THE IMPROPER EXPANSION OF LAW ENFORCEMENT OFFICERS' IMMUNITY UNDER THE FEDERAL TORT CLAIMS ACT DETENTION OF PROPERTY PROVISION: WHY IMMUNITY SHOULD NOT EXTEND TO BUREAU OF PRISONS OFFICIALS

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I. INTRODUCTION

Arnulfo Chapa filled two boxes with his personal belongings and brought them into prison, where they remained under the care of the Bureau of Prisons (BOP) during his detention as a federal prison inmate.[1] When the BOP transferred Mr. Chapa from the La Tuna Federal Correctional Institute in Texas to a federal prison camp in Louisiana,[2] the BOP was responsible for ensuring the safety of his belongings during the transfer.[3] The BOP claimed that it had taped the two boxes together and shipped them in this condition.[4] However, when Mr. Chapa contacted the shipping company, he was informed that only one of his two boxes of personal belongings had been shipped by the BOP.[5] Mr. Chapa

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I would like to express my sincere appreciation to Professors Michael P. Allen, Robert D. Batey, and Ann M. Piccard for their valuable advice and suggestions throughout my preparation of this Comment. I would also like to thank the *Stetson Law Review*; I am especially grateful to Josephine W. Thomas, Joshua P. Welsh, Suzanne M. Boy, Michael R. Sepe, and Professors Brooke J. Bowman, Bridget E. Remington, and Pamela M. Dubov of the *Law Review* for their professionalism and hard work throughout the publication process. In addition, I would like to thank my husband, Abdesslam Lahlou-Amine, whose kindness and support are instrumental in all of my endeavors.

1. *Chapa v. U.S.*, 339 F.3d 388, 389 (5th Cir. 2003).
2. Br. of Respt. at 5, *Chapa v. U.S.*, 339 F.3d 388 (5th Cir. 2003) [hereinafter *Chapa* Respt.'s Br.].
3. *Chapa*, 339 F.3d at 389.
4. *Chapa* Respt.'s Br., at 5.
5. *Id.*

subsequently brought suit against the Department of Justice under the Federal Tort Claims Act (FTCA)[6] for the BOP's negligent handling of his personal belongings, which resulted in the loss of one of the two boxes that he had placed in the BOP's care.[7] Although the FTCA was likely the only means of recovery available to Mr. Chapa,[8] he was barred from recourse under the FTCA.[9] Like most federal courts, the United States Court of Appeals for the Fifth Circuit held that BOP officials are immune from liability under the FTCA's detention of property provision.[10] This conclusion, however, is erroneous and, in the Author's opinion, derives from an improper construction of the FTCA.

The language of the FTCA provision regarding law enforcement officers' immunity with respect to the detention of property provides as follows:

> The provisions of this chapter [(28 U.S.C. §§ 2671 et seq.)] and section 1346(b) of this title shall not apply to—
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> • • •
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> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property[11] by any officer of customs or excise or any other law enforcement officer . . . .[12]

There is a split of authority in the federal circuit courts regarding whether BOP officials are law enforcement officers entitled to immunity under the FTCA.[13] In *Chapa v. U.S.*,[14] the Fifth

6. 28 U.S.C. §§ 2671–2680 (2000).

7. *Chapa*, 339 F.3d at 389.

8. *Infra* nn. 45–65 and accompanying text (explaining the lack of alternative means of relief for prisoners seeking to recover for damage to or destruction of their property during its detention by the BOP).

9. *Chapa*, 339 F.3d at 391.

10. *Infra* nn. 84–125 and accompanying text (setting forth federal precedent supporting a broad construction of the immunity provision, adopted by the majority of the federal circuit courts of appeal).

11. A 2000 amendment to the FTCA added the "or other property" clause, which some argue indicates that immunity should be broadly construed under the statute to encompass all law enforcement officers. *Infra* nn. 235–253 and accompanying text (presenting both sides of the debate surrounding the potential relevance of the recent addition of the "or other property" clause).

12. 28 U.S.C. § 2680(c) (2000) (emphasis added).

13. *Infra* nn. 67–177 and accompanying text (describing the split of authority among

Circuit followed the majority rule when it held that BOP officials were, in fact, entitled to immunity under the FTCA.[15] However, the minority rule is that the definition of a law enforcement officer under Section 2680(c) should be restricted to a narrow scope of federal employees that does not include BOP officials or any law enforcement officers who are not involved in taxation or customs.[16]

The law enforcement officer provision in Section 2680(c) should not be construed in isolation; courts must consider the provision's context to construe it properly.[17] When viewing the statute as a whole and considering the context of the law enforcement officer provision, it is evident that the meaning of the provision should be restricted to only those officers who are involved in taxation and customs duties.[18] The legislative history, while sparse, is consistent with this interpretation.[19]

While the broader issue is whether the immunity is limited or whether it extends to all law enforcement officers in general, this Comment will discuss the special circumstances that arise when inmates bring FTCA suits against BOP officials. This Comment will then demonstrate that a broad construction of the law enforcement officer provision in Section 2680(c) that encompasses BOP officials is contrary to the central purpose of the FTCA and is offensive to public policy. In effect, a broad construction precludes federal prisoners like Mr. Chapa from rightfully recovering for the negligent handling of their belongings that resulted in damage to or destruction of their personal property.

Section II of this Comment will set forth the relevant historical background,[20] which includes a brief history of the FTCA,[21] a description of the means by which alternative remedies for plain-

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the federal circuit courts of appeals regarding the construction of the law enforcement officer provision).

14. 339 F.3d 388.

15. *Id*. at 391.

16. *E.g. Kurinsky v. U.S.*, 33 F.3d 594, 597–598 (6th Cir. 1994).

17. *Id*. at 597.

18. *Id*.

19. *Infra* nn. 223–258 and accompanying text (discussing the significance of the provision's legislative history).

20. *Infra* sec. II.

21. *Infra* sec. II(A).

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tiffs like Mr. Chapa have been substantially limited,[22] and a discussion of case law construing the law enforcement officer provision of Section 2680(c).[23] Section III will present the argument against a broad construction of the provision encompassing BOP officials.[24] First, it will address principles of statutory construction.[25] Second, it will address relevant legislative history and other historical materials.[26] Third, it will present the argument that courts should not consider whether BOP officials are considered law enforcement officers in other contexts.[27] Finally, it will address the negative policy implications that result from a broad construction of the provision.[28] Section IV will conclude with a summary of the points expressed herein, concluding that FTCA immunity should not extend to BOP officials.[29]

II. HISTORICAL BACKGROUND

The history of the FTCA demonstrates that the expansion of sovereign immunity under the detention of property provision counters the main purpose behind the FTCA.[30] This improper expansion of immunity has a particularly harsh impact on federal prisoners who face increasingly limited remedies for claims arising out of the BOP's damage to or destruction of their property.[31] Finally, case law has exposed the weaknesses underlying arguments in support of a broad construction of the law enforcement officer provision.[32]

A. Brief History of the Federal Tort Claims Act

The FTCA was developed to provide plaintiffs with a remedy for torts committed by government actors.[33] It serves as a waiver

22. *Infra* sec. II(B).
23. *Infra* sec. II(C).
24. *Infra* sec. III.
25. *Infra* sec. III(A).
26. *Infra* sec. III(B).
27. *Infra* sec. III(C).
28. *Infra* sec. III(D).
29. *Infra* sec. III(D).
30. *Infra* sec. II(A).
31. *Infra* sec. II(B).
32. *Infra* sec. II(C).
33. Hervey A. Hotchkiss, *An Overview of the Federal Tort Claims Act*, 33 A.F. L. Rev. 51, 51 (1990).

of the general rule of sovereign immunity that otherwise applies in claims against the government.[34] The law enforcement officer provision discussed in this Comment is one of the thirteen exceptions to that waiver of sovereign immunity with respect to the government's detention of property under 28 U.S.C. § 2680(c), meaning that the provision restores sovereign immunity in the limited number of circumstances enumerated therein. Thus, government actors falling under the law enforcement officer exception or any of the other exceptions are immune from liability for damage done to detained property in their care.[35]

Judge Alexander Holtzoff, the primary drafter of Section 2680(c), stated that the purpose behind the provision was to prevent unnecessary lawsuits, as there were already remedies available for harm done to property detained by customs officers.[36] While the United States Supreme Court in *Kosak v. U.S.*[37] considered some of Judge Holtzoff's commentary,[38] as the dissent noted, no commentary discussed by the majority was contained in the official legislative history of the FTCA.[39]

While there is little legislative history regarding Section 2680(c), the available history indicates that the FTCA's liability exemptions were created, in part, to ensure that the government did not become overburdened by FTCA tort claims when other remedies were available to plaintiffs in such cases.[40] The legislative history is also clear that the exceptions to liability were gen-

34. *Id.*

35. 28 U.S.C. § 2680(c). A waiver of sovereign immunity such as that found in Section 2680(c) may not be broadened beyond the extent required by the language of the statute and must be strictly construed in the sovereign's favor. *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). However, the United States Supreme Court has held that the consideration of this principle provides no guidance in determining the scope of Section 2680(c) because applying a broad construction of the subsection to err on the side of immunity would run the risk of abrogating the purpose of the FTCA, which was created to permit, not preclude, government liability. *Kosak*, 465 U.S. at 854.

36. *Government Liability for Customs Officials' Negligence:* Kosak v. U.S., 67 Minn. L. Rev. 1040, 1057 (1983) (citing Sen. Jud. Comm., *Torts Claims against the U.S.: Hearings on S. 2690*, 76th Cong., 3d Sess. 38 (1940)) [hereinafter *Government Liability*].

37. 465 U.S. 848 (1984).

38. *Id.* at 867–868.

39. *Id.* at 863 (Stevens, J., dissenting). Justice Stevens noted that there was no evidence that Congress ever even received Judge Holtzoff's commentary. *Id.*

40. *See Bazuaye v. U.S.*, 83 F.3d 482, 484–485 (D.C. Cir. 1996) (citing Sen. Rpt. 79-1400 at 33 (1946); H.R. Rpt. 79-1287 at 6 (1945) (describing the reasons for the exceptions to liability established by the FTCA)).

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erally developed for two purposes, either of which is sufficient to justify immunity: (1) to preclude claims that "relate[d] to certain government activities which should be free from the threat of damage suit"; and (2) to preclude claims for which plaintiffs may obtain recovery by alternative means.[41] However, aside from these points of guidance, the legislative history does not provide much further insight into the construction of the law enforcement officer provision.[42]

B. The Inadequacy of Federal Prisoners' Alternative Means of Relief

Although the general rule is that sovereign entities are immune from civil liability,[43] the FTCA was created to constitute an exception to that immunity.[44] Because the purpose of the FTCA is to lift the immunity generally afforded to sovereign entities in cases falling under its province,[45] courts should reinstate immunity only in situations that fall squarely under the narrow exceptions enumerated within the FTCA.[46] While the legislative history provides justification for the reinstatement of sovereign immunity in cases involving "certain governmental activities which should be free from the threat of damage suit"[47] and those involving claims for which plaintiffs may obtain recovery by alternative means,[48] there is no indication that any legitimate interests are served by a broad construction of Section 2680(c).

The FTCA is a critical means of recovery for inmates because their alternative means are largely inadequate.[49] Therefore, the improper expansion of the law enforcement officer provision has

41. *Government Liability*, *supra* n. 36, at 1044–1045 (citing Sen. Rpt. 79-1400 at 33 (internal quotations omitted)).

42. *See Kosak*, 465 U.S. at 863 (Stevens, J., dissenting) (stating that the legislative history provides little assistance in the construction of Section 2680(c)).

43. Hotchkiss, *supra* n. 33, at 51.

44. *Id*.

45. *Id*.

46. *Government Liability*, *supra* n. 36, at 1043–1044.

47. *Id*. at 1044.

48. *Id*. at 1044–1045 (citing Sen. Rpt. 79-1400 at 33 (internal quotations omitted)).

