

Reining in Sovereign Immunity to Compensate Hurricane Katrina Victims

Katie Schaefer*

*In 2005, Hurricane Katrina devastated New Orleans, Louisiana. Residents sued the U.S. Army Corps of Engineers for negligently constructing and maintaining of a Gulf of Mexico shipping channel that caused the levee breaches that flooded their homes and destroyed their property. The Army Corps asserted immunity under the Flood Control Act, which exempts government flood-control projects from liability, and the Federal Tort Claims Act, which blocks suit where the government's action involved the exercise of a discretionary function. In *In re Katrina Canal Breaches*, the Fifth Circuit unanimously held that sovereign immunity did not bar the suit. But the same Fifth Circuit panel reversed its previous decision just months later, holding that the Army Corps was immune because its management of the channel involved discretionary policy considerations.*

The Fifth Circuit's reversal underscores an important issue: courts interpret these sovereign immunity provisions expansively and unpredictably. The historical and practical justifications for sovereign immunity fail to warrant this broad grant of immunity in the disaster context. Holding the government accountable for its negligence would encourage federal agencies to internalize the environmental externalities of its developments and reframe disaster policy to strengthen infrastructure before the next hurricane hit.

Introduction.....	412
I. Sovereign Immunity: The King Can Do No Wrong.....	413
A. Background on Sovereign Immunity	413
B. The Federal Tort Claims Act	416
C. The Flood Control Act.....	421
II. <i>In re Katrina Canal Breaches Litigation</i> : The Army Corps Can Do No Wrong	423
A. Facts and Procedural Summary	423

Copyright © 2013 Regents of the University of California.

* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2014; B.S. Georgetown University, 2008. Special thanks to Professor Bob Infelise for his guidance and wit, Alex Bandza and Jamie Tansey for their editing expertise, and my fellow members of Ecology Law Quarterly for all their hard work.

B.	The Fifth Circuit’s First Decision Held the Army Corps Liable for its Negligence	426
1.	FCA Immunity Did Not Apply Because MRGO Was a Navigational Canal, Not a Flood-Control Project.....	426
2.	The DFE Did Not Shield the Army Corps From Liability.....	427
C.	The Fifth Circuit Reversed its First Decision, Shielding the Army Corps from Liability Under the DFE.....	428
III.	Testing the Boundaries of Sovereign Immunity.....	430
A.	FCA Immunity Leads to Absurd Results.....	430
B.	Has the Discretionary Function Exception Swallowed the Rule?.....	431
1.	The <i>Berkovitz-Gaubert</i> Test Allows Considerable Judicial Leeway.....	432
2.	The <i>Gaubert</i> Presumption Favors Application of the DFE. ..	433
3.	Government Decisions Rooted in Scientific Principles Are Not Policy Decisions.	435
C.	Pulling Back the Veil of Sovereign Immunity Would Force the Government to Internalize the Costs of Its Own Negligence.	437
Conclusion	440

The Mississippi River will always have its own way; no engineering skill can persuade it to do otherwise.

—Mark Twain¹

Essayons (“Let Us Try”)

—Motto of the U.S. Army Corps of Engineers

INTRODUCTION

A 1958 report by the United States Army Corps of Engineers described the Mississippi River delta as “a land between earth and sea—belonging to neither and alternately claimed by both.”² Although the Army Corps spent almost two hundred years trying to claim the land through an extensive network of levees and canals, the sea dramatically reclaimed it during Hurricane Katrina in 2005. At least 1200 people died, and the official damage costs totaled over \$100 billion.³ The most severe losses of life and property damage were

1. MARK TWAIN, MARK TWAIN IN ERUPTION: HITHERTO UNPUBLISHED PAGES ABOUT MEN AND EVENTS 18 (Bernard DeVoto ed., 1940).

2. See JOHN MCQUAID & MARK SCHLEIFSTEIN, PATH OF DESTRUCTION 5 (2006).

3. ERIC S. BLAKE ET AL., THE DEADLIEST, COSTLIEST, AND MOST INTENSE UNITED STATES TROPICAL CYCLONES FROM 1851 TO 2010 (AND OTHER FREQUENTLY REQUESTED HURRICANE FACTS), NAT’L WEATHER SERV. NAT’L HURRICANE CTR., 5 (2011), available at <http://www.nhc.noaa.gov/pdf/nws-nhc-6.pdf>.

centered in New Orleans, Louisiana, where the storm rushed through port shipping channels and breached the levees to flood the city.

Many landowners brought lawsuits against the Army Corps, alleging that the government's negligent construction and maintenance of a Gulf shipping channel caused the levee breaches that flooded their homes and destroyed their property. In *In re Katrina Canal Breaches Litigation*, the Fifth Circuit initially upheld the district court's decision for the plaintiffs, but later reversed its own decision, solidifying the federal government's sovereign immunity for the negligent maintenance of the canals that caused the flooding.⁴

This Note argues that the historical justifications for sovereign immunity fail to warrant such a broad grant of immunity, and that the Army Corps should internalize the costs of its own negligence to make better decisions going forward. Part I of this Note outlines the development of sovereign immunity in the realm of flooding and disaster law. Part II examines those principles' application in the Katrina Canal Breaches case. Part III surveys the broad reach of sovereign immunity today and suggests that negligence liability could act as an incentive toward better development given the unique challenges and risks of natural disasters.

I. SOVEREIGN IMMUNITY: THE KING CAN DO NO WRONG

A. *Background on Sovereign Immunity*

The judicial doctrine of sovereign immunity shields the government from lawsuits without its consent. The principle derives from the English maxim that "the King can do no wrong," which was premised on the Crown's divine and absolute power over its subjects.⁵ Although the American people rejected the English monarch, the American legal system retained sovereign immunity.⁶

Scholars debate whether and to what extent sovereign immunity is embedded in the Constitution. On one hand, Article III explicitly extends the judicial power "to controversies to which the United States shall be a party."⁷ Professor Susan Randall argued that sovereign immunity was antithetical to the values of the new constitutional system, and this clause "extends to the national judiciary a fundamental governmental authority not subject to unexpressed and extraconstitutional common law limitations" like sovereign immunity.⁸ On the

4. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012) [hereinafter *Katrina Canal Breaches III*], *rev'g*, 673 F.3d 381 (5th Cir. 2012) [hereinafter *Katrina Canal Breaches II*].

5. See Edwin M. Borchard, *Government Liability in Tort*, 34 *YALE L.J.* 1, 2, 4 (1924).

6. See John Paul Stevens, *Is Justice Irrelevant?*, 87 *NW. U. L. REV.* 1121, 1125 (1993) ("The availability of a divine remedy against a wrongdoing sovereign may well justify civil immunity in a jurisdiction where the King is pictured as the vicar of God, but in a country such as ours, where the Constitution has erected a wall that separates church from state, the divine remedy theory leaves much unanswered.").

7. U.S. CONST. art. III, § 2, cl. 1.

8. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 *NEB. L. REV.* 1, 40 (2002).

other hand, the Constitution clearly gives Congress the exclusive power to appropriate money⁹—which would presumably include payments for judgments against the United States—and to establish lower federal courts.¹⁰ When Congress created such courts in the Judiciary Act of 1789, it only gave them jurisdiction over suits brought by the United States, implicitly prohibiting suits against the federal government.¹¹ Although the Constitution itself was silent on the subject of sovereign immunity, important constitutional framers expressed support. Alexander Hamilton urged, “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”¹² These and other competing considerations led one scholar to conclude that the “tensions within the constitutional scheme on the question of sovereign immunity were . . . considerable.”¹³

Regardless of its lack of textual constitutional underpinnings, sovereign immunity has persistently influenced the American legal system. As early as 1821, Chief Justice John Marshall declared, “The universally received opinion is, that no suit can be commenced or prosecuted against the United States.”¹⁴ A trio of 1868 Supreme Court cases—*The Siren*,¹⁵ *Gibbons v. United States*,¹⁶ and *Nichols v. United States*¹⁷—firmly established sovereign immunity in American jurisprudence. The Court’s rationale in these cases rested on pragmatic considerations, such as maintaining government efficiency and protecting the treasury. *The Siren* stressed, “It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen.”¹⁸ Similarly, *Nichols* emphasized that sovereign immunity

is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.¹⁹

In 1882, the Supreme Court began to express doubts about the justifications for and extent of sovereign immunity in *United States v. Lee*.²⁰ Although the Court treated sovereign immunity as an uncontroverted principle,

9. U.S. CONST. art I, § 9, cl. 7.

10. *Id.* art. III, § 1.

11. Judiciary Act of 1789, 1 Stat. 73, § 11; see also Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 609 (2003).

12. THE FEDERALIST NO. 81 (Alexander Hamilton).

13. Jackson, *supra* note 11, at 550.

14. *Cohens v. Virginia*, 19 U.S. 264, 411–12 (1821).

15. 74 U.S. 152, 153–54 (1868).

16. 75 U.S. 269, 275 (1868).

17. 74 U.S. 122, 126 (1868).

18. *The Siren*, 74 U.S. at 154.

19. *Nichols*, 74 U.S. at 126.

20. 106 U.S. 196 (1882).

the controversy revolved around whether plaintiffs could evade sovereign immunity by naming individual government officers as defendants or whether the Court should construe immunity more broadly to prohibit relief against those officers.²¹ The Court split five to four, upholding the legal fiction that there is a principled distinction between an action against a government employee and an action against the government itself.²² The majority permitted the suit to go forward against the government officers because “no man in this country is so high that he is above the law.”²³ The majority therefore championed the judicial branch’s role in safeguarding citizens’ rights from abuse of power by the other branches of government.²⁴ The *Lee* dissent rejected the majority’s theory that this was a suit against government officers and not against the sovereign.²⁵ The dissent further argued that the appropriate balance of power accorded Congress the sole right to waive sovereign immunity with measures designed to protect government interests.²⁶ Although the majority intended to open the door to citizen suits against the government—via its officers—*Lee* left the door of sovereign immunity “only slightly ajar.”²⁷

Indeed, the Supreme Court closed that door in *Larson v. United States*²⁸ and tightened the latch in *Malone v. Bowdoin*.²⁹ In 1949, the *Larson* court rejected the legal fiction endorsed in *Lee* that a suit against an officer of the United States can be distinguished from one against the United States itself. Instead, the Court expanded the application of sovereign immunity when “the relief sought in a suit nominally addressed to the officer is relief against the sovereign.”³⁰ In dissent, Justice Frankfurter questioned the validity of sovereign immunity, given the Court’s conflicting decisions and the evolving public perception favoring greater governmental accountability.³¹ Because sovereign immunity was “in disfavor,” the dissent argued it should not be extended, thereby undoing a long line of cases stemming from *Lee*.³²

In 1962, *Malone* strengthened and extended the *Larson* rule, further

21. *Id.* at 197; *see also* Gregory C. Sisk, A Primer on the Doctrine of Federal Sovereign Immunity, 58 OKLA. L. REV. 439, 447–51 (2005) (providing a detailed factual history and legal analysis of *Lee*).

