

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

4  
5 August Term, 2006

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7  
8 (Argued: April 23, 2007 Decided: September 5, 2007)

9  
10 Docket No. 06-1362-cv

11  
12 - - - - -x

13  
14 ABC,  
15  
16 Plaintiff-Appellant,

17  
18 -v.-

19  
20 DEF,  
21  
22 Defendant-Appellee.

23  
24 - - - - -x

25  
26 Before: JACOBS, Chief Judge, LEVAL and POOLER,  
27 Circuit Judges.

28  
29 Appeal from the judgment of the United States District  
30 Court for the Southern District of New York (Daniels, J.),  
31 dismissing ABC's complaint for lack of subject matter  
32 jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§  
33 1346(b), 1402(b), 2401(b), & 2671-2680.

34 Vacated in part and remanded.

35  
36 ABC, pro se.

1 PETER HALPIN, JUSTIN  
2 KOLBENSCHLAG, ERICA LAPLANTE  
3 (Jonathan H. Romberg, on the  
4 brief), for Seton Hall  
5 University School of Law Center  
6 for Social Justice, Newark, NJ,  
7 as amicus curiae in support of  
8 Appellant.\*  
9

10 KRISTIN L. VASSALLO, Assistant  
11 United States Attorney  
12 (Elisabeth Wolstein, Assistant  
13 United States Attorney, on the  
14 brief), for Michael J. Garcia,  
15 United States Attorney for the  
16 Southern District of New York,  
17 New York, NY, for Appellee.  
18

19  
20 DENNIS JACOBS, Chief Judge:  
21

22 A federal prison inmate pro se appeals from the  
23 judgment of the United States District Court for the  
24 Southern District of New York (Daniels, J.), dismissing his  
25 claim against the United States based on the allegation that  
26 a prison officer negligently detained and lost his property  
27 during his transfer from one cell to another. The Federal  
28 Tort Claims Act ("FTCA") waives the sovereign immunity of  
29 the United States for certain civil actions, with various

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1 \* The Seton Hall University School of Law Center for  
2 Social Justice ("CSJ") served as counsel for appellant Jack  
3 Lewis in Lewis v. United States, No. 05-2366, which was to  
4 be heard in tandem with this case. When Lewis was dismissed  
5 by stipulation prior to oral argument, CSJ successfully  
6 moved to participate in this appeal as amicus curiae.

1 exceptions, and vests jurisdiction in the district courts.  
2 28 U.S.C. §§ 1346(b), 2680(a)-(n). The district court  
3 dismissed the claim on the ground that § 2680(c), one of the  
4 exceptions to the FTCA's waiver, bars jurisdiction for  
5 claims involving the detention of goods "by any officer of  
6 customs or excise or any other law enforcement officer."  
7 The court ruled that a prison officer is such an "other law  
8 enforcement officer." We conclude that the phrase "any  
9 other law enforcement officer," as used in § 2680(c),  
10 references only law enforcement officers who are functioning  
11 in a capacity akin to that of a customs or excise officer.  
12 Since plaintiff's claim is not barred by § 2680(c), we  
13 vacate the judgment in relevant part and remand for further  
14 proceedings consistent with this opinion.

15  
16 **I**

17 Plaintiff-appellant ABC is a federal prisoner whose  
18 name is concealed in this opinion and in the caption; the  
19 district court proceedings are largely under seal (including  
20 the opinion reviewed on this appeal); and our statement of  
21 facts (accepted as true by the district court) is spare.