49. *E.g. Federal Agency Nonacquiesence: Defining and Enforcing Constitutional Limitations on Bad Faith Agency Adjudication*, 38 Me. L. Rev. 185, 235 (1986) (explaining that inmates' options for recovery are limited because they have no constitutionally based right to an action for the negligent deprivation of property).

effectively barred inmates in certain jurisdictions from stating valid claims against the BOP and has thereby precluded recovery for their losses.

Aside from the FTCA, federal prisoners' claims[50] regarding damage to their personal property arising from the tortious conduct[51] of government officials are limited to *Bivens* claims.[52] In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[53] the United States Supreme Court established a means by which plaintiffs could challenge violations of their constitutional rights committed by the federal government.[54] Consequently, *Bivens* provides a potential means of relief for prisoners who have property damage claims against the federal government when their causes of action arise from a constitutional violation.[55] For example, the violation at issue in *Bivens* involved a federal agent who improperly searched the defendant without a warrant.[56] In *Bigbee v. U.S.*,[57] on the other hand, the United States District Court for the Western District of Wisconsin applied

50. Unlike state prisoners, federal prisoners cannot bring claims arising from the tortious conduct of federal government officials under 42 U.S.C. § 1983, the Civil Rights Act, as the statute does not provide jurisdiction for claims against the federal government; it provides jurisdiction only for claims against state governments. *Id.*

51. Plaintiffs may bring complaints against the federal government under the Tucker Act, 28 U.S.C. § 1491, for damages based on contract. However, damages based on tort are specifically excluded from the jurisdictional scope of the Tucker Act. *Id.* The Tucker Act provides jurisdiction for claims against the government only when such claims are based on an actual or implied contract; contracts implied-in-law or quasi-contracts do not give rise to federal jurisdiction under the Act. *Weisberg v. U.S. Dept. of Just.*, 745 F.2d 1476, 1494 (D.C. Cir. 1984) (holding that "jurisdiction as to contract claims against the United States under the Tucker Act extends only to actual contracts, either express or implied-in-fact"). It is worth noting that the Inmate Personal Property Record form that an inmate fills out upon entering a prison provides no contractual guarantees regarding the treatment of the inmate's property. U.S. Dept. of Just., Fed. Bureau of Prisons, *Inmate Personal Property Record*—BP-A383.058 (Aug. 1994) (containing a provision that requires the return of the form to the inmate for his or her signature upon release of the property to the inmate, and providing a "Comments" section in which the inmate may indicate any damaged or missing property).

52. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that a prisoner may sue the BOP when the BOP violates the prisoner's Fourth Amendment rights).

53. 403 U.S. 388.

54. *Id.* at 396–397.

55. *Id.* at 389–392.

56. *Id.* at 389–390.

57. 359 F. Supp. 2d 806 (W.D. Wis. 2005).

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Bivens in a case involving a federal inmate who claimed a property interest in items that were seized as contraband.[58]

The main difficulty prisoners face when making *Bivens* claims based on property damage, however, is that damage to property resulting from random searches, unpredictable acts of government officials, or even intentional conduct requires merely an adequate post-deprivation remedy to sustain scrutiny under the Due Process Clause of the Fourth Amendment.[59] Because the FTCA is considered an adequate post-deprivation remedy, it undermines the viability of *Bivens* claims for federal prisoners.[60] Furthermore, *Bivens* claims have been largely unsuccessful for plaintiffs who have brought them in federal courts.[61] *Bivens* defendants are often able to prevail on motions for summary judgment because they need only satisfy an "objective standard of reasonable belief that [the] conduct [in question] was not unconstitutional. . . ."[62] Moreover, the FTCA includes a judgment bar provision that precludes future claims based on the same matter once that matter has been resolved pursuant to an FTCA claim.[63] Al-

58. *Id.* at 807, 809 (holding that the inmate had a Fifth Amendment property interest in two stolen purses that he alleged belonged to him). It is relatively well established that inmates have a property interest in their belongings that are kept inside a federal prison. *See Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998) (holding that an inmate had a property interest in a box of belongings and that the fact that the box included legal papers also implicated the inmate's right to access to the courts); *Caldwell v. Miller*, 790 F.2d 589, 608 (7th Cir. 1986) (deciding that the inmate had a property interest in books that he brought with him to prison); *Bigbee*, 359 F. Supp. 2d at 809 (holding that a property interest attached to two purses that the prison had seized as contraband and to which the inmate claimed ownership).

59. *Bigbee*, 359 F. Supp. 2d at 810 (holding that the FTCA was an adequate post-deprivation remedy such that damage to an inmate's personal property resulting from an allegedly wrongful deprivation did not constitute a due process violation (citing *Hudson v. Palmer*, 468 U.S. 517, 533–535 (1984) (holding that a prisoner who brought a similar claim under Section 1983 for an alleged violation in state prison did not experience a due process violation, due to the availability of adequate post-deprivation remedies under state law))).

60. *Id.* (explaining that the FTCA constitutes an adequate post-deprivation remedy that satisfies due process and thereby precludes the finding of a constitutional violation).

61. William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 Admin. L.J. Am. U. 1105, 1149–1150 (1996) (stating that the fact that plaintiff victories under *Bivens* are few and far between indicates that "courts and juries are hostile to imposing personal liability upon a government employee for merely doing his or her job").

62. *Id.* at 1150.

63. 28 U.S.C. § 2676 (providing that "[t]he judgment in an action under Section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission

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though some courts have held that a future *Bivens* claim is not barred under this statute when a prior FTCA claim was dismissed for lack of subject matter jurisdiction, other courts have held that such dismissal implicates the judgment bar and precludes future *Bivens* claims based on the same facts.[64] Thus, depending on the federal inmate's jurisdiction, an unsuccessful FTCA claim could preclude the inmate's further pursuit of relief under *Bivens*.

The general unavailability of the *Bivens* remedy for prisoners who have suffered property damage at the hands of BOP officials reveals the great importance of the FTCA in providing such prisoners with a remedy. Although federal courts have yet to address this issue, if the FTCA precludes relief based on a finding of sovereign immunity under the law enforcement officer provision, then this otherwise "adequate" remedy for purposes of due process is rendered wholly inadequate. Thus, a plaintiff who brings a due process claim against the government for damage done to his or her property, and who is turned away because an adequate remedy supposedly exists under the FTCA, will be left with no recourse in a jurisdiction that applies a broad interpretation of the law enforcement officer immunity provision. This result negates the adequacy of the FTCA as a post-deprivation remedy and violates the plaintiff's due process rights. Finally, harm to personal property caused by negligence that occurs while such property is lawfully detained during an inmate's imprisonment would not likely rise to the level of a constitutional violation actionable under *Bivens*.[65]

It is evident that inmates' ability to recover under the FTCA is critical due to their lack of alternative means of recovery. This narrow avenue of relief left open to federal inmates through the

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gave rise to the claim").

64. *Compare e.g. Hallock v. Bonner*, 387 F.3d 147, 155 (2d Cir. 2004), *vacated on other grounds*, *Will v. Hallock*, 126 S. Ct. 952 (2006) (holding that the dismissal of an FTCA claim for lack of subject matter jurisdiction did not bar a future *Bivens* claim based on the same or related facts) *with e.g. Gasho v. U.S.*, 39 F.3d 1420 (9th Cir. 1994) (holding that a prior FTCA claim in which summary judgment was entered for the government barred a later *Bivens* claim).

65. *Cf. Daniels v. Williams*, 474 U.S. 327, 328 (1985) (holding that such claims do not rise to the level of a due process violation in Section 1983 suits, the state counterpart to the *Bivens* claim).

FTCA makes the broad construction of the immunity provision in Section 2680(c) even more troubling.

C. Federal Courts' Construction of the Law Enforcement Officer Provision

The United States Supreme Court has yet to squarely decide whether the law enforcement officer provision in Section 2680(c) was meant to encompass all law enforcement officers or only those involved in taxation and customs duties.[66] However, all of the federal circuit courts of appeals have, to some extent, encountered the issue.[67]

1. The Supreme Court Has Not Directly Addressed the Issue

In 1984, the Supreme Court decided *Kosak v. United States*,[68] in which the plaintiff brought an FTCA suit against a customs officer for damage that resulted from the officer's seizure and detention of the plaintiff's property.[69] In *Kosak*, the United States Supreme Court construed another aspect of Section 2680—the portion that related to the scope of the detention covered under subsection (c) of the statute.[70] The Court's first point of reference in interpreting the subsection was the plain meaning of the statutory language,[71] as courts must assume "that the legislative purpose [was] expressed by the ordinary meaning of the words used."[72]

The Court then looked to legislative history to determine that the exemption applied to customs officers.[73] Specifically, it re-

66. *Infra* sec. II(C)(1).

67. *Infra* sec. II(C)(2)–(3).

68. 465 U.S. 848.

69. *Id.* at 849. In *Kosak*, customs officers confiscated works of art from the plaintiff after he was charged with smuggling art into the United States. *Id.* Following his acquittal, the customs officers returned the art to the plaintiff, but he alleged that some of it had been harmed during its detention. *Id.* at 849–850.

70. *Id.* at 853–854. Specifically, the Court construed the words "arising in respect of . . . the detention of any goods or merchandise." *Id.* at 853 (citing 28 U.S.C. § 2680(c)). In light of principles of statutory construction and the available legislative history, the Court construed the provision broadly, holding that claims "arising in respect of " such detentions included claims "arising out of," or caused during, the detentions. *Id.* at 862.

71. *Id.* at 853.

72. *Id.* (internal citation and quotations omitted).

73. *Id.* at 855–856.

ferred to the testimony of Judge Holtzoff, the primary drafter of Section 2680(c).[74] The Court quoted the portion of Judge Holtzoff's report on the FTCA pertaining to Section 2680(c), in which he stated:

> [The proposed provision immunizes defendants in claims] arising in respect of the assessment or collection of any tax or customs duty. This exception appears in all previous drafts. It is expanded, however, so as to include immunity from liability in respect of loss in connection with the detention of goods or merchandise by any officer of customs or excise. The additional proviso has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like.[75]

The majority acknowledged the dissent's concern that Judge Holtzoff's report was not reflected in the public record and, therefore, should not be relied upon for interpretation of the statute.[76] Nevertheless, it noted the relevance of the testimony, as Judge Holtzoff was the primary drafter of Section 2680(c), and because little other "direct evidence" of congressional intent was available.[77]

The Court also cited the House Judiciary Committee regarding the immunity provision, which provided as follows:

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74. *Id*.

75. *Id*. at 856 (citing Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931)) (emphasis omitted). In addition to his work with the United States government on the FTCA, Judge Holtzoff also provided reports to England regarding a bill with language similar to that of the FTCA. *Id*. at 856 n. 12. The Court noted that the provision had not been enacted in England. *Id*. The English bill stated that plaintiffs would be barred from bringing actions "for or in respect of the loss of or any deterioration or damage occasioned to, or any delay in the release of, any goods or merchandise by reason of anything done or omitted to be done by any officer of customs and excise acting as such." *Id*. (citing Rpt. of Crown Proceedings Comm. § 11(5)(c), 17–18 (Apr. 1927)).

76. *Id*. at 863 (Stevens, J., dissenting). The dissent stated that the majority's consideration of Judge Holtzoff's statements was improper, reasoning that as a drafter, "[Judge Holtzoff was] very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed." *Id*. at 864 (internal citation and quotations omitted). The dissent further noted that a drafter's intent in drafting a statute is rarely shared with Congress in its ultimate decision to pass the legislation. *Id*. at 864 n. 2.

77. *Id*. at 857 n. 13.

> [The] exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers; admiralty and maritime torts; deliberate torts such as assault and battery; and others.[78]

The Court specifically declined, however, to determine the scope of the law enforcement officer provision as it was not directly at issue since the case involved customs officers,[79] who were clearly immune under the statute.[80]

The Court found that the legislative history provided three main justifications for exceptions to liability under the FTCA: (1) preventing certain duties and activities of the government from being disrupted by the potential for lawsuits for damages; (2) preventing the government from being sued and exposed to liability for fraudulent or excessive claims; and (3) preventing the FTCA from providing a means of recovery when remedies for the same type of claim already exist.[81]

The *Kosak* dissent disagreed with the majority's application of legislative history to the issue at bar. Justice Stevens stated that he would have limited his analysis to the language of the provision.[82] While the *Kosak* Court did not determine the proper construction of the law enforcement officer provision, it sanctioned certain means of construction. *Kosak* opened the door to considerations of the FTCA's legislative history in the interpretation of Section 2680(c).

