the claim vigorously. 1 L. JAYSON, *supra* note 30, § 21.02, at 1-161.

While one may assume that these factors are equally applicable to ordinary private claims and to congressional reference cases, the two approaches differ with respect to political influence. Some argue that private claims are subject to "political pressures and dealings." Note, *supra* note 23, at 86 n.21. Others claim the enactment of a bill through congressional reference legislation is not dependent on political influence. Glosser, *supra* note 234, at 598.

258. 1 L. JAYSON, *supra* note 30, § 21.02, at 1-161 to 164.

259. One should note that congressional relief is still obtainable even after FTCA claims are utilized and exhausted. *Id.* at 1-161 to 162.

the member of Congress.[260] Once the claimant convinces the member to sponsor the bill, counsel should prepare an alternative draft of the legislation for consideration.[261] After the bill is referred to the appropriate subcommittee, the claimant's counsel should offer assistance to the member in preparing the necessary evidence to support the claim.[262] Furthermore, counsel should assist the member in analyzing the government agency report as soon as the subcommittee staff completes its investigation of the claim. The bill is then presented to the subcommittee as a whole, and after a favorable report, proceeds to the House and Senate for approval and eventually to the White House where the President will either approve or veto the bill.[263]

Legislative relief, while considered out of date and ineffective,[264] may offer the victim of property damage an avenue of relief. Cases such as *Formula One Motors*[265] and *Insurance Company*,[266] where the property owner is blameless and the customs inspection completely destroys the property, may attract sympathy from congressional leaders. These cases evince at least negligence and claimants could easily prove causation, thus establishing an "equitable claim" under congressional reference legislation.[267] Even the property owner in *Hatzlachh* would be a likely candidate for legislative relief if it had not violated the law and had properly established damages.[268]

Legislative relief does have procedural drawbacks, however. First, the success of the bills depends too much on external factors.[269] Second, in order to succeed, the claimant needs to show that all judicial and administrative remedies are exhausted.[270] This may prove difficult, considering the Supreme Court's holding in *Kosak*. While the Court then acknowledged that the lack of an effective remedy would not bar its decision, it

260. *Id.*
261. *Id.* at 1-162.
262. *Id.* at 1-162 to 163.
263. *Id.* at 1-163 to 164.
264. *See supra* notes 23-25 and accompanying text.
265. 777 F.2d 822 (2d Cir. 1985). In *Formula One Motors*, the property owner alleged that DEA agents "dismantled the car and damaged its parts to an extent far beyond what was reasonably required to determine whether the vehicle contained narcotics." *Id.* at 824.
266. 11 Cl. Ct. 1 (1986). Customs Service officials twice dismantled over $88,000 worth of imported furniture in Insurance Company which ultimately rendered the furniture unusable. *Id.* at 2-3.
267. *See supra* notes 252-55 and accompanying text.
268. *See supra* note 56.
269. *See supra* note 257.
270. *See supra* note 259.

did recognize the availability of a remedy against customs officials in their individual capacities.[271] Thus, claimants having the specific evidence to satisfy an "equitable claim" would probably also have the evidence to bring suit against the customs officials individually. This would effectively narrow the possibility of legislative relief to cases where the officials are protected by immunity. Finally, the claimant may also have to show that he has made an attempt to settle his claim administratively.

IV. ADMINISTRATIVE RELIEF

A claimant who feels damaged due to the unnecessary detention of property may contest the seizure and detention in the forfeiture process.[272] The filing of a petition for remission or mitigation of any fines or penalties is also permitted under 19 U.S.C. section 1618.[273] While these procedures may enable a property owner to prevent further depreciation or damages due to a loss of use,[274] they do little to comfort the owner of property that has been physically damaged. Furthermore, an importer who receives goods in a damaged condition may still be responsible for duties on the goods.

Section 563 of the Tariff Act of 1930[275] allows the Secretary of the Treasury to "abate or refund" duties upon a proper showing that the imported goods were damaged or lost while in the custody of the Customs Service.[276] The procedural requirements that the property owner must follow are outlined in 19 C.F.R. sections 158.21-30.[277] Under 19 C.F.R. § 158.26, for example, the importer must provide declarations from practically all those who came in contact with a partially lost or stolen package.[278] Proving that the merchandise was damaged or lost while in Customs Service's custody remains a critical element to recovery.

In *Delia Failde v. United States*,[279] several carved stone figures imported from Mexico were discovered broken when received by the im-

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271. *See supra* note 62 and accompanying text. The court in *Formula One Motors* recognized the potential for a *Bivens* action. 777 F.2d at 824.

272. *See* 19 U.S.C. §§ 1607-18 (1982); *see also supra* note 39 and accompanying text.

273. This section is enabled in 19 C.F.R. §§ 171.11-.15 (1988).

274. *See supra* notes 35-41 and accompanying text.

275. 19 U.S.C. § 1563 (1982).

276. *Id.* § 1563(a).