22 Sometime in 2001, the government came to believe that  
23 information regarding ABC's cooperation with the authorities

1 might have been disclosed to other prisoners. For his  
2 safety, ABC was transferred to a special housing unit. He  
3 was told by a prison official that certain property in his  
4 cell and in storage would be transferred with him. About  
5 six weeks after the transfer, ABC surveyed his property and  
6 discovered that many items were missing. He brought this  
7 action seeking money damages against the United States, the  
8 United States Department of Justice ("DOJ"), and the Federal  
9 Bureau of Prisons ("BOP"), alleging that the loss of his  
10 property was the result of negligence by federal prison  
11 officials during the transfer.<sup>1</sup> ABC's claims against the  
12 DOJ and the BOP were dismissed because the FTCA does not  
13 permit suits against federal agencies, see Mignogna v. Sair  
14 Aviation, Inc., 937 F.2d 37, 40 (2d Cir. 1991); see also 28  
15 U.S.C. § 2679(a), a ruling that is not contested on appeal.  
16 As to ABC's claim against the United States, the district  
17 court concluded that there was no waiver of sovereign  
18 immunity (and that the district court therefore lacked  
19 jurisdiction) because the BOP official responsible for  
20 transferring ABC's property was an "other law enforcement

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1           <sup>1</sup> The district court observed that ABC exhausted his  
2 administrative remedies. The government does not contest  
3 the issue on appeal.

1 officer" under § 2680(c). This appeal followed.

2  
3 **II**

4 In relevant part, the FTCA vests the district courts  
5 with

6 exclusive jurisdiction of civil actions on claims  
7 against the United States, for money damages . . .  
8 for injury or loss of property . . . caused by the  
9 negligent or wrongful act or omission of any  
10 employee of the Government while acting within the  
11 scope of his office or employment, under  
12 circumstances where the United States, if a  
13 private person, would be liable to the claimant in  
14 accordance with the law of the place where the act  
15 or omission occurred.

16  
17 28 U.S.C. § 1346(b)(1). This is a "broad waiver of  
18 sovereign immunity," Kosak v. United States, 465 U.S. 848,  
19 852 (1984); but it is subject to numerous exceptions, see 28  
20 U.S.C. § 2680(a)-(n). Relevant here, § 2680(c) excepts  
21 claims regarding the detention of property "by any officer  
22 of customs or excise or any other law enforcement officer."

23 The government contends that "any other law enforcement  
24 officer" should be read broadly to encompass any law  
25 enforcement officer who has detained any property in any law  
26 enforcement context. ABC contends that the phrase should be  
27 read more narrowly, in light of the surrounding text, to  
28 reference only law enforcement officers who are acting in a

1 customs or excise capacity.<sup>2</sup>

2 Our sister circuits are split on this issue. Compare  
3 Bramwell v. U.S. Bureau of Prisons, 348 F.3d 804 (9th Cir.  
4 2003) (adopting the broad reading of the exception advanced  
5 by the government); Chapa v. U.S. Dep't of Justice, 339 F.3d  
6 388 (5th Cir. 2003) (per curiam) (same); Hatten v. White,  
7 275 F.3d 1208 (10th Cir. 2002) (same); Cheney v. United  
8 States, 972 F.2d 247 (8th Cir. 1992) (per curiam) (same);  
9 Schlaebitz v. U.S. Dep't of Justice, 924 F.2d 193 (11th Cir.  
10 1991) (per curiam) (same); Ysasi v. Rivkind, 856 F.2d 1520  
11 (Fed. Cir. 1988) (same), with Andrews v. United States, 441  
12 F.3d 220 (4th Cir. 2006) (adopting the narrow reading of the  
13 exception advanced by ABC); Ortloff v. United States, 335

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1 <sup>2</sup> Because we conclude that § 2680(c) relates only to  
2 law enforcement officers acting in a customs or excise  
3 capacity, we need not decide whether federal prison  
4 employees generally, or the particular federal prison  
5 employee allegedly responsible for the loss of ABC's  
6 property, are "law enforcement" officers for the purpose of  
7 § 2680(c). But cf. Bramwell v. U.S. Bureau of Prisons, 348  
8 F.3d 804 (9th Cir. 2003) (holding that prison officers are  
9 law enforcement officers under § 2680(c)); Chapa v. U.S.  
10 Dep't of Justice, 339 F.3d 388 (5th Cir. 2003) (per curiam)  
11 (same); Hatten v. White, 275 F.3d 1208 (10th Cir. 2002)  
12 (same); see also 18 U.S.C. § 3050 (authorizing BOP officers  
13 and employees to make arrests in certain circumstances and  
14 to carry firearms). A prison employee detaining a  
15 prisoner's property in connection with a transfer is not  
16 acting in a customs or excise capacity, so § 2680(c) does  
17 not apply.

