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Federal Liability for Flood Damage Related to Army Corps of Engineers Projects

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Summary

The most costly natural disaster ever to hit the United States was Hurricane Katrina. It struck land on August 29, 2005, as a Category 3 hurricane. The damage to New Orleans from the hurricane was largely not the result of wind, but water — with 80% of New Orleans under water. In June 2008, continuous heavy precipitation caused severe flooding in seven midwestern states after numerous levees along the Mississippi River were breached. In the wake of these major flood events and levee breaches, the issue of federal liability for flood damage is getting attention in the media and in Congress.

After Katrina, lawsuits were filed against the federal government claiming that the levees and floodwalls designed and constructed by the U.S. Army Corps of Engineers (Corps) failed to protect the city. To succeed in these lawsuits, the litigants first must show that the federal government is not immune from suit. One source of government immunity is the federal government's exemption under the Federal Tort Claims Act for actions that constitute a discretionary function. A second source of immunity for the government is the Flood Control Act of 1928, which prevents the government from being sued for damages resulting from federally supported damage reduction projects or flood waters. Only after those two issues are resolved would the federal government's negligence be reviewed.

This report examines selected issues of the federal government's liability depending on the mechanism of the levee failures, and analyzes legal defenses available to the federal government. The report uses flood damage related to Hurricane Katrina as an illustration of these legal issues regarding federal liability, but these principles in the analysis generally would apply to flood damage resulting from similar projects.

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Introduction

In June 2008, continuous heavy precipitation resulted in severe flooding of the Midwest. Portions of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri and Wisconsin flooded after water from the Mississippi River and its tributaries breached at least 35 levees.[1] The flood was the second worst that the Midwest has experienced in 15 years.[2] This flooding brought renewed attention to liability after major flood events, including the liability for damage caused by Hurricane Katrina in 2005.

Hurricane Katrina struck the Gulf Coast on August 29, 2005, bringing with it rain, high-velocity winds, and a large storm surge, and leaving behind a massive path of destruction. Much of the extensive damage that occurred was the result of the storm surge that breached levees and floodwalls protecting New Orleans. By August 31, 2005, 80% of New Orleans was under water.[3] The city was not declared free of floodwaters until October 11, 2005.[4] Some flooding was expected in New Orleans, primarily because the city sits below sea level and lacks natural drainage, but the extent of inundation was not anticipated. Some of the protective structures in the New Orleans area that were breached were part of the federally authorized Lake Pontchartrain and Vicinity Project, constructed by the U.S. Army Corps of Engineers (Corps) and maintained by local levee districts.

In the aftermath of Katrina, legal claims were filed against the government over liability for the damage resulting from flooding. A fundamental question in litigating damages caused by the flooding is whether the breaches occurred because the storms

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[1] News Release, U.S. Army Corps of Engineers, Upper Mississippi River Flooding Update (June 25, 2008) (on file with author).

[2] The major flooding in the Midwest is reported to have been in the range of a 200-year to 500-year flood at some locations; however, much levee protection for developed areas is built to withstand roughly a 100-year flood. These flood-year designations, however, do not indicate how often an area may flood. Rather, they are based on the chance that an area may flood in any given year. For example, the term *100-year flood* is the flood elevation that has a 1% chance of being equaled or exceeded *annually*. It is *not* the flood that will occur once every 100 years. Likewise, a 500-year flood is five times less likely to occur in any given year than a 100-year flood (0.2% chance of flooding).

[3] *See* National Climatic Data Center, [http://lwf.ncdc.noaa.gov/oa/climate/research/2005/katrina.html].

[4] Richard Knabb *et al.*, Tropical Cyclone Report: Hurricane Katrina. National Hurricane Center, p. 9 (December 20, 2005).

overwhelmed a hurricane storm damage reduction project with a storm surge greater than it was designed to contain, or whether faulty design, construction, or maintenance caused the breaching. Studies indicate that both theories may have played a part in Katrina breaches. According to a National Hurricane Center (NHC) report, most of the breaches were due to overtopping, where the water was higher than the protective structures, but some breaches of significant floodwalls in New Orleans occurred before the surge exceeded the structures' design, meaning the floodwalls failed.[5]

Trillions of dollars in liability claims reportedly have been filed against the United States for damages from Hurricane Katrina.[6] The federal government's exposure is thus potentially significant, but defenses, including absolute immunity, may be available. This report analyzes potential federal liability for flood damage specifically relating to Hurricane Katrina and generally relating to U.S. Army Corps of Engineers flood and hurricane damage protection projects.

Flood control has garnered significant attention across the country and in Congress particularly since Katrina. Congress initiated a National Levee Safety Program in the Water Resources Development Act of 2007 (WRDA).[7] In July 2008, the Senate Committee on Environment and Public Works held a hearing to assess the Midwest flooding, including the effects of the flood, the Corps' response, and options for improving related authorities.[8]

Background

The legal defenses available to the federal government are closely linked to the facts behind the specific flooding incident at issue. Therefore, some factual background regarding Hurricane Katrina's flooding of New Orleans is included here before analyzing the legal issues.

