International Travelers and Shippers Beware: Is Anyone Liable When Customs Agents Damage Property

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I. INTRODUCTION

ON JANUARY 22, 1989, Gene Locks arrived in Philadelphia from London.1 To his dismay, a sculpture he had purchased in England did not arrive with him in Philadelphia as planned. Airline officials informed Locks that his sculpture would likely arrive the next day and that they would call him when it did so that he could clear it through customs. The sculpture, which was packaged in a crate, arrived the next day. Without calling Locks, an airline employee presented it to a customs official for clearance through customs.

After the airline employee opened the crate, a customs official briefly examined the art piece. The sculpture consisted of three pails welded together with sealed tops. After noting that the pails seemed unusually heavy, the agent gave the sculpture to two other customs agents for further inspection in an adjacent room. Although such an examination usually consists of taking an x-ray of the item, the machine in the room was too small to x-ray the sculpture. The only machine large enough was located at the end of the terminal. Therefore, to determine the contents of the pails, the agents drilled small holes in the top and bottom of them. Still unable to ascertain the con-
tents, the agents completely removed a portion of one pail. Upon doing this, the agents concluded that sand and pebbles caused the unusual weight and cleared the sculpture through customs. Although the sculpture was valued at almost $21,000, Locks could only recover $90.70 in subsequent lawsuits for its destruction.2

The damage done to Gene Locks' property is likely one of many such occurrences. This Comment discusses the liability of the various actors in situations where customs agents damage airline passengers' and shippers' property during customs inspections. Passengers and shippers, like Locks, generally recover very little. Part II of this Comment discusses the United States government's virtually non-existent liability in such situations. Part III considers the limited liability of individual customs agents. Part IV identifies the possibility of recovery against airlines. Finally, Part V recommends several changes that, if made, would insure that the results in such situations meet our tort system's goals of compensation and deterrence.

II. LIABILITY OF THE UNITED STATES GOVERNMENT

The most desirable defendant in a case where customs agents damage a passenger's or shipper's property is the United States government, since the funds from which to recover are so great.3 Under the Federal Torts Claim Act (FTCA), the federal government has waived much of its sovereign immunity in citizens' tort actions.4 To instigate

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2 British Airways, 759 F. Supp. at 1141.
3 Suits against the Customs Service are treated as suits against the United States. Shelton v. United States Customs Serv., 565 F.2d 1140, 1141 (9th Cir. 1977) (per curiam) (holding that government agencies are not subject to suit unless Congress has authorized such a suit, and Congress has not granted authorization for suits against the Customs Service).
4 See 28 U.S.C. § 2674 (1988) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . "). Historically, a person could not recover from the government for injury or loss caused by government employees. Ronald L. Cornell, Jr., Note, Property Damage Claims Against the
an action against the government the citizen must file an administrative claim with the Customs Administration.\(^5\) Although administrative claims may provide the plaintiff with an excellent avenue for relief,\(^6\) such a discussion is beyond the scope of this Comment, which focuses instead on judicial remedies.

Despite the waiver of sovereign immunity under the FTCA, a judicial claim against the government for property damage caused by customs agents will fail in almost all cases due to an exception to the waiver of immunity under the FTCA.\(^7\) In Kosak v. United States\(^8\) the Supreme Court broadly construed the language of 28 U.S.C. § 2680(c) to exclude claims both for damage to property resulting from detention of the property and for damage to property resulting from negligent handling or storage during detention. Prior to the Kosak decision, the meaning of the section 2680(c) exception was unclear. Some circuit courts thought section 2680(c) applied only to damage resulting from the actual detention itself, while others applied it to claims for damage occurring during detention.\(^9\)

\(^5\) 28 U.S.C. § 2675(a) (1988) ("An action shall not be instituted upon a claim against the United States . . . unless the claimant should have first presented the claim to the appropriate Federal agency . . . "). The claimant must present the claim in writing within two years after the claim accrues. \textit{Id.} § 2401(b).

\(^6\) See Philip E. Weiss, Comment, Claims Against Customs for Cargo Damage: The Administrative Route — the Path of Least Resistance, 1 U.S.F. MAR. L.J. 119 (1989). Weiss comments that the administrative claim may be the "path of least resistance" because the cost of such a claim is low and settlement occurs fairly quickly. \textit{Id.} at 141. Such settlement, however, is at the discretion of the agency. See 28 U.S.C. § 2672 (Supp. II 1990) (authorizing the head of the appropriate agency to compensate persons for injury to property caused by the negligence or wrongful act of an employee).

\(^7\) See 28 U.S.C. § 2680(c) (1988) (stating there will be no cause of action for "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs") (emphasis added); Cornell, \textit{supra} note 4; Case Comment, Governmental Liability for Customs Officials' Negligence: Kosak v. United States, 67 MINN. L. REV. 1040 (1983).


\(^9\) See Cornell, \textit{supra} note 4, at 394-95; Case Comment, \textit{supra} note 7, at 1045-50.
In Kosak the Supreme Court reasoned that a literal reading of the statute, the legislative history, and the objectives of the exceptions all supported the broad finding that the exception includes any claim arising out of a customs detention. The Court looked first at the language of the statute and considered the ordinary meaning of the words. The Court reasoned that the "fairest interpretation of the crucial portion of the provision is the one that first springs to mind." The words "arising in respect of" mean "arising out of," the Court opined, and, therefore, those words encompass claims based on negligent property handling.

The Court then looked to the legislative history to support its conclusion. It first considered a statement by the drafter of the pertinent portion of the statute and found that the drafter believed that the exception would bar suit for negligent handling of detained property. The Court also cited a Congressional committee report which suggested that section 2680(c) covers claims "arising out of" detention.

Finally, the Court argued that its liberal reading of subsection (c) best complied with the intent of Congress for the exceptions to the FTCA found in section 2680. The Court's reading fits best with the first purpose of the exception, protecting certain government activities from disruptive suits. The Court reasoned that subsection (c) allows customs agents to use the powerful tool of search and detainment in seeking compliance with the customs

Claims arising from the detention would include injuries such as loss of use or depreciation from a wrongful detention.

11 Id. at 853.
12 Id. at 854.
13 See supra note 7 for the relevant text of the statute.
14 Kosak, 465 U.S. at 854.
15 Id. at 856-57 (citing ALEXANDER HOLTZOFF, REPORT ON PROPOSED FEDERAL TORTS CLAIMS BILL 16 (1931)).
16 Id. at 857 (citing H.R. REP. NO. 1287, 79th Cong., 1st Sess. 6 (1945)).
17 Id. at 858-59.
18 Id. at 859.
laws free from fear of suit.\textsuperscript{19} The Court also found that its reading better protected the government from fraudulent claims, fulfilling another purpose of the exceptions.\textsuperscript{20} It reasoned that because the Customs Service lacks the resources necessary to carefully document the condition of detained property, it is difficult to identify fraudulent suits for damage to detained property.\textsuperscript{21} Finally, the Court argued that its reading of subsection (c) best complied with Congress’s third goal — to avoid government liability for claims for which adequate alternative remedies already exist.\textsuperscript{22} The Court found this purpose to be satisfied because the property owner may have a tort claim against individual customs agents or an implied bailment claim against the government under the Tucker Act.\textsuperscript{23} As this Comment later discusses, the Supreme Court’s reasoning is open to some criticism, indicating that the Court could have decided the case differently.\textsuperscript{24} Based on current case law, however, it appears that an FTCA claim against the United States will fail.

Despite the lack of an FTCA claim, the Court in Kosak did acknowledge a property owner’s right to sue the government under the Tucker Act when customs agents damage her property.\textsuperscript{25} Under the Tucker Act, plaintiffs may sue the government in actions not sounding in tort, as long as the claim does not exceed $10,000.\textsuperscript{26} Generally, such claims will take one of two forms: a cause of action for a Fifth Amendment uncompensated taking or a cause

\begin{footnotesize}
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\item[\textsuperscript{19}] Id.
\item[\textsuperscript{20}] Id.
\item[\textsuperscript{21}] Id.
\item[\textsuperscript{22}] Id. at 858.
\item[\textsuperscript{23}] Id. at 860 & n.22. At this time, the government usually paid any recovery an individual received via a tort claim against a Customs agent. Id. at 860.
\item[\textsuperscript{24}] See infra notes 257-94 and accompanying text; see also Kosak, 465 U.S. at 862-66 (Stevens, J., dissenting) (arguing that none of the majority’s rationale was accurate); Weiss, supra note 6, at 143-44 (arguing that the Court’s reasoning was incorrect).
\item[\textsuperscript{25}] Kosak, 465 U.S. at 860 n.22.
\item[\textsuperscript{26}] See 28 U.S.C. § 1346(a)(2) (1988) (giving the district courts concurrent jurisdiction with the Claims Courts for claims “founded either upon the Constitution . . . or upon any express or implied contract with the United States”).
\end{itemize}
\end{footnotesize}
of action for implied bailment.\textsuperscript{27} Both of these claims have severe restrictions, however, and provide relief only in limited situations.

Fifth Amendment uncompensated taking claims, for example, have been uniformly rejected in cases involving customs seizures.\textsuperscript{28} Such claims fail because seizures and forfeitures pursuant to government regulatory functions, such as customs enforcement, need not be compensated.\textsuperscript{29} Thus, in one case where Drug Enforcement Agents seized the plaintiff's money allegedly without probable cause, no taking requiring compensation transpired because drug enforcement is a regulatory process.\textsuperscript{30} One commentator has argued, however, that the more plaintiff-oriented approach used by the Supreme Court in some recent takings cases may change this outcome.\textsuperscript{31} This, however, remains to be seen.

In the recent case of \textit{Alde v. United States}\textsuperscript{32} the court used the same rationale to deny recovery for a takings claim where the plaintiff's plane was damaged during detainment by the Customs Service. The court identified two primary reasons for the claim's failure. First, the court stated that a taking occurs "when the \textit{rightful} property, contract, or regulatory powers of the Government are employed to control rights or property which have not been purchased."\textsuperscript{33} Thus, if the plaintiff alleges that customs acted wrongly or unlawfully, then there can be no taking.\textsuperscript{34} The second barrier to these takings claims was already discussed: Government action pursuant to its

\begin{itemize}
  \item \textsuperscript{27} Cornell, \textit{supra} note 4, at 400-14.
  \item \textsuperscript{28} \textit{Alde v. United States}, 28 Fed. Cl. 26, 34 (1993).
  \item \textsuperscript{29} Cornell, \textit{supra} note 4, at 400-01 (citing \textit{LaChance v. United States}, 15 Cl. Ct. 127 (1988)).
  \item \textsuperscript{30} \textit{LaChance}, 15 Cl. Ct. at 130.
  \item \textsuperscript{31} Cornell, \textit{supra} note 4, at 404.
  \item \textsuperscript{32} 28 Fed. Cl. 26 (1993).
  \item \textsuperscript{33} \textit{Id.} at 33 (emphasis added) (citing \textit{Florida Rock Indus. v. United States}, 791 F.2d 893, 898-99 (D.C. Cir. 1986), \textit{cert. denied}, 479 U.S. 1053 (1987)).
  \item \textsuperscript{34} \textit{Id.}
police powers is traditionally noncompensable action.\textsuperscript{35}

The bailment claim is limited as well. A bailment arises where a property owner delivers his property to another, while retaining title, for some particular purpose upon an express or implied contract.\textsuperscript{36} Whether the contract is alleged to be express or implied, the plaintiff must prove an offer, acceptance, and consideration.\textsuperscript{37} Furthermore, the plaintiff must show that the contract included a promise from an authorized customs agent that customs would carefully handle the property.\textsuperscript{38} Usually the plaintiff will not be able to provide such proof, and her claim will fail.\textsuperscript{39} Several cases illustrate this point.