1 F.3d 652 (7th Cir. 2003) (same); Bazuaye v. United States,  
2 83 F.3d 482 (D.C. Cir. 1996) (same); Kurinsky v. United  
3 States, 33 F.3d 594 (6th Cir. 1994) (same). The Supreme  
4 Court has granted a writ of certiorari to decide the  
5 question. Ali v. Fed. Bureau of Prisons, 127 S. Ct. 2875  
6 (2007).

7 The issue first arose in this Circuit in Formula One  
8 Motors, Ltd. v. United States, in which agents of the Drug  
9 Enforcement Administration ("DEA") had seized a car being  
10 shipped to the United States from Italy, searched it for  
11 illegal drugs, and allegedly damaged the car in the process.  
12 777 F.2d 822, 822-23 (2d Cir. 1985). In discussing whether  
13 the FTCA permitted suit against the United States, we  
14 observed that § 2680(c) "might suggest a more narrow  
15 reading" of the exception than the one advanced (then as  
16 now) by the government; but we did not so hold because we  
17 concluded that the DEA agents were performing a function  
18 "sufficiently akin to the functions carried out by Customs  
19 officials"; accordingly, we held that "the agents' conduct  
20 [was] within the scope of section 2680(c)." Id. at 823-24.

21 We now join a sound minority of the courts of appeals,  
22 and conclude that the phrase "other law enforcement officer"  
23 in § 2680(c) references only law enforcement officers whose

1 function or authority are related to customs or excise  
2 functions.<sup>3</sup> See id. at 822-24 (holding that § 2680(c)  
3 applied to the detention of "an automobile still in transit  
4 from overseas" because the detention was "sufficiently akin  
5 to the functions carried out by Customs officials").<sup>4</sup>

### 7 III

8 "The starting point of our analysis of these competing  
9 interpretations must, of course, be the language of §

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1 <sup>3</sup> The courts of appeals that have adopted a similar  
2 view of § 2680(c) have limited the phrase "other law  
3 enforcement officer" in various ways. The District of  
4 Columbia Circuit has held that § 2680(c) applies only if the  
5 officer was "acting under the authority of the tax or  
6 customs laws such that he would be eligible for  
7 indemnification under 28 U.S.C. § 2006." Bazuaye, 83 F.3d  
8 at 486. Other circuits have declined to look to the  
9 officer's statutory authority, and have instead required  
10 only a relationship between the detention at issue and  
11 customs or excise functions. See Andrews, 441 F.3d at 227  
12 ("limited to those officers acting in a tax or customs  
13 capacity"); Ortloff, 335 F.3d at 658 ("applies only to law  
14 enforcement officers performing functions related to customs  
15 and excise duties"); Kurinsky, 33 F.3d at 598 ("limited to  
16 the detention of goods by law enforcement officers acting in  
17 a tax or customs capacity"). We need not choose among these  
18 various approaches, because in this case, regardless of  
19 which test is employed, the prison employees involved would  
20 not come within the exception.

16 <sup>4</sup> This conclusion is more categorical than the wording  
17 used by this Circuit in Formula One, and as such, is closer  
18 to the view expressed by Judge Oakes in his concurring  
19 opinion in that case.



1 2680(c).” Kosak v. United States, 465 U.S. 848, 853 (1984).  
2 We look first to the plain and commonsense meaning of the  
3 statute. United States v. Dauray, 215 F.3d 257, 260 (2d  
4 Cir. 2000).