New Orleans is a city below sea-level, virtually surrounded by water, with Lake Pontchartrain to its north and the Mississippi River to the south. Not far to the east is the Gulf of Mexico. The city faces flooding risks from the Mississippi River, coastal storms, and heavy precipitation. A system of levees and floodwalls was designed to protect the city from the river and coastal storms. Levees are typically broad, earthen structures; floodwalls are made of concrete and steel, built atop a levee or in place of a levee. This infrastructure around New Orleans represents a combination of federal and local investments and responsibilities, and is referred to

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[5] *Id.*

[6] Brad Heath, *Katrina Victims Swamp Corps for Trillions in Claims*, USA TODAY, January 7, 2008, at 1A. According to the article, more than 489,000 claims have been filed against the Corps, including 247 claims that seek $1 billion or more.

[7] *See* Water Resources Development Act of 2007, P.L. 110-114, title IX, National Levee Safety Program.

[8] *The Midwest Floods: What Happened and What Might Be Improved for Managing Risk and Responses in the Future*, S. Comm. On Environment and Public Works, July 23, 2008.

in this report as the Hurricane Protection System. Like most of the nation's flood and storm damage reduction infrastructure, many of the levees and floodwalls in New Orleans were built by the federal government but are maintained by local governments and local levee districts once they are completed. Some portions of the Lake Pontchartrain and Vicinity Hurricane Protection Project,[9] the project most relevant to the Katrina failures, were under construction when Katrina struck. Consequently, while some portions of the system were managed by the levee districts, other portions were still under the jurisdiction of the Corps, the principal federal agency responsible for constructing flood and storm damage reduction infrastructure.[10]

The landscape of the Mississippi Delta has changed significantly since the 1965 Lake Pontchartrain act. According to a Corps report, more than 20,000 acres of coastal wetlands have been lost or converted because of some storm damage reduction projects in Louisiana.[11] This is meaningful because marshlands may slow storm surges. Moreover, some media reports asserted that the Corps was planning "an array of hurricane-protection projects" in 2002 in the region surrounding New Orleans.[12] Such projects might indicate a decision by the Corps to design a new system rather than improve an existing one, and could affect the Corps' liability.

Levee Failure

With respect to the failure of the Hurricane Protection System in New Orleans, two central questions have emerged: (1) were the levees and floodwalls breached because their design was exceeded, or (2) did they fail due to faulty design, construction, or maintenance, before ever reaching design capacity? A significant amount of flooding in New Orleans resulting from Hurricane Katrina resulted from structure failure of levees and floodwalls, allowing waters from Lake Pontchartrain, Lake Borgne, and other stormwaters to flow into the low-lying city.[13] Although the

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[9] P.L. 89-298, § 204, 79 Stat. 1073, 1077 (1965) (hereinafter referred to as the Lake Pontchartrain act).

[10] For more on the Corps' water resources activities, see CRS Report RS20866, *The Civil Works Program of the Army Corps of Engineers: A Primer*, by Nicole T. Carter and Betsy A. Cody.

[11] U.S. Army Corps of Engineers, New Orleans District, *Habitat Impacts of the Construction of the MRGO,* Report for the Environmental Subcommittee of the Technical Committee convened by the U.S. Environmental Protection Agency (New Orleans, LA: December 1999). *See also* CRS Report RL33597, *Mississippi River Gulf Outlet (MRGO): Issues for Congress,* by Nicole T. Carter and Charles V. Stern.

[12] John McQuaid and Mark Schleifstein, "In Harm's Way," *The Times-Picayune* (2002).

[13] For an extensive study of levee failure, see Interagency Performance Evaluation Task Force (IPET), *Draft Final Investigation of the Performance of the New Orleans Flood Protection Systems in Hurricane Katrina on August 29, 2005* (Washington, DC: May 22, 2006).

protection system was designed to withstand a Category 3 hurricane,[14] and Hurricane Katrina was a Category 3 storm at the time of landfall, the storm surges were higher than normal for such a storm.[15] In addition, Katrina dumped more than five inches of rainfall in eight hours.

The protection system failed in approximately 50 locations and for a variety of reasons. The vast majority of those failures occurred because of "overtopping," where the waters that exceeded design capacity went over the floodwalls. Although most failed in this manner, evidence gathered by a panel of experts commissioned by the Corps suggests that at least four levees/floodwalls were breached before they exceeded their design capacity.[16]

Following Katrina, the Corps commissioned an extensive report via a multiparty task force known as the Interagency Performance Evaluation Task Force (IPET). The IPET report did not point to one failure, but to a system of failures, noting that the city's flood protection system was a series: if one part failed, it increased the impacts on the others.[17] IPET found "differences in the quality of materials used in levees, differences in the conservativeness of floodwall designs, and variations in structure protective elevations due to subsidence and construction below the design intent due to error in interpretation of datums" all contributed to inconsistent protection within the system. The IPET report states that the 17th Street and London Avenue levees experienced foundation failures prior to water levels reaching the design levels of protection. The storm surges in the Inner Harbor Navigation Canal (IHNC) exceeded design levels, but IPET also found that the walls had subsided by more than two feet, contributing to the amount of overtopping that occurred.