In \textit{Insurance Co. of North America v. United States}\textsuperscript{40} the plaintiff importer delivered two containers of furniture to the Customs Service for inspection. After customs completed a partial inspection, the plaintiff requested a more extensive search because he feared that the lack of a complete inspection would leave open the suspicion he was smuggling drugs. During the more thorough search, customs agents destroyed the furniture. The court found no implied-in-fact bailment, stating that there was no “promise, representation or statement by any authorized government official that plaintiff’s goods would be returned damage-free.”\textsuperscript{41}

The \textit{Insurance Company} court distinguished this case

\textsuperscript{35} \textit{Id.} at 34 (citing Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl. Ct. 329, 338-39 (1985)).


\textsuperscript{37} \textit{Insurance Co.}, 11 Cl. Ct. at 3 (citing Baltimore & O.R. Co. v. United States, 261 U.S. 592 (1923)).

\textsuperscript{38} Cornell, \textit{supra} note 4, at 407-14.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} 11 Cl. Ct. 1 (1986).

\textsuperscript{41} \textit{Id.} at 4.
from *Alliance Assurance Co. v. United States*, in which the Claims Court found an implied-in-fact bailment between an importer and the Customs Service. The distinguishing fact was that in *Alliance* the customs agent had given the plaintiff several receipts, "at least two of which were designed to restore the goods to the owner." The presence of receipts, however, may not always create the bailment. In *Llamera v. United States*, for example, the Claims Court found no implied-in-fact bailment despite the fact that the plaintiff had received a receipt. The court opined that when government officials seize property pursuant to police power authority, there is no reasonable reason for the government to enter into the type of contract required for the finding of an implied-in-fact bailment. The court reiterated the reasoning in *Alde v. United States*, stating that "[w]hen property is seized pursuant to the Government's police powers, it is particularly difficult to assume formation of a bailment contract." In that situation, the government has no reason to make an offer of safekeeping and return.

Thus, the government's liability for common law torts in customs property damage cases appears limited. There are, however, three possible exceptions to this general rule based on FTCA claims. First, one commentator has argued that where a person gives a customs agent a piece of property for inspection rather than detention, and the agent damages it, the government will be liable because no detention is involved. The validity of this presumption has not yet been tested by the Supreme Court. In *Kosak* the plaintiff's claim that the government was liable for damage to a pagoda, which was destroyed during the pre-

42 252 F.2d 529 (2d Cir. 1958).
43 Insurance Co., 11 Cl. Ct. at 5.
44 Id.
46 Id. at 597. The court reasoned that the receipt was not evidence of an agreement that the Coast Guard would take care of the property (a boat). Id.
47 Id.
49 Case Comment, supra note 7, at 1056.
detention search, went unanswered because that issue was not presented on appeal.\footnote{Kosak v. United States, 465 U.S. 848, 850 n.3 (1984).} Furthermore, the Court refused to define "detention,"\footnote{Id. at 853 n.8.} which would have at least partially resolved this issue.

Since the Kosak decision, only one court has specifically decided whether section 2680 covers damage incurred during inspection. In Goodman v. United States\footnote{987 F.2d 550 (8th Cir. 1993) (per curiam). The inspection in this case apparently took place on a pier as the damage occurred when pier laborers under customs officials' supervision unloaded, inspected, and reloaded a freight container.} the Eighth Circuit held that the word detention in section 2680(c) encompasses routine customs inspections as well as actual detentions.\footnote{Id. at 551.} The court reasoned that the concerns of the Court in Kosak with regard to fraudulent claims were equally valid whether there was a detention or just an inspection.\footnote{Id. at 552. One judge strongly dissented, saying:

The Customs Service is empowered to perform a number of functions, including inspections, utilization of search warrants, or the seizure and holding of property leading to forfeiture. Against this broad background of the operation of the Custom[s] Service, Congress chose to use only the word "detention." Had Congress desired to use a broader term, it knew how to do so. Detention has a more limited meaning in the context of the customs laws, and I believe it was error to hold that inspection equates with detention.

\textit{Id.} (Gibson, J., dissenting).} In Locks v. Three Unidentified Customs Service Agents a United States district court did not specifically address the issue in the opinion, apparently deciding the issue by dismissing the plaintiff's claim.\footnote{Id. at 1133. The court's opinion did not specifically indicate that the inspection was equivalent to a section 2680(c) detention. Because the agents took the property to a different room and conducted the inspection, however, it may be possible to distinguish this case from one including a brief inspection at the normal customs checkpoint. Removing the property to a separate room arguably fits better with a common sense notion of detention than does a brief inspection at a checkpoint. It seems unreasonable to equate a temporary search with a detention...} The court held that section 2680(c) of the FTCA barred a claim where a customs agent damaged art work during an inspection in a room adjacent to the inspection area.\footnote{Id. at 1136 (E.D. Pa. 1990).}
Furthermore, two additional cases indicate that courts will likely read the exception expansively. In one case, Drug Enforcement Agency (DEA) agents damaged a car so extensively while disassembling it in a drug search that they effectively destroyed the car. The plaintiff argued that section 2680(c) should not apply because the agents' conduct exceeded a normal detention and constituted a destruction. The plaintiff also argued that the agents acted unreasonably and were motivated by malice. The court held that the distinction between a normal detention and a destruction was unimportant and that the exception contains no reasonableness limitation.

In another case, the Customs Service sold the plaintiff's goods after the plaintiff failed to claim them. Customs, however, failed to notify the plaintiff as required by the regulation governing sales. The plaintiff argued that section 2680(c) should not apply since the damage occurred from the sale, not from a detention. The court disagreed, holding that section 2680(c) does not recognize a distinction between a sale of goods and a detention of goods. Therefore, on the basis of the previously cited cases, it appears that the exception will cover damage during an inspection as well as during a detention.

Another exception to the general rule of government immunity from common law torts of customs agents may exist where the plaintiff seeks recovery based on an intentional tort not excepted in 28 U.S.C. § 2680(h) rather that entails the holding of property for a certain amount of time. The purposes of the exception as argued by the Kosak Court, however, are presumptively satisfied in both cases.

57 Formula One Motors, Ltd. v. United States, 777 F.2d 822 (2d Cir. 1985).
58 Id. at 824.
59 Solus Ocean Sys., Inc. v. United States Customs Serv., 777 F.2d 326 (5th Cir. 1985). The goods were sold pursuant to 19 C.F.R. § 127 (1993) (concerning government's right of disposal of unclaimed or abandoned merchandise).
61 Solus Ocean Sys., 777 F.2d at 328 (citing Kosak v. United States, 465 U.S. 848 (1984)).
than on the agent's negligence. In *Vu v. Meese* the court held that a claim against the United States for intentional infliction of emotional distress arising from a customs agent's detention of property was not barred by section 2680(c). In reaching its decision, the court discussed the interplay between sections 2680(h) and 2680(c). It reasoned that although subsection (c) begins with the words "any claim," the fact that all subsections in section 2680 start this way would make subsection (h) unnecessary if Congress had intended the meaning of these words to include intentional torts. As a result of its statutory interpretation, the court held that section 2680(c) applies only to negligent actions. Therefore, an intentional tort claim made by the property owner based on a customs agent's actions during an inspection, which are not covered by section 2680(h), may not be barred, and the court may hold the government liable for the intentional tort. Still, this does not compensate the plaintiff for the

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64 Id. at 1385.
65 Id. at 1385-86; see supra note 7 and infra note 68 for the relevant text of the statute.
66 Id. at 1386.
67 The conduct, however, must still be considered within the employee's scope of employment. For example, in one case the court dismissed a FTCA claim by an importer who alleged that customs agents stole goods during an inspection. *International Fragrances, Inc. v. M.V. "San Martin I"*, No. Civ.A.90-6972 (LJF), 1992 WL 93220 (S.D.N.Y. Apr. 21, 1992). The court held that under 28 U.S.C. § 1346(b), the actions a plaintiff bases her FTCA action on must be within the employee's scope of employment as determined by state law. *International Fragrances, Inc.*, 1992 WL at *1. In this case, state law dictated that stealing would not fall within the scope of employment, and therefore the plaintiff could not bring an FTCA action. *Id.* This outcome prevented the court from deciding another important issue — whether section 2680(c) might not apply where the agents committed the intentional tort of theft.
68 *Vu*, 755 F. Supp. at 1386. It is unclear whether the exceptions in section 2680(h) even apply to actions against Customs agents. The statute states:

The provisions of this chapter and section 1346(b) of this title shall not apply to —

... (h) Any claim arising out of assault ... 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
property damage and will not make the plaintiff whole.

Finally, a plaintiff may argue that the language of the exception, specifically the words "goods or merchandise," has a particular meaning that does not include ordinary personal property. This third possible exception to the general rule that the government is not liable for the torts of customs agents stems from the dissent in *Cheney v. United States*. In that case, the plaintiff sued a law enforcement officer under the FTCA. After having seized title to the plaintiff’s car from his safety deposit box, the officer turned the title over to a third party who wrecked the car. The court held that section 2680(c) barred the action despite the plaintiff’s claim that the officer never detained the car. Although this is the expected outcome, the lone dissenting judge in the case argued that section 2680(c) should not apply because the car was not "goods or merchandise" within the meaning of the statute. Although the judge did not expand upon this argument, one could argue that the words "goods or merchandise" refer only to property being imported by merchants for resale in the United States. Such a classification might provide a way for a plaintiff to get around section 2680(c) when her personal property is damaged by negligent customs agents.

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this title shall apply to any claim arising ... out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

28 U.S.C. § 2680(h). This subsection defines law enforcement officers as those officers who are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Id. Although the *Vu* court made no mention of this part of the statute, it appears to apply to customs agents.

69 See supra note 7 for the relevant text of the statute.

70 972 F.2d 247 (8th Cir. 1992) (Gibson, J., dissenting) (per curiam).

71 Id. at 248 (citing Schlaebitz v. United States Dep’t of Justice, 924 F.2d 193, 194 (11th Cir. 1991)(per curiam)).

72 Id. at 249.
III. LIABILITY OF INDIVIDUAL CUSTOMS AGENTS

A. COMMON LAW TORT CLAIM

Traditionally, courts have held individual customs agents personally liable for common law tort claims.\(^{73}\) Because the Director of Customs typically was not held liable for the actions of lower level employees, the plaintiff in these suits faced the obstacle of proving which particular agent caused the damage.\(^{74}\) Such proof would be difficult if the plaintiff was absent during the inspection. The plaintiff could sue the superior, however, if the superior directed the action of the subordinate.\(^{75}\)

Even when the plaintiff could prove which agent caused the damage, official immunity limited the agent's personal liability in some cases. Until recently, however, the agent's immunity probably would not have blocked recovery if customs agents damaged the property during an inspection. In 1988 the Supreme Court held in *Westfall v. Erwin*\(^{76}\) that government officials are absolutely immune only when they act within the scope of their employment and are performing discretionary functions.\(^{77}\) Under this definition of official immunity, customs agents would not be immune when they negligently damage property dur-

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\(^{73}\) See Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (holding that agents may be liable for "default or for negligence in the performance of [their] duties"); Conklin v. Newton, 34 F.2d 612, 614 (2d Cir. 1929) (holding agents liable for "unwarranted acts").


\(^{75}\) Conklin, 34 F.2d at 612-13 (holding the Collector of Customs liable for the negligence of his subordinates since the subordinates acted according to Collector's direct orders). In Kosak v. United States, 465 U.S. 848 (1984), the Court discussed this issue without deciding it. Although the government argued that the plaintiff did not have to prove which particular agent caused the damage, the Court opined that the plaintiff probably would have to identify the particular agent unless the Director "expressly authorize[d] tortious conduct by a subordinate." *Id.* at 861 n.23.

\(^{76}\) 484 U.S. 292 (1988).