277. The Secretary of the Treasury is authorized to proscribe regulations pertinent to this section. *Id.*

278. 19 C.F.R. § 158.26 (1988).

279. 51 Cust. Ct. 170 (1963).

porter. The customs collector reported, seven months after the date of receipt, that there had been a 100 percent loss on the items. However, due to the delay in filing, the importer's claim was denied. On review, the court held that evidence of the inspection of the merchandise after it had left the custody of Customs Service could not establish grounds for abatement or a refund.[280] The court also held that even if the goods were shown at trial to have been damaged while in the Customs Service's custody, the decision of the Secretary of the Treasury to deny the application was final and nonreviewable.[281] Here again, the owner of damaged property is faced with proof problems, uncertainty of recovery, and a negligible remedy at best.

On the other hand, property owners who have suffered minimal damages, and have an evidentially-sound claim against the Customs Service, may find modest relief under the Small Claims Act which provides recovery for those with property damage claims against government employees.[282] As part of an attempt to alleviate the pressures of private legislation, Congress enacted the Small Claims Act.[283] Though enacted prior to the FTCA, the Small Claims Act is in no way superceded by it. The FTCA deliberately saved the Small Claims Act to provide recovery for those claims for which the FTCA denied recovery.[284] The Small Claims Act was designed to compensate property damage victims for claims "caused by the negligence of an officer or employee of the United States Government acting within the scope of employment."[285] Indeed, the Act has been specifically described as a remedy for "claims for damage to goods in customs custody due to the negligence of customs employees."[286]

Under the Act, each agency head is given the authority to settle property damage and loss claims up to $1,000.[287] The claim must be filed within one year,[288] and must not be eligible for settlement under the

280. *Id.* at 171.

281. *Id.*; *see also* Camilo E. Rosello, Inc. v. United States, 63 Cust. Ct. 454, 456 (1969) (Secretary of Treasury decision is final).

282. 31 U.S.C. § 3723 (1982).

283. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. L.R. 509, 521 (1984-85).

284. *Id.* at 522; *see* Nakasheff v. Continental Ins. Co., 89 F. Supp. 87, 90 (S.D. N.Y. 1950).

285. 31 U.S.C. § 3723(a)(1) (1982).

286. *Nakasheff*, 89 F. Supp. at 90; *see also* 31 C.F.R. § 3.20 (1988).

287. 31 U.S.C. § 3723(a).

288. *Id.* § 3723(b).

FTCA.[289] Under regulations promulgated under the Act, claims are forwarded to the appropriate bureau's legal division for advice and recommendation.[290] Thereafter, the claim is approved, disapproved, or compromised by the bureau head.[291] Acceptance of the settlement by a claimant is recognized as "complete satisfaction" of the claim.[292]

Despite its purpose and design, the effectiveness of the Small Claims Act appears to be severely restricted. First, the $1,000 cap on recovery is extremely outdated and thoroughly inappropriate. This level of settlement obviously was enacted in 1922. Hence, while the owner of a $50 perfume bottle, dropped during a customs inspection may find solace under the Act, the owner of a $5,000 Swiss watch obviously will not. Unlike the Small Claims Act, the comparable settlement provision under the FTCA[293] has been consistently amended to reflect congressional attitudes towards governmental tort liability. Apparent from the disparity in congressional concern between the settlement opportunities under the FTCA and those under the Small Claims Act, is the fact that lawmakers seem more concerned with increasing remedies for governmental torts recognized over thirty years ago than remedying negligent government actions challenged only four years ago in *Kosak*. In other words, settlement under the FTCA is altered for administrative as well as equitable reasons. Hence, prior to the Supreme Court's finding that section 2680(c) bars claims against the Customs Service it was arguable that FTCA settlement opportunities were available to the property owners in *Kosak*[294] and *Formula One*.[295] Instead, based upon a disputed reading of legislative history in *Kosak*, these same property owners are faced with an opportunity for a $1,000 settlement under the Small Claims Act.

Second, the approval of a claim for settlement seems purely discretionary. The Government has no motive to waive its sovereign immunity. As

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289. *Id.* § 3723(a)(2). To recover under 28 U.S.C. section 2672, a claimant must show a valid claim under the FTCA. Since customs seizures and detentions have been interpreted as falling under 28 U.S.C. section 2680(c)—an exception to the broad waiver of immunity under the FTCA—this remedy is unavailable.

290. 31 C.F.R. § 3.22 (1988).

291. *Id.* § 3.23.

292. 31 U.S.C. § 3723(c) (1982). Until 1982, the agency had to report to Congress for appropriations. Bermann, *supra* note 283, at 522. Today, settlements are paid out of a judgment fund. 31 U.S.C. § 1304 (1982); Bermann, *supra* note 283, at 522. Judgments and other administrative settlements are also paid out of this fund. 31 U.S.C. § 1304.

293. 38 U.S.C. § 2672 (1982).

294. 465 U.S. 848 (1984).