Another theory of causation is that the levees were overtopped or breached because the storm surge was enhanced by the Mississippi River Gulf Outlet (MRGO). MRGO (also known as Mr. Go) is a 76-mile navigational channel between the Port of New Orleans and the Gulf of Mexico. It is designed as a shortcut for ships.[18] Studies have reviewed whether MRGO became a hurricane highway, or a funnel, acting as an accelerator in moving water from the Gulf into the IHNC. IPET found that MRGO did not accelerate the movement of the water. However, it did find that a portion of MRGO allowed the Lake Borgne waters to be pushed into the

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[14] The Lake Pontchartrain act required the system to withstand a "standard" storm, which is roughly equivalent to what is now called a Category 3 storm.

[15] The height of storm surges for Hurricane Katrina reportedly ranged between 5 and 19 feet in New Orleans, whereas storm surges for Category 3 hurricanes generally range between 9 and 12 feet. *See* Richard Knabb, *et al*., Tropical Cyclone Report: Hurricane Katrina, National Hurricane Center, *supra* note 3.

[16] *See* Interagency Performance Evaluation Task Force (IPET), *Draft Final Investigation of the Performance of the New Orleans Flood Protection Systems in Hurricane Katrina on August 29, 2005* (Washington, DC: May 22, 2006).

[17] *Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection System: Draft Final Report of the Interagency Performance Evaluation Task Force* (June 1, 2006).

[18] P.L. 84-155, 70 Stat. 65 (1956).

interior of New Orleans. IPET found that this connection amplified the surge level and velocity through the interior of the city and raised the level of Lake Pontchartrain.[19] In turn, that increased the pressure on the levees throughout the area, according to IPET.

Theories of Liability and Sources of Immunity

Hundreds of lawsuits related to Hurricane Katrina have been filed, many against insurers, some against the city and its officials, and some against the federal government. The lawsuits against the federal government and some contractors have been consolidated under the heading *In re Katrina Canal Breaches Consolidated Litigation*, in the federal District Court for the Eastern District of Louisiana.[20]

As a threshold issue, before reaching the merits of the claims, any suit against the federal government (including the Corps) must overcome the doctrine of sovereign immunity. Simply put, sovereign immunity means that the government cannot be sued. This basic concept has been modified over the years to hold that the federal government cannot be sued unless Congress specifically provides for such a suit.[21] Although the government can be sued under such circumstances, it is up to the plaintiff to demonstrate that it has the right to sue; the burden is not on the government to show it is immune from suit. One such vehicle for suit is the Federal Tort Claims Act.[22] Another is the Flood Control Act of 1928.[23] The following subsections of this report will discuss the relevant provisions of these statutes and the protections that they provide to the government. In order to illustrate the scope of immunity potentially available to the government, an analysis of cases in which courts addressed whether the federal government was immune under these provisions follows the discussion of each statute.

The Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) waives the federal government's sovereign immunity if a tortious act of a federal employee causes damage. (A tort, generally speaking, is a harmful act, other than breach of contract, for which relief may be sought in civil court.) Specifically, the FTCA creates liability for the following:

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[19] *See* CRS Report RL33597, *Mississippi River Gulf Outlet (MRGO): Issues for Congress*, by Nicole T. Carter and Charles V. Stern.

[20] Nos. 05-4182, 05-5237, 05-6314, 05-4181, 05-6073, 06-2545, 05-4191, 06-2268 (E.D. La.).

[21] *See, e.g.*, Federal Housing Administration v. Burr, 309 U.S. 242, 244 (1940) ("the United States cannot be sued without its consent"); Rothe Development Corp. v. United States, 194 F.3d 622, 624 (5th Cir. 1999).

[22] 28 U.S.C. §§ 1346, 2671-2680.

[23] 28 U.S.C. §§ 702a *et seq*.

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act of omission occurred.[24]

Negligence. To win a negligence claim under the FTCA, as elsewhere, a plaintiff must demonstrate four things: (1) that the defendant, i.e. the government, owed a duty to the plaintiff, (2) that the duty was breached by the defendant, (3) that the breach was the cause of the plaintiff's injury, and (4) that the plaintiff was actually injured. All of these elements must be shown in order to have a valid claim.

Discretionary Function Exception. The FTCA contains a number of exceptions under which the United States may not be held liable even if negligent, notably, the discretionary function exception. The discretionary function exception prevents the government from being sued for

> any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.[25]

In determining whether a government action is discretionary, courts look at whether the course of action was mandatory, or whether there was a choice. A claim related to the performance (or non-performance) of a mandatory function, one required by statute, would be actionable under the FTCA. However, a claim related to an action that requires decision making on the part of the government is likely to be found discretionary and exempt from suit. The theory behind this is, if Congress requires a certain action and the government unit fails to comply with that specific directive, the government should not be protected for failing to do what Congress expressly required. Sometimes, however, an action might include both mandatory and discretionary elements. The difficulty lies in determining which part of the government action was specifically required by Congress, and which part involved *discretion*. In this case, for example, Congress specifically required construction of the New Orleans Hurricane Protection System to protect against hurricanes. However, as caselaw illustrates, that does not mean that construction of the system was a purely non-discretionary action.

The Supreme Court clarified the circumstances in which the discretionary function exception. In *Dalehite v. United States*, the Court described discretion as being "more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."[26]

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[24] 28 U.S.C. § 1346(b).

[25] 28 U.S.C. § 2680(a).

[26] Dalehite v. United States, 346 U.S. 15, 35-6 (1953).

