

Commentary

Supreme Court To Address Circuit Split Under The Federal Tort Claims Act

By
John R. Richards

[Editor's Note: Mr. Richards is a law clerk for the Southern District of Ohio. Upon completion of his clerkship, Mr. Richards will join Jenner & Block LLP's Chicago office as an associate in the firm's Litigation Law Practice. Copyright 2007 by the author. Responses to this commentary are welcome.]

In one case, FBI agents lawfully enter a home to seize drugs, weapons, and other personal belongings in a search warrant. They fail to take inventory of them and then proceed to damage or mishandle them. In another common scenario, FBI agents place a federal inmate into segregation, fail to take inventory of his belongings, and then damage or lose them in the course of detention. As a result, courts are increasingly confronted with whether a federal law enforcement officer can be held liable under the Federal Tort Claims Act ("FTCA") for detaining a person's property and then losing or damaging it. The circuit courts are split, and the Supreme Court has recently granted certiorari to review this pressing issue. *Ali v. Federal Bureau of Prisons*, 204 F. App'x. 778 (11th Cir. 2006), cert. granted, 2007 WL 278844 (U.S. May 29, 2007) (No. 06-9130).

Normally, the United States is immune from suit. However, the FTCA is a limited waiver of sovereign immunity. 28 U.S.C. § 1346(b)(1). The FTCA allows claimants to bring actions in federal court for money damages against the United States for the injury or loss of their property caused by federal employees acting within the scope of their employment. *Id.*

The FTCA's broad waiver of immunity, however, is subject to enumerated exceptions. 28 U.S.C. § 2680(a)-(n). One of those exceptions, 28 U.S.C. § 2680(c), provides in pertinent part that § 1346 shall not apply to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer. . . ."

Whether the claimant is bared by § 2680(c) from bringing an action against the federal officer depends on the jurisdiction. Two conflicting views have emerged on this issue.

A. The Circuit Split

1. The Majority

The Fifth, Eighth, Ninth, Tenth, Eleventh, and Federal Circuits have adopted an expansive view of § 2680(c). The majority has read the phrase "any other law enforcement officer" broadly. It stands for the proposition that the FTCA exempts the United States from liability for damages resulting from the detention of property by any government employee in the scope of his or her employment. *See, e.g., Ali*, 204 Fed. Appx. at 779-80 (including Bureau of Prisons Officers ("BOP") officers within the meaning of "any other law enforcement officer"); *Chapa v. United States Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003) (including BOP officers); *Bramwell v. United States Bureau of Prisons*, 348 F.3d 804, 806-07 (9th Cir. 2003) (including BOP officers); *Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir. 2002) (includ-

ing BOP officers); *Cheney v. United States*, 972 F.2d 247, 248 (8th Cir. 1992) (including drug task force agents); *Schlaebitz v. United States Dep't of Justice*, 924 F.2d 193, 195 (11th Cir. 1991) (including US Marshals); *Ysasi v. Rivkind*, 856 F.2d 1520, 1524-25 (Fed. Cir. 1988) (including Immigration and Naturalization Service agents).

The basis of the majority's reasoning varies from case to case and is arguably supported on several grounds. First, the majority contends that its position is the result of a literal interpretation of the statute. This view is that the language of the statute is plain and unambiguous. The phrase "any law enforcement officer" should be read literally to include any federal officer who has detained goods in the performance of his or her official duties. To construe this phrase more narrowly would arguably defeat the ordinary meaning.

Second, canons of statutory construction also guided the Fifth and Ninth Circuit's reasoning in *Chapa and Bramwell*, respectively. *Chapa*, 339 F.3d at 390; *Bramwell*, 348 F.3d at 807. Interpretive principles instructed these Courts to construe the same words in different sections of the same statute similarly. *Id.* As a result, these Circuits were influenced by language in § 2680(h) that provides "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." *Id.* Furthermore, these Circuits recognized that the Supreme Court has construed "investigative or law enforcement officer" under § 2680(h) to include a BOP officer. *See Carlson v. Green*, 446 U.S. 14 (1980) (holding that intentional misconduct by BOP officers would give rise to a cause of action under § 2680(h)). The Fifth and Ninth Circuit used both the definition provided in § 2680(h) and the Supreme Court's interpretation of the language of § 2680(c) to justify their more expansive interpretation.

Third, bolstering the majority's reasoning is the fact that several other statutes consider BOP officers to be "law enforcement officers" outside the context of the FTCA. *Bramwell*, 348 F.3d at 807; *see also Smith v. United States*, No. Civ. 03-0932, 2006 WL 231663, at *3 (D.N.J. Jan 30, 2006). These include "5 U.S.C. §§ 5541(3), 8331(20) and 8401(17)(D)(i) (civil service benefits eligibility); 42 U.S.C. § 3796b(6)

(public safety officers' death benefits); and 18 U.S.C. § 3592(c)(14)(D) and 21 U.S.C. § 848(e)(2) (authorizing the federal death penalty for killing a "law enforcement officer")." *Id.*

Finally, the United States Supreme Court's decision in *Kosak v. United States* may provide support for the majority's broad interpretation of "any other law enforcement officer." 465 U.S. 848, 854 (1984). In *Kosak*, the Supreme Court did not address the meaning of "any other law enforcement officer"; however, the Court did broadly construe the phrase "arising in respect of . . . the detention of any goods" in § 2680(c). The *Kosak* Court rejected the argument that "detention" occurs only when officers knowingly and intentionally take control of a person's property. *Id.* Rather, the Court liberally construed the statute and held that "detention" also applies to the negligent handling of property and the storage of goods. *Id.* The Court's expansive reading of 28 U.S.C. § 2680(c) in *Kosak* may indicate its willingness to also construe "any other law enforcement" broadly and thereby affirm the majority's reasoning in *Ali*.