22. *See Lee*, 106 U.S. at 196.

23. *Id.* at 220.

24. *See id.*

25. *See id.* at 226 (Gray, J., dissenting) (reasoning that because the government can only hold property through its agents, a suit brought against those agents to recover property claimed by the United States is actually a suit against the United States).

26. *Id.* at 227 (“Every government has an inherent right to protect itself against suits . . .”).

27. Sisk, *supra* note 21, at 451.

28. 337 U.S. 682 (1949).

29. 369 U.S. 643 (1962).

30. *Larson*, 337 U.S. at 687.

31. *See id.* at 709 (Frankfurter, J., dissenting) (noting that the Court has been persuaded at times “by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice”); *id.* at 708 (finding that “a steady change of opinion has gradually undermined unquestioned acceptance of the sovereign’s freedom from ordinary legal responsibility.”).

32. *Id.* at 723.

legitimizing sovereign immunity.³³ Justice Douglas dissented, calling for a rejection of sovereign immunity as a concept that “has become more and more out of date, as the powers of the Government and its vast bureaucracy have increased.”³⁴ Echoing the *Larson* dissent’s concern about arbitrary application of the doctrine, Justice Douglas suggested one reason for the Court’s unpredictable decisions was that “policy considerations, not always apparent on the surface, are powerful agents of decision.”³⁵ These policy undercurrents explain why courts were willing to expand sovereign immunity in certain instances and restrict it in seemingly similar cases.

Congress’s enactment of various statutory waivers of sovereign immunity diluted the practical impact of the Supreme Court’s line of reasoning through *Malone*. These laws generally provide litigants access to redress from the federal government,³⁶ but statutory provisions have also been enacted to enshrine immunity.³⁷ In effect, “the battleground over sovereign immunity has shifted from common-law claims against government officers to statutory claims presented pursuant to congressional waivers of sovereign immunity.”³⁸ This Note next examines the relevant statutory entrenchments and waivers of sovereign immunity at issue in the *Katrina Canal Breaches* case.

B. *The Federal Tort Claims Act*

Given the firm hold of sovereign immunity in U.S. law, if a citizen suffered harm from the negligent act of a government official before enactment of the Federal Tort Claims Act (FTCA), the only recourse was a private Congressional claim bill, grounded in the First Amendment’s guarantee of the right to petition.³⁹ This “notoriously clumsy” system consumed Congress’s limited resources and resulted in inconsistent, ad hoc redress.⁴⁰ As the federal government expanded in the first half of the twentieth century, more and more people were injured by the government, and the number of private bills rose correspondingly.⁴¹ Looking to streamline the compensation system, Congress

33. See *Malone*, 369 U.S. at 643 (expanding the *Larson* grant of sovereign immunity to cover actions against government agents to recover title to land).

34. *Id.* at 652 (Douglas, J., dissenting).

35. *Id.* at 650.

36. See, e.g., Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.) (authorizing non-tort money claims against the federal government based on a statute or a contract); Federal Tort Claims Act of 1946, 28 U.S.C. §§ 1346(b), 2671–2680 (2012) (authorizing common-law tort claims against the United States); Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16 (2012) (extending employment discrimination provisions of Title VII of the Civil Rights Act of 1964 to federal employees).

37. See Flood Control Act of 1928, 33 U.S.C. § 702(c) (explicitly exempting federal government flood control projects from liability).

38. Sisk, *supra* note 21, at 460.

39. See PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT 6–7 (2012).

40. Dalehite v. United States, 346 U.S. 15, 24–25 (1953); see also LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 2.08 (2011), available at LexisNexis.

41. See *id.*

considered relinquishing the adjudication of such claims to the federal courts to allow citizens to sue the government for negligence.⁴²

In 1946, Congress enacted the FTCA, which waived the federal government's sovereign immunity in tort.⁴³ The statute made the United States liable "in the same manner and to the same extent as a private individual under like circumstances."⁴⁴ If sovereign immunity is a moat protecting the fortress of the federal government from suit, the FTCA is a drawbridge across that moat.⁴⁵ However, the drawbridge is frequently raised, because Congress built a number of exceptions into the FTCA.

One of the most powerful bars to suit is the discretionary function exception (DFE), which prohibits "[a]ny claim . . . based upon the exercise or performance or the failure to 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."⁴⁶ The DFE is both the broadest and the most contentious of the FTCA's exceptions.⁴⁷ Its purpose "is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."⁴⁸ The "discretion of the executive or the administrator to act according to one's judgment of the best course" is "a concept of substantial historical ancestry in American law."⁴⁹ Justice Marshall observed in *Marbury v. Madison* that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."⁵⁰ The DFE therefore reinforces a tradition of protecting the policy considerations government officials make in the course of their duties.

The FTCA's legislative history offers courts little guidance for what constitutes a "discretionary function." Congress's explanation of the DFE, which it characterized as a "highly important exception," merely reiterates that "alleged abuse of discretionary authority" is precluded from liability.⁵¹ Beyond expressly contemplating liability for "negligence in the operation of

42. See *id.* § 2.10 (describing the growing pressure for Congress to enact a comprehensive bill to replace the private claim system).

43. See 28 U.S.C. § 1346 (2012).

44. 28 U.S.C. § 2674.

45. See Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1109 (2009) (citing *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979)).

46. 28 U.S.C. § 2680(a). See also Jackson, *supra* note 13, at 564 ("Of [the FTCA exceptions], the most important is the 'discretionary function' exemption.").

47. See James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (calling the DFE "[t]he most gaping and frequently litigated of the FTCA's exceptions").

48. *United States v. Gaubert*, 499 U.S. 315 (1991).

49. *Dalehite v. United States*, 346 U.S. 15, 34 (1953).

50. 5 U.S. 137, 170 (1803).

51. H.R. REP. NO. 2245, at 10 (1942).

vehicles,”⁵² Congress gave few examples to clarify the extent of the FTCA’s waiver of sovereign immunity.⁵³ Judicial interpretation has therefore played an influential role in shading the contours of the DFE.⁵⁴

To determine whether the exception applies, courts use the two-prong test the Supreme Court articulated in *Berkovitz by Berkovitz v. United States*⁵⁵ and affirmed in *United States v. Gaubert*.⁵⁶ First, the government action must involve “an element of judgment or choice” rather than being specifically prescribed by a federal statute, regulation, or policy that leaves the employee “no rightful option but to adhere to the directive.”⁵⁷ Second, the challenged action must be based on considerations of social, economic, or political policy—the type of judgments the exception was intended to protect.⁵⁸ The second prong is met if the actions were “susceptible to policy analysis,” regardless of whether the government employee actually made a policy determination.⁵⁹

With the susceptibility inquiry, the *Gaubert* decision clarified one important question: does the DFE apply whenever policy considerations *might* influence the judgment, or when they actually *do* influence the judgment? When this concern was raised during oral argument, the government cautioned that limiting the DFE to cases where an actual policy consideration was made would lead to “a full-scale trial in every case that involves the raising of the defense of discretionary function.”⁶⁰ The justices agreed that “it must be presumed” that the government’s action involved policy considerations.⁶¹ Although the opinion cited no authority for this pronouncement, it is possible

52. H.R. REP. NO. 2428, at 3 (1940).

53. H.R. REP. NO. 2245, at 10 (1942) (offering claims based on the allegedly negligent exercise by the Treasury Department of blacklisting or freezing powers as an example of when the DFE would apply).

54. See Stephen L. Nelson, *The King’s Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 298 (2009) (“By passing the DFE with such vague language, declining to include specific statements of Congressional intent within the DFE, and choosing not to revisit the DFE in the sixty-one years after its passage, Congress implicitly allowed the Judiciary to establish the parameters of the DFE.”).

55. 486 U.S. 531 (1988).

56. 499 U.S. 315 (1991).

57. *Id.* at 322.

58. *Id.* at 322–23.

59. *Id.* at 325. This second prong gives judges considerable leeway, and may be used to reflect political preferences. See Hon. Robert C. Longstreth, *Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, 8 U. ST. THOMAS L.J. 398 (2011).

60. Oral Argument at 21:02, *Gaubert*, 499 U.S. 315 (1991) (No. 89-1793), available at http://www.oyez.org/cases/1990-1999/1990/1990_89_1793/argument.

61. *Id.* at 324 (majority opinion). Justice Scalia was the only justice to disagree with this reasoning and call for more clarity in the application of the second prong. See *id.* at 334–39 (Scalia, J., concurring). Lower courts have widely adopted the *Gaubert* presumption. See, e.g., *Shansky v. United States*, 164 F.3d 689, 692 (1st Cir. 1999) (noting that the “critical question is whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis”); *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998) (the challenged conduct “need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis”).

the Court was attempting to avoid needless litigation and offer lower courts clear guidance for ruling on motions to dismiss based on the DFE.⁶² In sum, the *Gaubert* presumption dictates that where no regulation mandates specific conduct, courts must presume government decisions involve policy considerations, and the burden shifts to the plaintiffs to overcome the presumption with evidence that the specific decision was not susceptible to policy analysis.⁶³

While the application of the first prong—whether the government act or omission was discretionary—is generally straightforward,⁶⁴ the second prong—whether policy concerns formed the basis for the discretionary decision—demands a more nuanced approach.⁶⁵ On one end of the spectrum are decisions totally divorced from policy analysis, such as a government official’s negligent driving that causes an accident.⁶⁶ As the Court observed in *Gaubert*, “[a]lthough driving requires the constant exercise of discretion, the official’s decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.”⁶⁷ At the other end of the spectrum are decisions “fully grounded in regulatory policy,” such as the regulation and oversight of a bank.⁶⁸

In the middle of the spectrum, courts take a case-by-case approach, finding the second prong to apply in a variety of situations. For example, claims alleging the negligent design or operation of federal facilities are typically found to be susceptible to policy considerations and therefore protected by the DFE. This category includes cases privileging the Park Service’s decision to preserve the antiquity of a national historic site by not installing a handrail where a visitor fell down the stairs;⁶⁹ the Postal Service’s discretion to choose the location of its mailboxes, one of which contributed to an accident by obstructing a driver’s view of traffic;⁷⁰ and the government’s

62. See Jonathan R. Bruno, *Immunity for “Discretionary” Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 430 (2012).