In *United States v. Gaubert*, the Court suggested a two-part test for applying the discretionary function exception: (1) the challenged conduct must involve an element of judgment or choice, and (2) the judgment or choice must be based on considerations of public policy.[27]

Immunity for Corps of Engineer Projects Under the Discretionary Function Exception. The discretionary function exception has typically been interpreted broadly. Generally, the discretionary function exception has prevented claims against the United States for water damage to real property resulting from negligent design or construction of flood control or irrigation projects. In *Vaizburd v. United States*, plaintiffs alleged that a Corps project to reduce storm damage and protect the shoreline damaged their property because of negligent design and implementation.[28] The court used the *Gaubert* two-part test to find that the Corps exercised discretion in the design, planning, and implementation of the project. The Corps chose from several different project plan designs and factored in a number of policy considerations, including cost, reliability, resource allocation, environmental protection, and political implications. The court also found that even though the project was required by statute, the actual implementation of the project was not precisely dictated by any plan, regulation, or statute, and thus, the Corps had a degree of choice in how to implement the project.[29] Accordingly, even if there has been negligent design or implementation, the presence of choice and judgment may allow the discretionary function exception to preclude any claim against the United States.

A discretionary function can also be exercised when choosing the materials of a required project. In *United States v. Ure*, the plaintiff argued the government was negligent in constructing an irrigation canal that burst and flooded the plaintiff's property. The canal had not been constructed with a stronger (and more expensive) material available for reinforcement, which the plaintiff claimed to be a breach of the government's duty to ensure against breaks. Ultimately, the court found that the government made a cost-based decision not to use stronger material. That the decision was based on cost was enough to invoke the discretionary function exception and overcome any negligence claim.[30]

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[27] United States v. Gaubert, 499 U.S. 315, 322-23 (1991), refining the test developed in Berkovitz v. United States, 486 U.S. 531 (1988). The *Gaubert* Court stated:

> [I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations. (internal citations omitted)

[28] Vaizburd v. United States, 90 F. Supp. 2d 210, 214-15 (E.D.N.Y. 2000).

[29] *Id.*

[30] *See* U.S. v. Ure, 225 F.2d 709, 712-13 (9th Cir. 1955).

Similarly, when the government creates infrastructure to withstand a certain level of storm, despite knowing that more powerful storms are possible, courts have held that the discretionary function exception applies. In *Valley Cattle Co. v. United States*, the plaintiff contended that the government was negligent and liable for damages because of flood preparations that could handle only a "two-year storm" despite having the knowledge that storms of much stronger intensity hit the area. The court found that the government clearly made decisions at the planning level to prepare only for a two-year storm based on policy factors, and was immune from liability because of the discretionary function exception.[31]

Even deciding to delay improving a project can excuse liability as a discretionary action. In *National Union Fire Insurance v. United States*, the court held the Corps' decision to delay a smaller improvement to a breakwater that protected a harbor while planning for a larger improvement was a choice immune from liability. The plaintiff asserted the Corps was negligent for not discovering the existing structure had subsided, and for not acting quickly to improve the deficiency. The Corps in fact was aware of the problems with the breakwater protection several years before the damage to plaintiff's property actually occurred. However, the court held that the FTCA's discretionary function exception applied because the Corps chose to put off the smaller improvement to the breakwater while studying the feasibility of a larger improvement. The decision of timing with respect to improvements invoked the exception.[32] The court also decided that considering the cost of greater safety is a discretionary function.

At times, discretion has been construed more narrowly in a construction context, despite the prevailing practice of broad interpretation. In *Seaboard Coast Line Railroad Company v. United States*, the Court of Appeals for the Fifth Circuit found the government liable for damages caused by a drainage system. The government claimed that the discretionary function exception applied, arguing it was a policy decision to create the drainage system in the first place. The court found that the decision to build a drainage system was discretionary but the construction was not. The construction of the ditch had to be performed in a non-negligent manner.[33] However, this decision was made before the U.S. Supreme Court decision in *United States v. Varig* and thus, according to the 11th Circuit, may no longer be a good

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[31] Valley Cattle Co. v. United States, 258 F. Supp. 12, 19-20 (D. Haw. 1966) (finding that the FTCA allowed claims for only one of the two floods at issue).

[32] *See* National Union Fire Ins. v. United States, 115 F.3d 1415 (9th Cir. 1997). The Corps had to make the decision as to improvements weighing a wide variety of factors, including (1) how much commerce benefits from the project; (2) what kind of commerce benefits from the project; (3) how much the project will cost; (4) how necessary the work is; and (5) whether the work should be built, continued, or maintained by the federal government or some other entity.

[33] 473 F.2d 714 (5th Cir. 1973). The Corps was not a party to the case. *See also* Kennewick Irr. Dist. v. United States, 880 F.2d 1018 (9th Cir. 1989) (specific safety standards for construction meant discretionary function exception did not apply).

evaluation.[34] Under the *Varig* analysis, an agency's execution of a decided-upon action is also a discretionary action.[35]

Under some circumstances, maintenance has been found *not* to be a discretionary action. In *E. Ritter & Co. v. U.S. Army Corps of Engineers*, the court found the government liable for a failure to maintain a flood control project. The court noted that it was the Corps' decision not to maintain the banks of the project. However, the fact that a decision was made did not mean the discretionary function exception automatically applied. The court relied on the second prong of the *Gaubert* test, that only governmental decisions *based on considerations of public policy* are protected by the exception. The court found the discretionary function exception did not apply because operating the project incorrectly was not part of the Corps' mandated policy to prevent flooding.[36] A similar result was found in a case where a court decided that the failure not to maintain a road in a National Park was not "a decision grounded in social, economic, or political policies."[37] Therefore, the discretionary exemption did not apply.