2. The Minority

The minority has interpreted "any other law enforcement officer" in § 2680(c) more narrowly. In *Kurinsky v. United States*, the Sixth Circuit held that § 2680(c) is "limited to the detention of goods by law enforcement officers acting in a tax or customs capacity." 33 F.3d 594, 598 (6th Cir. 1994). Thus, according to the Sixth Circuit's analysis, whether a court has authority to exempt law enforcement officials from liability under the FTCA is contingent on whether the law enforcement officials were engaged in activities related to the collection of taxes or custom duties. *Id.* According to this interpretation, FTCA claims may be brought for lost or damaged property against law enforcement officers who were not acting in a tax or custom capacity. The Seventh Circuit and the District of Columbia Circuit have adopted the Sixth Circuit's narrow reading of § 2680(c). *See Orloff v. United States*, 335 F.3d 652 (7th Cir. 2003) (excluding BOP officers from the meaning of "any other law enforcement officer"); *Bazuaye v. United States*, 83 F.3d 482 (D.C. Cir. 1996) (excluding postal inspectors).

The minority's narrower interpretation—most thoroughly articulated by the Sixth Circuit in *Kurinsky*—

of “any other law enforcement officer” is also supported by canons of statutory construction. 33 F.3d at 596-97. The Sixth Circuit emphasized that a general term must be understood not in isolation, but in light of the specific terms and the context that surround it. *Kurinsky*, 33 F.3d at 597 (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)) (stating that “[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.”) With respect to § 2680(c), the Sixth Circuit stresses that it contains parallel clauses, which cover “the assessment or collection of any *tax or customs duty*, or the detention of any goods or merchandise, or other property by any officer of *customs or excise* or any other law enforcement officer.” *Kurinsky*, 33 F.3d at 597 (emphasis added). The Sixth Circuit emphasizes that both clauses “dwell exclusively” on detaining goods for tax or customs purposes. *Id.* Furthermore, it concluded that in light of surrounding words and the context of the statute, the term “any other law enforcement officer” must refer to officers who are not custom or excise officers by title but are acting in that instance in a tax or custom capacity. *Id.* at 597 (stating the phrase should be viewed as “[C]ongress’ 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 custom purposes.”) (citing *A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849, 850-51 (9th Cir. 1978)) (Tang, J, concurring).

The Sixth Circuit reasoned that reading § 2680(c) piecemeal would also support its interpretation. The Sixth Circuit specifically considered Congress’ use of the word “detention” instead of the word “seizure.” *Kurinsky*, 33 F.3d at 597. After noting significant differences between the connotation of the two words, the Sixth Circuit concluded that if Congress had intended to exempt from the reach of the FTCA damages arising out of any seizures by government officers, it would have chosen the word “seizure.” *Id.* (discussing that the word “detention,” is generally associated with a period of temporary custody or delay, and not “seizure,” which is the act of taking possession of property, for instance, by virtue of execution or for a violation of the law). Instead, the Sixth Circuit posits that Congress chose the word “detention” to limit the scope of the exception. *Id.* Therefore, to be consistent with the language, the Sixth Circuit concluded that the language of the statute mandated

that “any other law enforcement officer” be read narrowly. *Id.*

The Sixth Circuit also emphasizes that the legislative history, though sparse, supports its narrow interpretation. *Id.* at 597-98. The Senate Report to the Legislative Reorganization Act of 1946 stated the following about the tort claim exceptions:

This section specifies types of claim[s] which would be 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 or assessments; the detention of goods by customs officers . . .

A-Mark, Inc., 593 F.2d at 851 (Tang, J, concurring) (quoting S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946)).

The Sixth Circuit noted that the “report makes no mention whatsoever of an exemption for any and all seizures by law-enforcement officers.” *Kurinsky*, 33 F.3d at 598.

Moreover, the Sixth Circuit bolsters its position by referring to statements made by the Special Assistant to the Attorney General before the Senate Subcommittee prior to passage of the FTCA:

The . . . exception relates to claims arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officers of customs or excise or any other law enforcement officer. There are various tax laws providing machinery for recovering back any tax that has been paid but not properly owing. There was no purpose in interfering with that machinery.

Formula One Motors, Ltd., v. United States, 777 F.2d 822, 825 (2d Cir. 1985) (Oakes, J, concurring) (quoting S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946)); see also *Kurinsky*, 33 F.3d at 598.

B. Conclusion

Both sides support their interpretation of § 2680(c) by attempting to interpret the plain meaning of the statute. With little guidance from the legislative history, both the majority and minority rely on canons of statutory interpretation to reach vastly different results regarding the breadth of § 2680(c). In the wake of this conflict between circuits, the law is uncertain as to when a federal law enforcement officer can be held liable for any injury to detain goods in the exercise of his or her official duties.

The Supreme Court has noted the ambiguity as to the reach of the phrase “any other law enforcement officer,” but has not yet determined whether § 2680(c) is limited to the customs or excise context. Given the circuit split and the frequency at which this issue presents itself, resolution by the Supreme Court in *Ali* is important. A definitive answer as to the meaning of “any other law enforcement officer” in § 2680(c) of FTCA will have significant consequences for when a practitioner may bring suit, and when the United States must defend itself. ■