63. See *Elder v. United States*, 312 F.3d 1172, 1182 (10th Cir. 2002) (explaining that “the facts of the specific case may overcome the presumption to which the government is entitled under *Gaubert*.”).

64. See, e.g., *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1177 (10th Cir. 2008) (finding that an Air Force field guide did not “prescribe a specific, mandatory course of conduct,” and therefore satisfied the first prong of the DFE test).

65. See generally David S. Fishback, *The Federal Tort Claims Act is a Very Limited Waiver of Sovereign Immunity – So Long As Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, 59 U.S. ATTY’S BULL. 16, 23–26 (2011) (explaining cases where courts have found prong two to apply or not apply).

66. See H.R. REP. NO. 2428, at 3 (1940); but see *Dalehite v. United States*, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting) (“Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that ‘The King can do no wrong’ has not been uprooted; it has merely been amended to read, ‘The King can do only little wrongs.’”).

67. *Gaubert v. United States*, 499 U.S. at 325 n.7.

68. See *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (citing *Gaubert*, 499 U.S. at 315).

69. See *Shansky v. United States*, 164 F.3d 688 (1st Cir. 1999).

70. See *Riley v. United States*, 486 F.3d 1030 (8th Cir. 2007).

design of an irrigation reclamation project that broke and flooded.⁷¹

Claims involving the governmental failure to warn are generally dismissed under the second prong as well. These cases have touched on a variety of contexts, including the Environmental Protection Agency's failure to warn residents about lead contamination after investigating an area containing three lead smelters;⁷² the Department of Interior's failure to warn about thin ice on a lake that was prevented from freezing through use of an aeration system;⁷³ and the government's failure to warn about possible terrorist threats.⁷⁴

However, courts have distinguished these failure-to-warn cases from instances where the government made a policy decision to warn and then failed to do so. Although such policy decisions are not a specific and mandatory requirement under the first prong, the failure to adhere to them could implicate a contrary policy that the DFE is not intended to shield. For example, where the Forest Service failed to warn about a serious known hazard on a snowmobile road, the DFE did not provide immunity because the U.S. Forest Service had increased the speed limit without following its own internal procedures to test the safety of that change.⁷⁵ This same rationale has prevailed in a number of cases, permitting negligence suits to move forward against the government where its inaction contradicted established guidelines.⁷⁶

Courts have found that the second prong is not satisfied in other cases where government actions were not susceptible to policy considerations. For example, where there is an acute and immediate danger, courts have held that no policy could justify failing to warn or intervene.⁷⁷ Also outside the DFE are cases in which the government's failure to act was merely the result of ignoring an obvious problem, especially where the government was best-situated to address it and no policy implications could be articulated. For example, in *O'Toole v. United States* the government was found liable for ignoring routine maintenance of an irrigation system, causing a river to back up and damage

71. See *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018 (9th Cir. 1989). However, the court found that once the government adopted a design plan, construction of the canal was not rooted in the type of policy considerations the DFE was intended to shield. *Id.* at 1031–32.

72. See *Wells v. United States*, 851 F.2d 1471, 1477–78 (D.C. Cir. 1988) (concluding that the government's decision to order further study before warning residents of the risks involved social, economic, and public policy considerations).

73. See *Demery v. U.S. Dep't of Int.*, 357 F.3d 830 (8th Cir. 2004).

74. See *Macharia v. United States*, 334 F.3d 61, 66–67 (D.C. Cir. 2003) (explaining that such warnings implicated public policy concerns).

75. See *Oberson v. U.S. Dep't of Ag., Forest Serv.*, 514 F.3d 989 (9th Cir. 2008).

76. See *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995) (finding the DFE inapplicable where the National Park Service did not follow its internal manual's guidance for posting warning signs on a road); *Faber v. United States*, 56 F.3d 1122 (9th Cir. 1995) (finding the DFE inapplicable where the U.S. Forest Service failed to follow specifically prescribed federal policy and the failure to comply with that policy did not involve broader policy decisions).

77. See, e.g., *Andrulonis v. United States*, 952 F.2d 652 (2d Cir. 1991) (finding that a government scientist's failure to warn another scientist of a known, imminent danger could not possibly have been grounded in the policy of the Center for Disease Control's regulatory regime).

plaintiffs' land.⁷⁸ There, the Ninth Circuit held that “an agency’s decision to forego, for fiscal reasons, the routine maintenance of its property—maintenance that would be expected of any other landowner—is not the kind of policy decision that the discretionary function exception protects.”⁷⁹ Although government cost considerations are typically sufficient to protect a decision under the DFE, *O’Toole* indicates that sometimes fiscal constraints alone will not satisfy the second prong’s policy consideration requirement.⁸⁰

Ultimately, although courts have found some government decisions not susceptible to policy analysis, the second prong weighs in the government’s favor. As the title of a Department of Justice practitioner’s article aptly observes, *The Federal Tort Claims Act is a Very Limited Waiver of Sovereign Immunity—So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*.⁸¹

Flood victims face not one but two sovereign immunity hurdles. In addition to the FTCA exceptions, plaintiffs must prove that a more specific immunity provision in the Flood Control Act of 1928 does not apply to their case. Despite the FTCA’s general waiver of sovereign immunity in tort, the judiciary continues to recognize an absolute immunity for failings of federal flood-control projects under the Flood Control Act.⁸²

C. *The Flood Control Act*

Congress enacted the Flood Control Act of 1928 (FCA)⁸³ in response to the catastrophic Mississippi River flood of 1927.⁸⁴ The statute’s comprehensive flood-control program established the largest public works project undertaken up to that point in the United States.⁸⁵ In exchange for taking charge of such massive infrastructure projects, the law’s drafters sought a guarantee of federal government immunity from liability from any resulting damages.⁸⁶ Although sovereign immunity was firmly entrenched in U.S. law at

78. *O’Toole v. United States*, 295 F.3d 1029 (9th Cir. 2002).

79. *Id.* at 1036.

80. *See id.*

81. Fishback, *supra* note 65.

82. *See, e.g., Nat’l Mfg. Co. v. United States*, 210 F.2d 263, 274 (8th Cir. 1954); *see also* Amy Hall, *The Immunity Provision of the Flood Control Act: Does it Have A Proper Role After the Demise of Sovereign Immunity?*, 31 MCGEORGE L. REV 77, 84 (1999) (recognizing the interplay of FCA immunity with the FTCA and arguing that the broad interpretation of FCA immunity is inconsistent with the FTCA’s general waiver of sovereign immunity).

83. *See* 33 U.S.C. § 702a–m (2012).

84. *United States v. James*, 478 U.S. 597, 606 (1986), abrogated by *Cent. Green Co. v. United States*, 531 U.S. 425 (2001). The flood resulted in nearly 200 deaths, more than \$200 million in property damage, and left almost 700,000 people homeless. *Id.* (citing S. REP. NO. 619 at 12 (1928)).

85. *Id.* at 606 n.8 (noting that the flood control projects authorized under the new legislation would cost “four times as much as the Panama Canal”) (citing 69 CONG. REC. 6640 (1928)).

86. *Id.* at 607 (citing 69 CONG. REC. 6641 (1928) (statement of Rep. Snell) (“I want this bill so drafted that it will contain all the safeguards necessary for the Federal Government. If we go down there and furnish protection to these people—and I assume it is a national responsibility—I do not want to

the time, Congress included a provision making explicit the federal government's immunity for flood damages. The section 702c immunity provision provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters in any place."⁸⁷ Although the statutory language is broad,⁸⁸ courts have narrowed the provision's application somewhat.

The Fifth Circuit first considered FCA immunity in *Graci v. United States*, after the newly constructed Mississippi River-Gulf Outlet (MRGO) facilitated flooding in the wake of Hurricane Betsy in 1965.⁸⁹ The *Graci* court held that immunity did not apply there, as MRGO was a navigational canal "unconnected with flood control projects."⁹⁰ This interpretation constrained the broad wording of section 702c, exposing the government to negligence liability under the FTCA.

The Supreme Court did not examine an FCA immunity question until *United States v. James*, nearly sixty years after its enactment.⁹¹ In *James*, the Court considered two similar personal injury cases that arose because the Army Corps negligently failed to warn recreational users that it opened dam reservoir flood-control gates.⁹² *James* gave the federal government broad immunity, holding that it is "clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control."⁹³ Therefore, even though the case involved the alleged mismanagement of recreational facilities wholly unrelated to flood control, the government enjoyed immunity because the waters eventually passed through a flood-control project.⁹⁴

The Supreme Court substantially narrowed the scope of FCA immunity in *Central Green Co. v. United States*.⁹⁵ There, a California pistachio farmer argued that seepage from a combined flood-control and irrigation system led to subsurface flooding that damaged his orchards.⁹⁶ The government argued that it should enjoy immunity if any part of the system was related to flood control,

have anything left out of the bill that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years.")).

87. 33 U.S.C. § 702(c).

88. See *United States v. James*, 478 U.S. 597, 604 (1986), *abrogated by* *Cent. Green Co. v. United States*, 531 U.S. 425 (2001) (noting that "[i]t is difficult to imagine broader language").

89. 456 F.2d 20 (5th Cir. 1971).

90. *Id.* at 27.

91. *James*, 478 U.S. at 606.

92. *Id.* at 599–602.

93. *Id.* at 605. The *James* decision is also noteworthy for extending FCA immunity to cover personal injury, in addition to property damages. In dissent, Justice Stevens rebuked the majority's "perverse" statutory construction and argued that restricting section 702c to property damage was "more faithful to the objective of Congress." *Id.* at 613–18 (Stevens, J., dissenting).

94. See *id.* at 605 (majority opinion).

95. 531 U.S. 425 (2001).

96. *Id.*

which the lower courts generally found persuasive under the *James* rule.⁹⁷ The Supreme Court, however, articulated a new test requiring consideration of the “character of the waters that cause the relevant damage rather than the relation between that damage and a flood-control project.”⁹⁸ The Court then remanded the case to consider whether the waters in question were “flood waters” under the meaning of the statute.⁹⁹ Whereas *James* would have barred suit wherever flood waters even incidentally passed through a flood-control project, *Central Green* required a more discerning, case-by-case inquiry into the “character of the waters” and the “purpose behind their release.”¹⁰⁰ Therefore, the Court recognized that some floodwaters are immune and others not, and the question of immunity rests on whether a flood-control project caused the damage.¹⁰¹

Having assessed the guiding principles of sovereign immunity in the flood disaster context, the next Part of this Note will explain how the Fifth Circuit applied those principles in the *Katrina Canal Breaches* case.