5 Without context, the phrase “any other law enforcement  
6 officer” would mean (as the government argues) anyone who is  
7 a law enforcement officer. But statutes are not construed  
8 in isolation; “the meaning of statutory language, plain or  
9 not, depends on context.” King v. St. Vincent’s Hosp., 502  
10 U.S. 215, 221 (1991). Section 2680(c)’s exception to the  
11 FTCA’s waiver of immunity is expressed in two phrases (as  
12 marked):

13 Any claim arising in respect of [1] the assessment  
14 or collection or any tax or customs duty, or [2]  
15 the detention of any goods, merchandise, or other  
16 property by any officer of customs or excise or  
17 any other law enforcement officer . . . .

18  
19 The first phrase relates only to the customs and excise  
20 functions of government. The second phrase, which concerns  
21 the detention of property by “any other law enforcement  
22 officer,” is similarly confined by context to customs and  
23 excise.

24 If “any other law enforcement officer” were read to  
25 mean any law enforcement officer doing anything, then the  
26 immediately preceding language regarding “any officer of

1 customs or excise" would be superfluous. But, as a general  
2 proposition of statutory interpretation, we are counseled  
3 "'to give effect, if possible, to every clause and word of a  
4 statute,' and to render none superfluous." Collazos v.  
5 United States, 368 F.3d 190, 199 (2d Cir. 2004) (quoting  
6 Duncan v. Walker, 533 U.S. 167, 174 (2001)); see also Tablie  
7 v. Gonzales, 471 F.3d 60, 64 (2d Cir. 2006) (concluding that  
8 a proffered construction's reduction of statutory language  
9 to surplusage was "fatal").

10 The government contends that ABC's reading does  
11 violence to the statutory language by replacing what  
12 Congress actually said ("any other law enforcement officer")  
13 with something Congress did not ("any other law enforcement  
14 officer acting in a customs or excise capacity"). But  
15 statutes are drawn to be to be read in context. When a  
16 general term such as "any other law enforcement officer"  
17 follows the enumeration of specific types of law enforcement  
18 officers, the general term is often "understood as a  
19 reference to subjects akin to the one[s] with specific  
20 enumeration." Norfolk & W. Ry. Co. v. Am. Train  
21 Dispatchers' Ass'n, 499 U.S. 117, 129 (1991). To the extent  
22 the phrase "any law enforcement officer" is ambiguous, "the  
23 meaning of doubtful terms or phrases may be determined by

1 reference to their relationship with other associated words  
2 or phrases." Dauray, 215 F.3d at 262. As the District of  
3 Columbia Circuit explained in interpreting § 2680(c): "if a  
4 statute lists 'fishing rods, nets, hooks, bobbers, sinkers  
5 and other equipment,' 'other equipment' might mean plastic  
6 worms and fishing line, but not snow shovels or baseball  
7 bats." Bazuaye v. United States, 83 F.3d 482, 484 (D.C.  
8 Cir. 1996) (citation omitted).<sup>5</sup>

9

#### 10 IV

11 In 2000, the FTCA was amended by the Civil Asset  
12 Forfeiture Reform Act of 2000 ("CAFRA"), Pub. L. 106-185,  
13 114 Stat. 202 (2000). The government contends that the  
14 CAFRA amendments compel a broad reading of the phrase "any  
15 other law enforcement officer," relying on the principle  
16 that "[a] statute should be construed to be consistent with  
17 subsequent statutory amendments," Dauray, 215 F.3d at 263.

18 CAFRA effected three amendments to § 2680(c), two of

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<sup>5</sup> Our reading is also consistent with the history behind the adoption of the FTCA in 1946, as other courts adopting the minority position have recognized. See, e.g., Bazuaye, 83 F.3d at 485-86.