2. The Majority of the Federal Circuit Courts of Appeals Have Broadly Construed Section 2680(c)

The United States Courts of Appeals for the Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have construed Section 2680(c) broadly so as to support the inclusion of all types of law

78. *Id*. (citing H.R. Rpt. 1287, 79th Cong., 1st Sess. 6 (1945)).

79. *Id*. at 853 n. 7.

80. *Id*. at 852–853.

81. *Id*. at 858. The Court refuted the reasoning of the Court of Appeals below, which stated that Section 2680(c) should be broadly construed so as to result in a wider application of sovereign immunity. *Id*. at 853–854 n. 9. The Court determined that the "unduly generous" immunity provision suggested by the appellate court would be contrary to the central purpose of the FTCA. *Id*.

82. *Id*. at 866–867 n. 5, 869 (Stevens, J., dissenting).

enforcement officers in the provision.[83] In addition, United States district courts in the Third and Fourth Circuits have broadly construed the provision.[84]

In 1952, the United States District Court for the District of Kansas, a court in the Tenth Circuit, decided *Chambers v. U.S.*;[85] the first federal case to address law enforcement officers' immunity under Section 2680(c).[86] In *Chambers (I)*, the court determined that an agent of the Treasury Department who had seized the plaintiff's property while carrying out duties in the Treasury's Alcohol Tax Unit was immune under the exception.[87] The way that the court applied the law in *Chambers (I)* began a trend that would be followed by the majority of subsequent courts addressing the law enforcement officer provision; it disregarded the context of the provision, stating that the plaintiff's claims "ar[ose] out of 'the detention of . . . goods or merchandise by . . . [a] law-enforcement officer. . . .'"[88] The court's use of ellipses in its explanation demonstrates its disregard for the context of the law enforcement officer provision.[89]

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83. *Hernandez v. U.S.*, 1995 WL 692982 at *4 (D. Minn. Sept. 28, 1995).

84. *See e.g. Smith v. U.S.*, 2006 U.S. Dist. LEXIS 3576 at **1–4 (D.N.J. Jan. 30, 2006) (indicating that while the Third Circuit had not decided whether the provision extends to officials not acting in a tax or customs capacity, the majority rule supports the conclusion that it does extend to BOP officials); *Buckley v. U.S.*, 2005 U.S. Dist. LEXIS 39286 at **1, 4–5 (D.S.C. July 27, 2005) (holding that while the Fourth Circuit had not considered the reasoning of the *Chapa* decision, such reasoning was persuasive, and concluding that the provision extended to BOP employees).

85. 107 F. Supp. 601 (D. Kan. 1952) [hereinafter *Chambers (I)*].

86. Todd R. Wright, *"Any Other Law-Enforcement Officer": Federal Tort Claims Act § 2680(c)*, 83 Ky. L.J. 707, 710 (1995).

87. *Chambers (I)*, 107 F. Supp. at 602–603.

88. *Id.* Four years after *Chambers (I)* was decided, the United States District Court for the District of Maryland, a court in the Fourth Circuit, decided *Jones v. FBI* and applied the same line of reasoning, holding that FBI agents were exempt under Section 2680(c) even though they were not in any way involved in taxation or customs duties. 139 F. Supp. 38, 40–42 (D. Md. 1956). The court did not supply any rationale for its holding aside from a citation to *Chambers (I)*. *Id.* at 42 (citing *Chambers (I)*, 107 F. Supp. at 601).

89. Wright, *supra* n. 86, at 711. This stance against a narrow construction of the law enforcement officer provision was reinforced in *U.S. v. Chambers*, a case decided by the United States District Court for the District of New Jersey, a court in the Third Circuit. 92 F. Supp. 2d 396 (D.N.J. 2000) [hereinafter *Chambers (II)*]. In *Chambers (II)*, DEA officers detained the plaintiff's property in the course of an official operation. *Id.* at 397. After a brief summary of the split in authority in the federal circuit courts of appeals, the district court sided with the majority and applied a literal construction of the provision that disregarded its context. *Id.* at 402–403. Citing a case from the United States District Court for the Southern District of New York, the court stated, "If [DEA agents] are not [law en-

In 1978, the Ninth Circuit decided *A-Mark, Inc. v. U.S. Secret Service Department*,[90] a case involving a plaintiff who brought an FTCA suit against the Department of the Treasury for damage to goods during detention for matters unrelated to taxation or customs.[91] The majority held that the law enforcement officer exception did not apply to the Department of Treasury in this case because the damage from which the cause of action arose was the result of negligence and not the routine detention of goods.[92] The concurring opinion, however, suggested that this application of Section 2680(c) was inappropriate because the detention in question did not occur "within the context of customs [or] tax activities."[93]

In his concurring opinion, Judge Tang suggested that the fact that Section 2680 "dwell[s] exclusively on customs and taxes" indicates that by incorporating the law enforcement officer provi-

forcement officers], it is difficult to imagine who is." *Id.* at 402 (citing *Garnay, Inc. v. M/V Lindo Maersk*, 816 F. Supp. 888, 897 (S.D.N.Y. 1993)) (internal quotations omitted).

In 1992, the United States District Court for the District of Puerto Rico, a court in the First Circuit, also sided with the majority of courts of appeals when it addressed the law enforcement officer provision in *Cardona Del Toro v. U.S.*, holding that the exception included FBI officers. 791 F. Supp. 43, 47 (D.P.R. 1992). The court pulled the "any other law enforcement officer" phrase from the statute without referring to the surrounding statutory language, indicating its literal construction of the provision without any consideration of its context. *Id.* The court relied upon a case from the Tenth Circuit that supported a broad construction of the immunity provision. *Id.* (citing *U.S. v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984)). However, that case shed no further light on any supporting rationale for a broad construction of the provision. *See 2,116 Boxes of Boned Beef*, 726 F.2d at 1491 (citing the language of Section 2680(c) and dismissing the claim without analysis). Similarly, without any supporting rationale, the *Cardona Del Toro* court expressly held that FBI inspectors not involved in taxation or customs were immune under Section 2680(c). 791 F. Supp. at 47.

90. 593 F.2d 849 (9th Cir. 1978).

91. *Id.* at 849–850.

92. *Id.* at 850. In 1979, the Ninth Circuit decided *U.S. v. Lockheed L-188 Aircraft*, holding that FAA officials not involved in taxation or customs duties were encompassed by the law enforcement officer provision of Section 2680. 656 F.2d 390, 392, 397 (9th Cir. 1979). The court held that "[S]ection 2680(c) . . . does not apply solely to loss from detention of goods by tax or customs officers, but includes actions by 'any other law enforcement officer.'" *Id.* at 397. While the court acknowledged the plaintiff's argument, which mirrored the reasoning in the *A-Mark* concurring opinion that the exception did not apply because the action did not involve customs or taxation, it held the other way without further explanation. *Id.* at 397. In a footnote, the court acknowledged that "Judge Tang, concurring in *A-Mark*, argued for the narrow reading of the exception." *Id.* at 397 n. 17. In 1984, the court decided *U.S. v. $149,345 U.S. Currency* and, in dicta, restated its holding from *Lockheed L-188 Aircraft*, that the law enforcement officer provision should not be limited to officers involved in taxation and customs duties. 747 F.2d 1278, 1283 (9th Cir. 1984).

93. *A-Mark*, 593 F.2d at 850–851 (Tang, J., concurring).

sion, Congress merely intended to acknowledge and include all federal law enforcement officers involved in taxation and customs duties in "recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes."[94] Judge Tang quoted the following portion of the Senate Report to the Legislative Reorganization Act of 1946 pertaining to Section 2680(c):

> This section specifies types of claim[s] which would not be covered by the title. They include . . . claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes; the detention of goods from customs officers . . . .[95]

Because none of the legislative history addressed a purpose for the law enforcement officer provision outside the scope of taxation or customs, Judge Tang asserted that prior courts' holdings that the provision applied broadly to all law enforcement officers were in error.[96]

The Fifth Circuit decided Mr. Chapa's case[97] in accordance with this precedent, as well as precedent within its own circuit.[98]

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94. *Id.* at 851.

95. *Id.*

96. *Id.*

97. *Chapa*, 339 F.3d 388.

98. The first case in the United States Court of Appeals for the Fifth Circuit to address the law enforcement officer provision was *Halverson v. U.S.*, a case involving a plaintiff's FTCA suit against INS officials. 972 F.2d 654, 655–656 (5th Cir. 1992). Like the other federal circuit courts of appeal that had already decided the issue, the court broadly construed Section 2680(c) and held that the INS agents were immune under the provision. *Id.* at 656. The *Halverson* court applied the same sleight of hand exhibited in *Chambers (I)*, when it used ellipses to deliberately disregard the context of the law enforcement officer provision. *Chambers (I)*, 107 F. Supp. at 601 (using ellipses to omit the contextual language of the law enforcement officer provision that would otherwise limit the "any other law enforcement officer" phrase to officers involved in taxation and customs); *Halverson*, 972 F.2d at 656 (applying the same use of an ellipsis to omit the contextual language). Specifically, the *Halverson* court stated, "We find persuasive the reasoning of the other circuits, not to mention the plain language of section 2680(c) that exempts '[a]ny claim arising in respect of . . . the detention of any goods or merchandise by . . . any other law-enforcement officer.'" *Halverson*, 972 F.2d at 656 (omissions in original).

It noted that while Section 2680(c) does not define "law enforcement officer," Section 2680(h), another immunity provision, provided the following definition of the term: "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[99] The court cited Supreme Court precedent that established that BOP officials were law enforcement officers under Section 2680(h).[100] The court proceeded with an extensive list of contexts in which BOP officials have been considered law enforcement officers.[101] Specifically, the court noted that BOP officials are "eligib[le] for Civil Service premium pay, for retirement benefits, and for survivorship annuities."[102] Also, the court noted that BOP officials are considered law enforcement officers such that upon their deaths, their family members are eligible to receive Public Safety Officers' Death Benefits,[103] and that anyone who causes a BOP official to be fatally injured on the job may be prosecuted for the crime of killing a law enforcement officer.[104] Ultimately, using what the court considered a "strict" construction of Section 2680(c), it held that BOP officials were law enforcement officers under the statute.[105]

The Eighth Circuit has repeatedly interpreted the law enforcement officer provision and has held several times that the

99. *Chapa*, 339 F.3d at 390 (citing 28 U.S.C. § 2680(h)). Subsection (h) reinstates sovereign immunity for:

> [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. *For the purpose of this subsection*, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h) (emphasis added). The court considered the broad definition provided in subsection (h) despite the subsection's express disclaimer stating that the definition was limited to application in subsection (h). *Chapa*, 339 F.3d at 390.

100. *Id*. (citing *Carlson v. Green*, 446 U.S. 14, 17, 20 (1980)).

101. *Id*.

102. *Id*. (citing 5 U.S.C. §§ 5541(3), 8331(20), and 8401(17)(D)(i) (2000)).

103. *Id*. (citing 42 U.S.C. § 3796(b)(5) (2000)).

104. *Id*. (citing 18 U.S.C. § 3592(c)(14)(D) (2000)).