A contrary result was found in a second case based on the failure of the National Park Service (NPS) to maintain a road. In that case, the court looked at whether a decision had been made not to maintain. It considered that the NPS had developed a maintenance task list, and that maintaining that particular road was to occur following other projects.[38] That scheduling determination was discretionary, according to the court. Agencies are allowed to establish priorities "by balancing the objectives sought to be obtained against such practical considerations as staffing and funding."[39] In a third case, the NPS's trail maintenance was held to be a discretionary action. In that case, the court reviewed the policy-prong of the *Gaubert* test to find that agencies are allowed to balance public policy against "the constraints of resources available to them."[40]

Flood Control Act of 1928

Even if litigants are able to refute the discretionary function exception and sue the government under the FTCA, the Flood Control Act of 1928 (FCA) offers additional immunity to the federal government. Section 702c of the FCA provides that "no liability of any kind shall attach to or rest upon the United States from any

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[34] Alabama Elec. Co-op., Inc. v. United States, 769 F.2d 1523, n. 5 (11th Cir. 1985)

[35] United States v. Varig, 467 U.S. 797 (1984) (holding that the Federal Aviation Administration had immunity from failing to find a problem with an aircraft during its spot-checking, because that inspection process was discretionary).

[36] 874 F.2d 1236 (8th Cir. 1989).

[37] ARA Leisure Services v. United States, 831 F.2d 193 (9th Cir. 1987).

[38] Cope v. United States, 45 F.3d 445 (D.C. Cir. 1995).

[39] *Id*. at 451, *quoting from* United States v. Varig, 467 U.S. at 820.

[40] Childers v. United States, 40 F.3d 973 (9th Cir. 1994).

damage from or by floods or flood waters."[41] The overall breadth and scope of this immunity from liability is the subject of considerable controversy and litigation. Despite the Supreme Court's comment that "it is difficult to imagine broader language,"[42] the case history of the FCA evidences a more nuanced application.

The FCA was enacted in response to a large flood that devastated the Mississippi River Valley. Congress wanted to fund large flood control projects while also limiting the government's liability for those projects. One stated purpose during floor debate was to provide safeguards that would protect the government against lawsuits if the government provided flood protection to the people.[43] The legislative history illustrates that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control," according to the Supreme Court.[44]

The Supreme Court applied Section 702c immunity broadly in the case of *United States v. James*. In that case, the petitioners filed wrongful death claims against the government after two recreational boaters drowned in the reservoirs of federal flood control projects. The Court wrote that the language of Section 702c was unambiguous and should be given its "plain meaning."[45] *Damage* under the act included both personal and property damage.[46] The terms *flood* or *flood waters* applied to "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control."[47] This holding was interpreted by most courts to mean if a public works project has flood control as one of its purposes, Section 702c immunity would apply.

Following the *James* decision, the courts split as to what relationship a federal project must have to flood control in order for the government to have immunity. All circuits agreed that federally funded public works projects "wholly unrelated" to flood protection purposes are not entitled to Section 702c immunity. The dissent among circuits arose in determining exactly how connected the project must be to flood control in order to invoke Section 702c immunity.

In 2001 the Supreme Court revisited its interpretation of the FCA in *Central Green Company v. United States*.[48] The Court held that the portion of the *James* decision that referred to flood control projects was dicta and did not relate the

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[41] 33 U.S.C. § 702c. Section 702c is sometimes referred as "Section 3 of the act," based on where it appears in the public law.

[42] United States v. James, 478 U.S. 597, 604 (1986).

[43] 69 Cong.Rec. 6641 (1928) (remarks of Rep. Snell).

[44] United States v. James, 478 U.S. at 608.

[45] United States v. James, 478 U.S. 597 (1986).

[46] *Id.* at 604-606.

[47] *Id*. at 604.

[48] 531 U.S. 425 (2001).

specific wording of the statute, thereby rendering the bulk of FCA litigation of little precedential value. The Court did not focus on the character of the federal project or the purpose it served, but looked at the waters that caused the damage and the purpose for their release. The unanimous Court held that "in determining whether § 702c immunity attaches, courts should consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project."[49]

Immunity for the Federal Government Under § 702c. Although the Supreme Court in *Central Green* effectively rendered the bulk of FCA litigation of little precedential value, an overview of the types of cases in which courts have applied § 702c immunity illustrates the situations in which claims might arise and immunity might be applied. Like the discretionary function exception, § 702c immunity had been applied in a broad range of cases. For instance, federal courts have held that § 702c immunity is not available exclusively to the Corps, but rather may also be available to the Bureau of Reclamation within the Department of the Interior.[50]

Section 702c immunity may also be applied in cases where the nature of the damage is not specifically flood damage. For instance, the government has been held not liable in a case claiming that negligence related to a flood control project caused damage to the fresh water supply, not flood damage.[51] As an example of a limitation on immunity, at least one federal court held that § 702c does not provide immunity for breach of contract claims stemming from or related to flood control projects because other legislation waiving immunity had not been repealed.[52]

Courts have applied § 702c and found the government immune from suit in cases of both property damage and personal injury that result from cases related to flood control projects. Claims of damage to property for which the government was held immune have generally been cases where lands or personal property are damaged as a result of flooding.[53] Damages claimed for personal injury and death often arise in cases with swimmers, divers, boaters, and fishermen who recreationally used facilities related to a flood control project with adverse consequences.[54] Courts

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[49] *Id.* at 437.