\(^{77}\) *Id.* at 297-98 (reasoning that this standard furthers the purpose of official immunity — to protect the decision making process).
ing routine customs inspections.78

While official immunity most likely did not apply to customs agents' negligence in inspecting peoples' property after the Westfall decision, today it almost certainly does. In response to Westfall, Congress passed the Federal Employee's Liability Reform and Tort Compensation Act (Liability Reform Act).79 In so doing, Congress intended to reinstate absolute immunity for federal officials acting within the "scope of [their] employment," regardless of whether the act was discretionary.80

The Liability Reform Act provides that an FTCA action against the United States is the exclusive remedy for loss of property arising or resulting from negligent or wrongful acts of any government employee acting within the scope of her employment.81 The Liability Reform Act is particularly damaging to the plaintiff's claims in the situation at issue here. In United States v. Smith82 the Supreme Court held that the exclusive remedy clause barred a claim against a federal employee acting within the scope of his employment even if an exception to the FTCA also barred the FTCA action.83 Thus, section 2680(c) of the FTCA now bars tort claims against both the United States

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78 A routine inspection would likely not include the level of discretion or policy considerations necessary to be immune.
81 28 U.S.C. § 2679(b)(1). The statute states:
   The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding . . . against the employee . . . .
   Id. (emphasis added). This does not apply if the official's action violates the Constitution or a federal statute. Id. § 2679(b)(2)(A)(B).
83 Id. at 165 (holding an action for damages caused by a U.S. military physician overseas barred by section 2680(k) of the FTCA).
and individual customs agents for property damage the agents cause during inspection or detention if the agents were acting within the scope of their employment.

Therefore, the primary issue in a tort suit against a customs agent today is whether the official doing the inspection acted within the scope of her employment at the time of the damage. Initially, the United States Attorney General decides this question by certifying that the action was within the scope of employment, or by refusing to do so. If the Attorney General makes the certification, most circuit courts have permitted the plaintiff to contest the decision before the district court.

When the issue is before the court, certification raises a presumption that the official acted within the scope of her employment. The plaintiff must rebut this presumption by producing specific facts to the contrary. Most courts have applied state respondeat superior law to determine whether the plaintiff has rebutted the presumption.

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84 28 U.S.C. § 2679(d)(1). The statute states in part:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident . . . any civil action or proceeding commenced upon such claim . . . shall be deemed an action against the United States . . . and the United States shall be substituted as the party defendant.

Id. Apparently, the Attorney General's determination is based solely on her discretion. Id. § 2679(d)(3).

85 See McHugh v. University of Vt., 966 F.2d 67, 71-72 (2d Cir. 1992); Brown v. Armstrong, 949 F.2d 1007, 1011 (8th Cir. 1991); Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 745 (9th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209, 1210 (7th Cir.), cert. denied, 112 S. Ct. 200 (1991); S. J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1540-41 (11th Cir. 1990), cert. denied, 112 S. Ct. 62 (1991); Melo v. Hafer, 912 F.2d 628, 642 (3d Cir. 1990), aff'd on other grounds, 112 S. Ct. 358 (1991); Nasuti v. Scannell, 906 F.2d 802, 812 (1st Cir. 1990); Arbour v. Jenkins, 903 F.2d 416, 421 (6th Cir. 1990). But see Johnson v. Carter, 983 F.2d 1316, 1319-20 (4th Cir. 1993) (holding that the plain language of the statute gives no discretion to the district court, and therefore, the Attorney General's decision is conclusive); Mitchell v. Carlson, 896 F.2d 128, 131 (5th Cir. 1990) (holding that the Attorney General's certification is given preclusive effect); Aviles v. Lutz, 887 F.2d 1046, 1049 (10th Cir. 1989) (holding that the "mandatory" language of the statute does not permit the court to challenge the Attorney General's decision).

86 Brown, 949 F.2d at 1012.

87 Id.

88 See Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 876 (9th Cir. 1992);
Under the law of most states, it appears that negligent actions causing damage to a person's property will fall within the customs agent's scope of employment. Actions constituting more than mere negligence, however, may not be within the scope of employment.

In Texas, for example, the court considers three factors in determining if an employee acts within the scope of her employment. These include whether the employee acted within the general authority of the employer, in furtherance of the employer's business, and to accomplish the employer's objective. Negligent acts would likely occur while the agent was furthering the United States business and meeting its objectives and, therefore, would be within the scope of the agent's employment. On the other hand, intentional acts causing damage would not further the objectives of the United States and would fall outside the scope of employment.

In California, an employee acts within the scope of her employment if she is carrying out the employer's business when she takes the action in question. This definition includes some unauthorized conduct, but does not cover conduct that deviates substantially from the employee's duties or that is done for personal purposes. Here, again, negligent acts of customs agents would likely occur while furthering the employer's business, while intentional conduct would be a substantial deviation from the agent's duties.

Nadler v. Mann, 951 F.2d 301, 305 (11th Cir. 1992). These courts based their decision on a brief Supreme Court opinion in which the Court held that California's respondeat superior law applied to the question of whether a soldier in the United States military was acting within the scope of his employment under the FTCA. Williams v. United States, 350 U.S. 857 (1955). Recently, however, one court applied federal common law to determine the scope of employment. Garcia v. United States, 799 F. Supp. 674, 680 (W.D. Tex. 1992) (reasoning that interests of uniformity and consistency support application of federal law rather than the law of the state where the act occurred).

Garcia, 799 F. Supp. at 682-83 (citing Robertson Tank Lines v. Van Cleave, 468 S.W.2d 354, 359 (Tex. 1971)).

Pelletier, 968 F.2d at 876 (citing Perez v. Van Groningen & Sons, Inc., 719 P.2d 676, 679 (Cal. 1986)).

Id.
Under Florida law, the rule is similar. In Florida, an employee acts within the scope of his employment if “the employee [is] doing what his employment contemplated.” This includes actions “of the kind he is employed to perform,” occurring “within the time and space limits of employment” and motivated “at least in part by a purpose to serve the master.” This rule would include agents’ negligent acts as part of their scope of employment, but would probably not include intentional acts. Reckless actions, those falling between negligent and intentional conduct, could be within or without the agents’ scope of employment under the law in all three states, depending on the particular circumstances.

If the court applies the federal common law, the actions would be within the scope of employment if the official had the intent, even if secondary, to serve the government’s purpose. Recovery from individual agents would be limited to those cases in which the agent acts solely to harass or harm the plaintiff. Therefore, regardless of whether state or federal law applies, it appears that customs agents’ actions will have to be fairly egregious to remove the actions from within the agents’ scope of employment, depriving the agents of the protection of official immunity.

B. CONSTITUTIONAL CLAIM

Although it is unlikely that a plaintiff will recover against an individual customs agent based on common law tort actions, she may have a damages action based di-

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92 Nadler, 951 F.2d at 305 (quoting Morrison Motor Co. v. Manheim Serv. Corp., 346 So. 2d 102, 104 (Fla. Dist. Ct. App. 1977)).
93 Id. (quoting Kane Furniture Corp. v. Miranda, 506 So. 2d 1061, 1067 (Fla. Dist. Ct. App. 1987)).
95 In discussing the pitfalls of the exclusive remedy provision of the Liability Reform Act, one commentator wrote that when the official’s actions include one of the specific intentional torts enumerated in 28 U.S.C. § 2680(h), “there is a good chance that... a finding will be rendered that the employee acted outside the scope.” Cornell, supra note 4, at 149.
rectly on the Constitution. In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics* the defendants argued that the plaintiff's remedy was a state tort action and that the Fourth Amendment only limits the government's actions in searches and seizures. The Court rejected this argument and concluded that the Fourth Amendment guarantees the right to be free from unreasonable searches and seizures and that federal courts have the power to grant relief when these rights are violated. The Court then held that the ordinary relief for such an invasion of liberty is damages. Thus, the Constitution serves as a sword, as well as a shield in protecting fundamental rights.

The Court identified two situations when damages are not available directly under the Constitution. First, where there are "special factors counseling hesitation in the absence of affirmative action by Congress," the court will not provide damages relief. Second, the plaintiff has no cause of action if there is an "explicit congressional declaration that persons . . . may not recover money damages from agents, but must instead be remitted to another remedy, equally effective in the view of Congress."

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97 Id. Agents of the Federal Bureau of Narcotics made a warrantless entry into the plaintiff's apartment, searched the apartment, and arrested the plaintiff, all allegedly without probable cause. The plaintiff sued the agents to recover damages for the humiliation, embarrassment, and mental suffering that resulted from the agents' unlawful conduct.

98 Id. at 395.

99 Id. Justice Harlan, in his concurrence, wrote that "federal courts do have the power to award damages for violation of 'constitutionally protected interests.'" Id. at 399. Although the *Bivens* Court specifically addressed liberty interests, it appears the rationale equally applies to property interests, which would be the issue in a suit against customs agents for damage done during customs inspections. See *States Marine Lines v. Schultz*, 498 F.2d 1146, 1157 (4th Cir. 1974) (finding that "the necessity and appropriateness of judicial relief is no less compelling in this case" where property rights are at issue "than it was in *Bivens*").

100 *Bivens*, 403 U.S. at 396-97.

101 Id. at 397.

102 Id.
When applied to actions for damages when customs agents damage property, the first limitation should not apply. The defendant may argue that the unique importance of protecting the country's borders from incoming contraband is the type of "special factor" to which the Bivens Court referred. The test for whether an action should be barred by this factor is whether the agent "occupies such an 'independent status' in our constitutional scheme to render a judicially-created remedy against him inappropriate." 103 Although a customs agent may occupy such a status due to the nature of border searches, at least one court has applied a Bivens action in a suit against customs agents. 104

The second limitation on the availability of damages directly under the Constitution will probably also not apply. In a case with facts similar to the customs property damage scenario, the Ninth Circuit Court of Appeals held that a Bivens action was available against a Forest Service official who allegedly destroyed the plaintiff's property in violation of his due process rights. 105 Although there was an adequate alternative remedy available under the Tucker Act and the Fifth Amendment just compensation clause, the court found no explicit declaration by Congress that such a claim was an exclusive remedy. 106

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104 States Marine Lines v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974). It appears this limitation was not even an issue since the court did not discuss it. The court held that the only reason a Bivens action would not lie in that case was because the Bivens Court referred to liberty interests and not to property interests. The court decided that this difference was immaterial. Id.
105 Weiss, 642 F.2d at 267.
106 Id. In granting the defendant's writ of certiorari, the Supreme Court vacated and remanded the case simply "for further consideration in light of Parratt v. Taylor, 451 U.S. 527 (1981)." Weiss, 454 U.S. at 807. The Parratt Court held that a person's procedural due process rights are not violated when post-deprivation remedies are available and there is either a necessity for quick state action or when pre-deprivation process would not be practical. Parratt, 451 U.S. at 539. On remand, the court of appeals in Weiss vacated its earlier judgement. Weiss, 676 F.2d 1320. The appellate court focused not on the availability of the Bivens action, but rather on the threshold issue of whether the official violated the plaintiff's consti-
Furthermore, the Supreme Court has held that the availability of an FTCA claim is parallel to a Bivens action. Thus, a plaintiff may assert both claims. Most likely, then, the second limitation, preempting a Bivens action when Congress has specified another remedy, does not apply to passengers' suits against customs agents for damage to their property. Even if an agent argues that the availability of a Tucker Act or FTCA claim should preclude a Bivens action in this situation, it is clear that those remedies are effective. The plaintiff, therefore, may sue the agents for violation of her constitutional rights. A constitutional claim will fail, however, unless the plaintiff can prove that the agent's actions violated specific constitutional rights. The plaintiff will most likely succeed under either the Fourth or Fifth Amendment.

1. Fourth Amendment Claim

First, the property owner may sue the agent for a violation of the Fourth Amendment unreasonable search prohibition. The Supreme Court rejected such a claim in United States v. Ramsey. In Ramsey customs agents opened several pieces of international mail without a warrant or probable cause. They did, however, have reasonable cause to suspect a violation of the customs laws. The issue before the Court was whether such an inspection was constitutional. In holding the inspection constitutional, the Court reasoned that border searches "pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of constitutional rights. The court found no constitutional rights were violated and, therefore, no Bivens action was available. Id. at 1322. Thus, the court's reasoning on the alternative remedies issue is still persuasive.

108 See supra notes 3-72 and accompanying text.
111 Id. at 624-25.
of the fact that they occur at the border." Furthermore, the Court recited its earlier ruling that border searches were not intended to fall under the Fourth Amendment warrant provision.