II. *IN RE KATRINA CANAL BREACHES LITIGATION*: THE ARMY CORPS CAN DO NO WRONG

A. *Facts and Procedural Summary*

Flanked by the Mississippi River on one side and Lake Pontchartrain on the other, New Orleans is shaped like a bowl, with some parts of the city as much as seventeen feet below sea level and continuing to sink up to one inch every year.¹⁰² Although the city was always vulnerable to hurricanes, it was historically protected by a buffer of hundreds of square miles of coastal wetlands that helped absorb Gulf of Mexico storm surges before they reached dry land.¹⁰³ The city was also prone to yearly flooding from the river.¹⁰⁴ Although extensive levees and other protections have tamed the river and

97. *Id.* at 427–28; *see also* *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (holding that because a child drowned in a flood control project, all waters contained in the project were “flood waters” and the government was immune); *Boudreau v. United States*, 53 F.3d 81 (5th Cir. 1995) (finding immunity per *James* where the Coast Guard negligently assisted a stranded recreational boater on a recreational lake with flood control purposes); *but see* *Fryman v. United States*, 901 F.2d 79, 81 (7th Cir. 1990) (holding that FCA immunity applies if the flood control project increased the probability of the plaintiff’s injury, and noting that “*James* was so broadly written it cannot be applied literally.”).

98. *Cent. Green*, 531 U.S. at 437.

99. *Id.*

100. *Id.* at 436. Subsequent cases have followed the *Central Green* rule. *See, e.g.*, *Bierer-Carter v. United States*, 806 F. Supp. 2d 1245 (S.D. Fl. 2011) (assessing the “character of the waters” to find that FCA immunity applied where the Army Corps’s negligent maintenance of a flood-control reservoir caused a recreational user’s death).

101. *See Cent. Green*, 531 U.S. at 437.

102. Joel K. Boerne, Jr., *New Orleans: A Perilous Future*, NAT’L GEOGRAPHIC (Aug. 2007), <http://ngm.nationalgeographic.com/2007/08/new-orleans/new-orleans-text>.

103. Michael Grunwald & Susan B. Glasser, *The Slow Drowning of New Orleans*, WASH. POST (Oct. 9, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/08/AR2005100801458_pf.html.

104. *Id.*

paved the way for population growth and industrial expansion, they have also cut off the natural patterns of silt deposition, which has decimated the coastal wetlands, the city's first line of defense for hurricane storm surges.¹⁰⁵ Nearly one million acres of buffering wetlands in southern Louisiana disappeared between 1930 and 2005; indeed, by 2005 the state was losing a football field of land every thirty-eight minutes.¹⁰⁶ Although designed for protection, the extensive civil engineering of New Orleans actually contributed to the catastrophic flooding during Hurricane Katrina, by reducing the natural wetlands buffer and building conduits to bring the storm surge directly to the city.¹⁰⁷

The source of misfortune for many New Orleans residents during Hurricane Katrina was a little-used shipping channel, the Mississippi River-Gulf Outlet (MRGO), known locally as "Mr. Go." In 1943, Congress asked the Army Corps to investigate ways to make the Port of New Orleans more accessible for commercial and military uses.¹⁰⁸ In 1956, Congress authorized the MRGO, a 76-mile channel designed "to be 36 feet deep and 500 feet wide, increasing at the Gulf of Mexico to 38 feet deep and 600 feet wide."¹⁰⁹ The Army Corps constructed MRGO by dredging virgin coastal wetlands and exposing layers of soft soil known to compress easily.¹¹⁰ Although the Army Corps was aware of this phenomenon, they declined to armor the channel's banks with foreshore protection, which would have substantially ameliorated erosion.¹¹¹ Compounding the problem, saltwater intrusion from the Gulf of Mexico killed marsh vegetation and intensified erosion caused by wash from ship wakes.¹¹² Since its completion in 1968, erosion more than tripled the width of the channel to almost 2000 feet prior to Hurricane Katrina.¹¹³ Maintaining MRGO was a Sisyphean task. The Army Corps had to repeatedly dredge it at a cost of \$16 million per year to maintain the depth necessary for ship navigation, despite the fact that it never caught on as a shipping channel and fewer than one ship per day travelled it.¹¹⁴ By 1998, a number of local

105. *Id.*; see also MCQUAID & SCHLEIFSTEIN, *supra* note 2, at 3–25 (providing a historical background of New Orleans geography and flood control measures); Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3 (1983) (attributing coastal subsidence and wetland loss in the Mississippi Delta to the Army Corps's river engineering projects to further commercial shipping interests and oil and gas extraction).

106. DOUGLAS BRINKLEY, *THE GREAT DELUGE* 9 (2006).

107. MCQUAID & SCHLEIFSTEIN, *supra* note 2, at 88.

108. *Katrina Canal Breaches II*, 673 F.3d 381, 385 (5th Cir. 2012).

109. *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp. 2d 644, 717 (E.D. La. 2009) [hereinafter *Katrina Canal Breaches I*].

110. *Katrina Canal Breaches II*, 673 F.3d at 385.

111. *Id.*

112. MCQUAID & SCHLEIFSTEIN, *supra* note 2, at 97.

113. *Katrina Canal Breaches II*, 673 F.3d at 386.

114. See *Katrina Canal Breaches I*, 647 F. Supp. 2d at 670; INDEP. LEVEE INVESTIGATION TEAM, *INVESTIGATION OF THE PERFORMANCE OF THE NEW ORLEANS FLOOD PROTECTION SYSTEMS IN HURRICANE KATRINA ON AUGUST 29, 2005*, 4-1 to 4-28 (2006), available at http://www.ce.berkeley.edu/projects/neworleans/report/CH_4.pdf; MCQUAID & SCHLEIFSTEIN, *supra*

resident groups had called for closing the channel, and an independent coastal consulting expert called MRGO “a serious threat to public safety and an environmental threat to the region.”¹¹⁵

During the construction of MRGO, the Army Corps also initiated the Lake Pontchartrain and Vicinity Hurricane Protection Plan (LPV).¹¹⁶ In 1965, Hurricane Betsy ravaged New Orleans, resulting in catastrophic flooding and providing further momentum to implement the LPV.¹¹⁷ Under the plan, the Army Corps built a series of levees and floodwalls protecting New Orleans East, the Ninth Ward, St. Bernard Parish, 17th Street, Orleans Avenue, and London Avenue from hurricane flooding.¹¹⁸ After Katrina, the Army Corps admitted this patchwork flood protection system was “a system in name only.”¹¹⁹ Due to ballooning construction costs and scarce funds, it was “managed like a circa 1965 flood control museum.”¹²⁰

When Hurricane Katrina struck New Orleans on August 29, 2005, the storm surge rushed through MRGO, poured over the levees, and flooded the city. The confluence of the wide MRGO with the much narrower Industrial Canal created a funnel that concentrated and amplified the storm surge.¹²¹ Scientists had called MRGO the city’s “Trojan Horse,” warning the government even before construction began that the canal would have devastating environmental effects that would increase hurricane damage.¹²² Although the Army Corps was aware of the funnel effect, they failed to armor the banks to mitigate the problem.¹²³

More than 400 plaintiffs sued in federal court to recover for Katrina-related damages.¹²⁴ Seven of these plaintiffs (the “Robinson plaintiffs”) went

note 2, at 97; see also Gary P. Shaffer et al., *The MRGO Navigation Project: A Massive Human-Induced Environmental, Economic, and Storm Disaster*, 54 J. COASTAL RES. 206, 217 (2009) (noting that “[f]rom the beginning, MRGO was never an economic success,” and explaining that many large ships found it quicker to travel the longer river route because MRGO’s banks were highly prone to erosion, so large ships had to go slow).

115. IVOR VAN HEERDEN & MIKE BRYAN, *THE STORM* 80 (2006).

116. *Katrina Canal Breaches II*, 673 F.3d at 385.

117. *Katrina Canal Breaches I*, 647 F. Supp. 2d at 652.

118. *Katrina Canal Breaches II*, 673 F.3d at 385–86.

119. John Schwartz, *Army Engineers Admit Levees Were Badly Made*, INT’L HERALD TRIBUNE, (June 1, 2006) <http://www.nytimes.com/2006/06/01/world/americas/01iht-orleans.1870162.html>.

120. THE BIG UNEASY (Harry Shearer documentary film 2010); see also *Katrina Canal Breaches I*, 647 F. Supp. 2d at 651 n.7 (describing the New Orleans flood protection system as “a fifty-year exercise in ineptitude and gross economic and technological mismanagement.”).

121. See *Katrina Canal Breaches I*, 647 F. Supp. 2d at 676–78; Michael Grunwald, *Canal May Have Worsened City’s Flooding*, WASH. POST (Sept. 14, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091302196.html>; Shaffer et al., *supra* note 114, at 217 (“The funnel caused the amplification of the surge such that water levels were much higher, and were transmitted much sooner, than they would have been naturally.”).

122. Grunwald, *supra* note 121. See Shaffer et al., *supra* note 114, at 222–24 app. (listing the public comments, correspondence, and reports about the environmental effects of MRGO from 1951 to 1998).