1 which are arguably relevant:<sup>6</sup> [i] changing the phrase "the  
2 detention of any goods or merchandise" to "the detention of  
3 any goods, merchandise, or other property," see CAFRA §  
4 3(a)(1), 114 Stat. at 211; and [ii] inserting the following  
5 text at the conclusion of the subsection:

6 , except that the provisions of this chapter and  
7 section 1346(b) of this title apply to any claim  
8 based on injury or loss of goods, merchandise, or  
9 other property, while in the possession of any  
10 officer of customs or excise or any other law  
11 enforcement officer, if--

12  
13 (1) the property was seized for the purpose of  
14 forfeiture under any provision of Federal law  
15 providing for the forfeiture of property other  
16 than as a sentence imposed upon conviction of  
17 a criminal offense;

18  
19 (2) the interest of the claimant was not  
20 forfeited;

21  
22 (3) the interest of the claimant was not  
23 remitted or mitigated (if the property was  
24 subject to forfeiture); and

25  
26 (4) the claimant was not convicted of a crime  
27 for which the interest of the claimant in the  
28 property was subject to forfeiture under a  
29 Federal criminal forfeiture law.

30  
31 Id. § 3(a)(3), 114 Stat. at 211 (internal quotation marks  
32 omitted).

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1 <sup>6</sup> The third amendment, which is not relevant to this  
2 appeal, reflects Congress's evolving approach to the use of  
3 hyphens: "striking 'law-enforcement' and inserting 'law  
4 enforcement.'" CAFRA § 3(a)(2), 114 Stat. at 211.

1           As to the first CAFRA amendment, the government argues  
2 that the additional phrase ("or other property") "only  
3 make[s] sense if the statute is read to apply to all law  
4 enforcement officers, not merely those engaged in customs or  
5 excise duties." But our reading of § 2680(c) is entirely  
6 compatible with its application where "other property" is  
7 detained by an officer acting in a customs or excise  
8 capacity. Cf. Cheney v. United States, 972 F.2d 247, 249  
9 (8th Cir. 1992) (Gibson, J., dissenting) (concluding that  
10 plaintiff's sports car was not "'goods or merchandise'  
11 within the meaning of 28 U.S.C. § 2680(c)").

12           The second (longer) CAFRA amendment creates "an  
13 exclusion to the [§ 2680(c)] exception which re-waives the  
14 government's immunity for certain seizures of property made  
15 in connection with asset-forfeiture laws." Dahler v. United  
16 States, 473 F.3d 769, 771 (7th Cir. 2007) (per curiam).  
17 Thus CAFRA amended § 2680(c) to allow claims based on loss  
18 or damage to property that "was seized for the purpose of  
19 forfeiture under any provision of Federal law providing for  
20 the forfeiture of property other than as a sentence imposed  
21 upon conviction of a criminal offense." CAFRA § 3(a)(3),  
22 114 Stat. at 211 (emphasis added). The government relies on  
23 the phrase "forfeiture under any provision of Federal law,"

1 arguing that it is broader than provisions relating only to  
2 customs or excise, and that it reflects Congress's  
3 understanding that § 2680(c) applies to the detention of  
4 property by officers other than those acting in a customs or  
5 excise capacity.

6 The government has a reasonable (although not  
7 necessarily conclusive) argument that this was Congress's  
8 view in 1999. The Report of the House Judiciary Committee  
9 on CAFRA expressed the view that under the pre-CAFRA version  
10 of § 2680(c) the "federal government is exempted from  
11 liability under the [FTCA] for damage to property while  
12 detained by law enforcement officers." H.R. Rep. No. 106-  
13 192, at IV(5) (1999), available at 1999 WL 406892, at \*18  
14 (emphasis added). That was, for the most part, an accurate  
15 reflection of the general view of the courts: in 1999, four  
16 out of five courts of appeals to address the question had  
17 adopted a broad reading of § 2680(c).<sup>7</sup> But the  
18 understanding of Congress in 1999, assuming that was its

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1 <sup>7</sup> Compare Cheney, 972 F.2d 247; Schlaebitz v. U.S.  
2 Dep't of Justice, 924 F.2d 193 (11th Cir. 1991) (per  
3 curiam); Ysasi v. Rivkind, 856 F.2d 1520 (Fed. Cir. 1988);  
4 United States v. 2,116 Boxes of Boned Beef, Weighing  
5 Approximately 154,121 Pounds, 726 F.2d 1481 (10th Cir.  
6 1984), with Kurinsky v. United States, 33 F.3d 594 (6th Cir.  
7 1994).