105. *Id*.

provision applies to BOP officials.[106] *Hernandez v. U.S.*[107] was the first court in the Eighth Circuit to apply the law enforcement officer provision to BOP officials, immunizing them from prisoners' claims under the FTCA.[108] The *Hernandez* court relied on the stance of the majority of the federal circuit courts of appeals, stating that the courts have "read the [law enforcement officer provision] expansively."[109] The court employed much of the same analysis that was later applied by the Fifth Circuit in *Chapa*.[110]

The Eighth Circuit also cited Section 2680(h) and noted precedent holding that BOP officials were law enforcement officers for purposes of subsection (h) of the statute.[111] To make the leap from subsection (h) to subsection (c) of Section 2680, the court applied the canon of statutory construction known as *in pari materia*.[112] Accordingly, the court cited precedent from the Eighth Circuit for the proposition "that when a court interprets multiple statutes dealing with a related subject or object, the statutes are *in pari materia* and must be considered together."[113] The court found that subsections (c) and (h) were *in pari materia* because they both created exceptions from liability for law enforcement officers under the FTCA.[114] It therefore held that the same defini-

106. *E.g. Parmelee v. Carlson*, 1996 WL 64701 at *1 (8th Cir. Feb. 15, 1996) (applying the provision to BOP officials); *Cheney v. U.S.*, 972 F.2d 247 (8th Cir. 1992) (applying the provision to Food and Drug Administration (FDA) officials); *Hernandez v. U.S.*, 1995 WL 692982 (D. Minn. Sept. 28, 1995) (holding that the provision applies to BOP officials).

107. 1995 WL 692982.

108. *Id.* at *4.

109. *Id.* The court stated that the majority of the federal circuit courts "have uniformly rejected a construction of [the law enforcement officer provision] which would have limited its application to customs and excise officers or to those law enforcement officers who solely engaged in customs or excise duties," and that "[i]nstead, the phrase has been broadly construed to encompass all types of Federal law enforcement officers, whatever should be their duties." *Id.* (internal citations omitted).

110. *Compare id.* at **4–7 *with Chapa*, 339 F.3d at 389–390 (discussing the application of the definition of "law enforcement officer" provided in Section 2680(h)).

111. *Id.* at *5 (citing, *inter alia*, *Carlson*, 446 U.S. at 20, for the proposition that BOP officials are law enforcement officers under 28 U.S.C. § 2680(h)).

112. *Id.* Statutory provisions are *in pari materia* when they pertain to the same subject or relate to the same matter. *Black's Law Dictionary* 807 (Bryan A. Garner ed., 8th ed., West 2004). Statutes that are *in pari materia* are simultaneously construed to allow courts to resolve an ambiguous provision in one of the statutes by deferring to another *in pari materia* statute's resolution of the inconsistent provision at issue. *Id.*

113. *Hernandez*, 1995 WL 692982 at *5 (citing *Linquist v. Bowen*, 813 F.2d 884, 887 (8th Cir. 1987) (internal quotations omitted)).

114. *Id.*

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tion of law enforcement officers should apply to both subsections.[115]

In 2003, the Ninth Circuit decided *Bramwell v. BOP*,[116] in which the court specifically addressed the issue of whether BOP officials were law enforcement officers under Section 2680(c).[117] The court noted that the majority of the federal circuits had broadly construed the provision to include all types of law enforcement officers, not just those involved in taxation and customs duties.[118] The court also found persuasive the Fifth Circuit's decision in *Chapa*, in which the court held that because BOP officials are considered law enforcement officers under subsection (h) of Section 2680, they should also be considered law enforcement officers under subsection (c).[119]

In addition to the *in pari materia* reasoning presented in *Chapa*, the *Bramwell* court also agreed with *Chapa*'s rationale

115. *Id*. In addition, the court noted that BOP officials were considered law enforcement officers in several other contexts such as "for Civil Service premium pay, for retirement benefits and for survivorship annuities." *Id.* The court was further influenced by its perceived obligation to interpret a provision implicating sovereign immunity "in favor of the sovereign [d]efendant." *Id*. at *6.

A similar rationale was applied by the United States District Court for the District of Minnesota in 1998 when it decided *Farmer v. Jacobsen*, 1998 WL 957237 (D. Minn. Nov. 30, 1998). While the *Farmer* court maintained that the plain language of the statute should be the primary source for its construction, it stated that it could also consider other indications of legislative intent "because the plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Id*. at *4 (citing *Watt v. Alaska*, 451 U.S. 259, 266 (1981)) (internal citation and quotations omitted). The court also noted that the definition of law enforcement officers under Section 2680(h) encompassed BOP officials. *Id*. at **4–5 (citing *Carlson*, 446 U.S. at 20). Accordingly, the court held that subsections (c) and (h) were *in pari materia* and that the same definition of law enforcement officer should be applied to both. *Id*. at *5. The court further noted the other contexts in which BOP officials were considered law enforcement officers. *Id*. (setting forth the same list that the *Hernandez* court provided in 1995 WL 692982 at **4–6). Overall, the district court in *Farmer* concluded that in order for BOP officials to effectively manage their daily affairs in prison facilities, they must be able to conduct investigations and carry out procedures in accordance with their own regulations. *Id*. at *6.

Worth noting is the *Farmer* court's interesting observation that Section 2680(c) placed a hyphen in the term "law-enforcement officer," while no other provisions in the section placed a hyphen in the term. *Id*. at *2, n. 3. It noted that no other courts had explored the significance, if any, of this inconsistency and concluded that the discrepancy had no apparent relevance. *Id*.

116. 348 F.3d 804 (9th Cir. 2003).

117. *Id*.

118. *Id*. at 806–807.

119. *Id*. at 807 (citing *Chapa*, 339 F.3d at 390).

considering other contexts in which the term "law enforcement officer" had been applied to BOP officials.[120] In consideration of these rationales, the *Bramwell* court sided with the majority of the federal circuit courts and held that the law enforcement officer provision included BOP officials.[121]

In 1986, the United States District Court for the Southern District of Florida, a district court in the Eleventh Circuit, decided *Milburn v. U.S.*,[122] a case involving a plaintiff's suit against United States Marshals who allegedly took custody of an aircraft and improperly turned it over to foreign authorities.[123] Applying what it referred to as a "plain language" construction of the law enforcement officer provision, the court held that the Marshals were immune from suit simply due to their status as law enforcement officers, regardless of their involvement in taxation or customs.[124] In 1991, the Eleventh Circuit adopted the *Milburn*

120. *Id.* (citing *Chapa*, 339 F.3d at 390); *supra* nn. 97–105 and accompanying text (setting forth the *Chapa* court's list of other contexts in which it noted that BOP officials were considered law enforcement officers).

121. *Id.* United States District Courts in the Tenth Circuit and the Tenth Circuit itself have likewise followed the majority. However, these courts have failed to provide any substantial justification or support for this position. In 2000, the United States District Court for the District of Kansas, a court in the Tenth Circuit, decided *Dennison v. U.S.*, an unreported decision in which the court held that BOP officials were law enforcement officers under Section 2680(c). 2000 WL 206317 *1 (D. Kan. Jan. 14, 2000). Citing *Parmelee*, *Farmer*, and *Hernandez*, the court stated that "every court to address the issue has held that prison officials are considered 'other law enforcement officer[s]' under Section 2680(c)." *Id.* at *3. The court further stated that the majority of the federal circuit courts of appeals likewise supported a broad construction of the law enforcement officer provision. *Id.* Based on this strong precedent in favor of a broad construction, the court held that BOP officials were immune under the FTCA. *Id.*

Later district court decisions in the Tenth Circuit echoed the reasoning of the *Dennison* court. *E.g. Wilson v. U.S.*, 2001 WL 761204 at *2 (D. Kan. June 26, 2001) (holding that BOP officials were law enforcement officers under Section 2680(c) without providing any supporting rationale); *Johnson v. U.S.*, 2000 WL 968795 at **2–4 (D. Kan. June 27, 2000) (holding that BOP officials were law enforcement officers under Section 2680(c) and that the provision was not limited to officers involved in taxation or customs, but failing to provide any supporting rationale for its decision).

The Tenth Circuit endorsed these district court holdings when it decided *Hatten v. White* in 2002, in which it applied Section 2680(c) to BOP officials, finding that they were protected as law enforcement officers under the provision. 275 F.3d 1208, 1210 (10th Cir. 2002). *Hatten* did not provide any additional rationale or discussion regarding this interpretation. *Id.*

122. 647 F. Supp. 1521 (S.D. Fla. 1986).

123. *Id.* at 1523–1524.

124. *Id.* at 1524–1525. The *Milburn* court also found persuasive the Supreme Court's consideration of Judge Holtzoff's statements regarding Section 2680(c) in *Kosak*, specifi-

court's reasoning when it, too, broadly construed the law enforcement officer provision.[125]

3. The Minority Rule Favors a Limited Construction of Section 2680(c)

The Sixth, Seventh, and District of Columbia Circuits have construed Section 2680(c) narrowly so as to limit it to officers involved in taxation or customs duties.[126]

In 1994, the Sixth Circuit decided *Kurinsky v. U.S.*,[127] in which it held that FBI agents were not law enforcement officers under section 2680(c).[128] The FBI activity at issue in *Kurinsky* did not involve taxation or customs.[129] Relying on Supreme Court precedent, the *Kurinsky* court held that serious indications of contrary intent exhibited by legislative history would be required in order to construe the statute in a way that was inconsistent with its plain meaning.[130] The court, therefore, began its analysis by

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cally his statement that Section 2680(c) "has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like." *Id.* at 1524 (citing *Kosak*, 465 U.S. at 856 (citing Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931)) (emphasis omitted)). The court further stated that Section 2680(c) was created to limit the government's liability for improperly conducted seizures, thereby forcing claimants to use other statutory means of recovery in forfeiture cases. *Id.* at 1525 (citing *$149,345 U.S. Currency*, 747 F.2d at 1285).

125. *Schlaebitz v. U.S. Dept. of Just.*, 924 F.2d 193, 194–195 (11th Cir. 1991). In *Schlaebitz*, the court held that U.S. Marshals who had seized the plaintiff's property were entitled to immunity under Section 2680(c). Although the court cited precedent for its decision, it did not supply a supporting rationale for its holding. *Id.*

126. *Kurinsky v. U.S.*, 33 F.3d 594 (6th Cir. 1994); *Ortloff v. U.S.*, 33 F.3d 652 (7th Cir. 2003); *Bazuaye v. U.S.*, 83 F.3d 482 (D.C. Cir. 1996).

127. 33 F.3d 594.

128. *Id.* at 598. Before the Sixth Circuit decided *Kurinsky*, its decision was foreshadowed in *Van Buskirk v. U.S.*, a case in which the United States District Court for the Eastern District of Tennessee, a court within the Sixth Circuit, ultimately determined that the FTCA did not apply for reasons unrelated to the law enforcement officer exception, but stated in dicta that despite its "opinion that subsection (c) [was] not confined to activities of Government officers in connection with tax[ation] and customs duties," the plaintiffs had presented an argument "*with some plausibility to the contrary*." 206 F. Supp. 553, 556 (E.D. Tenn. 1962) (emphasis added); *see also* Wright, *supra* n. 86, at 713–715 (suggesting that despite its ultimate opinion that the law enforcement officer provision should be broadly construed, *Van Buskirk* set the stage for later courts to consider the argument against a broad construction by noting the "plausibility" of such an argument).

129. *Kurinsky*, 33 F.3d at 596.

130. *Id.* (citing *U.S. v. Johnson*, 855 F.2d 299 (6th Cir. 1988), and *Garcia v. U.S.*, 469 U.S. 70, 75 (1984)).

addressing several means of determining the plain meaning of the statute.[131]

The court construed the statute in accordance with the principle of *ejusdem generis*, the method of statutory construction whereby general terms are limited by the meaning of surrounding specific terms.[132] The court simultaneously considered the similar principle of *noscitur a sociis*, by which general terms are construed in light of the context of the words surrounding them.[133] It determined under both of these methods that Congress intended to limit the law enforcement officer provision to officers involved in taxation and customs duties because language regarding such duties pervaded the provision.[134]

In further support of this interpretation of the provision's plain meaning, the *Kurinsky* court cited the Senate Report to the Legislative Reorganization Act of 1946 for the proposition that immunity under Section 2680(c) should extend to "claims [that] relate to certain governmental activities [that] should be free from the threat of damage suit, or for which adequate remedies are already available."[135] The report further provided that the exceptions "cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; [and] the detention of goods by customs officers . . . ."[136]

The *Kurinsky* court also found persuasive Judge Holtzoff's commentary to the Senate Subcommittee regarding the FTCA's passage.[137] Specifically, the court considered the following statement:

> [Section 2680(c)] 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 cus-

131. *Id*.

132. *Id*. at 596–597.