123. See *Katrina Canal Breaches I*, 647 F. Supp. 2d at 676–78.

124. *Katrina Canal Breaches II*, 673 F.3d at 385–86.

to trial, asserting that the Army Corps's negligent maintenance of MRGO led to the flooding that destroyed their property during Hurricane Katrina.¹²⁵ On November 18, 2009, after a nineteen-day bench trial, Judge Stanwood Duval of the Eastern District of Louisiana issued a lengthy opinion finding the Army Corps negligent under Louisiana law and therefore liable for damages.¹²⁶ The decision further held that neither the FCA nor the discretionary function exception to the FTCA shielded the government from liability.¹²⁷ The court held that the failure to maintain the MRGO properly was not rooted in policy protected by the DFE, but "insouciance, myopia, and shortsightedness."¹²⁸

On appeal the Army Corps did not challenge the District Court's negligence finding, arguing instead that the court erred by not dismissing the action based on the sovereign immunity provisions.¹²⁹ The Fifth Circuit unanimously upheld the District Court's ruling on March 2, 2012.¹³⁰ The Army Corps petitioned for rehearing en banc, which the Fifth Circuit treated as a request for panel rehearing and issued a superseding opinion unanimously reversing its first one.¹³¹

B. The Fifth Circuit's First Decision Held the Army Corps Liable for its Negligence.

1. FCA Immunity Did Not Apply Because MRGO Was a Navigational Canal, Not a Flood-Control Project.

The Fifth Circuit affirmed the district court's ruling that the Army Corps was not immune under section 702c of the FCA because MRGO was not a flood-control project.¹³² The court adopted a narrow view of FCA immunity consistent with *Graci* and *Central Green*, concluding that section 702c will only shield the government from liability "where damages result from waters released by flood-control activity or negligence therein."¹³³ The Fifth Circuit adopted the District Court's analogy comparing MRGO to a Navy Vessel that negligently crashed through a levee and caused a flood; while the levee is certainly a flood control project, the cause of the flooding is the negligent operation of a government ship, a "wholly extrinsic government action" that has nothing to do with flood control.¹³⁴ Although the court clarified that if the Army Corps had installed foreshore protection on MRGO, it would have given

125. *Id.*

126. *Katrina Canal Breaches I*, 647 F.Supp. 2d at 644.

127. *Id.* at 699, 716-17.

128. *Id.* at 732.

129. *Katrina Canal Breaches II*, 673 F.3d at 399.

130. *Id.*

131. *Katrina Canal Breaches III*, 696 F.3d 436 (5th Cir. 2012).

132. *Katrina Canal Breaches II*, 673 F.3d at 389.

133. *Id.*

134. *Id.*

the canal the immune character of a flood-control activity, the government failed to install flood-control protections and therefore could not claim FCA immunity.¹³⁵

Having cleared the first sovereign immunity hurdle, the Fifth Circuit moved on to consider the New Orleans residents' next hurdle: sovereign immunity under the DFE.

2. *The DFE Did Not Shield the Army Corps From Liability.*

The Fifth Circuit next turned to the DFE to the FTCA, upholding the District Court's ruling that the exception did not bar the suit.¹³⁶ After determining that the decision about whether to armor MRGO's banks involved an element of judgment or choice—thus satisfying the first prong of the *Berkovitz-Gaubert* test—the court considered whether the Army Corps's inaction met the second prong by involving policy considerations.¹³⁷ Citing *Gaubert*, the Fifth Circuit noted that although satisfaction of the first prong creates a “strong presumption” that the second prong will also be met, “the presumption can be overcome by specific facts about the actual bases for an actor's decision.”¹³⁸ Under the court's conception, plaintiffs could rebut the *Gaubert* presumption by showing that the government's actual decision was not policy-based.¹³⁹

In finding that this was not the type of consideration the DFE was intended to shield, the court set up a dichotomy between applying technical principles and weighing policy considerations: between liability and immunity. The court explained that if the decision is grounded in policy, it is immune, even if it also entails application of scientific principles; however, if the decision involves only the application of scientific principles, it is not immune.¹⁴⁰ Following *Berkovitz*, courts have withheld immunity where federal actions involved “technical or scientific standards” or “objective principles of electrical engineering.”¹⁴¹ Applying this exception for scientific principles, the court agreed with plaintiffs' argument that the Army Corps's decision to postpone armoring MRGO was an erroneous scientific judgment, not a decision rooted in public-policy considerations:

[T]he government enjoys immunity only where its discretionary judgments are susceptible to public-policy analysis. The key judgment made by the Corps, however, involved only the (mis-)application of objective scientific principles and not any public-policy considerations: The Corps misjudged

135. *Id.* at 390.

136. *Id.* at 391.

137. *See id.* at 391–96.

138. *Id.* at 394 (citing *United States v. Gaubert*, 499 U.S. 315, 324–25 (1991)).

139. *See id.*

140. *Id.*

141. *Id.* at 394 & n.6 (citing *Bear Med. v. United States ex rel. Sec'y of Interior*, 241 F.3d 1208, 1214 (9th Cir. 2001); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992)).

the hydrological risk posed by the erosion of MRGO's banks.¹⁴²

The Fifth Circuit's holding echoed the District Court's claim that "the Corps cannot mask these failures with the cloak of 'policy.'" ¹⁴³ Since "policy played no role in the government's decision to delay armoring the MRGO," the Fifth Circuit held the Army Corps liable for \$720,000 in property damage, and exposed them to a flood of similar claims from other property owners.¹⁴⁴

The government petitioned the Fifth Circuit for rehearing en banc, asking the court to reconsider its rulings on both the FCA and FTCA immunities.¹⁴⁵ The petition argued that the court misconstrued the facts, the law, and the policy behind sovereign immunity.¹⁴⁶

C. *The Fifth Circuit Reversed its First Decision, Shielding the Army Corps from Liability Under the DFE.*

On September 24, 2012, in an unusual move, the same panel of the Fifth Circuit did a complete about-face and issued a new opinion dismissing the lawsuit against the Army Corps.¹⁴⁷ Although certainly out of the ordinary—especially because neither opinion contained a dissent—the panel's decision to reverse its previous opinion is not unheard of in the Fifth Circuit.¹⁴⁸ Treating the government's petition for rehearing en banc as a petition for panel rehearing, the Fifth Circuit withdrew its previous decision and unanimously reversed its holding.¹⁴⁹ Although the court's analysis of FCA immunity was the same, it reassessed the application of the DFE, finding that it now "completely insulates the government from liability."¹⁵⁰

Although based on the same factual record, the new decision makes a striking turnaround in its interpretation of those facts. Where before "ample

142. *Id.* at 391.

143. *Katrina Canal Breaches I*, 647 F. Supp. 2d 644, 709 (E.D. La. 2009).

144. *Katrina Canal Breaches II*, 673 F.3d at 394; *Katrina Canal Breaches I*, 647 F. Supp. 2d at 736.

145. See Corrected Petition of United States for Rehearing En Banc, In re Katrina Canal Breaches Litigation, 696 F.3d 436 (5th Cir. 2012) (10-30429).

146. *Id.*

147. See *Katrina Canal Breaches Litigation III*, 696 F.3d at 436.

148. Occasionally, the original panel will issue a new decision as a result of a petition for rehearing or sua sponte. This may occur because the panel realized that it erred or because the panel guessed that its position was likely to be overturned en banc or had the potential to create a circuit split. See, e.g., *Houston v. City of New Orleans*, 682 F.3d 361 (5th Cir. 2012) (per curiam) (treating a petition for rehearing en banc as a petition for panel rehearing, the court found a state-law basis to resolve the dispute, and issued a new opinion because federal courts do not decide constitutional issues where there is an adequate state-law basis to resolve the dispute); *Walji v. Gonzales*, 500 F.3d 432 (5th Cir. 2007) (per curiam) (treating a petition for rehearing en banc as a petition for panel rehearing and issuing a new opinion that reversed the original decision, which had allegedly created a circuit split); *Moore v. Quarterman*, 491 F.3d 213 (2007) (per curiam), *rev'd*, 533 F.3d 338 (5th Cir. 2008) (en banc) (treating a petition for rehearing en banc as a petition for panel rehearing, the panel denied a death row inmate's petition for habeas corpus, which was later overturned en banc).

149. See *Katrina Canal Breaches Litigation III*, 696 F.3d at 436.

150. *Id.* at 454.

record evidence” indicated that “policy played no role in the government’s decision to delay armoring MRGO,” the same “ample record evidence” now revealed a “public-policy character.”¹⁵¹ Where before “considerable evidence” suggested the Army Corps’s decisions were “grounded on an erroneous scientific judgment, not policy considerations,” now the Army Corps “appreciated the benefit” of armoring all along, but rejected it on policy grounds.¹⁵² The court cited a 1988 Army Corps report that used cost-benefit analysis to justify the government’s inaction: the expected cost of protecting the banks outweighed the cost of continuing to dredge the canal to maintain its navigability.¹⁵³ By 1996, the Corps realized the actual costs of foreshore protection were less than previously estimated, and Congress granted the Corps the necessary funds to protect the shore to minimize future dredging costs and preserve the wetlands.¹⁵⁴ Relying on these facts, the Fifth Circuit held that the DFE shielded the Army Corps because “there can be little dispute that the decisions here were susceptible to policy consideration.”¹⁵⁵

Although the Fifth Circuit offered no explanation, a number of factors could have influenced the panel’s reversal of its previous decision. Predominant among its reasons may have been a concern that finding liability would open the floodgates to hundreds of thousands of similar claims pending in a master consolidated class action.¹⁵⁶ Although an empirical study determined that there has been no statistically significant association between the number of plaintiffs affected and the successful use of the DFE in the federal courts of appeal, the study did note that in class action suits, the DFE has been successful in every case it was raised.¹⁵⁷ Therefore, courts may be engaging in downstream concerns about their holdings, such that the scope of the financial liability influences their decisions, rather than strictly the merits of the cases.¹⁵⁸ Ultimately, the reversal illustrates that finessing the facts can lead to different results under the second prong of the *Berkovitz-Gaubert* test, highlighting that DFE determinations can be made arbitrarily to suit selective

151. Compare *Katrina Canal Breaches II*, 673 F.3d at 394, with *Katrina Canal Breaches III*, 696 F.3d at 451.

152. Compare *Katrina Canal Breaches II*, 673 F.3d at 395, with *Katrina Canal Breaches III*, 696 F.3d at 451.

153. *Katrina Canal Breaches III*, 696 F.3d at 442.

154. *Id.* at 443.

155. *Id.* at 451.

156. See Stanwood R. Duval, *Sovereign Immunity, Anachronistic or Inherent: A Sword or a Shield?*, 84 TUL. L. REV. 1471, 1488 (2010).

157. William G. Weaver & Thomas Longoria, *Bureaucracy that Kills: Federal Sovereign Immunity and the Discretionary Function Exception*, 96 AM. POL. SCI. REV. 335, 345, 348 (2002). Although not statistically significant, the DFE has been successful in 77 percent of cases where over 100 people were affected, but only 70 percent of cases involving fewer than ten plaintiffs. *Id.*

158. See *id.* at 343; but see *Indian Towing Co. v. United States*, 350 U.S. 61, 68–69 (1955) (“Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.”).

facts.