At least one court has broadly construed this presumption of reasonableness. In United States v. Objebode the defendant alleged a violation of his Fourth Amendment rights when he was the sole passenger searched by customs agents. He claimed that the agent's motive for searching only him was that he was the only black passenger on the plane. He also contended that the agents had no reasonable suspicion to conduct the search. The court rejected Objebode's arguments as groundless and quoted Ramsey in holding that all border searches are reasonable. The court then held that even racially motivated searches were reasonable.

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112 Id. at 616. The search in Ramsey took place at the New York Post Office after the mail arrived at Kennedy Airport via international mail. The Court identified the Post Office as a "border" for the purposes of border searches. Id. at 609 n.2. In an earlier case, the Court held that there are certain non-border locations where officials conduct searches which are considered "functional equivalents" of the border. Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (giving as one example an airport where international flights land and searches of their passengers take place). Thus, the border search reasoning in Ramsey applies in the case of a customs inspection of baggage from an international flight.

113 Ramsey, 431 U.S. at 617 (citing Carroll v. United States, 267 U.S. 132 (1925)).

114 957 F.2d 1218 (5th Cir. 1992), cert. denied, 113 S. Ct. 1291 (1993).

115 Id. at 1223.

116 Id. (citing United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976)). In United States v. Martinez-Fuerte the Court upheld the constitutionality of check point inspections for illegal aliens close to the Mexican border. Martinez-Fuerte, 428 U.S. at 563. Although the court did not believe that the stops in Martinez-Fuerte were made solely on the basis of ancestry, the court noted that selection based upon ancestry would be constitutional. Id. at 563 & n.16. The Court reasoned that the Border Patrol had wide discretion and needed no special justification for stopping a car because the intrusion was minimal, generally consisting only of questioning. Id. at 563-64.

The Objebode case seems distinguishable on this fact. A customs inspection is much more intrusive than questioning by the Border Patrol because of the physical search that takes place. Furthermore, the case of United States v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975), held that ancestry could not be the sole reason for making a roving-patrol stop near the border. The Brignoni-Ponce Court found that such a stop is unreasonable under the Fourth Amendment. Id. at 884. The Martinez-Fuerte Court apparently found the check point stop less intrusive
Therefore, it seems that a Fourth Amendment claim against a customs agent who has damaged someone’s property will likely fail solely because it is a border search. Although the cases previously cited concerned the issue of the reasonableness of conducting the search in the first place, it appears that the rule of presumed reasonableness will apply to cases where the method of the search is at issue. For example, in Locks v. Three Unidentified Customs Service Agents\textsuperscript{117} the court dismissed just such a claim. The court in Locks does, however, provide some hope for plaintiffs by holding that some customs searches may be unreasonable if the agents conduct them in a “particularly offensive manner.”\textsuperscript{118} The Locks court cites two cases in support of its holding.\textsuperscript{119} In the first case cited, the Supreme Court ruled that the exhaustive search of a cabin, the seizure of its entire contents, and the removal of those contents 200 miles away was unreasonable.\textsuperscript{120} In the second case, the Supreme Court found a search unreasonable where the official compelled the person to open a desk and a safe, and then made a general explora-

\textsuperscript{117} 759 F. Supp. 1131, 1134-35 (E.D. Pa. 1990). In reaching this decision, the court cited both Ramsey and Carroll for the proposition that most customs searches are reasonable. \textit{Id.} The facts of Locks are contained in the introduction to this Comment.

\textsuperscript{118} \textit{Id.} at 1135. The Supreme Court in Ramsey refused to decide whether a border search could be unreasonable for this reason. Ramsey, 431 U.S. at 618 n.13. In expounding on the general principle laid out in Ramsey, the court in United States v. Johnson, 991 F.2d 1287 (7th Cir. 1993), stated: “[A] customs official may search a border entrant’s luggage and outer clothing in a reasonable manner . . . on a random basis, if the search and seizure may be characterized as routine.” \textit{Id.} at 1291 (emphasis added) (citing United States v. Braks, 842 F.2d 509, 514 (1st Cir. 1988)). Unfortunately, the issue in Johnson was not the reasonableness of the manner of the search, but rather the reasonableness of conducting the search at all. \textit{Id.} at 1290. Therefore, the court did not expand on the “reasonable manner” idea.

\textsuperscript{119} Locks, 759 F. Supp. at 1134 (citing Kremen v. United States, 355 U.S. 346 (1957) (per curiam) and Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)).

\textsuperscript{120} Kremen, 355 U.S. at 347. The officials had arrest warrants for two of the four people present at the cabin, and the search took place during the course of those arrests, but without a corresponding search warrant.
tory search.\textsuperscript{121} The Court declined to formulate a test for determining unreasonableness, but instead opined that the court or jury should decide the reasonableness standard according to the facts of each case.\textsuperscript{122}

In applying the offensive manner test to the case before it, the \textit{Locks} court held that the agents' actions did not violate the Fourth Amendment.\textsuperscript{123} The court decided that the agents, at most, acted negligently in using an alternate, less damaging means of inspection.\textsuperscript{124} The court held that simple negligence is not violative of the Fourth Amendment and that the agents had no duty to search in the "least intrusive manner".\textsuperscript{125} The court did, however, limit its decision to the particular facts and specifically stated that agents do not have "unbounded discretion."\textsuperscript{126}

The \textit{Locks} decision, then, leaves open the possibility of a Fourth Amendment unreasonable search claim in limited situations. First, the plaintiff must be able to demonstrate that the agents conducted the search in a particularly offensive manner. Most customs inspections, however, will not rise to this level. Second, the plaintiff must allege and prove something more than simple negligence in the agents' actions. Most cases of property damage during inspection will likely fall into the category of simple negligence. It is not unimaginable, however, that a plaintiff would be able to demonstrate that the agents acted recklessly, or even intentionally, in damaging the plaintiff's property. In these instances, the plaintiff should recover.

\textsuperscript{121} \textit{Go-Bart Importing Co.}, 282 U.S. at 358. The official compelled the search by pretension of right and by threat of force. \textit{Id.}

\textsuperscript{122} \textit{Id.} at 357. In neither this case, nor in \textit{Kremen}, did the search take place at the border or its equivalent. Their applicability to the present issue is, therefore, suspect, despite the citation by the \textit{Locks} court.

\textsuperscript{123} \textit{Locks}, 759 F. Supp. at 1135.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.} at 1135 n.7.
2. Fifth Amendment Claim

Property owners may also sue customs agents for damage to their property under the Due Process Clause of the Fifth Amendment. The Supreme Court, in *Davis v. Passman*, found that a cause of action and a damages remedy may be implied under the Fifth Amendment for a violation of the Due Process Clause. Prior to the Supreme Court's decision in *Davis*, the Fourth Circuit Court of Appeals had allowed a Bivens action against customs agents under the Due Process Clause. The plaintiff in *States Marine Lines v. Shultz* based his claim on the fact that customs agents had refused either to return the plaintiff's seized cargo or to institute forfeiture proceedings against the cargo pursuant to federal law. The plaintiff alleged that the prolonged detention unconstitutionally deprived him of his property. After holding that the plaintiff had stated a cause of action, the court remanded the case for further consideration.

Provided that plaintiffs have an action under the Due Process Clause, the primary issue involves determining in which situations customs agents violate due process rights. Determination of this issue is confusing because of the nature of due process rights and the conflicting opinions on the topic. In *Daniels v. Williams* the Supreme Court identified two primary purposes of the Due Process Clause. The clause requires that governmental agents

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127 U.S. CONST. amend. V (stating "nor [shall any person] be deprived of life, liberty, or property, without due process of law").
128 442 U.S. 228, 245-49 (1979). In *Davis* the Court held that an employee of a Congressman had a remedy for a discriminatory discharge from her job. *Id.*
129 *States Marine Lines v. Shultz*, 498 F.2d 1146 (4th Cir. 1974). For a discussion of this case as it applies to the availability of a Bivens action against customs agents in general, see supra note 99 and accompanying text.
130 *States Marine Lines*, 498 F.2d 1146.
131 *Id.* at 1156-57. No opinion was issued for the remand hearing.
133 See *id.* This case involved a claim based on the Fourteenth Amendment rather than the Fifth. The Fourteenth Amendment reads in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1. The only difference between the two due process clauses is that the Fourteenth Amendment applies to states. Therefore, this char-
follow certain procedures when depriving any person of "life, liberty or property" to ensure fairness, and bars "certain government actions regardless of the fairness of the procedures used to implement them" in order to prevent the government from using its power "for purposes of oppression."\(^{134}\)

In his concurrence in *Daniels v. Williams*, Justice Stevens expanded on the nature of due process rights.\(^{135}\) Justice Stevens argued that the Fourteenth Amendment Due Process Clause includes three types of protection: the specific protections included in the Bill of Rights, substantive due process rights that bar arbitrary government action despite fair procedures, and procedural due process rights that guarantee fair and appropriate procedural safeguards.\(^{136}\) The right upon which the plaintiff bases her claim has important implications for the outcome of the claim. In a substantive due process claim, for example, the plaintiff will allege a deprivation of property based solely on the official's actions, not on inadequate or unfair procedures governing the official's actions.\(^{137}\) Thus, the constitutional violation is complete as soon as the official acts, and the claim will not be denied based on

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\(^{134}\) *Daniels*, 474 U.S. at 331-32 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)).

\(^{135}\) *Id.* at 337-43 (Stevens, J., concurring).

\(^{136}\) *Id.* at 337. For our discussion here, only the last two rights are important. Because customs agents are federal, not state, officials, the plaintiff whose property the customs agents damaged will bring suit for a violation of Fifth Amendment, not Fourteenth Amendment, due process. Unlike the Fourteenth Amendment due process clause, which applies the Bill of Rights to state officials, the Fifth Amendment due process clause does not make such an application because the Bill of Rights already applies to federal officials.

\(^{137}\) *Id.* at 338.
the availability of alternative or post-deprivation remedies.\textsuperscript{158}

Procedural claims, on the other hand, include allegations that while the deprivation itself may have been legitimate, procedural safeguards are inadequate to insure that the deprivation was fair.\textsuperscript{159} Another procedural due process claim may allege that the deprivation, although not unconstitutional, was made by mistake or negligence, and that there are no appropriate procedures to remedy the deprivation.\textsuperscript{140} The inquiry in these claims focuses on the procedures followed, not the deprivation itself, as in substantive claims.\textsuperscript{141}

Having identified the two causes of action available under Fifth Amendment due process protection, the next step is to identify when the owner of property damaged by customs agents may have one of these claims. In most cases, plaintiffs will lack a procedural due process claim. Although case law is sparse on this issue,\textsuperscript{142} it seems likely that the procedures in place for conducting customs searches and detentions do not violate due process. Furthermore, an allegation that negligent or mistaken deprivation has occurred without adequate procedural remedies will also likely fail because of the administrative

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{140} Id. at 339.

\textsuperscript{141} Id.

\textsuperscript{142} The primary case in which a property owner sued customs agents based on the violation of his procedural due process rights is States Marine Lines v. Shultz, 498 F.2d 1146 (4th Cir. 1979). The court apparently treated the plaintiff's claim in this case as a procedural due process claim without naming it as such. The defendants in the case had seized the plaintiff's property and, after sixteen months, had not returned it or instituted forfeiture proceedings against it. Statutes governing the process to be followed after seizure required expeditious administrative and judicial action, but imposed no time limits. 19 U.S.C. §§ 1602-1604 (Supp. IV 1992). The court held that the statutes required implication of some time limit to be constitutional, but declined to set precise limits. \textit{States Marine Lines}, 498 F.2d at 1154-55. The agents' delay in this case failed to comply with the implied time limits, depriving the plaintiff of his property rights without due process of law. Id. at 1157.
proceedings available for recovery.\textsuperscript{143}

The \textit{Locks} case illustrates this point. Although the court did not indicate that Locks's claim was based on procedural due process, it appears that the court considered it to be such a claim.\textsuperscript{144} The court identified the agents' possible noncompliance with a regulation as the \textit{only basis} for a due process violation.\textsuperscript{145} The court then held that the agents had complied with the regulations and, therefore, had not violated the plaintiff's due process rights.\textsuperscript{146} Thus, it seems likely that a procedural due process claim will fail unless the plaintiff can prove noncompliance with a regulation. Even then, the court may bar the claim since other remedies are typically adequate.