133. *Id*. at 597.

134. *Id*. The court explained that the provision was nonetheless necessary because many different types of law enforcement officers may periodically engage in duties related to taxation or customs, and when they do, they should be protected from liability under Section 2680(c). *Id*. (citing *A-Mark*, 593 F.2d at 850–851 (Tang, J., concurring)).

135. *Id*. at 597–598 (quoting Sen. Rpt. 79-1400 at 33, as cited in *A-Mark*, 593 F.2d at 851 (Tang, J., concurring)).

136. *Id*. at 598 (quoting Sen. Rpt. 79-1400 at 33, as cited in *A-Mark*, 593 F.2d at 851 (Tang, J., concurring)).

137. *Id*.

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> toms 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.[138]

Pursuant to what the court considered to be the plain meaning of the statute,[139] it concluded that Section 2680(c) did not apply to law enforcement officers in general and was restricted to officers involved in taxation and customs duties.[140] The court disregarded what had become an overwhelming amount of precedent favoring a broad construction of Section 2680(c) by noting that the cases forming such precedent had provided little analysis to support a broad construction.[141] The court held that its in-depth analysis of the issue compelled a finding that Section 2680(c) did not encompass all law enforcement officers.[142]

In 2003, the United States Court of Appeals for the Seventh Circuit decided *Ortloff v. U.S.*[143] and joined the minority of federal jurisdictions favoring a narrow construction of Section 2680(c).[144] Specifically, the court held that BOP officials were not law enforcement officers under the FTCA liability exception.[145] The court emphasized the importance of viewing the law enforcement officer provision in context, applying the statutory construction

138. *Id.* (citing *Formula One Motors, Ltd. v. U.S.*, 777 F.2d 822 (2d Cir. 1985) (Oakes, J., concurring) (quoting *Tort Claims against the U.S.*: *Hearings on S. 2690*, 76th Cong., 3d Sess. 38 (1940))).

139. *Kurinsky*, 33 F.3d at 597. The majority of courts relying upon a plain meaning argument have suggested that the plain meaning of the statute leads to a broad construction encompassing all law enforcement officers. *E.g. Milburn*, 647 F. Supp. at 1524–1525.

140. *Id.* at 597. In arriving at its decision, the court also relied upon United States Supreme Court precedent requiring statutes to be construed in their entirety and not in isolation. *Id.* (citing *U.S. v. Morton*, 467 U.S. 822, 828 (1984)). In doing so, the court noted that Section 2680(c) addressed the "detention" of property as opposed to the "seizure" of property. *Id.* It reasoned that a detention is typically considered a "period of temporary custody or delay" and is thus more closely tied to customs activities than a "seizure," which is more permanent and is typically the consequence of a violation of the law. *Id.* A seizure is the type of deprivation of property typically associated with law enforcement officers. *Id.* Based on this reasoning, the court held that Congress' characterization of the deprivation of property as a "detention," as opposed to a "seizure," was a further indication that it intended the provision to be restricted to those officers involved in taxation and customs. *Id.*

141. *Id.*

142. *Id.*

143. 335 F.3d 652.

144. *Id.* at 658.

145. *Id.*

principles of *ejusdem generis* and *noscitur a sociis*.[146] Considering these principles, the court held that the language in Section 2680(c) regarding taxation and customs limited the law enforcement officer provision at the end of the subsection.[147]

The court also noted that Section 2680(c) exempted certain types of actions for which plaintiffs could recover under alternative theories of relief, but asserted that plaintiffs suing law enforcement officers not involved in taxation or customs duties had no alternative means of recovery.[148] In a slippery slope argument, the court also pointed out that by allowing Section 2680(c) to encompass all law enforcement officers, the waiver would apply to the majority of actions against federal officials because many of them could be considered law enforcement officers of some type.[149] The court reasoned that a broad construction of the law enforcement officer provision would "swallow up Congress' waiver of immunity" for which the FTCA was enacted.[150]

Finally, the *Ortloff* court suggested that while it had joined the minority of federal circuit courts of appeals with respect to this issue, the courts espousing the majority view had not yet addressed the matter with a sufficiently sophisticated analysis.[151] It further stated that the courts that had engaged in a sophisticated analysis of the issue had all held in favor of a narrow construction of the law enforcement officer provision.[152]

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146. *Id*. at 658–659.

147. *Id*. at 659. Citing Supreme Court precedent, the court presented an additional argument in favor of a limited construction of the law enforcement officer provision. *Id*. (citing *Conn. Natl. Bank v. Germain*, 503 U.S. 249, 253 (1992)). This reasoning was initially presented in *Bazuaye*, 83 F.3d at 484. Specifically, the court applied the principle that when construing a statute, a court should avoid interpreting the statute in such a way as to render part of its language superfluous. *Ortloff*, 335 F.3d at 659 (citing *Conn. Natl. Bank*, 503 U.S. at 253). Applying a broad construction of the law enforcement officer provision in Section 2680(c) would render the "any officer of customs or excise" portion of the statute superfluous. *Id.* Therefore, the court held that the law enforcement officer provision should be limited to officers involved in taxation or customs duties. *Id.*

148. *Id*.

149. *Id*.

150. *Id*. The court referred to the "alphabet soup" of American government agencies including "the DEA, EPA, FBI, FDA, FTC, INS, OSHA, SEC, or USDA, to name a few," members of which could erroneously be considered law enforcement officers by courts that mistakenly apply an overly broad construction of the statute. *Id.*

151. *Id*. at 659–660.

152. *Id*. The court cited to *Kurinsky* and *Bazuaye* for what it considered to be a sophisticated analysis of the construction of the law enforcement officer provision. *Id*. Notably, both the *Kurinsky* and *Bazuaye* courts decided that Section 2680(c) did not apply broadly

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In 1996, the United States Court of Appeals for the District of Columbia Circuit decided *Bazuaye v. U.S.*,[153] a case of first impression in that circuit regarding the construction of the law enforcement officer provision.[154] *Bazuaye* involved a plaintiff's FTCA suit against a postal inspector.[155] The *Bazuaye* court held that postal inspectors were not law enforcement officers under Section 2680(c).[156] Applying *ejusdem generis* and *noscitur a sociis*, the court determined that the language of Section 2680(c) discussing tax and customs duties limited the meaning of the law enforcement officer provision.[157]

The court then discussed historical materials that were cited in precedent, such as the statements made by Judge Holtzoff.[158] The court quoted Judge Holtzoff's assertions that Section 2680(c) was drafted to create immunity under specific limited circumstances.[159] While Judge Holtzoff's statements, when presented in their entirety as the *Bazuaye* court presented them, might make a stronger case for the proposition that the law enforcement officer provision should be broadly construed, the *Bazuaye* court rejected any attempt to parse his statements.[160] The court concluded that the statements should be given little, if any, weight in the construction of the provision because Judge Holtzoff made the statements fifteen years prior to Congress' enactment of the FTCA.[161] Further, the court noted that there is no evidence that Congress was ever made aware of Judge Holtzoff's statements, nor is there evidence that Congress relied upon his statement in any way when voting on and enacting the provision.[162]

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to all law enforcement officers. *Kurinsky*, 33 F.3d at 598; *Bazuaye*, 83 F.3d at 484.

153. 83 F.3d 482.

154. *Id.* at 483.

155. *Id.*

156. *Id.* at 484.

157. *Id.* The court also discussed principles of sovereign immunity. *Id.* While it could be argued that such principles suggest a broad construction of the statute in favor of more widespread immunity, the court noted that the Supreme Court specifically foreclosed that argument in *Kosak* when it stated that such principles were not helpful in construing section 2680(c). *Id.* (citing *Kosak*, 465 U.S. at 854 n. 9).

158. *Id.*

159. *Supra* nn. 75, 138 and accompanying text (setting forth Judge Holtzoff's statements regarding the bases for the exceptions to the FTCA).

160. *Bazuaye*, 83 F.3d at 484.

161. *Id.*

162. *Id.*

By contrast, the court considered reports from the Senate and House Committees to be more persuasive.[163] It cited to the following portion of such reports:

> [The] exceptions covering "claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers; admiralty and maritime torts; deliberate torts such as assault and battery; and others' were meant to exempt from the FTCA 'certain governmental activities" [that] either "should be free from the threat of damage suits or for which adequate remedies are already available."[164]

The court determined that while there were adequate remedies available to plaintiffs whose causes of action arose from the mistreatment of their property by officers involved in taxation or customs at the time that the FTCA was enacted (alternative means of relief that are still available today), no such remedies were available to plaintiffs bringing tort claims against the BOP.[165] In light of the foregoing reasoning, the court held that the law enforcement officer provision should be narrowly construed, limiting it to officers involved in taxation or customs.[166]

4. No Court in the Second or Federal Circuits Has Expressly Addressed the Construction of the Law Enforcement Officer Provision

While the United States Courts of Appeals for the Second and Federal Circuits have both applied Section 2680(c), neither has expressly decided whether the law enforcement officer provision applies to officers not involved in taxation or customs duties.[167] Rather, both circuits have found that when law enforcement officers' activities are sufficiently similar to the duties of officers involved in taxation or customs, an analogy is appropriate and such

163. *Id*. at 484–485.
164. *Id*. at 485 (citing Sen. Rpt. 79-1400 at 33; H.R. Rpt. 79-1287 at 6).
165. *Id*. at 485–486.
166. *Id*. at 486.
167. *Formula One Motors*, 777 F.2d at 822; *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988).

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officers should, therefore, be granted immunity under Section 2680(c).[168]

In 1985, the Second Circuit decided *Formula One Motors, Ltd. v. United States*,[169] in which the court stated in dicta that Section 2680(c) should be narrowly construed in accordance with the principles of *ejusdem generis*.[170] However, the court's holding that the DEA officers in question did constitute law enforcement officers under Section 2680(c) was a result of the court's finding that their actions were akin to those of customs officers, who were clearly immune under Section 2680(c).[171] The court thus interpreted the law enforcement officer provision to apply to officers involved in taxation or customs duties.[172] While the majority expressly declined to decide whether Section 2680(c) applied to law enforcement officers who were not involved in taxation or customs duties,[173] Judge Oakes concurred to address this issue and to suggest that Section 2680(c) should not be applied broadly to all law enforcement officers.[174]

In 1988, the Federal Circuit decided *Ysasi v. Rivkind*[175] and held that INS officials were immune from FTCA claims regarding

168. *Id*.

169. 777 F.2d 822 (2d Cir. 1985).

170. *Id*. at 823.

171. *Id*. at 823–824. The DEA officers in *Formula One* had searched and seized an automobile that was in a container and had been shipped overseas to the United States, to determine whether the automobile contained illegal drugs. *Id*. at 824. The court held that the DEA officers' actions coupled with their purpose for such actions were akin to those of customs officials who were immune under Section 2680(c). *Id*.

172. *Id*.

173. *Id*. at 823–824.

174. *Id*. at 825 (Oakes, J., concurring). Quoting Judge Tang's concurring opinion in *A-Mark*, Judge Oakes stated that "[t]he 'any other law-enforcement officer' phrase should be viewed as Congress' recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes." *Id*. (quoting *A-Mark*, 593 F.2d at 850–851 (Tang, J., concurring)). Judge Oakes also relied upon the available legislative history regarding Section 2680(c). *Id*. Specifically, he cited to the House Judiciary Committee's characterization of the provision as one that covered "the assessment or collection of taxes or assessments; [and] the detention of goods by customs officers. . . ." *Id*. (citing H.R. Rpt. 79-1287 at 6).

Judge Oakes agreed with the position of the majority of the courts of appeals because he believed that the DEA officers acting in their customs-related capacity were precisely the type of law enforcement officers that Congress envisioned would be protected under Section 2680(c). *Id*. However, he emphasized that "where no nexus exists between customs activity and the act complained of, [he] would hold that section 2680(c) does not bar recovery." *Id*.