295. 777 F.2d 822 (2d Cir. 1985).

a result, the remedy is awarded purely as a matter of good will[296] or for political reasons,[297] in order to restore public trust in the Customs Service. Despite these weaknesses and given the unlikelihood of a judicial or legislative remedy, the Small Claims Act may provide the only true avenue of recovery for property damaged by the Customs Service.

V. CONCLUSION

Over the last seven years the role of the Customs Service has drastically changed. Traditionally a revenue raising agency, the Customs Service is now in the vanguard of narcotic and contraband enforcement.[298] To fulfill its new mission, the Customs Service devotes time and energy to the development of high-technology surveillance and detection devices.[299] Following a detailed 1982 report on damage to property seized pursuant to enforcement, the Customs Service and Congress have focused efforts on increasing the value of seized items for purposes of sale or further customs use. For instance, the Customs Service recently introduced a new concept in the custody, maintenance, and disposition of seized and forfeited property.[300] Further, the Customs Service has recently initiated a program designed to prevent the theft of detained property.[301] Despite these advancements, the owner of goods imported or searched at the border remains without a remedy for property that is damaged or lost while in Customs Service custody.

To a large extent, the Supreme Court in *Kosak* foreclosed the possibility of judicial remedies against the Government for property damage.

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296. Bermann, *supra* 283, at 522.

297. Telephone interview with Lawrence W. Hanson, Assistant Regional Counsel, United Stated Customs Service, North Central Region (March 2, 1989).

298. *See generally* CUSTOMS U.S.A., *supra* note 2; MISSION, *supra* note 3; Accomplishments, *supra* note 6.

299. ACCOMPLISHMENTS, *supra* note 6, at 9 (use of high-technology Automated Commercial Systems to provide inspectors with information to increase the efficiency of searches and seizures).

300. *See* HANDBOOK, *supra* note 10, at iii, app. B. The *Handbook* provides guidelines for a new contractor program. This program is designed to allow the Customs Service to contract with the private sector for services of storing and disposing of seized property. Provision 4.5 of the Statement of Work, appended to the *Handbook*, outlines the proper steps to be taken when goods are lost, damaged, or destroyed. *Id.* at app. B, § 4.5. Ironically, a clause in the guidelines holds the contractor and subcontractor liable for just such an occasion. It remains to be seen whether a property owner could successfully sue under a similar contract. *See, e.g.*, Schwartz v. Michigan Warehouse Co., 219 Mich. 401, 189 N.W. 1 (1920) (bonded warehouseman liable for negligence when goods damaged while in his possession).

301. ACCOMPLISHMENTS, *supra* note 6, at 10.

Though potentially available, recovery under the Tucker Act is largely inadequate and limited to specific fact situations. Questionable authority supports a limited recovery under the due process clause for depreciation caused by a constitutionally infirm seizure, forfeiture, or subsequent sale.[302] Implied-in-fact contracts of bailment are severely restricted to situations, such as those in *Alliance* or *Bielass*, where the owner of the goods can produce material evidence of a "tacit understanding" to contract.[303] On the other hand, recent Supreme Court authority suggests success under a "takings" analysis, provided that the owner is innocent of wrongdoing and the court becomes more plaintiff-oriented in its "ad hoc" approach.[304] Similarly, the preemption of most common law tort claims by the new Liability Reform Act may require judicially-relaxed proof standards of in *Bivens* actions. This would allow a broader recovery against customs officials in their individual capacities.[305]

Contrary authority, however, suggests that these remedial problems and solutions are more appropriately addressed to Congress, and not to the courts.[306] While it is highly unlikely that the Legislature can remedy this situation through enactment of private bills or congressional reference legislation, Congress may be able to effectuate a remedy through adjustments to the administrative settlement process. A modest increase in settlement amounts under the Small Claims Act, accompanied by stricter proof standards similar to those accompanying the abatement and refund scheme,[307] would serve to curtail excessive and fraudulent claims thereby reducing litigation costs, while at the same time increasing the political posture and support for Customs Service enforcement activities. Most important, the innocent victim of property damage is partially if not fully compensated.

As threats to the nation's security and welfare increase, so do the responsibilities of the Customs Service.[308] Customs is rightfully encouraged to conduct a greater number and more extensive searches of commercially shipped imports and goods carried across the border. With the ever-increasing activity of the Customs Service in mind, Congress and the judiciary should be reminded that "it is as much the duty of Govern-

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302. *See supra* notes 118-37 and accompanying text.
303. *See supra* Part II, B, 2.
304. *See supra* notes 83-117 and accompanying text.
305. *See supra* Part II, C.
306. *See, e.g.*, Kosak v. United States, 465 U.S. 848, 862 (1984).
307. *See* 19 C.F.R. §§ 158.21-.30; *supra* notes 276-81 and accompanying text.
308. *See* ACCOMPLISHMENTS, *supra* note 6, at 1.

ment to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."[309]

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309. Abraham Lincoln's First Annual Message to Congress, December 3, 1861, CONG. GLOBE, 37th Cong., 2d Sess. pt. iv, app. at 2 (1862).