The plaintiff's best chance of recovery, then, is a substantive due process claim. Although no court has decided how substantive due process applies to customs agents' actions, other types of cases provide some guidance on the requirements of such a claim.

These cases deal primarily with the types of conduct that deprive persons of their substantive due process rights. As stated above, the Supreme Court in \textit{Daniels} characterized substantive due process as barring certain governmental actions to prevent the government from using its power "for the purposes of oppression."\textsuperscript{147} In his concurrence to that case, Justice Stevens described substantive due process as barring arbitrary government ac-

\textsuperscript{143} See 28 U.S.C. § 2672 (Supp. II 1990) (giving property owners the right to file a claim with the Customs Service).

\textsuperscript{144} The court apparently was confused over Locks's due process claim, indicating that his theory of recovery under the Fifth Amendment was unclear. Locks v. Three Unidentified Customs Serv. Agents, 759 F. Supp. 1131, 1136 (E.D. Pa. 1990). Although Locks could have been claiming a substantive due process violation, the court focused on whether the agents deprived Locks of his property without due process. \textit{Id.} This emphasis on process by the court demonstrates that the court thought the claim was based on procedural due process rights.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.} The court also pointed out that, at most, the agents had acted negligently and that negligence does not rise to the level of a due process violation. \textit{Id.; see infra} note 149 and accompanying text.

\textsuperscript{147} Daniels v. Williams, 474 U.S. 327, 331 (1986).
In applying these characterizations in subsequent cases, lower courts and the Supreme Court have attempted to set a standard for when government action is arbitrary or oppressive. The results are incongruent. The courts in these cases generally employ two lines of analysis. The first line of analysis focuses on the government actor's state of mind, while the second concentrates on the severity of the action itself in determining whether a constitutional violation occurred.

One of the first cases analyzing the official's state of mind was Daniels. In that case the Supreme Court held that negligence, or the lack of due care, on the part of a government official cannot violate the Due Process Clause. The Court, however, specifically refused to decide whether something less than intentional conduct, but more than negligence, such as gross negligence or recklessness, could violate such rights. Since Daniels, several courts using an analysis focusing on state of mind have decided this issue.

The Sixth Circuit Court of Appeals has addressed the issue in several cases. For example, in Nishiyama v. Dickson County the plaintiff alleged that the police had violated his daughter's substantive due process right to life by acting with gross negligence. The court first recognized the holding in Daniels v. Williams that simple negligence

148 Id. at 337 (Stevens, J., concurring).
150 Daniels, 474 U.S. at 328. Although this case involved procedural due process, other courts have applied it to substantive due process claims. See, e.g., Salas v. Carpenter, 980 F.2d 299, 306 (5th Cir. 1992); Gibson v. Matthews, 926 F.2d 532, 537 (6th Cir. 1991); Germany v. Vance, 868 F.2d 9, 17 (1st Cir. 1989).
151 Daniels, 474 U.S. at 334 n.3. This decision implies that intentional conduct will constitute a deprivation. Thus, in Smith v. Eley, 675 F. Supp. 1301 (D. Utah 1987), the court held that where a police officer was negligent in determining the lawfulness of his actions but acted intentionally to deprive the plaintiff of his constitutional rights, the officer may have violated the plaintiff's due process rights. Id. at 1305.
152 814 F.2d 277 (6th Cir. 1987) (en banc).
153 The police officers had allowed an inmate (a convicted felon) to use a patrol car without supervision. The inmate used the patrol car to stop the plaintiff's daughter and then he beat her to death.
cannot deprive persons of their due process rights. It then held gross negligence sufficient to constitute such a deprivation, stating that an "allegation . . . of gross negligence on the part of the defendants was sufficient to charge them with arbitrary use of government power." The term gross negligence, according to the court, "evades easy definition," but basically involves a person "intentionally [doing] something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow."

The Sixth Circuit Court of Appeals reaffirmed the use of this standard and further clarified the definition of gross negligence/recklessness as it applied to substantive due process violations in Vinson v. Campbell County Fiscal Court, Jones v. Sherrill, and Gibson v. Matthews. In Jones the court held that actions constituting gross negligence must be sufficient to charge that the government official acted outrageously or arbitrarily used his power. According to the court, such action involves wanton disregard or reckless indifference to the plaintiff's rights. In Vinson the court characterized gross negligence as an egregious abuse of governmental power. Finally, the court held in Gibson that reckless or arbitrary actions by government officials may violate substantive due process

154 Id. at 282.
155 Id. Later in the opinion, the court used the term "reckless indifference" to describe the state of mind of the government actors. Id. at 283. It appears from this and the court's definition of gross negligence that the two terms are interchangeable.
156 Id. at 282. Applying this definition, the court held that the defendants acted with gross negligence. Id. at 283.
157 820 F.2d 194 (6th Cir. 1987) (involving a substantive due process claim by the plaintiff arising from an alleged false imprisonment).
158 827 F.2d 1102 (6th Cir. 1987) (involving a high speed chase by police of a fleeing offender during which the plaintiff, an innocent bystander, was injured).
159 926 F.2d 532 (6th Cir. 1991).
160 Jones, 827 F.2d at 1106.
161 Id. at 1107.
162 Vinson, 820 F.2d at 198. The court equated egregious abuse of power with malicious and intentional abuse of power. Id. at 198, 201.
rights when they cause a deprivation. The court stated that reckless or arbitrary actions would occur if the official was otherwise able to undertake another action to prevent the harm without producing an offsetting danger, yet failed to do so.

Recently, however, the Sixth Circuit has used the second line of reasoning, focusing on the severity of the official’s action, not his state of mind. In two cases the court applied a test that looked to whether the official’s actions shocked the conscience of the judges. Neither case mentioned *Nishiyama* or its progeny, so it is unclear what effect these recent cases have.

Other circuits that seem to use the state of mind analysis include the Third, Fifth, Seventh, and Tenth. These circuits apply reckless or reckless indifference standards for the threshold of when a government official violates substantive due process rights.

The second line of analysis focuses on the egregiousness of the official’s action. The courts using this analysis

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163 *Gibson*, 926 F.2d at 537 (citing *Nishiyama*, 814 F.2d 277). The plaintiff in *Gibson*, a prison inmate, sued the defendant government official alleging a violation of her substantive due process rights by refusing to help her get an abortion.

164 *Id.*

165 *Feliciano v. City of Cleveland*, 988 F.2d 649, 657 (6th Cir. 1993); *Newell v. Brown*, 981 F.2d 880, 886 (6th Cir. 1992). In both cases the claims involved the allegation that a certain procedure used by the officials violated the plaintiff’s substantive due process rights.


167 *Salas v. Carpenter*, 980 F.2d 299, 307 (5th Cir. 1992) (applying analysis in case in which plaintiffs sued the sheriff for actions taken during a hostage standoff).

168 *Ross v. United States*, 910 F.2d 1422, 1433 (7th Cir. 1990) (applying analysis in case where plaintiff sued police officers for preventing private individuals from attempting to save a drowning victim); *Archie v. City of Racine*, 847 F.2d 1211, 1219-20 (7th Cir. 1988) (applying analysis in case where an official failed to provide rescue services to a woman who had requested them), *cert. denied*, 489 U.S. 1065 (1989).


170 *Fagan*, 1993 WL 290386, at *12; *Salas*, 980 F.2d at 307; *Medina*, 960 F.2d at 1496; *Ross*, 910 F.2d at 1433 (citing Bieneman v. City of Chicago, 864 F.2d 463, 466 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989)).
apply a "shocks the conscience" standard, taken from the Supreme Court's decision in *Rochin v. California*.

The Supreme Court more recently applied this standard in *Collins v. City of Harker Heights*. In *Collins* the plaintiff's husband was killed after entering a sewer to do repairs. The Court characterized one of the plaintiff's claims as arguing that "the city's 'deliberate indifference' to Collins's safety was arbitrary Government action that must 'shock the conscience' of federal judges." The Court held that the city's omissions were not conscience-shock- ing.

Although *Collins* indicates the Supreme Court's willingness to use this standard, rather than a recklessness standard, the Court does not specifically state that the shocks the conscience standard is the proper standard for all substantive due process claims. Furthermore, at least one circuit court has used the recklessness standard after *Collins*, and one commentator recently noted that the Court appears to use an ad hoc balancing test, at times using the shocks the conscience standard and at other times, a different standard.

Several circuit courts have also taken the shocks the conscience standard from *Rochin* and applied it in cases involving substantive due process claims. Other circuit...
courts, however, seem to take a more ad hoc approach. In *Committee of United States Citizens v. Reagan* the D.C. Circuit opined that substantive due process protects against oppressive use of government power or the abuse of government power that shocks the conscience and that its touchstone is protection against arbitrary government action. According to the court, whether a reckless act is an oppressive use of power or an abuse of power shocking the conscience depends on whether the "constitutional line" has been crossed. "[R]eckless conduct is a necessary, though not sufficient, condition for deprivations of due process." This language indicates the D.C. Circuit uses an ad hoc balancing test approach to the issue without any set standard for when a violation has occurred.

The First Circuit has held that there are two alternative tests to use in determining if substantive due process rights are implicated. In *Pittsley v. Warish* the court opined that an analysis of Supreme Court substantive due

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178 859 F.2d 929 (D.C. Cir. 1988). The plaintiffs alleged that certain United States officials had acted in reckless disregard for the plaintiffs' safety in funding the Contras of Nicaragua. The plaintiffs, citizens of the United States living in Nicaragua and victims of some of the Contras' violence, based their claim on the substantive due process protections of the Fifth Amendment.

179 *Id.* at 943 (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

180 *Id.* at 944 (citing Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981)).

181 *Id.* at 943 (citing Wolff v. McDonnell, 418 U.S. 539, 558 (1979)).

182 *Id.* at 949 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

183 *Id.* at 951.

184 *Id.* at 953. The court then held that in this particular case, the defendants had not crossed the constitutional line considering the circumstances. *Id.*

process cases shows that two tests are appropriate. If the plaintiff does not prove that a specific liberty or property interest was violated by the official, the shocks the conscience standard applies. If the plaintiff does prove such a violation, however, then the action need not be conscience-shocking. This latter test was apparently applied in the previously discussed case of Germany v. Vance. The court in Germany applied a reckless indifference standard to a substantive due process claim in which the plaintiff proved a violation of her right of access to the courts.

Therefore, the standard a court will apply in any given case seems to depend on the court and possibly the type of case. The best standard is open to speculation. It seems safe to assume, however, based on the case law that the court will either apply a shocks the conscience, a reckless, or a reckless indifference standard.

Applying these standards, property owners may have Fifth Amendment substantive due process claims against customs agents who have damaged their property. If
the agent negligently damages the property, the plaintiff will not recover.\textsuperscript{194} On the other hand, if the agent acts intentionally to deprive the person of her property, the owner should recover damages in courts using a state of mind framework, and might recover in others if the conduct was egregious enough to shock the conscience of the judge.\textsuperscript{195} Whether an action falling between intentional and merely negligent conduct will create liability depends on the court. If the conduct is severe enough, it might shock the conscience of the judge and constitute a violation in courts recognizing the shocks the conscience test. If the official was reckless or showed reckless indifference, then courts recognizing the reckless or reckless indifference standard would find that the official violated the plaintiff’s rights. Whether conduct is reckless, however, depends on each court’s definition of that term. The best test in the customs inspection situation is the test applied

\textsuperscript{194} See Daniels v. Williams, 474 U.S. 327, 331 (1986) (holding negligence does not constitute a due process violation).