175. 856 F.2d 1520.

the detention of property under the law enforcement officer exception.[176] The court's holding, however, cannot be considered as favoring an all-encompassing construction of Section 2680(c) because the court reasoned that INS officials' duties were similar to those of customs officers and, therefore, they should enjoy the same immunity under the FTCA.[177]

III. THE ARGUMENT AGAINST A BROAD CONSTRUCTION OF THE LAW ENFORCEMENT OFFICER PROVISION

The case law clearly indicates an awareness of the problems stemming from a broad construction of the law enforcement officer provision of Section 2680(c). While most courts have not addressed the issue in depth, applying a literal interpretation of the provision and disregarding its context,[178] some have applied a more exacting analysis that evidences the lack of a well-reasoned argument for a broad construction of the provision.[179]

Part A of this section will analyze the law enforcement officer provision under various theories of statutory construction, all of which have been applied by federal courts that have addressed the issue.[180] Part B will discuss the legislative history and other historical materials regarding the purpose of Section 2680(c) and the law enforcement officer exception.[181] Part C will explain why courts should not find persuasive the fact that BOP officials are considered law enforcement officers in other contexts for purposes of construing Section 2680(c).[182] Finally, Part D will describe the

176. *Id*. at 1525.

177. *Id*. Although the court stated in dicta that prior decisions finding that Section 2680(c) applied broadly to law enforcement officers beyond those involved in taxation and customs were persuasive, it did not expressly decide the case in favor of a broad construction of the statute. *Id*. In fact, it noted that a broad construction of the "any other law enforcement officer" provision would render the language describing specific types of law enforcement officers (those involved in taxation or customs) superfluous. *Id*. at 1524–1525.

178. *See e.g. Chapa*, 339 F.3d at 388–390 (concluding that the law enforcement officer provision encompassed BOP officials and noting that BOP officials were also considered law enforcement officers in other contexts).

179. *E.g. Kurinsky*, 33 F.3d at 597 (finding that a sophisticated analysis yields the inevitable result that Section 2680(c) should be narrowly construed).

180. *Infra* nn. 184–222 and accompanying text.

181. *Infra* nn. 223–258 and accompanying text.

182. *Infra* nn. 259–263 and accompanying text.

negative policy implications that result from a broad construction of Section 2680(c) encompassing BOP officials.[183]

A. Applicable Canons of Statutory Construction Compel a Limited Construction of the Law Enforcement Officer Provision

The most authoritative form of statutory interpretation is that found in the "plain meaning" of a statute.[184] However, when the plain meaning of the statute is unclear or ambiguous, a court may apply canons of statutory construction to determine the statute's meaning.[185] The canons of statutory construction applicable to this discussion include *ejusdem generis*,[186] *noscitur a sociis*,[187] and *in pari materia*.[188]

While the courts are in agreement that the plain meaning of a statute is the best source of statutory interpretation,[189] the plain meaning doctrine has not been applied consistently throughout the courts with respect to the law enforcement officer provision.[190] Under the guise of a plain meaning construction,

183. *Infra* nn. 264–274 and accompanying text.

184. *Kosak*, 465 U.S. at 853. In *Kosak*, the Court stated that it must "assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Id*. (internal citation and quotations omitted).

185. *Helvering v. Hammel*, 311 U.S. 504, 510–511 (1941) (holding that "courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results, or would thwart the obvious purpose of the statute" (internal citations omitted)). The Court has held that although Congress' intent in enacting a statute is generally determined "by giving the words their natural significance," if doing so results in an "unreasonable" construction of the statute "plainly at variance with the policy of the legislation as a whole," the application of various means of statutory construction is appropriate. *Takao Ozawa v. U.S.*, 260 U.S. 178, 194 (1922). Clearly, expanding immunity under the law enforcement officer provision in Section 2680(c) yields an unreasonable result and is at odds with the central purpose of the FTCA. Thus, the application of canons of statutory construction is appropriate when construing the law enforcement provision.

186. *E.g. Kurisnky*, 33 F.3d at 596–597. *Infra* nn. 197–207 and accompanying text (discussing *ejusdem generis* as a canon of statutory construction).

187. *E.g. Kurisnky*, 33 F.3d at 596–597. *Infra* nn. 208–210 and accompanying text (discussing *noscitur a sociis* as a canon of statutory construction).

188. Michael Sinclair, *A Guide to Statutory Interpretation* 107 (Lexis Publg. 2000). *Infra* nn. 211–222 and accompanying text (discussing *in pari materia* as a canon of statutory construction).

189. *E.g. Kosak*, 465 U.S. at 853 (holding that the plain meaning of the statute must govern its interpretation); *U.S. v. Fisher*, 10 F.3d 115, 120 (3d Cir. 1993) (holding that any question of statutory interpretation that can be answered from the face of the statute must not be subjected to other means of interpretation).

190. Sinclair, *supra* n. 188, at 107.

courts could mistakenly interpret the law enforcement officer provision without considering the context of its surrounding language or the overall purposes of the FTCA.[191] However, context is essential to construing a statute's meaning.[192] Although the majority of the federal circuit courts have asserted that they have correctly interpreted the law enforcement officer provision by considering its "plain meaning" in isolation from the rest of the statute,[193] the Supreme Court has repeatedly held that statutory language must be construed in context.[194] As the application of the following methods of statutory construction demonstrate,[195] context is critical in construing the law enforcement officer provision.[196] When considering the law enforcement officer provision in light of its context, it is clear that the provision should not encompass all officers regardless of the nature of their duties; rather, it should be restricted to those involved in taxation and customs.

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191. *Kurinsky*, 33 F.3d at 596–597.

192. *See generally* Sinclair, *supra* n. 188, at ch. 9 (explaining the various canons of statutory construction and emphasizing the important role that context plays in interpreting statutes).

193. *Supra* nn. 83–125 and accompanying text (providing a summary of the federal circuit courts of appeals that have broadly construed the law enforcement officer provision so as to include BOP officials).

194. *E.g. Holloway v. U.S.*, 526 U.S. 1, 7 (1999); *Bailey v. U.S.*, 516 U.S. 137, 150 (1995).

195. The application of text-based canons of statutory construction, while a seemingly benign attempt to interpret statutory language, is not an uncontroversial practice. Professor Karl Llewellyn has argued against the application of canons of statutory construction, claiming that they are used merely to "justify results reached on other grounds." Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647, 647–648 (1992). In conflict with Professor Llewellyn's harsh critiques of the canons of statutory construction, United States Supreme Court Justice Antonin Scalia strongly advocates their use, considering them more objective and accurate than sparse statements from a statute's legislative history that fail to demonstrate the intent of the entire legislative body that enacted the statute. Christian E. Mammen, *Using Legislative History in American Statutory Interpretation* 161–166 (Kluwer Law Intl. 2002); *see generally* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton U. Press 1997). Along these lines, it is worth noting that although the application of *ejusdem generis* and *noscitur a sociis* supports the proposition that Section 2680(c) does not broadly encompass all law enforcement officers, an *in pari materia* approach suggests the contrary result, as noted in *Bramwell*, 348 F.3d at 807.

196. The *Kurinsky* court held that the plain meaning of the Section 2680(c) was such that it did not include law enforcement officers except those involved in taxation and customs duties. 33 F.3d at 598.

1. Ejusdem Generis *and* Noscitur a Sociis *Analyses Reveal the Provision's Limited Scope*

Ejusdem generis is a canon of construction that is applied "when a general word or phrase follows a list of specifics."[197] It required that "the general word or phrase . . . be interpreted to include only items of the same type as those listed."[198] Under this canon of construction, Section 2680(c)'s specific references to taxation and customs officials should be interpreted so as to limit the breadth of the general term, "any other law enforcement officer," thereby including only those officers involved in taxation and customs.[199] Section 2680(c) relates entirely to taxation and customs duties with the sole exception of the final law enforcement officer provision, thus indicating a clear intent to limit the provision to those officers involved in taxation or customs duties.[200]

An *ejusdem generis* analysis is generally conducted in several steps.[201] First, the specifically enumerated items are separated from the general items.[202] In an analysis of the law enforcement officer provision, this step involves identifying the "any other law enforcement officer" catch-all phrase and separating it from its specific counterparts.[203] Second, potential characteristics that the specific items have in common must be identified.[204] In this case, all items enumerated in the list at issue in Section 2680(c) pertain to officers involved in taxation or customs duties. The third step involves connecting these common characteristics to the general language provided in the statute.[205] Applying this step leads to the inevitable construction of the statute that limits the "any other law enforcement officer" provision to encompass only those

197. *Black's Law Dictionary*, *supra* n. 112, at 556. The *Kurinsky* court adopted the *Black's Law Dictionary* definitions of both *ejusdem generis* and *noscitur a sociis* in its analysis. *Kurinsky*, 33 F.3d at 596–597.

198. *Id*.

199. *Id*.

200. *Id*.

201. William P. Statsky, *Legislative Analysis: How to Use Statutes & Regulations* 100–101 (West 1975) (suggesting the four-step procedure discussed in the text for applying *ejusdem generis*).

202. *Id*. at 100.

203. *Id*.

204. *Id*. Statsky suggests deriving all possible common characteristics before evaluating the possibility that any or all of them might limit the scope of the general term. *Id*. at 103.

205. *Id*. at 101–102.

officers who are involved in taxation or customs duties.[206] The fourth and final step involves an evaluation of the results to determine whether they are logical and in accordance with the legislative intent behind the statute.[207] Here, no compelling need for BOP officials' immunity is evident, and the legislature has left no indication that it even considered reinstating sovereign immunity for all law enforcement officers regardless of their duties. Particularly, in cases like Mr. Chapa's, involving prisoners' claims against the BOP based on property damage, failure to apply context-oriented canons of construction yields an especially unjust result.

Closely related to *ejusdem generis* is *noscitur a sociis*, a canon of statutory construction that is also context-based.[208] *Noscitur a sociis* operates to construe unclear statutory language in light of "the words immediately surrounding it."[209] Interpreting the law enforcement officer provision in accordance with this principle of statutory construction demands a consideration of the provision's surrounding terms. Due to the provision's strong context of taxation and customs, it would be illogical to conclude that Congress intended that the provision be broadly construed.[210] Rather, the provision must be limited by the taxation and customs context and, therefore, must not include BOP officials.

2. In Pari Materia *Was Applied Improperly by Courts That Have Broadly Construed the Immunity Provision*

The canon of statutory construction known as *in pari materia* is defined as referring to the "same subject" or "relating to the

206. *Id.*

207. *Id.* at 102. After generating all possible constructions of the statute, Statsky suggests referring to legislative history to determine whether any of the possibilities are in accordance with what appears to have been the legislative intent behind the statute in question. *Id.* at 103.

208. *Black's Law Dictionary*, *supra* n. 112, at 1087.

209. *Id.*

210. *See Kurinsky*, 33 F.3d at 597 (holding that under *noscitur a sociis*, the statute should be narrowly construed so as to foreclose its application to all types of law enforcement officers). Also noteworthy under both the principles of *ejusdem generis* and *noscitur a sociis* is the *Kurinsky* court's observation that Section 2680(c) refers to the "detention" of property as opposed to the "seizure" of property. *Id.* While the latter seems to implicate the duties of law enforcement officers in general, the former seems to implicate a more limited scope of law enforcement officers, particularly those involved in customs duties. *Id.*

same matter."[211] The definition further provides that "statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject."[212] Unlike the principles of *ejusdem generis* and *noscitur a sociis*, the canon of *in pari materia* could be applied to lead to the conclusion that Section 2680(c) should encompass all law enforcement officers. However, the application of this canon of construction is precluded by the express language of Section 2680(h).[213] Although Section 2680(h) defines the term "investigative or law enforcement officer," it prefaces that definition with the phrase, "[f]or the purpose of this subsection," thus expressly and definitively limiting the scope of the definition's application.[214]

Nevertheless, both the *Hernandez* and *Chapa* courts applied *in pari materia* in support of a conclusion that the law enforcement officer provision in Section 2680(c) should encompass law enforcement officers in general.[215] They both noted that the term "law enforcement officer" was defined in Section 2680(h) as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[216] Under the principle of *in pari materia*, they held that the definition under subsection (h) should be applied to subsection (c).[217]

Although these courts applied *in pari materia* in accordance with its definition, they have come to erroneous conclusions. Notwithstanding the fact that an *in pari materia* analysis is specifically precluded by the language of subsection (h), the context created by the pervasive language regarding taxation and customs duties in subsection (c) nullifies any argument for a broad construction based on *in pari materia*.