[50] *See* Morici Corp. v. United States, 491 F. Supp. 466 (E.D. Cal. 1980), *aff'd*, 681 F.2d 645 (9th Cir. 1982).

[51] Stelly v. United States, 598 F. Supp. 344 (W.D. La. 1984).

[52] *See* California v. United States, 271 F.3d 1377 (Fed. Cir. 2001).

[53] *See* National Manufacturing Co. v. United States, 210 F.2d 263 (8th Cir. 1954); Stover v. United States, 332 F.2d 204 (9th Cir. 1964); Parks v. United States, 370 F.2d 92 (2nd Cir. 1966); *Stelly*, 598 F. Supp. 344.

[54] *See James*, 478 U.S. 597 (1986); Reese v. South Fla.Water Management Dist., 59 F.3d 1128 (11th Cir. 1995); Zavadil v. United States, 908 F.2d 334 (8th Cir. 1990); McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988).

have also found immunity in cases of accidental drowning and automobile accidents related to flood control projects.[55]

After *James*, a split developed in the federal circuit courts on the interpretation of the scope of § 702c immunity, specifically regarding the required nexus to flood control activities in order for immunity to apply.[56] The U.S. Supreme Court declined to address the split in the circuits in 1992 when it denied review in *Hiersche v. United States*.[57] In *Hiersche*, the family of a diver under contract with the federal government to inspect fish screens on the Columbia River sued the government for wrongful death after the diver was fatally injured. The family alleged that the death was caused by the government employees' failure to shut off the water flow to the fish bypass system as agreed to. The Court declined to review the case, and Justice Stevens issued a concurring memorandum to explain his reasons for denial. The memorandum stated that, while it is generally the Court's "duty to resolve conflicts among the courts of appeals," some conflicts, including issues presented in *Hiersche*, "can be resolved more effectively by Congress."[58] Justice Stevens offered this analysis of § 702c immunity:

> The statute at issue here is an anachronism. It was enacted 18 years before the [FTCA] waived the Federal Government's sovereign immunity from liability for personal injuries. At the time of its enactment, no consideration was given to the power generation, recreational, and conservation purposes of flood-control projects, or to their possible impact on the then nonexistent federal liability for personal injury and death caused by negligent operation of such projects. Today this obsolete legislative remnant is nothing more than an engine of injustice. Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained.[59]

Although Congress does not appear to have addressed the issue of § 702c immunity, the Court revisited it in *Central Green*. It appears that the *Central Green* decision was an attempt to clarify a test for resolving immunity issues arising under § 702; however, as a statutory grant of immunity, Congress remains able to reconsider these issues legislatively.

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[55] *See* Mocklin v. Orleans Levee Dist., 877 F.2d 427 (5th Cir. 1989); Dawson v. United States, 894 F.2d 70 (3rd Cir. 1990); Holt v. United States, 46 F.3d 1000 (10th Cir. 1995).

[56] *Compare* Boyd v. United States ex rel. U.S. Army, Corps of Engineers, 881 F.2d 895 (10th Cir. 1989) *with* Reese v. South Fla. Water Management Dist., 59 F.3d 1128 (11th Cir. 1995).

[57] 503 U.S. 923 (1992).

[58] *Id.*at 1305.

[59] *Id.*

Analysis of Federal Liability After Katrina

The FTCA and the FCA are compatible statutes, frequently appearing as defenses within the same case. It has been affirmatively held by one circuit court that the FTCA does not overrule or invalidate Section 702c of the Flood Control Act.[60]

Both the FTCA's discretionary function exception and the immunity provision under the FCA are jurisdictional, meaning that if they apply, the court has no authority to hear the case. Typically, in cases brought under the FTCA and FCA, courts first determine whether those statutes' immunity provisions apply. Then, if the case survives that review, the court would consider the application of the facts to the underlying tort claim. However, in the Katrina cases, the District Court for the Eastern District of Louisiana has ruled that the facts necessary to show whether the Corps exercised any discretion are inextricably intertwined with the factual questions that will determine liability.[61] Also, the court ruled that the facts necessary to show whether flooding was linked to a flood control project were inseparably linked to the determination of whether FCA immunity applied.[62] The court decided it would be judicially inefficient to consider the discretionary exception and Section 702c immunity, and then have the jury consider the same facts to determine negligence. Accordingly, a jury will determine whether the Corps used its discretion and whether MRGO caused damages from floodwaters.[63] Significantly, none of the other cases cited in this report used juries to decide these issues.

Federal Tort Claims Act

To determine whether FTCA's discretionary function exception applies in the Katrina litigation, the court would apply the *Gaubert* test: (1) the challenged conduct must involve an element of judgment or choice, and (2) the judgment or choice must be based on considerations of public policy.[64] Hence, to be successful, a suit based on the FTCA would have to show that policy decisions and government discretion did not play any part in building the Hurricane Protection System. The resolution of these questions should be independent of any decision regarding negligence or fault.