\textsuperscript{195} Seemingly, for plaintiffs to have a cause of action based on an agent’s intentional action, the agent must act with the purpose of depriving the plaintiff of her rights. Thus, in \textit{Locke} the agents were not liable even though they acted intentionally in taking apart the sculpture because they were not acting with the purpose of depriving Locke of his rights. Locke v. Three Unidentified Customs Serv. Agents, 759 F. Supp. 1151 (E.D. Pa. 1990); \textit{cf.} Smith v. Eley, 675 F. Supp. 1301, 1305 (D. Utah 1987) (holding a police officer liable under the due process clause where he acted to harm and deprive the plaintiff of his rights).
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in Gibson. Under that test, the court would find liability if the agent could have taken less damaging actions without jeopardizing the effectiveness of the search. Therefore, in a situation similar to Locks, the agents should have been liable since they had an equally effective, alternative means of inspecting the sculpture by using the x-ray machine at the end of the terminal.

3. Official Immunity

Even if the plaintiff can state a Fourth or Fifth Amendment claim against customs agents, official immunity may protect the agents from suit. In three primary cases, the Supreme Court has determined the law of official immunity as it applies to federal executive officers. In Butz v. Economou the Supreme Court decided whether certain Department of Agriculture officials were entitled to absolute immunity in a suit for alleged violations of another's constitutional rights. The government argued, and the trial court held, that executive officials are absolutely immune from actions taken that violate another's constitutional rights if the actions are within the outer perimeter of their authority and are discretionary, even if done knowingly and deliberately. The Supreme Court rejected this position, holding that Barr v. Matteo relied on by both the government and the trial court, did not control because it did not involve actions violating constitutional rights. Finding that federal executive officers

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196 See supra notes 163-64 and accompanying text.
197 The court, however, found the agents at most negligent. Locks, 759 F. Supp. at 1135.
198 The immunity available here is different than that available under the Liability Reform Act, which does not apply when the plaintiff alleges constitutional violations. See 28 U.S.C. § 2679(b)(2)(A) (Supp. 1993).
201 360 U.S. 569 (1959) (holding an executive official's false and damaging publication of information about two employees privileged because issuing the publication was within the official's authority).
202 Butz, 438 U.S. at 478, 495.
should have the same immunity as state officials in suits for constitutional violations, the Court held that "federal executive officials exercising discretion are entitled only to the qualified immunity" held by state officials.

Four years later, the Court clarified the concept of qualified immunity in Harlow v. Fitzgerald. Citing Butz, the Harlow Court stated that executive officials typically have qualified immunity in suits alleging constitutional violations. This immunity is an affirmative defense pled by the defendant and is generally available only to officials performing discretionary functions. Next, the Court laid out the test for qualified immunity, changing the law as stated in other cases such as Scheuer v. Rhodes and Wood v. Strickland. The Harlow Court held that the official is liable for conduct violating "clearly established statutory or constitutional rights of which a reasonable person would have known." This test eliminated the subjective element of the older tests and provided that allegations of malice are no longer sufficient by themselves to make the immunity inapplicable. Although this test could be read to provide immunity to an official who knowingly violates a person's rights, other statements made in the opinion indicate that this reading is incorrect.

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203 Id. at 500.
204 Id. at 507 (emphasis added). The Court had previously held that state executive officers were immune if the officers had reasonable grounds, coupled with a good faith belief, to believe that their actions were constitutional. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). The exception to this rule is that there is absolute immunity for certain special functions, including the judicial and prosecutorial functions. Butz, 438 U.S. at 508-09.
206 Id. at 807.
207 Id. at 815-16.
209 420 U.S. 308 (1975). The Wood Court held that there was no qualified immunity if the official "knew or reasonably should have known that the action he took... would violate the [plaintiff's] constitutional rights, or if he took the actions with the malicious intent to" deprive the plaintiff's rights. Id. at 322 (emphasis added).
210 Harlow, 457 U.S. at 818. In subsequent decisions, the test became known as an "objective legal reasonableness" test. See Anderson v. Creighton, 483 U.S. 635, 659 (1986).
211 Harlow, 457 U.S. at 817.
The Court restated the test as allowing immunity if the official "neither knew nor should have known" that her actions violated the plaintiff's rights. Furthermore, the Court stated that by focusing on objective factors, they "provide no license to lawless conduct."

To determine what an official knew or should have known in order to satisfy the qualified immunity test, the law must clearly establish which conduct violates constitutional rights. The Supreme Court expanded on this issue in the case of Anderson v. Creighton. The Court in that case held that the "[c]ontours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The Court went on to state that the very action need not have been held unlawful, but that the unlawfulness must be apparent in light of the existing law.

Although no cases have applied qualified immunity to customs agents after Harlow, several assumptions can be made as to its application. First, the defense may not always be available because it only applies to discretionary conduct. In the case of negligent damage to property during inspection, the level of decision making necessary for an action to be discretionary will typically be lacking.

212 Id. at 819.
213 Id. Justices Brennan, Marshall, and Blackmun in their concurrence stated that the test does not "allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know." Id. at 821.
214 Id. at 818.
216 Id. at 640.
217 Id.
218 In two cases prior to Harlow, courts applied the immunity to Customs agents. See Benson v. Hightower, 635 F.2d 868, 870 (9th Cir. 1980); Shelton v. United States Customs Serv., 565 F.2d 1140, 1141 (9th Cir. 1977) (per curiam). Both of these cases applied the test using both the subjective and the objective criteria and were based on facts different from a property damage during inspection scenario. Therefore, they provide little support in the application of the immunity to customs agents sued by damaged property owners. The cases do, however, show that customs agents are considered executive officers and that the defense is available to them.
The carrying out of a routine inspection is probably ministerial, not discretionary. Second, if the immunity does apply, the requirement that the law be clearly established may benefit the defendant.\textsuperscript{220} As indicated earlier, there are few cases based on suits against customs agents for constitutional violations. Therefore, the defendant will have a strong argument that he could not have reasonably known his actions violated clearly established rights.\textsuperscript{221}

IV. AIRLINE LIABILITY

Since suits against the United States and individual customs agents for damage done to property during customs inspections provide virtually no relief in most cases, creative plaintiffs may attempt to sue the airline on which they travelled. This alternative, however, is likely to produce little, if any, recovery.

An airline's liability for damage to or loss of its passengers' property is covered by the airline's tariff.\textsuperscript{222} Generally, these tariffs are contracts between the carrier and the passenger governing their rights and liabilities.\textsuperscript{223} In these tariffs, airlines attempt to limit or exculpate themselves from liability in certain situations including loss or damage to baggage. Federal common law governs the effectiveness and fairness of these limitations.\textsuperscript{224} According to federal common law, the airline may not totally exculpate itself from liability.\textsuperscript{225} It may, however, limit its lia-

\begin{itemize}
\item \textsuperscript{220} Id. at 818.
\item \textsuperscript{221} In fact, in one case dealing with an alleged substantive due process violation by a law enforcement official, the court found that in applying qualified immunity, it was significant that the law on substantive due process was not clear. Salas v. Carpenter, 980 F.2d 299, 310 (5th Cir. 1992). More particularly, the court found that “[e]ven today, it remains uncertain whether officials who cause harm by gross negligence can violate the due process clause.” Id.
\item \textsuperscript{222} Martin E. Rose & Beth E. McAllister, The Effect of Post-Deregulation Court Decisions on Air Carriers Liability for Lost, Delayed or Damaged Baggage, 55 J. Air L. & COM. 653, 656 (1990).
\item \textsuperscript{223} Id. at 669.
\item \textsuperscript{225} Rose & McAllister, supra note 222, at 678 (citing Klicker v. Northwest Airlines, 563 F.2d 1310 (9th Cir. 1977)).
\end{itemize}
Liability if the passenger has the option of purchasing increased coverage and if the carrier gives the passenger notice of the limit and the increased valuation option.226

Thus, when a passenger sues the airline for property damage, the tariff's terms bind the passenger, and the plaintiff must base his suit on contract theory.227 The passenger cannot avoid the terms of the contract by forming the complaint in terms of bailment or tort.228 As a result, the liability limitation almost always applies. As a tradeoff for the limitation, the airline concedes its negligence in cases of property damage and, therefore, assumes liability up to the tariff's limit.229 In the normal situation, then, the airline will reimburse the plaintiff, up to the limits in its tariff, who discovers that his property has been damaged during loading or flight.

The situation in which the damage occurs during a customs inspection, however, is unlike the normal situation. The question becomes when and how the airline is liable. Presumably, the airline must have taken some action linking itself to the cause of the damage. Thus, when the carrier delivers the property to the passenger and the passenger then checks it through customs where it is damaged, the airline will not be liable.

In *Locks v. British Airways*230 the airline's actions subjected it to liability even though the damage to the plaintiff's property occurred during the customs inspection. Although the court did not address why the airline was liable, the factual setting indicates the reason. Because Locks's property arrived a day later than Locks, a British Airways employee delivered the property to customs.

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226 *First Pa. Bank*, 731 F.2d at 1122 (applying the increased value doctrine); see also *Rose & McAllister*, supra note 222, at 666-67.
228 *Id.*
229 *First Pa. Bank*, 731 F.2d at 1116. Normally, the Warsaw Convention imposes the same limit. See *infra* notes 233-40 and accompanying text.
Furthermore, the airline failed to notify Locks that his sculpture had arrived, as they allegedly promised to do.\textsuperscript{231} The liability probably arose either because the airline had possession of the property when it was delivered to customs or because it was negligent in failing to notify Locks of the sculpture's arrival. Therefore, for the plaintiff to recover from the airline, he must be able to prove some action by the airline linking it to the damage. Apparently, establishing this link can be very difficult.\textsuperscript{232}

Since the plaintiff in a customs property damage suit has flown on an international flight before the inspection, the Warsaw Convention\textsuperscript{233} also governs her claim.\textsuperscript{234} As with the tariff, the Convention limits the carrier's liability and, in turn, creates a presumption of the airline's liability.\textsuperscript{235} The liability limit is determined according to the

\textsuperscript{231} Locks alleged that a British Airways employee told him the sculpture would likely arrive the next day and that he would be notified so he could check it through customs.

\textsuperscript{232} It is unlikely that the airline could be liable based solely on vicarious liability principles. Two state courts have decided similar, but distinguishable, cases. Both cases involved loss of baggage during pre- or post-flight security checks. In Tremaroli v. Delta Airlines, 458 N.Y.S.2d 159, 161-62 (Civ. Ct. 1983), the court held that since the airline required the security check and its agent performed it, the airline had control of the passenger's property and was liable for its negligent loss under a bailment theory. The court also held that despite the fact that the F.A.A. required the security check, the airline still had a duty to safeguard the baggage. \textit{Id.} at 161.

In Wackenhut Corp. v. Lippert, 591 So. 2d 215, 218 (Fla. Dist. Ct. App. 1991), the court found an airline liable for lost baggage during a security check. The court reasoned that since the security company was the airline's agent, the airline could be liable for its negligence. \textit{Id.} The court also held that the airline's tariff limitations did not apply. \textit{Id.}

Since these cases involve negligence on the part of the airline's agents, they do not apply to the case of damage done by customs officials who are not the airline's agents.


\textsuperscript{234} For a thorough discussion of airline baggage claims under the Warsaw Convention, see Stephen C. Fulton, \textit{Airline Baggage Claims: A Tour Through the Legal Minefield}, 5 FlA. J. Int'l L. 349, 349-68 (1990).