If the legislature had chosen to omit the "any other law enforcement officer" language in Section 2680(c), it would not have

211. *Black's Law Dictionary*, *supra* n. 112, at 807.
212. *Id*.
213. 28 U.S.C. § 2680(h). The text of Section 2680(h) is provided *supra* n. 99.
214. *Id*.
215. *Chapa*, 339 F.3d at 389–390; *Hernandez*, 1995 WL 692982 at **4–5.
216. *Chapa*, 339 F.3d at 389–390 (citing 28 U.S.C § 2680(h)); *Hernandez*, 1995 WL 692982 at **4–5 (citing 28 U.S.C § 2680(h)).
217. *Chapa*, 339 F.3d at 389–390; *Hernandez*, 1995 WL 692982 at **4–5.

protected all officers involved in taxation or customs duties because many types of federal officers occasionally engage in activities akin to those regularly carried out by taxation and customs officials.[218] If and when other officers do participate in customs- or tax-related duties, they should be afforded the same protection that Section 2680(c) clearly provides to customs and tax officials.[219] Therefore, Congress likely added the law enforcement officer provision to protect such individuals, not to create a broad waiver of liability that would (1) contravene the central purpose of the FTCA[220] and (2) render the language pertaining to officers involved in taxation or customs superfluous.[221] Thus, under the applicable canons of statutory construction,[222] the law enforcement officer provision should be restricted to those officers acting in a taxation or customs capacity during the time at issue in the suit.

B. Legislative History Indicates a Legislative Intent to Limit the Law Enforcement Officer Provision

The use of legislative history in statutory interpretation is a controversial practice[223] that has created heated rifts among the justices of the United States Supreme Court.[224] At opposing sides

218. *Kurinsky*, 33 F.3d at 596–597.

219. *Id*.

220. *Kosak*, 465 U.S. at 853 n. 9.

221. *Ortloff*, 83 F.3d at 659.

222. Arguments regarding the construction of the law enforcement officer provision may also be made under "the rule against surplusage," a canon of statutory construction operating under the assumption that every word of a statute has a purpose. William N. Eskridge, Jr. et al., *Legislation and Statutory Interpretation* 266 (Found. Press 2000). However, the two opposing arguments under this canon of construction tend to cancel each other out. While the plaintiff may argue that the inclusion of the law enforcement officer provision was necessary to include all law enforcement officers involved in taxation and customs duties including those who were not strictly taxation and customs officers, the government's likely response would be that the inclusion of the term was necessary to enlarge the scope of the immunity provision to include all law enforcement officers, not just those involved in taxation and customs. Thus, the rule against surplusage is not particularly helpful in the construction of Section 2680(c).

223. For a comprehensive account of the debate surrounding the use of legislative history as an aid in statutory interpretation, see Mammen, *supra* n. 195.

224. *See U.S. v. Thompson/Ctr. Arms Co.*, 504 U.S. 505 (1992). In *Thompson*, the plurality opinion, authored by Justice Souter and joined by Chief Justice Rehnquist and Justice O'Connor, applied legislative history to interpret a statute. *Id.* at 514–516. In Justice Scalia's concurring opinion, which Justice Thomas joined, Justice Scalia asserted his lack of support for the use of legislative history as an aid in statutory construction. *Id.* at 519–

of the issue are Justice Scalia and Justice Breyer, the former maintaining that legislative history should not be used to construe statutory language,[225] and the latter advocating such use.[226] Despite the strong controversy surrounding the use of legislative history, the debate is largely moot for purposes of interpreting the law enforcement officer provision due to the unavailability of significant and reliable information from the provision's legislative history. Nevertheless, a brief discussion of the possible implications of the provision's legislative history provides some interesting points to consider.

There is little legislative history related to the FTCA, and even less available regarding the immunity provision of Section 2680(c). While Judge Holtzoff was primarily responsible for drafting Section 2680(c), his commentary is arguably of little use in the interpretation of the provision today.[227] Cases have cited to Judge Holtzoff for the proposition that the law enforcement officer provision should be narrowly construed so as to encompass only

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521 (Scalia, J., concurring). Specifically, Justice Scalia referred to legislative history as a "last hope of lost interpretive causes" and the "St. Jude of the hagiology of statutory construction." *Id.* at 521.

In response to this attack on the use of legislative history as a means of statutory construction, Justice Souter articulated the divide among the justices regarding this controversial practice. *Id.* at 517 (Souter, J., plurality). He stated as follows:

> Justice Scalia upbraids us for reliance on legislative history, his "St. Jude of the hagiology of statutory construction." The shrine, however, is well peopled (though it has room for one more) and its congregation has included such noted elders as Justice Frankfurter: "A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.

Id.; *see also* Mammen, *supra* n. 195, at 168 (describing the dispute set forth in *Thompson* and providing additional perspectives of justices and scholars regarding the propriety of using legislative history as an aid in statutory interpretation).

225. Mammen, *supra* n. 195, at 167 (summarizing Justice Scalia's arguments against the use of legislative history in statutory construction).

226. *Id.* at 184–185 (setting forth Justice Breyer's arguments for the use of legislative history and explaining his view of legislative history as a "judicial tool" for statutory interpretation). The arguments for and against the application of legislative history, compelling as they are, do not have a significant impact upon the interpretation of the law enforcement officer provision of Section 2680(c) because the legislative history of the provision is so sparse.

227. *See supra* n. 75 and accompanying text (setting forth Judge Holtzoff's statements upon which the *Kosak* Court relied).

those detentions made in taxation or customs contexts.[228] However, some of Judge Holtzoff's statements regarding the law enforcement officer provision are quite ambiguous and, when taken together, provide very little insight on the matter.[229] Moreover, his statements cannot be parsed in the same way that one can parse a statute.[230]

The most pertinent legislative history addressing Section 2680(c), as the *Bazuaye* court noted, includes reports from both the Senate and House Committees.[231] The reports note two rationales for immunity under Section 2680(c): (1) certain types of government activities should not be burdened by widespread liability; and (2) certain types of claims can be remedied by alternative means of relief and, therefore, need not be actionable under the FTCA.[232] The purpose of the law enforcement officer provision was most likely related to the second justification for immunity, the justification regarding the availability of other remedies.[233]

The first justification for immunity is that, in the situation at issue, the potential for governmental liability for nondiscretionary acts is too burdensome.[234] This is the reason for mail carriers' immunity under Section 2680(b); allowing such suits would be too burdensome for the federal government, considering the volume of mail that carriers handle.[235] However, the problems that Judge

228. *E.g. Kurinsky* 33 F.3d at 597–598.

229. *Kosak*, 465 U.S. at 873–874 (Stevens, J., dissenting) (stating that the Court should not rely upon the off-the-record commentary of Judge Holtzoff because there is no conclusive evidence that Congress ever heard or relied upon his statements regarding Section 2680(c)). In fact, the Supreme Court's reliance upon such "legislative history" drew much criticism. *See e.g.* Eskridge et al., *supra* n. 222, at 297 (describing the *Kosak* Court's reliance upon the commentary of Judge Holtzoff as the primary drafter of the legislation as "inconsistent . . . with democratic considerations because there was no evidence that even Congress was or could have been aware of the secret memorandum [containing his statements]"). William Eskridge explained that the Court's use of the commentary violated the "accessibility rule" pertaining to the use of legislative history. *Id.* The "accessibility rule" requires that any statements from legislative history used by a court in construing a statute must have been available to Congress when the statute was enacted. *Id.* at 296.

230. *Cf. Bazuaye*, 83 F.3d at 484 (stating that attempts to parse Judge Holtzoff's statements would be ineffective because there is no evidence that Congress ever relied upon such statements when enacting the statute).

231. *Id.* at 484–485.

232. *Id.*

233. *Government Liability*, *supra* n. 36, at 1057.

234. Richard F. Neidhardt, *Using the Federal Tort Claims Act to Remedy Property Damage Following Customs Service Seizures*, 17 U. Mich. J.L. Reform 83, 91 (1983).

235. *Id.* Neidhardt cites to Judge Holtzoff's commentary for the proposition that allow-

Holtzoff acknowledged with respect to mail carriers do not apply in the context of property detained by BOP officials because the number of goods detained in prisons do not rise to a fraction of the number of goods that are passed through the mail system.[236] Therefore, the first justification for Section 2680 immunity does not apply in cases in which BOP officials have detained property.[237]

The second justification for immunity is that other remedies exist and are available to potential plaintiffs.[238] While other remedies are available with respect to suits against officials specifically exempted from liability under subsection (c) (like officers involved in taxation and customs), alternative remedies for prisoners bringing suit against BOP officials are much more limited.[239] Although administrative remedies within the BOP are available, such administrative remedies cannot be considered the type of "other remedies" that justify granting government officials immunity because under the FTCA, all plaintiffs must exhaust administrative remedies to satisfy the FTCA's standing requirement.[240]

In addition to the legislative history preceding the FTCA's enactment, some argue that legislative enactments following the FTCA are relevant to an interpretation of the immunity provision. Specifically, some have argued that the Civil Asset Forfeiture Reform Act of 2000 (CAFRA)[241] is relevant to the courts' determination of the law enforcement officer provision.[242] CAFRA amended Section 2680(c) in two ways: (1) it broadened the language of the provision from that pertaining to the detention of

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ing claims based on mail carriers' detention of property "would be intolerable, of course, if in any case of loss or delay the Government could be sued for damages." *Id.* at 97 n. 48 (internal citations and quotations omitted).

236. *Id.* at 92.

237. *Id.*

238. *Government Liability*, *supra* n. 36, at 1044–1045.

239. *Bazuaye*, 83 F.3d at 485.

240. Under 42 U.S.C. § 1997(e)(a), any prisoner bringing a claim regarding conditions in a prison must exhaust administrative remedies available through the BOP before acquiring standing to sue in a federal court.

241. Pub. Law No. 106-185, 114 Stat. 202 § 3 (2000) (amending Section 2680(c) of the FTCA).

242. Br. of Respt. at 7–8, *Bramwell v. Fed. BOP*, 543 U.S. 811 (2004) [hereinafter *Bramwell* Respt.'s Br.]; Reply Br. of Pet. at 1–6, *Bramwell v. Fed. BOP*, 543 U.S. 811 (2004) [hereinafter *Bramwell* Petr.'s Reply Br.].

"any goods or merchandise" to the detention of "any goods, merchandise, or other property"; and (2) it added criteria for certain asset forfeiture proceedings in which sovereign immunity would not be restored under the statute.[243]

After *Bramwell* was decided against the plaintiff in the Ninth Circuit,[244] the plaintiff filed a petition for writ of certiorari with the Supreme Court.[245] Although the Court denied the petition, the arguments raised by the parties in their briefs merit discussion, as such arguments will likely be addressed by a federal court in the future. In its Brief in Opposition, the Government claimed that the CAFRA amendments were relevant to the Court's construction of the law enforcement officer provision.[246] The plaintiff, however, responded that because the CAFRA amendments to Section 2680(c) pertain only to property forfeitures,[247] they are inapplicable to the BOP setting, which involves the detention, not the forfeiture, of inmates' personal property.[248]

Specifically, the Government claimed that Congress viewed the law enforcement officer provision broadly because while officers dealing in taxation and customs arguably detain only "goods and merchandise," the addition of the "other property" clause to the provision reflected an intent to encompass all law enforcement officers.[249] The Government supported this assertion by arguing that officers performing taxation and customs duties detain only "goods or merchandise" and that the inclusion of the "other property" clause, therefore, pertained to other law enforcement officers beyond those involved in taxation and customs duties.[250] The Government also argued that by providing an additional set of exceptions to the statute that prevent the reinstatement of sov-

243. Pub. Law. No. 106-185, 114 Stat. 202 at § 3. These additional amendments, located in Section 2680(c)(1)–(4), provide criteria for certain asset forfeiture proceedings that, if met, preclude the reinstatement of sovereign immunity under the statute and provide the plaintiff jurisdiction for recovery. *Id.*

244. *Supra* nn. 116–121 and accompanying text (discussing the Ninth Circuit's decision in *Bramwell*).