III. TESTING THE BOUNDARIES OF SOVEREIGN IMMUNITY

A. *FCA Immunity Leads to Absurd Results.*

The *Katrina Canal Breaches* decision highlights the tensions underlying FCA section 702c immunity. The ruling encouraged reliance on the legal fiction that the levees were not also responsible for the flooding. Although MRGO facilitated the devastating flooding of New Orleans, negligent levee construction and maintenance were also part of the problem.¹⁵⁹ To avoid FCA immunity, plaintiffs framed the case around MRGO as a navigational canal, but ignored contribution to the damage from federally immune flood-control projects. This resulted in similarly-situated plaintiffs being treated differently; for example, claims from plaintiffs injured by breaches along the 17th Street, London Avenue, and Orleans Avenue Canals were all dismissed under section 702c because those canals were designed to prevent flooding and were incorporated into the LPV hurricane protection plan.¹⁶⁰

Moreover, allowing action against the government for navigational projects but not flood-control projects is fundamentally inconsistent, an inequity exacerbated by the FTCA's general waiver of sovereign immunity.¹⁶¹ Arguably, flood control is an important social good, and sweeping liability could chill government efforts to develop these projects. However, both types of projects could lead to catastrophic damages if they fail; therefore, encouraging non-negligent construction and maintenance should apply to all types of major government infrastructure projects. Finally, flood control immunity has encouraged the U.S. government to open areas in danger of flood risk to development. By promoting growth in flood-prone areas the government could actually be increasing eventual flood damages if flood-control structures fail.

Fear of liability could encourage the Army Corps to install flood-control protections on all of its navigational or non-flood-control projects to immunize dilapidated infrastructure. In *Katrina Canal Breaches*, the Fifth Circuit pointed out that if the Army Corps had armored MRGO's banks instead of continuing to dredge the channel, FCA immunity would have applied.¹⁶² While this would

159. See, e.g., INDEP. LEVEE INVESTIGATION TEAM, *supra* note 114, at 11-1 to 11-29, available at http://www.ce.berkeley.edu/projects/neworleans/report/CH_11.pdf (finding that the levees were constructed of cheap, erodeable materials known to perform poorly over time); MCQUAID & SCHLEIFSTEIN, *supra* note 2, at 73-86 (describing the engineering challenges the Army Corps faced when designing levees in the swampy New Orleans soil and the corners they cut during construction).

160. *Katrina Canal Breaches III*, 696 F.3d at 448.

161. See Kent C. Hofmann, *An Enduring Anachronism: Arguments for the Repeal of the § 702c Immunity Provision of the Flood Control Act of 1928*, 79 TEX. L. REV. 791, 810 (2001) ("The parallel existence of 702c and the FTCA thus has led to inconsistent dispositions of similar cases.").

162. See *Katrina Canal Breaches III*, 696 F.3d at 447.

confer governmental immunity in the event of future flood damages, it might divert money from more deserving projects or delay needed repairs to flood-control projects.

Justice Stevens has called sovereign immunity under the FCA an “anachronism” and stated that “this obsolete legislative remnant is nothing more than an engine of injustice.”¹⁶³ Whereas sovereign immunity once guarded the public treasury, the growth of both the treasury and the power of the federal government means “sovereign immunity may now serve to protect government power and its abuse rather than to safeguard the public.”¹⁶⁴ Congress could amend or repeal FCA immunity to remedy this injustice.¹⁶⁵ However, FCA immunity will continue to play a relatively small role in government decisions if courts continue to interpret the DFE broadly. Whereas FCA immunity applies to a small subset of cases against the federal government, the DFE applies to all discretionary government decisions that implicate policy.

B. *Has the Discretionary Function Exception Swallowed the Rule?*

While the Fifth Circuit’s first decision suggested that the FTCA is a broad waiver of sovereign immunity with narrow exceptions, its reversal suggests that the law is a narrow waiver of sovereign immunity with broad, nearly insurmountable exceptions. Many commentators have lamented the DFE’s broad reach, and the Fifth Circuit’s reversal in the *Katrina Canal Breaches* case reveals that uncertainty also plagues the DFE’s application.¹⁶⁶ Concern that the DFE is swallowing the FTCA’s general waiver of sovereign immunity is not a new development; in 1954, frustrated with the DFE’s broad application, two authors bitterly proposed the statute’s name be changed from the “Federal Tort Claims Act” to the “Federal Negligent Operation of Motor Vehicles Act.”¹⁶⁷ More recently, a Tenth Circuit judge described the FTCA as a “false promise” because sovereign immunity “still prevails at the federal level in all but the

163. *Hiersche v. United States*, 503 U.S. 923, 926 (1992) (Stevens, J.) (respecting the denial of certiorari and protesting the Supreme Court’s refusal to review the application of sovereign immunity in a case in which a professional diver suffered fatal injuries at a federal flood control project).

164. Elizabeth Kunderling Hocking, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L.J. 203, 211–12 (1991).

165. See *Hiersche*, 503 U.S. at 926 (“Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained.”).

166. See, e.g., Bruno, *supra* note 62, at 414; Amy M. Hackman, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act, How Much Is Enough?*, 19 CAMPBELL L. REV. 411, 445 (1997) (arguing that “[t]he Discretionary Function Exception is applied too often and with varying results.”); Weaver & Longoria, *supra* note 157, at 341 (“The waiver to immunity has become the exception and the exceptions have become the rule; the FTCA has been turned inside out.”).

167. Walter Gellhorn & Louis Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1326 (1954); see also Hugh C. Stromswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U. INT. L. REV. 41, 42 (1954) (referring to the DFE as “the monstrous joker now threatening to engulf the entire Act in a twilight zone”).

most trivial of matters.”¹⁶⁸ To accord with the FTCA’s policy to compensate victims of governmental negligence in the same manner and to the same extent to which a private actor would be liable,¹⁶⁹ the DFE must be more predictably applied and fairly balanced.

1. *The Berkovitz-Gaubert Test Allows Considerable Judicial Leeway.*

The Fifth Circuit’s *Katrina Canal Breaches* flip-flop makes it obvious that judges have considerable latitude to define the extent of the DFE. In *United States v. Varig Airlines*, the Supreme Court disclaimed any ability “to define with precision every contour of the discretionary function exception” and admitted the Court’s interpretation of the FTCA “has not followed a straight line.”¹⁷⁰ The history of the DFE is plagued with inconsistent applications of the exception, and the *Berkovitz-Gaubert* test has not offered a bright line either.

Commenting on the Fifth Circuit’s reversal, plaintiffs’ attorney Joseph Bruno said, “This is politics, not law.”¹⁷¹ Indeed, politics can play a role in how a court interprets the DFE. A recent study by the Honorable Robert C. Longstreth found considerable room for judicial partisanship.¹⁷² The “open-ended nature” of the second prong allows judges to insert their own preferences as to the appropriate balance between compensating government wrongs and protecting government decisions.¹⁷³ The study found that Republican-nominated judges applied the DFE 81.8 percent of the time in published decisions, whereas Democratic-nominated judges applied the bar only 64.7 percent of the time in published decisions.¹⁷⁴ The second prong’s broad latitude explains almost all of the partisan difference.¹⁷⁵ However, appellate judges of both parties were more likely than trial court judges to dismiss actions under the exception: Republicans applied the bar 88.9 percent of the time, compared with 87.1 percent for Democratic appellate judges.¹⁷⁶

A bright-line test could reduce judicial partisanship and increase government accountability. One possibility would be a rule that balancing competing safety concerns could never constitute a legitimate policy

168. *Allen v. United States*, 816 F.2d 1417, 1424–25 (10th Cir. 1987) (McCay, J., concurring), cert. denied, 484 U.S. 1004 (1998).

169. See 28 U.S.C. § 1346(b)(1) (2012).

170. 467 U.S. 797, 811, 813 (1984); see also *O’Toole v. United States*, 295 F.3d 1029 (9th Cir. 2002) (commenting that “reconciling conflicting case law in this area can be difficult”); *Shansky v. United States*, 164 F.3d 688, 693 (1st Cir. 1999) (noting that the “case-by-case” approach of the second prong “has led to some disarray,” and citing cases whose holdings directly conflict).

171. *Joe Bruno on Appeals Panel Flip-Flip: This is Politics Not Law*, LEVEES.ORG (Sept. 28, 2012), <http://levees.org/2012/09/28/joe-bruno-on-appeals-panel-flip-flip-this-is-politics-not-law>.

172. See Longstreth, *supra* note 59.

173. See *id.* at 403.

174. *Id.* at 406.

175. *Id.* at 399.

176. *Id.* at 406. One explanation for the government’s high rate of DFE success is that the defense cannot be raised on appeal without approval from the Department of Justice, which only approves cases with a good chance of success. *Id.* at 407.

consideration.¹⁷⁷ Ninth Circuit Judge Betty Fletcher articulated such a rule in her dissent in *Bailey v. United States*, where the majority held that the DFE shielded the Army Corps's failure to replace signs warning boaters about a submerged dam, and where a boater died after going over the dam.¹⁷⁸ The dissent pointed out: "All decisions require balancing. Every action has both costs and benefits. There are *always* trade-offs."¹⁷⁹ Therefore, the proper test requires assessing whether the decision involved a valid policy consideration, because safety considerations are not the type of policy considerations Congress intended the DFE to shield.¹⁸⁰

A related factor that courts could take into consideration is whether the decision involved permissible discretion in designing or constructing a project, or whether it involved the day-to-day maintenance of a voluntarily undertaken structure. The Supreme Court found this persuasive in *Indian Towing Co. v. United States*, where the Court held that once the Coast Guard chose to undertake lighthouse service, it was obligated to use due care in its operation of the lighthouse.¹⁸¹ The Court relied on congressional intent when enacting the FTCA that the DFE would preclude liability for negligent performance of "uniquely governmental functions," but maintenance of a voluntarily undertaken public works project was not unique to the government.¹⁸²

The Army Corps's maintenance of MRGO was similarly non-discretionary. Initially building the canal was discretionary, but maintaining it to proper safety standards was not. The District Court remarked, "Safety concerns are not a talisman when deciding whether to apply the discretionary function exception, but certainly are a very significant consideration."¹⁸³ Safety concerns of the scale at issue in New Orleans should not be able to outweigh perfunctory cost concerns.

2. *The Gaubert Presumption Favors Application of the DFE.*

The *Gaubert* presumption that discretionary decisions involve policy considerations has shifted the judicial balance in favor of the government.¹⁸⁴ Stephen Nelson's empirical study of all reported district court cases reveals that

177. See *Bailey v. United States*, 623 F.3d 855, 863 (2010) (B. Fletcher, J., dissenting); but see *Shansky v. United States*, 164 F.3d 688, 693 (1st Cir. 1999) (finding "no principled basis for superimposing a generalized "safety exception" upon the discretionary function defense," and noting that "[a] case-by-case approach is required.").