Congress authorized and delegated primary design and construction responsibility to the Corps for the Hurricane Protection System in the Flood Control Act of 1965.[65] The construction of the system was ongoing through the time Hurricane Katrina hit the city.[66] In those several decades, the Corps had to revise the

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[60] National Manufacturing Co. v. United States, 210 F.2d 263 (8th Cir. 1954).

[61] *In re* Katrina Canal Breaches Consolidated Litigation (Robinson), 471 F. Supp. 2d 684 (E.D. La. 2007).

[62] *Id.*

[63] *Id.*

[64] United States v. Gaubert, 499 U.S. 315 (1991).

[65] P.L. 89-298, Title II.

[66] *See* New Orleans Hurricane Protection Projects Data at [https://ipet.wes.army.mil/]. (continued...)

design and construction of the Hurricane Protection System for a number of reasons, including cost, environmental factors, technical issues, the necessity of acquiring additional lands, and aesthetic issues. Thus, the overall design and construction required balancing many different policy factors, which may provide a basis for the Corps to invoke discretionary immunity.

As discussed, courts have found that design and construction of a project are considered discretionary activities, and it appears likely that the various steps that went into designing and building the Hurricane Protection System were discretionary actions under existing precedent. A possible complicating factor is that the statute authorizing construction mandated the levees and floodwalls be constructed to withstand a standard hurricane for the region, which was roughly equivalent to a Category 3 hurricane, the rated strength of Katrina.[67] The decision to design to that standard appears to be a non-discretionary action.[68]

A more difficult issue may be liability related to maintenance of the system. As discussed earlier, the courts are inconsistent in finding whether maintenance requires choice or is purely a non-discretionary action. Courts tend to lean away from finding an exemption in cases where a decision appears to be contrary to public policy and not supported by documentation showing public policy considerations behind the decision. The Corps' ongoing evaluation of a new Hurricane Protection System could bolster the argument that the Corps was considering public policy, if it were shown that the Corps chose to work on a new system, rather than expend funds on an existing system. It also is not clear who was responsible for maintenance of the levees and floodwalls, because local levee districts managed them only after they were completed, and not all were completed.

Plaintiffs would potentially be able to bypass discretionary immunity if they demonstrated that the persons at the operational level were required to maintain the system according to a prescribed protocol. For example, if inspections had to meet specific guidelines, or if various assessments were strictly prescribed, there may be little or no discretion involved.[69] However, to be consistent with other caselaw, any documented choice involving prioritization would likely be considered a discretionary action, exempting the government from liability.

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[66] (...continued)
Construction was temporarily halted in December 1977 when a court decision enjoined the Corps from continued building until an environmental impact study could be completed. After the study was accepted, the Corps changed significant portions of the design in response to environmental and cost concerns.

[67] P.L. 89-298, § 204.

[68] For more information about the process of authorizing and designing these structures, see CRS Report RL33188, *Protecting New Orleans: From Hurricane Barriers to Floodwalls*, by Nicole T. Carter.

[69] *Id.* The "pre-Katrina" section has several examples of studies that were done prior to the storm.

Bolstering a case for immunity is the July 2007 report released by the Corps describing 50 years of decision making behind the Hurricane Protection System.[70] The report's stated purpose is to show "how Corps' policies and organization, legislation, and financial and other factors influenced the decisions" leading to the New Orleans' system. This report appears to relate directly to the discretionary function exception, as it addresses not only decision making, but the policies behind the decisions, thus satisfying the two prongs of *Gaubert*.[71]

Flood Control Act of 1928

Even if the government cannot invoke discretionary function immunity, a plaintiff would have to overcome the broad Section 702c immunity of the Flood Control Act. According to the district court in *In re Katrina Canal Breaches*, the U.S. Supreme Court *Central Green Company* decision did not resolve what nexus floodwaters must have to a flood control project to trigger immunity.[72] Under this theory, Section 702c immunity appears to apply only where the floodwaters are linked to a flood control project. It is not clear how this ruling fits with the Supreme Court's statement that courts "determine the scope of the immunity conferred, not by the character of the federal project or the purposes it serves, but by the character of the waters that cause the relevant damage and the purposes behind their release."[73]

There appears to be little controversy that the Hurricane Protection System was a flood control project, and so the Corps likely would be immune from claims based on that system's failure. However, some plaintiffs have alleged that their claims are based not on the levee and floodwall failures, but on MRGO, which they argue is solely a navigational project. Section 702c has already been found not to apply to MRGO by the Fifth Circuit in 1971, in *Graci v. United States*.[74] In the 1971 case, which followed Hurricane Betsy, litigants argued the construction of MRGO caused their properties to flood. The circuit court refused to find Section 702c applied to all flood damage actions, stating it would be "contrary to the express policy of the Federal Tort Claims Act."[75] However, the *Graci* case predates *Central Green Company*.

Also, language in a more recent Fifth Circuit case might imply that projects with mixed purposes (i.e., that are not purely flood-related) may be covered under the

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[70] Douglas Woolley and Leonard Shabman, Draft Final Report: Decision-making Chronology for the Lake Pontchartrain & Vicinity Hurricane Protection Project (June 2007), *available at* [http://www.iwr.usace.army.mil/inside/products/pub/hpdc/hpdc.cfm].