\textsuperscript{235} \textit{Id.} at 350 (citing Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 247 (1984)).
weight of the lost or damaged property and the plaintiff may recover $9.07 per pound.\textsuperscript{236}

The Convention imposes liability for destruction, loss, or damage to checked baggage when it occurs during transport by air.\textsuperscript{237} The Convention defines transport by air as the time in which the carrier is in charge of the baggage.\textsuperscript{238} This definition encompasses any custody the airline has of the property prior or subsequent to the time the baggage is actually on the airplane.\textsuperscript{239} Therefore, to recover, the plaintiff must establish delivery of property to the airline in good condition, damage or loss of the property during "transport," and the extent of the damage or loss.\textsuperscript{240}

The plaintiff in a customs property damage case may recover from the airline in limited situations, such as that in *Locks*. Even in these situations, the plaintiff’s monetary recovery is limited.\textsuperscript{241} The plaintiff may, however, avoid the Convention’s damage limitation if she can prove that the airline or its agent acted with willful misconduct.\textsuperscript{242}

In most cases, the plaintiff will not be able to show willful misconduct. In one case, the plaintiff expressed his concerns to an airline ticketing agent about a suspicious Customs agent to whom he had turned over his baggage prior to boarding.\textsuperscript{243} The plaintiff then asked the agent to see his baggage, but the agent refused to get it. On reach-

\textsuperscript{236} Convention, *supra* note 233, art. 22, 49 Stat. at 3019. An exception to the liability limit exists if the carrier or its employees acted with willful misconduct. *Id.* art. 25, 49 Stat. at 3020.

\textsuperscript{237} *Id.* art. 18, \textsection 1, 49 Stat. at 3019.

\textsuperscript{238} *Id.* art. 18, \textsection 2, 49 Stat. at 3019.

\textsuperscript{239} Fulton, *supra* note 234, at 355 (citing Berman v. Trans World Airlines, 421 N.Y.S.2d 291 (Civ. Ct. 1979)). Thus, in *Locks* British Airways was liable since it was in charge of the property when the damage occurred.

\textsuperscript{240} Fulton, *supra* note 234, at 366.

\textsuperscript{241} See Convention, *supra* note 233, art. 22, 49 Stat. at 3019 (imposing a limit of $9.07 per pound); First Pa. Bank, N.A. v. Eastern Airlines, Inc., 731 F.2d 1113, 1122 (3d Cir. 1984) (holding that airlines may limit their liability if certain requirements are met).

\textsuperscript{242} Convention, *supra* note 233, art. 25, 49 Stat. at 3020.

ing his destination, the plaintiff discovered his baggage was lost. He alleged that the airline acted with willful misconduct and that the employee and the Customs agent colluded to steal his property. The court defined willful misconduct as "a conscious intent to do or to omit doing the act from which the harm results to another." Although it appears from this definition that the agent's action constituted willful misconduct, the court applied paragraph 2 of Article 25 of the Convention and concluded that no willful misconduct existed. The court held that this provision required the agent to be acting within the scope of his employment and that collusion with the customs agent to steal was not within the scope. Thus, even where it appears there is willful misconduct, the exception may not apply.

In another case, an airline's agent refused to check the plaintiff's baggage to see if it had been tagged. The court held that the agent did not act with willful misconduct. The court applied a similar test of "conscious intent," adding that "[t]here must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." The court found that the agent did not realize such actions would result in probable injury and that he did not disregard the consequences of those actions.

The above case seriously limits the situations in which the passenger can prove willful misconduct. It is unlikely that in the few situations where the airline is liable for

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244 Id. at 1020 (quoting Goepp v. American Overseas Airlines, 117 N.Y.S.2d 276, 281 (App. Div. 1952), aff'd 114 N.E.2d 37 (N.Y.), cert. denied, 346 U.S. 874 (1953)).
245 Id. Paragraph 2 of Article 25 says "the carrier shall not be entitled to avail himself of the said provisions [of the Convention], if the damage is caused [by the willful misconduct of] any agent of the carrier acting within the scope of his employment." Convention, supra note 233, art. 25, ¶ 2, 49 Stat. at 3020.
246 Rymanowski, 416 N.Y.S.2d at 1020.
248 Id. at 141-42.
249 Id. at 141 (quoting Grey v. American Airlines, Inc., 227 F.2d 282, 285 (2d Cir. 1955), cert. denied, 350 U.S. 989 (1956)).
250 Id. at 142.
damage done by customs agents, willful misconduct will also be present. Therefore, recovery from the airline, if available at all, will be largely inadequate in most cases because of the liability limitation.

V. RECOMMENDATIONS FOR CHANGE

As demonstrated by the previous discussion, property owners lack adequate judicial remedies when customs agents damage their property during inspection or detention. Despite the importance of the Customs Service's function, some form of adequate remedy should be available to the innocent property owner. Furthermore, the present state of the law in this area does not meet the goals of our tort system. Although compensation is the primary goal of the law of torts, plaintiffs are inadequately compensated for their loss. When negligent customs officials damage an innocent airline passenger's baggage, the passenger deserves just compensation according to our tort system. In most cases, the passenger will not be compensated unless she recovers via an administrative claim. In addition, the present law in this area does not satisfy another important goal of torts — deterrence and prevention of future harm. The federal government has no incentive to prevent Customs Service employees from damaging citizens' property because the government is immune from suit in those cases. Furthermore, due to the difficulty of succeeding on a claim against individual agents, customs agents need not attempt to inspect property carefully.

To remedy the lack of compensation and deterrence in this area, one or two changes need to be made. First, the Supreme Court should overturn its decision in Kosak v.

252 See supra note 6.
253 KEETON, supra note 251, § 4, at 25.
254 See supra notes 7-23 and accompanying text.
255 See supra part III.
The majority's rationale in this case is open to criticism, and Justice Stevens's dissent is the better reasoning in the case.

Justice Stevens first rejected the Court's finding that the ordinary meaning of the provision's words "arising in respect of" was really "arising out of," and therefore applied to damage occurring during detention. Justice Stevens instead thought that the normal reading of those words was what the language said, not "arising out of." "Arising in respect of," according to Justice Stevens, applies only to damages resulting from the temporary interference with the property owner's possession rather than physical damage to the goods during detention. Clearly, as a matter of common sense, the ordinary reading of "arising in respect of" is "arising in respect of," not "arising out of." Justice Stevens' reading of the words, therefore, is the more obvious reading, and it appears that the two phrases have two distinct meanings.

Justice Stevens offered further proof that the majority erred on the issue of the phrase's meaning. He analyzed the other exceptions found in 28 U.S.C. § 2680 and argued that since Congress used the "arising out of" language in some of the other subsections, and since there was no persuasive evidence to the contrary, the Court should assume that Congress intended to express a different meaning in section 2680(c) than in the others subsec-

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257 See supra notes 10-23 and accompanying text. The Court cited the plain meaning of the words, the legislative history of the statute, and the objectives of the exceptions to 28 U.S.C. § 2680 as supporting its interpretation of subsection (c). Kosak, 465 U.S. at 854-61.

258 Kosak, 465 U.S. at 862-69 (Stevens, J., dissenting).

259 28 U.S.C. § 2680(c) (1988) states that there is no cause of action for "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any office of customs." Id. (emphasis added).

260 Kosak, 465 U.S. at 862, 863.

261 Id. at 862.

262 Id.

263 See, e.g., 28 U.S.C. § 2680(b), (e), (h) (1988).
This argument is very persuasive. If Congress intended the words "arising in respect of" to mean "arising out of" as the majority held, why did Congress not use those words in subsection (c) as it did in the other subsections? The Ninth Circuit Court of Appeals made a similar argument in deciding this issue in a case prior to Kosak. In holding that section 2680(c) should be read narrowly, the court compared subsection (c) to subsection (b) of section 2680. Subsection (b) excepts actions "arising out of the loss, miscarriage or negligent transmission" of the mail. The court reasoned that if Congress had intended to make the government immune for negligent handling of property by customs agents, it would have included the Customs Service in subsection (b), or at least worded subsection (c) similarly. The court found "[t]he conclusion... inescapable that [Congress] did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others." Justice Stevens next argued that the statute's legislative history did not support the majority's interpretation. The majority had found strong support for its reading in a report by an apparent draftsman. However, dismissed the report as worthless since it was an internal Justice Department working paper that was never

264 Kosak, 465 U.S. at 863. As seen by the following discussion, Justice Stevens did not find any persuasive evidence to the contrary.

265 At least one commentator has made this same argument, stating that the use of different language suggests that § 2680(c) does not apply to damage arising out of the detention. Case Comment, supra note 7, at 1054.

266 A-Mark, Inc. v. United States Secret Serv. Dep't of the Treasury, 593 F.2d 849, 850 (9th Cir. 1978) (per curiam).


268 A-Mark, 593 F.2d at 850.

269 Id. (quoting Alliance Assurance Co. v. United States, 252 F.2d 529, 534 (2d Cir. 1958)).

270 Id. at 863-65.

271 Id. at 856-57.
mentioned in the statute’s legislative history.\textsuperscript{272} He argued that the Court should not attribute the intent of a lobbyist to Congress without any evidence that Congress shared that intent.\textsuperscript{273}

Furthermore, Justice Stevens found the House Committee Report that the majority cited\textsuperscript{274} unhelpful in determining Congress’s intent because of the way the words “arising out of” were used in the Report.\textsuperscript{275} The Report, according to Justice Stevens, contained the words in an introduction to a list of exceptions and used them in the interest of brevity, not precision.\textsuperscript{276} Considering the legislative history in the light Justice Stevens presented it, the majority’s reliance on it appears misplaced.

Finally, Justice Stevens argued that the Court’s analysis of the purposes of the exceptions found throughout the legislative history carried no weight.\textsuperscript{277} He thought that such a discussion only explained generally why Congress may have decided to create exceptions to the statute’s waiver of sovereign immunity.\textsuperscript{278} According to Justice Stevens, such a general discussion was no more persuasive than an argument based on the general reasons for waiving the immunity in the first place.\textsuperscript{279} Specifically, Justice Stevens addressed each purpose the majority cited.

The Court reasoned that the denial of any claim for

\textsuperscript{272} Id. at 863. Justice Stevens said there is no evidence that Congress even knew of the report’s existence. Id.
\textsuperscript{273} Id. One commentator, in a review of the Supreme Court’s use of non-legislators’ contributions to legislative history, argued that the Kosak Court should not have relied on the report at all since it was not in the Congressional Record. Allison C. Giles, Note, The Value of Nonlegislators’ Contributions to Legislative History, 79 Geo. L.J. 359, 383 (1990).
\textsuperscript{274} Kosak, 465 U.S. at 857 (citing H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945)).
\textsuperscript{275} Id. at 865.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id.
\textsuperscript{279} Id. Even if it were a valuable analysis, Justice Stevens found the general basis of the exceptions less persuasive than the overwhelming purpose of the statute. Id. at 868.
damages relating to a customs detention protected an important government activity from the disruption of lawsuits. 280 Justice Stevens responded to this by saying that the majority's reasoning was not persuasive since, shortly thereafter, the Court identified two alternative remedies available to plaintiffs. 281 By citing the need to protect the Customs Service from disruptive suits and then identifying two alternate remedies, the Court seems to belittle this goal. Furthermore, it is questionable that an FTCA suit would disrupt the Custom Service's activities as the Court said. More likely, the availability of an alternative claim against the individual customs agent would disrupt the agent's effectiveness in performing her duties, yet the majority expressed no concern over these suits. 282

Another argument against the majority's reasoning on this point is that allowing suits against the government for the Custom Service's, or its officials', negligence does not undermine the Service's effectiveness any more than do suits that are allowed under the FTCA for other federal agencies' negligence. 283 Allowing suits for detention, on the other hand, potentially undermines the Customs Service's effectiveness because it threatens the agents' discretion in determining when to detain goods. 284 Allowing suits for customs agents' negligence would only be disruptive in the sense that it would make negligent agents alter the incorrect methods of inspection they employ, which is obviously not the type of disruption concerning the Court. Therefore, based on these arguments, it ap-

280 Id. at 859.
281 Id. at 866; see also Weiss, supra note 6, at 144 (arguing that the availability of other remedies works against the Court's reasoning here). The majority identified the common-law tort claim against the customs agent and an implied bailment claim against the government as possible remedies. Kosak, 465 U.S. at 860, 861 n.22.
282 Justice Stevens also thought that the availability of a claim against the agent was more "dampening" to the Customs Service's effectiveness than a suit against the federal government. Kosak, 465 U.S. at 866.
283 Case Comment, supra note 7, at 1059.
284 Id.
pears that Justice Stevens’s reading of the statute fits logically with the first general purpose of the exceptions.