1 understanding,<sup>8</sup> does not control the interpretation of a law  
2 passed fifty years before. “[S]ubsequent legislative  
3 history provide[s] an extremely hazardous basis for  
4 inferring the meaning of a congressional enactment,”  
5 Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S.  
6 102, 118 n.13 (1980); and the understanding of a future  
7 Congress “will rarely override a reasonable interpretation  
8 of a statute that can be gleaned from its language,” id.

9 The relevant question is not how § 2680(c) was read by  
10 the Congress that passed CAFRA. What matters is whether our  
11 reading of § 2680(c) is consistent with the CAFRA  
12 amendments. See Dauray, 215 F.3d at 263. It is.

13 The CAFRA exclusion from § 2680(c), re-waiving  
14 immunity, applies “for the purpose of forfeiture under any  
15 provision of Federal law.” 28 U.S.C. § 2680(c)(1). As the  
16 government emphasizes, this category is broader than the  
17 customs or excise laws. But inconsistency with our reading  
18 of the statute arises only if one makes the invalid  
19 assumption that officers acting in a customs or excise  
20 capacity can effect forfeitures only under the customs or

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<sup>8</sup> In the House Judiciary Committee Report, Congress appeared to be concerned primarily about boats and other conveyances, which are often detained by customs and excise officials in service of enforcing the nation’s drug laws.

1 excise laws.

2 One example close at hand is Formula One Motors Ltd. v.  
3 United States, in which DEA agents seized a car, searched it  
4 for illegal drugs, and allegedly damaged the car in the  
5 process. 777 F.2d 822, 822-23 (2d Cir. 1985). We concluded  
6 that § 2680(c) barred a claim against the United States  
7 because the agents were acting in a customs capacity. Id.  
8 at 823-24. But if (hypothetically) DEA agents found illegal  
9 drugs in a car traveling within the confines of the United  
10 States, then the car would be subject to forfeiture, see 21  
11 U.S.C. § 881(a) (subjecting to forfeiture containers for  
12 illegal drugs, vehicles used to transport illegal drugs, and  
13 other property), and if the car is "seized for the purpose  
14 of forfeiture under" 21 U.S.C. § 881(a), then CAFRA would  
15 presumably apply, despite the fact that 21 U.S.C. § 881(a)  
16 is not a provision of federal law relating to customs or  
17 excise. This single instance drawn from our case law  
18 sufficiently demonstrates that the CAFRA amendments are not  
19 inconsistent with our reading of § 2680(c).

20  
21 **V**

22 The government advances two additional arguments,  
23 neither of which need detain us long. First, the government



1 points to subsection (h) which--in contrast to § 2680(c)--  
2 defines "law enforcement officer" as "any officer of the  
3 United States who is empowered by law to execute searches,  
4 to seize evidence, or to make arrests for violations of  
5 Federal law." 28 U.S.C. § 2680(h). Under this definition,  
6 federal prison officers are "law enforcement officers." See  
7 18 U.S.C. § 3050. But the definition of "law enforcement  
8 officer" in subsection (h) is expressly limited to  
9 subsection (h) and does not apply to § 2680 generally. See  
10 28 U.S.C. § 2680(h) ("For the purpose of this subsection,  
11 'investigative or law enforcement officer' means . . . ."  
12 (emphasis added)). If subsection (h) has any bearing on  
13 this appeal, it provides an example of what § 2680(c) could  
14 have said had Congress wanted to broaden the category of law  
15 enforcement officers, or what Congress could say if it  
16 wished to do so now. And even if the definition in  
17 subsection (h) applied explicitly to subsection (c), that  
18 would not necessarily aid the government, because there is  
19 no indication that the BOP employees who allegedly lost  
20 ABC's property were of the sort who are "empowered by law to  
21 execute searches, to seize evidence, or to make arrests for  
22 violations of Federal law."