178. See *Bailey*, 623 F.3d. at 855.

179. *Id.* at 869 (B. Fletcher, J., dissenting).

180. See, e.g., *Navarette v. United States*, 500 F.3d 914, 919 (9th Cir. 2007) (holding that United States not immune because decision to warn involved "safety considerations under an established policy, rather than the balancing of competing policy considerations" (internal quotation marks omitted)); *Miller v. United States*, 163 F.3d 591 (9th Cir. 1998) ("[S]afety is not a consideration based on policy.").

181. *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

182. *Id.* at 64.

183. *Katrina Canal Breaches I*, 647 F.2d 644, 732 (E.D. La. 2009).

184. See Nelson, *supra* note 54, at 279.

the government's success rate for asserting the DFE rose from 69.9 percent pre-*Gaubert* to 76.3 percent post-*Gaubert*.¹⁸⁵ This modest 6.4 percent increase belies *Gaubert*'s significance, since after the Supreme Court's decision the government has asserted the DFE in nearly twice as many cases as it did in the forty-four years of FTCA litigation before *Gaubert*.¹⁸⁶ Even where federal officials apparently or admittedly failed to take account of policy concerns, the DFE nevertheless shields the United States from resulting tort claims, as long as some conceivable policy could have informed the decision.¹⁸⁷ This broad grant of immunity should be replaced by an "actual policy decision" requirement to balance the DFE in accord with Congress's intention of generally waiving sovereign immunity through the FTCA.¹⁸⁸

Although the Fifth Circuit's first *Katrina Canal Breaches* decision noted that plaintiffs could overcome the presumption by presenting evidence that the actual basis for the government's decision was not policy-based, the panel's second opinion omitted this.¹⁸⁹ If the *Gaubert* presumption is insurmountable, it would be hard to imagine a government decision not susceptible to policy considerations. Resource constraints will always be a strong argument for DFE application, and—without any restraint on the *Gaubert* presumption—could justify nearly any government policy.¹⁹⁰ Many courts have ruled that the DFE permits agencies to balance public policy against "the constraints of resources available to them."¹⁹¹ However, some cases reveal a countercurrent to the general rule that resource constraints are a valid justification for policy discretion.¹⁹²

Congress did not intend the DFE to be so broad. Costs should not be able to outweigh public safety, especially where the potential failures are so damaging, as in the *Katrina Canal Breaches* case.

185. *Id.* at 292–93.

186. *Id.* at 300 (noting that the government asserted the DFE in 266 cases pre-*Gaubert* and 494 cases post-*Gaubert*).

187. *See, e.g.*, *C.R.S. v. United States*, 11 F.3d 791 (8th Cir. 1993) (barring plaintiffs' claims for negligent exposure to HIV, even though Army officials did not make special policy considerations to administer a blood screening program in a military setting). The plaintiffs' attorneys criticized the unjust application of the *Gaubert* presumption in the *C.R.S.* case. *See* Bruce A. Peterson & Mark E. Van Der Wiede, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 469–72 (1997).

188. *See* Peterson & Van der Wiede, *supra* note 187, at 487–90.

189. *Compare* *Katrina Canal Breaches II*, 673 F.3d 381, 394 (5th Cir. 2012), with *Katrina Canal Breaches III*, 696 F.3d 436, 449 (5th Cir. 2012).

190. *See* *Whisnant v. United States*, 400 F.3d 1177, 1183 (9th Cir. 2005) ("Budgetary constraints underlie virtually all governmental activity.").

191. *Childers v. United States*, 40 F.3d 973 (9th Cir. 1994); *see also* *Cope v. United States*, 45 F.3d 445 (D.C. Cir. 1995) (finding that the DFE applied to the National Park Service's failure to maintain a road because the agency engaged in policy considerations "by balancing the objectives sought to be obtained against such practical considerations as staffing and funding").

192. *See, e.g.*, *ARA Leisure Servs. v. United States*, 831 F.2d 193 (9th Cir. 1987) (holding that the DFE was inapplicable because the failure to maintain a road in a national park was not a decision grounded in social, economic, or political policies).

3. *Government Decisions Rooted in Scientific Principles Are Not Policy Decisions.*

The Fifth Circuit's first *Katrina Canal Breaches* opinion recognized that government decisions solely rooted in scientific or engineering principles are not susceptible to the type of policy considerations the DFE shields,¹⁹³ but its reversal retreated from this reasoning. The reversal marked a triumph of cost considerations over standard engineering practices based on science and public safety. Because cost constraints will almost always be available to justify government inaction, courts should not extend DFE immunity where the decision was based on the application of objective, technical principles. Best engineering practices simply offer no room for policy considerations.

In *Gaubert*, the Supreme Court addressed the question of when "technical" decisions might be outside the scope of the DFE, explaining that while it "may be that certain decisions resting on mathematical calculations, for example, involve no choice or judgment in carrying out the calculations," the exception applies when the "challenged actions involv[e] the exercise of choice or judgment."¹⁹⁴ Although the general trend since *Gaubert* has been toward broad application of the DFE, some lower courts have carved out pockets of liability where the decision involved the mere application of scientific principles. Such decisions tend to arise in cases involving negligent maintenance of a federal project, as opposed to the planning or construction stages.

In *Whisnant v. United States*, the Ninth Circuit found that the government's failure to maintain safe and healthy premises on a naval base was not a decision susceptible to policy consideration; the DFE therefore did not shield the plaintiff's action for injury from negligent exposure to toxic mold.¹⁹⁵ The court emphasized that "matters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy."¹⁹⁶ Similarly, the Ninth Circuit announced, "[T]he crux of our holdings on this issue is that a failure to adhere to accepted professional standards is not susceptible to a policy analysis."¹⁹⁷

In *Katrina Canal Breaches*, the District Court made voluminous findings chronicling decades of unsafe engineering practices that were not grounded in

193. See *Katrina Canal Breaches II*, 673 F.3d at 394.

194. *United States v. Gaubert*, 499 U.S. at 331.

195. *Whisnant*, 400 F.3d at 1185.

196. *Id.* at 1181; see also *Ala. Elec. Cooperative, Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985) (finding that the DFE did not shield the Army Corps from liability caused by engineering errors).

197. *Bear Med. v. United States ex rel. Sec'y of Interior*, 241 F.3d 1208, 1217 (9th Cir. 2001); see also *In re Glacier Bay*, 71 F.3d 1447, 1453 (1995) ("Decisions involving the application of objective scientific standards are not insulated by the discretionary function exception because they do not involve the weighing of economic, political and social policy.").

public policy concerns.¹⁹⁸ The court found that “the Corps’ defalcations with respect to the maintenance and operation of the MRGO were in direct contravention of professional engineering and safety standards”¹⁹⁹

Courts have long struggled with their role in reviewing scientific decisions. Generally, courts defer to government agencies’ scientific determinations because agencies are the experts in their field.²⁰⁰ Review of agency decisions under the Administrative Procedure Act’s arbitrary and capricious standard²⁰¹ has contributed to a “science charade” where agencies disguise policy judgments as scientific decisions to avoid heightened judicial review and political accountability.²⁰² The science charade promotes opaque government decision making, preventing meaningful public contributions or judicial review.

In comparison, a strong scientific principles exception to the DFE could promote a “reverse science charade” by incentivizing agencies to couch routine science or engineering decisions as policy-based ones to obtain DFE immunity. By emphasizing uncertainty, agencies could play up the policy components of their decisions, even where basic science dictates the procedure. We want to encourage agencies to use the best-available science and not cower behind a policy shield. The public interest favors the Army Corps’s use of best engineering practices in all of their projects. Improving the environmental effects of public infrastructure projects can begin by improving agency decision making through the right balance of scientific and policy considerations. The Fifth Circuit’s *Katrina Canal Breaches* reversal deferred too broadly to the Army Corps’s cost considerations, though their first opinion correctly identified that the government’s relevant decisions were purely scientific and not subject to countervailing cost considerations. A stronger rule that precludes sovereign immunity where the decision was rooted in scientific principles or professional standards will promote robust judicial review and government accountability to the public.

The New Orleans residents petitioned the U.S. Supreme Court for certiorari, focusing on exactly this question.²⁰³ The petitioners argued that decisions based on objective scientific or technical principles should not be

198. See *Katrina Canal Breaches I*, 647 F. Supp. 2d 644, 653–76, 705–12, 714–17 (E.D. La. 2009).

199. *Id.* at 705.

200. See, e.g., *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (holding that the court must defer to an agency’s judgments about areas that are highly technical within the agency’s field of discretion, as long as the judgments are reasonable).

201. See 5 U.S.C. § 706 (2012) (“The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

202. See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

203. See Petition for Writ of Certiorari, *Lattimore v. United States*, No. 12-1092 (Mar. 7, 2013), 2013 WL 860360.

exempted from FTCA liability.²⁰⁴ The petition casts the Fifth Circuit's *Katrina Canal Breaches* decision as creating a circuit split: the Eighth and Ninth Circuits have imposed liability for torts resulting from the government's scientific and technical decisions, while the Fifth Circuit conversely found that a comparable decision in *Katrina Canal Breaches* was an immune discretionary choice.²⁰⁵ A number of amici filed briefs in support, including members of Congress, professional engineers, and law professors.²⁰⁶ The case offers the Supreme Court the opportunity to delineate the boundaries of the DFE and provide clear guidelines for lower courts to follow, but the Court has not yet decided whether it will review the *Katrina Canal Breaches* decision.

C. *Pulling Back the Veil of Sovereign Immunity Would Force the Government to Internalize the Costs of Its Own Negligence.*

The threat of tort liability can be a potent deterrent to undesirable behavior, especially at the government level, because organizations tend to act more rationally than individuals.²⁰⁷ Accordingly, without the threat of liability, the Army Corps will continue its negligence, rebuilding failed systems without being forced to engineer stronger or more resilient structures. The Army Corps's most catastrophic failures are perversely growth opportunities: when levees break, Congress levies the funds and the Army Corps creates jobs.²⁰⁸ This creates a moral hazard, which describes a situation where the availability of insurance protection lowers an insured party's incentive to avoid risk.²⁰⁹ Sovereign immunity is similarly a moral hazard. Therefore, restricting

204. *Id.* at 18–20.