The second objective of the exceptions to the FTCA, which the majority found satisfied by their holding, is preventing fraudulent claims. The Court found this objective especially important to section 2680(c) because of the Customs Service’s inability to screen fraudulent claims due to the limited funds available for careful inspection of the condition of incoming goods. Justice Stevens responded to this finding by saying: “[O]ne wonders what the staff which detain the items are doing with them if not inspecting them, why they cannot make a record of the condition of the goods, [and] why this burden would be onerous . . . .” Furthermore, he noted that customs agents make such inspections of condition to some extent already. Therefore, the lack of funds complained of by the majority in reality is of little concern. Although the general concern of fraudulent claims appears legitimate, the majority’s reliance on it is misplaced. The problem of preventing fraudulent claims is no more difficult in the customs context than for any other government function. Furthermore, the Court’s identification of alternative claims available in these situations, which are just as likely to be fraudulent, shows that in reality avoiding fraudulent claims is not an important objective of this exception.

Finally, the majority found that its interpretation fulfilled the third general objective of the FTCA exceptions, that is, not waiving sovereign immunity for claims where existing remedies were adequate. The majority found this third objective met because of the availability of the tort claim and the implied bailment claim. Justice Stevens

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285 Kosak, 465 U.S. at 858.
286 Id. at 859.
287 Id. at 865 n.3.
288 Id. (citing U.S. CUSTOMS INSPECTOR’S HANDBOOK §§ 3.54(b), 5.72 (1982)).
289 See supra note 22 and accompanying text.
290 See Weiss, supra note 6, at 144.
291 Kosak, 465 U.S. at 800.
argued that reliance on this finding "simply beg[ged] the question."\textsuperscript{292} He found no evidence that Congress thought the remedies for these types of claims were adequate.\textsuperscript{293} Therefore, Justice Stevens thought the basic objective of the FTCA, to remedy the inadequacies of existing remedies, trumped this third objective of the exceptions.\textsuperscript{294}

After analyzing both opinions, Justice Stevens's reasoning appears to be the most persuasive. According to the plain language of the statute, the statute's legislative history, and the general purposes of the FTCA and its exceptions, section 2680(c) should only apply to claims against the federal government for damages arising from the fact of the detention itself. This construction of the statute is also more consistent with the objectives of our tort system. It allows for the adequate compensation of the innocent plaintiff when harmed by the government's negligence. Furthermore, this construction provides incentive for the Customs Service to take care in inspecting and detaining citizens' property.

The other change that would improve plaintiffs' compensation and provide better deterrence of negligent

\textsuperscript{292} Id. at 866.

\textsuperscript{293} Id. There is evidence, however, that section 2680(c) was included in the statute precisely because of the availability of adequate alternative remedies. Case Comment, supra note 7, at 1057 (citing Irvin M. Gottlieb, The Federal Tort Claims Act — A Statutory Interpretation, 35 Geo. L.J. 1, 45 (1946)). These pre-existing remedies, however, were available only for claims based on the detention itself, not for damage to property during the detention. Id. Therefore, Justice Stevens probably was referring to the property damage claim when he said there was no evidence that Congress considered the existing remedies adequate. See Kosak v. United States, 465 U.S. 848, 866 (1984). This evidence also supports Justice Stevens's interpretation of the statute. If remedies were only adequate for damages from the detention itself, then the purpose of section 2680(c) would likely be to exclude those claims from the FTCA, but not claims for property damage during the detention.

\textsuperscript{294} Kosak, 465 U.S. at 866. Whatever the merits of the Court's and Justice Stevens's findings on this point, it appears from this Comment's analysis of the two supposed alternate remedies, as well as any other alternatives, that such remedies are no longer adequate. Thus, the argument that section 2680(c) covers all claims involving a customs detention because of existing adequate remedies carries no weight.
property handling is overruling the Supreme Court’s decision in United States v. Smith,295 or amending the Liability Reform Act to abrogate that decision. The Court held in Smith that the Liability Reform Act’s sole remedy provision296 requires the substitution of the United States as the defendant in suits against government officials acting within the scope of their employment, even if the plaintiff has no remedy against the United States due to an exception to the FTCA.297 Although it identified a split among the circuit courts on the issue, the Court supported its decision by analyzing the statute’s language and legislative history.298

By reaching this decision, the Court reversed the Ninth Circuit Court of Appeals’ decision in the case.299 The circuit court had held the Liability Reform Act inapplicable to the case because Smith would have had no remedy against the United States under the FTCA.300 The circuit court decided that Congress did not intend the Liability Reform Act to extend to claims covered by the exceptions found in section 2680 of the FTCA.301 To support this decision, the court discussed the Act’s treatment of Tennessee Valley Authority (TVA) officials. Although section 2680(1) exempts the United States from liability for the conduct of these officials, the Liability Reform Act expressly provides coverage for TVA employees.302 The court found that “[t]he fact that Congress felt it necessary to specifically mention TVA employees in [the Liability Reform Act] strongly suggests that Congress believed that

296 See supra note 80.
297 Smith, 499 U.S. at 162.
298 Id. at 165-67.
299 See Smith v. Marshall, 885 F.2d 650 (9th Cir. 1989).
300 Id. at 654-55. Smith’s suit involved a claim of malpractice against a military physician arising from an incident occurring at an overseas military base. Smith’s suit, once the United States was substituted as the defendant, was barred by 28 U.S.C. § 2680(k) (1988), which bars suits based on conduct occurring in foreign territory.
301 Id. at 655.
absent [this] specific language . . . those employees would remain without immunity."® In other words, the court assumed that since the government was not liable for claims based on TVA action, TVA officials would remain liable despite the Liability Reform Act unless they were specifically covered by it.

Although the circuit court's reasoning seems logical, the Supreme Court rejected this analysis, finding that the purpose of the Act's reference to TVA employees was to indicate that a suit against them would proceed against the TVA, not the United States, as in the usual case.® The Court thought this provision had nothing to do with the exception found in section 2680(l), but instead thought Congress included it only to clarify who would be substituted in such a suit.® This analysis is quite persuasive, and it casts serious doubt on the correctness of the lower court's reasoning.

The circuit court, unlike the Supreme Court,® found the legislative history of the Liability Reform Act contradictory on the issue.® The circuit court and Justice Stevens® opined that one of the primary themes of the Act, found in the legislative history, supported its construction of the statute.® This theme is that "no one who previously had the right to initiate a lawsuit will lose that right." 310 Although this clearly supports the appellate court's holding, the Supreme Court characterized the report's language as an indication that the Liability Reform Act would preserve the procedural right to sue, not the

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305 Smith, 885 F.2d at 655.
306 Smith, 499 U.S. at 169. Apparently, the TVA itself is liable in tort apart from the FTCA. Id.
307 Id.
308 Id.
309 Justice Stevens dissented from the majority's opinion finding, in part, that the legislative history supported the contrary decision. Id. at 178-81.
310 Smith, 885 F.2d at 655.
306 Smith, 499 U.S. at 169.
308 Smith, 885 F.2d at 655.
substantive right. The Court found that other language in the report was more dispositive of the issue. This language said that "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee.

The circuit court also cited this passage saying that, combined with the other quoted portion of the report, this showed the legislative history was contradictory. The language used by the Supreme Court, however, appears unambiguous and strongly supportive of its holding. Nevertheless, the circuit court found the two passages unreconcilable, making the report "internally inconsistent." The circuit court concluded that since the legislative history was inconsistent, "but the statutory language is not," the Liability Reform Act did not apply.

As seen by the court of appeals' and Justice Stevens's analysis, it is clear that the Liability Reform Act is legitimately susceptible to the construction that it does not apply when section 2680 of the FTCA bars the substituted claim against the government. The Supreme Court's analysis, however, is equally persuasive and should probably stand, in which case, the legislature should step in and abrogate the Supreme Court's decision. Congress should do this for several reasons. First, with the prevailing construction of section 2680(c) of the FTCA, the immunity of individual customs agents for common law tort claims under the Liability Reform Act and Smith almost assures the plaintiff no remedy for customs agents' negligence. This prevents the fulfillment of the primary goal of our

511 Smith, 499 U.S. at 166 n.9.
512 Id.
514 Smith, 885 F.2d at 655.
515 Id. at 656.
516 Id.
tort system, that of victim compensation.\textsuperscript{317}

Furthermore, the Liability Reform Act does not accomplish another important goal of torts: deterrence. The best way to deter customs agents from negligently handling a person’s property is to hold them personally liable for the damage they cause. Although such liability may harm or disrupt the effectiveness of the customs agents’ performance of their duties, this must be balanced with the right and importance of compensation of innocent property owners and the need to prevent future harm. If the person were able to recover from the government, the harmful effects of holding agents personally liable may outweigh the need for deterrence. Until that is possible, however, the combination of the need for compensation and deterrence is too strong to merit concern for the disruption of the agents’ effectiveness.

Finally, the prevailing construction of the Liability Reform Act does not satisfy the primary purpose of the Act itself. This purpose is to protect federal employees and \textit{at the same time} benefit the plaintiffs by giving them a better source of recovery in the federal government.\textsuperscript{318} Plaintiffs whose property customs agents damage, however, are severely harmed by the Liability Reform Act. Therefore, the balance intended by the legislature is unattainable as it applies to customs officials. The question, therefore, is which is more important, the compensation of innocent victims or the protection of federal employees from suit. Although both objectives are extremely important, courts should not place the interests of the wrongdoer above those of the innocent. The property owner should receive compensation.

\section*{VI. CONCLUSION}

The importance of the Customs Service in protecting our borders from the influx of narcotics is unquestioned.

\textsuperscript{317} See supra notes 253-55 and accompanying text for a discussion of the purposes of tort law.

\textsuperscript{318} Smith, 499 U.S. at 181 (Stevens, J., dissenting).
In carrying out their important duties, customs agents may severely damage the property of innocent airline passengers and shippers. This was Gene Locks's experience. In most cases, judicial remedies for such damage are highly inadequate. Through its decision in *Kosak*, the Supreme Court for all practical purposes foreclosed a remedy under the FTCA for these plaintiffs by reading an exception to the FTCA broadly. The exception now bars any claims arising out of a customs detention. It also appears that, because of the broad reading given the exception by the *Kosak* Court and others, the exception bars claims arising out of simple inspections. Therefore, recovery under the FTCA is limited to plaintiffs who can avoid this barrier through creative pleading. Furthermore, claims against the government under the Tucker Act are rarely available to plaintiffs in this situation, leaving recovery against the government essentially nonexistent.

Claims against individual customs agents also provide inadequate recovery. The Liability Reform Act bars any common law tort claim against agents acting within the scope of their employment. This likely covers most cases. Constitutional claims against agents based on the Fourth or Fifth Amendments offer more hope than common law tort claims, but they too are seriously limited. Fourth Amendment claims almost certainly fail because of the broad policy that all border searches are reasonable. Fifth Amendment substantive due process claims are limited because they require plaintiffs to show the agent acted with more than negligence. Even if plaintiffs can satisfy these burdens, customs agents have qualified immunity, which may protect them.

Having no remedy against the government or individual customs agents, plaintiffs may attempt to recover against the airlines as Gene Locks did. Most likely, recovery on this claim will occur only in the highly unusual cases in which the airline has some connection to the customs agents' actions. If the connection exists, the Warsaw
Convention limits the airline's liability in most cases. Even though the Convention limits their liability, airlines should not be responsible for compensating plaintiffs in these cases. Therefore, this Comment recommends two changes in the law to make the government and customs agents responsible. These changes involve overturning the Kosak decision and amending the Liability Reform Act to abrogate the Smith decision. This would allow for full compensation of innocent property owners and deterrence of negligence by customs agents. With these changes in place, the next Gene Locks can recover the $21,000 his sculpture is worth, not the $90.70 actually recovered.
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