245. *Bramwell v. Fed. BOP*, 543 U.S. 811 (2004).

246. *Bramwell* Respt.'s Br., at 6.

247. Pub. Law. No. 106-185, 114 Stat. 202 at § 3.

248. *Bramwell* Petr.'s Reply Br., at 1–2 (explaining that because claims like the plaintiff's do not involve civil forfeiture proceedings, CAFRA is not implicated and, therefore, has no impact on the provision's construction outside of the civil forfeiture context).

249. *Id.* at 7.

250. *Id.*

ereign immunity in certain civil asset forfeiture proceedings, Congress was acknowledging that prior to the CAFRA amendments, officers who had been involved in asset forfeitures, but were not necessarily involved in taxation or customs, were immune under Section 2680(c).[251]

The plaintiff, on the other hand, refuted the applicability of CAFRA altogether, claiming that it did not apply because prisoners' claims regarding damage to their own property while it remains in the BOP's care are not forfeiture claims.[252] The plaintiff noted that the legislative history for the CAFRA amendments to Section 2680(c) reflected the limited goals of the amendments.[253] The plaintiff cited to the House Judiciary Report, which emphasized that the purpose of the amendments was to increase due process for plaintiffs in forfeiture proceedings.[254] The plaintiff also argued that the absence of any discussion of the potential impact that the amendments could have on future interpretations of the law enforcement officer provision indicated that Congress did not contemplate that the amendments could possibly have any effect on the provision.[255]

While no case law has yet addressed the potential significance of the CAFRA amendments to the law enforcement officer provision,[256] several courts have decided cases interpreting the provision after the CAFRA amendments were enacted, and none of those courts have raised the issue of whether CAFRA may have affected the proper interpretation of the provision.[257] Although the significance of the amendments in cases not involving forfeiture proceedings is questionable at best, federal courts addressing

251. *Bramwell* Respt.'s Br., at 7 (stating that "the exception added by CAFRA reinforces the view that a broad group of law-enforcement agents [is] presumptively excepted from the FTCA's coverage").

252. *Bramwell* Petr.'s Reply Br., at 1–2 (stating that "[t]he Government overlooks, however, that CAFRA is inapplicable in cases, like Mr. Bramwell's, that do not involve forfeiture proceedings").

253. *Id*. at 3–4.

254. *Id*. (citing H.R. Rpt. No. 106-192 (1999)).

255. *Id*. at 4 (explaining that members of Congress would have addressed the potential impact of the provision if the amendments were meant to affect, or could possibly affect, the interpretation of the law enforcement officer provision).

256. *Id*. at 5.

257. *E.g. Ortloff*, 335 F.3d 652 (interpreting the law enforcement officer provision without considering the significance of the CAFRA amendments); *Bramwell*, 348 F.3d 804 (same); *Hatten*, 275 F.3d 1208 (same).

the law enforcement officer provision in the future may utilize the CAFRA-based arguments presented by the government in *Bramwell* in support of the majority position favoring a broad construction of the provision. However, given the narrow scope and purpose of the amendments and the corresponding legislative history that is devoid of any indication that the legislature contemplated that the amendments might affect the construction of the law enforcement officer provision, the CAFRA-based argument appears weak. In the intervening period of uncertainty, plaintiffs like Mr. Bramwell and Mr. Chapa can only hope that the Supreme Court will resolve the issue that it expressly left undecided in *Kosak*,[258] and that it will find that the law enforcement officer provision in Section 2680(c) must be narrowly construed so as to encompass only those officers involved in taxation and customs.

C. BOP Officials' Qualification As Law Enforcement Officers in Other Contexts Should Have No Impact on the Proper Construction of the Immunity Provision

There are several contexts, such as payscales, benefits, and the like, in which BOP officials are considered "law enforcement officers."[259] While the *Chapa* court considered the fact that BOP officials qualified as law enforcement officers in certain contractual situations,[260] this discussion was not relevant to the construction of the law enforcement officer provision in Section 2680(c). In fact, consideration of this point misses the main issue that is central to the proper construction of the provision. Specifically, the application of definitions from other statutes incorporating a "law enforcement officer" term obfuscates the fallacy underlying the majority rule—that the provision must not be construed in isolation, but in light of its surrounding terms in Section 2680(c). The *Chapa* court improperly considered the meaning of the law enforcement officer provision in isolation and, accord-

258. *See supra* n. 81 and accompanying text (explaining that the *Kosak* Court specifically declined to decide the scope of the law enforcement officer provision).

259. *Inmate Loses Damages Claim for Loss of Personal Belongings*, 9 Corrects. Prof. 1 (Aug. 2003).

260. 339 F.3d at 390.

ingly, erroneously held that BOP officials were law enforcement officers under Section 2680(c).[261]

The instances cited by *Chapa* and other courts in which BOP officials have been considered law enforcement officers cannot be applied to the construction of Section 2680(c) because the law enforcement officer provision therein must be construed in context. The issue before past courts has been whether the law enforcement officer provision was intended to create another express category of immunity or whether the provision was merely added to ensure that all officers engaged in duties related to taxation or customs would be immune from liability regardless of their official classification as customs officers, DEA officers, etc.[262] However, by moving straight to the issue of determining who is encompassed by the "law enforcement officer" term without considering whether the term was added to create an independent category of immunity, courts have circumvented the true issue before them.[263]

D. Barring Prisoners' Claims for the Mishandling of Their Property under the FTCA Has Negative Policy Implications

Prisoners have faced a series of limitations upon their rights in state and federal courts.[264] With respect to harm done to prisoners' property during its detention by BOP officials, prisoners' main recourse is through the FTCA. Allowing BOP officials to be immune under Section 2680(c) effectively precludes such prisoners from recourse for the negligent loss of or damage to their property.[265]

The Supreme Court has recognized the importance of federal prisoners' recourse under the FTCA.[266] In *U.S. v. Muniz*,[267] the

261. *Id.*

262. *Id.*

263. *E.g. id.* (discussing the definition and scope of the term "law enforcement officer").

264. *See supra* nn. 43–65 and accompanying text (discussing the limitations placed upon prisoners attempting to litigate matters concerning their imprisonment).

265. *Supra* sec. II(B) (explaining the lack of alternative remedies available to prisoners who have experienced loss of or damage to their personal property while such property was in the BOP's possession).

266. *E.g. U.S. v. Muniz*, 374 U.S. 150, 166 (1963) (stating that "[the FTCA] provides much-needed relief to those suffering injury from the negligence of government employees").

267. 374 U.S. 150 (1963).

Court addressed an inmate's personal injury claim against the BOP.[268] In a challenge made by the Government against federal prisoners' ability to sue for negligence under the FTCA, the Court held not only that prisoners did, in fact, have standing as plaintiffs, but also that Congress had contemplated suits by federal prisoners against the Government and that the potential for such suits contributed to Congress' motivation for enacting the FTCA.[269]

Furthermore, allowing immunity for BOP officials under Section 2680(c) gives such officials little motivation to treat inmates' belongings with due care. This could have the troubling effect of an increased number of violations by BOP officials, most of which would be without remedy to the prisoners who experienced the violative or otherwise tortious conduct.[270] Affording BOP officials immunity would further exacerbate the problem of the prisoners' already limited ability to bring suit in federal court to remedy such harm, as BOP officials' immunity effectively forecloses such prisoners from recovery.

The BOP provides administrative proceedings in which inmates must participate when seeking to recover for damage to their property that occurred during its detention by the BOP.[271] If a prisoner accepts a settlement during these proceedings, the agreement to settle will act to bar any future action by the prisoner against the United States, including claims under the

268. *Id.* at 150. In *Muniz*, the inmate alleged that the BOP's negligence resulted in injuries that he suffered while detained in a BOP facility. *Id.* at 151–152.

269. *Id.* at 153–155. The *Muniz* Court noted that before the enactment of the FTCA, federal prisoners and other parties pursuing claims against the government were required to submit their allegations in the form of private claim bills. *Id.* at 154. Upon the submission of a private claim bill, Congress was charged with the task of evaluating the claim and either enacting or rejecting each private claim bill. *Id.* The steady increase in the number of private claim bills being filed, a significant portion of which were filed by federal prisoners, led Congress to consider a more efficient means of the resolution of such claims—the FTCA. *Id.* Through the FTCA, claimants would be able to seek recourse in the federal courts. *Id.* at 158.

270. As noted earlier, the form that constitutes the record of an inmate's belongings at a BOP facility provides no guarantee of any standard of care with which his or her belongings will be treated. *Supra* n. 51 and accompanying text (describing the lack of a contractual agreement regarding the standard of care for prisoners' property during its detention at a BOP facility).

271. Prog. Stmt. from U.S. Dept. of Just., Fed. Bureau of Prisons, *Federal Torts Claims Act* (Aug. 1, 2003) [hereinafter *Prog. Stmt.*].

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FTCA.[272] Therefore, in jurisdictions in which prisoners are on notice that the federal courts have rejected claims against BOP officials pursuant to a finding that they are immune under the law enforcement officer provision, such prisoners are forced either to accept a settlement offered by the government or be afforded no recourse whatsoever for their damaged or destroyed property.[273]

The policy implications of this rule are grave because absent any possibility of legal recourse for inmates bringing challenges under the BOP's administrative procedures in jurisdictions supporting broad immunity under the FTCA, the BOP has little incentive to make a just settlement offer. This result undermines the purpose of the FTCA, which was developed to provide recourse for torts committed by government officials, not to make access to such recourse more difficult.[274]

IV. CONCLUSION

Mr. Chapa pursued his only means of obtaining relief for his lost personal belongings—he brought suit under the FTCA. When his claim was rejected based on an erroneous construction of the detention of property provision, he was unjustly foreclosed from legal recourse. This result is not in keeping with the purpose of the FTCA, which was enacted to provide relief for plaintiffs like Mr. Chapa, not to take such relief away. The policy implications resulting from the majority's stance on this issue pose a harsh reality for federal inmates. In jurisdictions barring relief for plaintiffs like Mr. Chapa, prisoners must turn over their belongings to the BOP without the comfort of knowing that BOP officials are obligated to treat such belongings with a reasonable degree of care.

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272. *Id*. at 8.

273. Ernst Freund, late professor of law at the University of Chicago and zealous proponent of the FTCA, hoped that the FTCA would provide a viable means of relief for plaintiffs like Arnolfo Chapa, who pursued actions in tort against the federal government to recover from harm for which the government was responsible. *See* Edwin M. Borchard, *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1, 1 (1933) (explaining the effects of the then-newly enacted FTCA). In fact, Professor Freund and other scholars had advocated for such liability since the late 1800s. *Id*. It would surely be a disappointment to these scholars to learn that their strident efforts to achieve what had been clearly recognized as "just and sound public policy" had been unfairly and unnecessarily undermined so as to preclude recovery for those with no alternative means to obtain relief. *Id*.

274. *Supra* nn. 30–42 and accompanying text (describing the FTCA and its purpose).

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The current split of authority among the federal circuit courts regarding the construction of the law enforcement officer provision of Section 2680(c) will likely be addressed by the Supreme Court at some point, just as the scope of the detention provision of the same statute was addressed by the Court in *Kosak* after the circuit courts split regarding that issue.[275] While the question at issue in the current circuit split involves the potential extension of immunity to all government officials, not just BOP officials, the case against applying the provision to BOP officials builds upon the general argument against a broad construction of the provision and is particularly compelling.

Principles of statutory construction as well as the relevant legislative history indicate that the law enforcement officer provision was never meant to encompass law enforcement officers not involved in taxation or customs duties. Moreover, the policy implications of the provision's application to BOP officials presents concerns surrounding the prisoners' means of legal recourse in the federal courts. These considerations inevitably lead to the conclusion that Section 2680(c) cannot encompass BOP officials, and that the provision should be limited to customs and tax officials and law enforcement officers who are involved in taxation or customs duties.

275. *Kosak*, 465 U.S. at 848.