205. *Id.* at 25–30 (citing *Appley Bros. v. United States*, 7 F.3d 720 (8th Cir. 1993) (holding that the DFE did not apply when a subordinate's failure to collect necessary information denied the decisionmaker the ability to make a well-informed decision based on that data) and *In re Glacier Bay*, 71 F.3d 1447 (9th Cir. 1995) (holding that the DFE did not apply when government hydrographers made objective scientific errors leading to inaccurate maps that caused an oil tanker to collide with a submerged rock)).

206. See Brief of Members of Congress as Amici Curiae in Support of Petitioners, *Lattimore v. United States*, No. 12-1092 (Apr. 8, 2013), 2013 WL 1491669; Brief of Concerned Scientists, Engineers, and Academics as Amici Curiae in Support of Petitioners, *Lattimore v. United States*, No. 12-1092 2013 (Apr. 8, 2013), WL 1491668 (“Engineers in the public sector who make grossly erroneous scientific decisions, contradicted by all of the available scientific evidence available to them at the time of those decisions, are not exercising discretion or judgment embedded in public policy concerns. They are, instead, committing engineering malpractice, and should be held to the same high ethical and competency standards as engineers working in the private sector.”).

207. Weaver & Longoria, *supra* note 157, at 339 (citing GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970)); see also WILLIAM MARTIN LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 11 (1987) (noting the widespread agreement that imposing tort liability on professionals, for example through medical malpractice, affects behavior).

208. The Army Corps's civil engineering budget consists almost entirely of “earmarks” inserted by individual legislators to stimulate local economic progress. See Grunwald & Glasser, *supra* note 103.

209. Raymond J. Burby, *Hurricane Katrina and the Paradoxes of Government Disaster Policy: Bringing about Wise Governmental Decisions for Hazardous Areas*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 171, 180 (2006).

sovereign immunity will cut off the Army Corps's "insurance" and push them to account for the true costs of their projects, leading to better project design and maintenance that values environmental and human health.

Since the Flood Control Act of 1936, congressional funding for the Army Corps has been limited to projects whose benefits exceed costs.²¹⁰ Although this cost-benefit requirement functions as a check on Army Corps funding, the simple calculus can be distorted to justify a wide range of projects.²¹¹ According to an official Army Corps history, MRGO was built to please local politicians and powerful shipping interests, even though "the costs were shown to be high and the benefits . . . speculative."²¹² The government justified both MRGO and the LPV hurricane protection plan using cost-benefit analysis based on the future property values of the new development these projects enabled. An astonishing 79 percent of the benefits needed to justify the LPV were to come from new development that the added flood protection would enable.²¹³ These private development schemes were counterproductive to flood protection because they put more people in the path of hurricanes and further destroyed the storm-absorbing coastal wetlands.²¹⁴

The Army Corps did not consider the monetary value of the ecosystem and hurricane protection services the coastal wetlands provided; they also ignored the benefit of saved human lives from stronger flood protection.²¹⁵ These intangible factors are inherently difficult to measure and monetize, so "[b]ecause they could not measure what is important, they made important what they could measure."²¹⁶ Even if the Army Corps had included environmental and human health in its cost-benefit analyses, the agency would have faced difficult questions about how and whether to monetize them. Putting a dollar value on intangible environmental services often fails to capture their

210. 33 U.S.C. § 701(a) (2012).

211. See, e.g., TAXPAYERS FOR COMMON SENSE & NAT'L WILDLIFE FED'N, CROSSROADS: CONGRESS, THE CORPS OF ENGINEERS AND THE FUTURE OF AMERICA'S WATER RESOURCES (2004), available at <http://www.waterprotectionnetwork.org/sitepages/downloads/ToolsAndResources-Reports/CRN-trRpt-Crossroads2004.pdf> (documenting numerous Army Corps projects with discredited and questionable cost-benefit analyses that overstate project benefits and discount environmental harms); Michael Grunwald, *Money Flowed to Questionable Projects*, WASH. POST (Sept. 8, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090702462.html> (chronicling a series of Army Corps projects that received funding under cost-benefit analyses later found to be flawed).

212. Grunwald & Glasser, *supra* note 103.

213. Burby, *supra* note 209, at 174–75. New housing in New Orleans boomed after completion of the LPV: "the metropolitan area . . . simply exploded into the swamps" and "most of the newly developed land is built on muck and is sinking at various rates." *Id.* at 175. See also MCQUAID & SCHLEIFSTEIN, *supra* note 2, at 64–65 (describing the "build it and they will come" logic the Army Corps used to justify its infrastructure projects).

214. See DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 88 (2010).

215. See *id.* at 87; MCQUAID & SCHLEIFSTEIN, *supra* note 2, at 64 (noting that "[t]he focus was infrastructure, and infrastructure was a gold mine.").

216. KYSAR, *supra* note 214, at 88.

true value.²¹⁷ Cost-benefit analysis also presents challenging questions of how to account for the intertemporal distribution of costs and benefits.²¹⁸ Discounting distant future harms skews the analysis toward present benefits. Setting an adequate discount rate is especially important for disaster preparation because future harms are both uncertain and especially high risk.

An improved cost-benefit analysis would acknowledge that “[b]etter alignment is needed between the nature of harms we suffer and the techniques of valuation we deploy.”²¹⁹ Oliver Houck detailed a number of the tangible and intangible values of the Louisiana coastal plain that cost-benefit analysis generally fails to recognize: the cultural resources of Louisiana’s people, and the associated tourist dollars; flood protection, pollution control, and protection from saltwater intrusion that the coastal wetlands provide; fish and wildlife, which can be assessed both by a tangible value represented by the fisheries and tourism industries and also by the intangible value of their contributions to the ecosystem; and state revenues from oil and gas extraction, to name just a few.²²⁰ Although these values may be “an economist’s nightmare,” incorporating alternative valuation methods into cost-benefit analyses can improve decision making.²²¹

The National Environmental Policy Act (NEPA) is one proxy by which the Army Corps considers these factors. Congress enacted NEPA to ensure that federal agencies evaluate the environmental consequences of their actions before making final decisions.²²² The NEPA process requires agencies to prepare a detailed environmental impact statement (EIS) for “major federal actions significantly affecting the quality of the human environment.”²²³ The EIS must take into account “reasonable alternatives which would avoid or minimize adverse impacts.”²²⁴ The evaluation does not guarantee a particular substantive result, but instead exists to ensure a process. Although the Army Corps completed an EIS for MRGO in 1976, it ignored many known environmental effects, like the erosive effects of ship wakes, and the agency never updated the EIS for later projects.²²⁵ In *Katrina Canal Breaches*, the Fifth Circuit ruled that because NEPA has no substantive bite, the violation of NEPA is not a violation of a specific, mandatory regulation under the first prong of the DFE test. Even though NEPA is not directly related to sovereign immunity, heightened governmental liability could encourage the Army Corps to take its environmental review duties more seriously to account for the factors

217. See Robert R.M. Verchick, *Afterword: The Economics of Infrastructure*, 52 LOY. L. REV. 1287, 1292 (2006).

218. *Id.* at 87–88.

219. KYSAR, *supra* note 214, at 113.

220. See Houck, *supra* note 105, at 74–92.

221. *Id.* at 92.

222. See 40 C.F.R. § 1500.1(b) (2012).

223. 42 U.S.C. § 4332(C) (2012).

224. 40 C.F.R. § 1502.1.

225. *Katrina Canal Breaches I*, 647 F. Supp. 2d 644, 726–30 (E.D. La. 2009).

that its cost-benefit analyses fail to include.

In sum, policy considerations should not be shielded based solely on cost-benefit analysis because negligence liability should weigh as part of the cost. The Army Corps should take into account the value of environmental services and human lives to reflect the interconnection between its projects with the natural environment. Regulation of how the Army Corps conducts cost-benefit analysis could result in better environmental effects and would provide a mandatory duty, the violation of which would exclude them from DFE protections.²²⁶

Since Katrina, the Army Corps has made an effort to heed these suggestions. The agency is moving toward more “risk-informed” decision making.²²⁷ This process replaces the previous one-size-fits-all cost-benefit analysis with a more holistic approach that recognizes non-market values like saved lives and protected ecosystems. The new approach specifically acknowledges that preventing induced development should be one goal of future infrastructure projects.²²⁸

CONCLUSION

As economist Paul Romer quipped, “A crisis is a terrible thing to waste.”²²⁹ Crisis certainly presents opportunities, and Hurricane Katrina initiated a dialogue about the need to emphasize disaster mitigation to reduce risk and limit loss in advance of disaster. Charging the Army Corps for its negligence and compensating victims can help to achieve those goals. Unfortunately, the immunity provisions in the FCA and FTCA work in tandem to make recovery next to impossible for disaster victims. The Katrina Canal Breaches decision upheld the status quo, endorsing a system that rewards government negligence.

Negligence liability is backward-thinking, but it has lessons for the future and can deter dangerous conduct. Pulling back the veil of sovereign immunity can help the United States reframe disaster policy to emphasize disaster prevention by reducing risk and limiting losses in advance of disaster. Climate change will lead to more frequent and more severe storms.²³⁰ Climate change-

226. *Id.* at 166.

227. See U.S. ARMY CORPS OF ENG’RS, LOUISIANA COASTAL PROTECTION AND RESTORATION: FINAL TECHNICAL REPORT (2009), available at <http://biotech.law.lsu.edu/la/coast/lacpr/FinalReport/03%20LACPR%20Final%20Technical%20Report.pdf>.

228. *Id.* at 27–28 (“The most state of the art hurricane protection system can actually increase the assets at risk if it encourages development in wetlands or areas near the levee footprint. Such action would not only be risky from a safety and economic standpoint, but it would also degrade wetlands and eliminate interior flood storage capacity.”).

229. Jack Rosenthal, *On Language: A Terrible Thing to Waste*, N.Y. TIMES (July 31, 2009), <http://www.nytimes.com/2009/08/02/magazine/02FOB-onlanguage-t.html>.

230. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION AND VULNERABILITY 365 (2001), available at http://www.grida.no/climate/ipcc_tar/wg2/index.htm.

induced sea level rise will further imperil cities like New Orleans that are already located below sea level.²³¹ Therefore, incorporating environmental and human health externalities into infrastructure planning will be especially important to promote coastal restoration and resilient development.

Abraham Lincoln asserted, “It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.”²³² Sovereign immunity confounds fairness and federal governmental accountability, and this legal anachronism should be reined in to accord with Congress’s intent for the FTCA and to render justice for the victims of Hurricane Katrina.

231. See Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 26-30 (2006).

232. Abraham Lincoln, First Annual Message to Congress by President Lincoln (Dec. 3, 1861).

We welcome responses to this Article. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org.

Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.