[71] The report addresses three main issues: selection of the overall protection approach; treatment of new information, including surge modeling and land subsidence; and the design of I-wall parallel protection structures. It also considers the number of decision makers during the project's history, including local levee districts.

[72] *In re* Katrina Canal Breaches Consolidated Litigation (Robinson), 471 F. Supp. 2d at 695 (E.D.La. 2007).

[73] Central Green Co. v. United States, 531 U.S. at 434.

[74] Graci v. United States, 456 F.2d 20, 27 (5th Cir. 1971)

[75] Graci v. United States, 456 F.2d at 27.

FCA immunity, in which case a navigational channel that served some flood control purposes could be covered under the FCA. A 1999 decision by the Fifth Circuit refused to find FCA immunity where the action was neither "associated with flood control" nor "clearly related to flood control,"[76] seemingly establishing immunity for those projects that are associated with or clearly related to flood control. The government has argued that MRGO serves some flood control purposes.[77]

Negligence

Only after a court determines that the government is not immune under the FTCA and the FCA would it consider the negligence of the federal government. At that point the plaintiffs will still have to show that the federal government owed them a duty when it built the Hurricane Protection System. The plaintiffs must show that the federal government breached that duty, that the breach caused harm, and that the plaintiffs were injured as a result of that breach.

The most difficult factor of negligence for the plaintiffs to prove appears to be the second one — that the duty was breached by the Corps. To succeed on this count, the plaintiffs would have to show that the specific property was flooded because the Corps failed to exercise reasonable care. This argument could be based on the allegedly faulty design, construction, and maintenance, arguing that the levees fell apart. Or it could be based on a theory that the system was overwhelmed because of water funneled by MRGO and that this result was reasonably foreseeable and preventable.

A common defense for such a claim is that the damage was caused by an act of God, in this case, a hurricane. The act of God defense appears to apply the most easily to those levees and floodwalls that were overtopped by the waters. They essentially failed because their design capacity was exceeded by the unusually high storm surges brought on by Katrina. However, as was discussed earlier, some of the overtopping occurred because some levees and floodwalls had subsided by as much as two feet. Also, plaintiffs may argue that the storm surge was as large as it was because of MRGO, which was the result of an act of Congress, not of God.

It may be more difficult to defend the system breaches that some studies have attributed to design defects. The purported design defects reportedly led to the failure of the four levees nearest downtown New Orleans. These failures might also be attributed to negligent construction or negligent maintenance.

The district court would follow state law when reviewing for negligence. Louisiana is a comparative fault state, meaning if multiple actors are negligent, they are each responsible only for that portion of the harm that they caused.[78] This applies

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[76] Kennedy v. Texas Utilities, 179 F.3d 258, 263 (5th Cir. 1999).

[77] *In re* Katrina Canal Breaches Consolidated Litigation (Robinson), 471 F. Supp. 2d at 695-97.

[78] La. C.C. art. 2323: comparative fault means a "percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the

(continued...)

even if all of the actors are not parties to the suit. In this case, if it is found that negligent design, construction, or maintenance of the levees caused the flooding, the Corps would be responsible only for that portion of the blame attributed to it, but not the negligence attributed to the local levee boards, or contractors that may have worked on the project.

Current Status of Litigation and Issues for Congress

In 2008, two key decisions were made in the Katrina litigation. In January, the federal district court dismissed certain counts of the class action that alleged federal liability for levee failures, citing Section 702c immunity as a bar to the claims.[79] That decision barred recovery for flood damage determined to be caused by levee failures, but allowed the plaintiffs to proceed with the litigation with respect to MRGO.[80] In May 2008, the court held that Section 702c immunity did not apply to claims that alleged liability for MRGO because MRGO was a navigation project, rather than a flood control project.[81]

The liability of the United States Army Corps of Engineers for damages following Hurricane Katrina appears to be in the hands of a jury. In such a case, with the previous decisions issued by the judge regarding Section 702 immunity for the levees and MRGO, the jury would have to establish first whether any legal defense is available to the Corps, such as the discretionary function exception under the FTCA. This determination will examine the design, construction, maintenance, and purpose of MRGO. The Corps' liability depends on whether the Corps' actions are found to be discretionary. Only after making these decisions will the jury consider the question of whether the Corps acted without reasonable care in regard to the project. Even if the Corps is found liable, its liability could be reduced if other parties share responsibility.

It does not appear that Congress has addressed the issue of § 702 immunity in the wake of *James*, *Hiersche,* or *Central Green*. Although the Supreme Court attempted to clarify a test for resolving immunity issues arising under § 702, Congress remains able to reconsider issues of federal immunity related to flood damage and flood control projects legislatively. As statutory provisions of immunity, it is within Congress' authority to define the scope of the protections offered by both the FTCA and FCA.

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[78] (...continued)
person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute ... or that the other person's identity is not known or reasonably ascertainable." *See also* La. R.S. 9:2800.68

[79] In re Katrina Canal Breaches Consolidated Litigation, No. 05-4182, January 30, 2008.

[80] *Id*.

[81] In re Katrina Canal Breaches Consolidated Litigation, No. 05-4182, May 2, 2008.