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## Cleaning up Disaster or Making More - A Look at Avenues of Relief for Those Devastated by the Clean-up Efforts of Hurricane Katrina

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2007]

CLEANING UP DISASTER OR MAKING MORE?  
A LOOK AT AVENUES OF RELIEF FOR THOSE DEVASTATED  
BY THE CLEAN-UP EFFORTS OF HURRICANE KATRINA

I. INTRODUCTION

In the wake of Hurricane Katrina, issues have surfaced concerning real property damage caused by clean-up efforts in cities already devastated by the hurricane's destructive path.<sup>1</sup> Specifically, the concern is that government agencies charged with clean-up efforts will further damage real property.<sup>2</sup> Under the Disaster Relief and Emergency Assistance Act (DREAA), federal agencies have the explicit authority to remove debris after major disasters have occurred.<sup>3</sup> In reality, these governmental agency actions can often add to the damage of real property.<sup>4</sup> Sovereign immunity protecting the United States may diminish or abolish the chance of relief for those whose real property is damaged by the government's actions.<sup>5</sup> Without statutory permission to sue the United States or an express waiver of sovereign immunity, harmed parties may not sue the United States or its agencies; thus no legal or equi-

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1. See Richard D. Knabb, Jamie R. Rhome & Daniel P. Brown, *Tropical Cyclone Report, Hurricane Katrina*, NATIONAL HURRICANE CENTER 10-13 (2005), available at [www.nhc.noaa.gov/pdf/TCR-AL122005\\_Katrina.pdf](http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf) (discussing cause and effect of Hurricane Katrina).

2. See *Air Monitoring and Contingency Plan for Hurricane Katrina Debris Activities Louisiana* 5 (2005), [epa.gov/sab/appendix\\_c\\_air\\_mon\\_plan\\_katrina\\_debris\\_09-2005.pdf](http://epa.gov/sab/appendix_c_air_mon_plan_katrina_debris_09-2005.pdf) (discussing preparation for waste of hazardous materials). Possible damage includes contamination of drinking water and/or groundwater, as well as inadvertent structural damage related to clean-up projects. See *id.* In late summer 2005, Hurricane Katrina hit the Louisiana, Mississippi and Alabama coastlines. See Knabb et al, *supra* note 1, at 1 (providing information about Hurricane Katrina). The severe impact of the hurricane was realized soon after the skies cleared, and Hurricane Katrina quickly became one of the largest natural disasters in United States history. See *id.*

3. See 42 U.S.C. § 5173 (2000) (granting authorization for clean-up efforts). See also *Sunrise Vill. Mobile Home Park v. Phillips & Jordan, Inc.*, 960 F. Supp. 283, 286 (S.D. Fla. 1996) (explaining statutory mandate of hurricane clean-up). The DREAA is also known as the Stafford Act. See *id.*

4. For a discussion of the implications of clean-up efforts, see *supra* note 2 and accompanying text.

5. See *Maruska v. United States*, 77 F. Supp. 2d 1035, 1041 (D. Minn. 1999) (holding suit against sovereign if judgment sought would expend itself on public domain, interfere with public administration, or if effect of judgment would restrain government from acting or to compel to act). Sovereign immunity precludes suit against the United States absent statutory consent. See *id.* at 1037.

table remedies are available for those seeking redress.<sup>6</sup> Despite this seemingly absolute immunity, Congress enacted the Federal Tort Claims Act (FTCA), providing a comprehensive remedy against the United States for tort claims arising out of the negligent and/or wrongful acts or omissions of federal employees while acting within the scope of their employment or office.<sup>7</sup>

On the surface, the FTCA provides potential relief when clean-up efforts exacerbate the damaged property of individuals.<sup>8</sup> Upon close examination, however, the FTCA's Discretionary Function Exception clause limits recovery.<sup>9</sup> This statutory clause reinforces sovereign immunity for lawsuits involving services performed in the exercise of a statute or regulation.<sup>10</sup> Because the DREAA oversees governmental response to disasters, any action stemming from this statute invalidates claims arising out of disaster relief.<sup>11</sup> When surveying the damage Hurricane Katrina caused, the issue then becomes whether the FTCA compensates those who suffered true and extensive property damage from the clean-up efforts.<sup>12</sup>

This Comment will first provide a short overview of Hurricane Katrina and survey the destruction the storm caused.<sup>13</sup> Part II will then discuss the DREAA<sup>14</sup> and the FTCA.<sup>15</sup> This section also discusses cases illustrating the lack of relief mechanisms for those individuals suffering damage.<sup>16</sup> Part III will analyze potential claims

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6. *See* *Beller v. Middendorf*, 632 F.2d 788, 796 (9th Cir. 1980) [(overruled on other grounds, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990))] (stating equitable and legal remedies barred unless sovereign immunities are waived); *Simons v. Vinson*, 394 F.2d 732, 736 (5th Cir. 1968) (stating no suit may be brought against governmental agency absent consent); *DeTienne v. DeTienne*, 815 F. Supp. 394, 396 (D. Kan. 1993) (stating no suit may be brought against the United States absent consent).

7. *See* 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2402, 2412, 2671-80 (2000) (providing text of FTCA). The FTCA also confers exclusive jurisdiction for such actions upon the federal district courts. *See id.* § 1346(b).

8. *See id.* (providing text for FTCA).

9. *See id.* (providing text of Discretionary Function Exception of FTCA).

10. *See id.* (providing text of Discretionary Function Exception of FTCA).

11. *See* 42 U.S.C. § 5173 (2000) (setting forth text of statute).

12. *See* 28 U.S.C. § 1346(b) (2000) (providing text of statute governing possible relief).

13. For a discussion of Hurricane Katrina, see *infra* notes 19-23 and accompanying text.

14. For a discussion of the DREAA and the FTCA, see *infra* notes 24-55 and accompanying text.

15. For a discussion of the FTCA, see *infra* notes 31-55 and accompanying text.

16. For a discussion of cases illustrating lack of relief avenues, see *infra* notes 56-75 and accompanying text.

using current precedent.<sup>17</sup> Part IV will conclude with the impending outcome of those seeking relief for further damage.<sup>18</sup>

## II. BACKGROUND

### A. Hurricane Katrina

Hurricane Katrina was an extremely destructive storm, ranking among the most costly and deadly hurricanes to ever fall upon a coastline of the United States.<sup>19</sup> The American Red Cross estimated that damage exceeded two billion dollars.<sup>20</sup> Within days of Katrina hitting land, governments declared “disasters” in numerous counties in Alabama, Florida, Louisiana and Mississippi.<sup>21</sup> The storm obliterated entire cities.<sup>22</sup> In addition to the natural wrath these states suffered, some residents still remaining in the damaged cities looted stores in the hopes of finding food, water and shelter.<sup>23</sup>

### B. The Disaster Relief and Emergency Assistance Act

Under the DREAA, the president may explicitly authorize federal agencies to remove debris following a disaster, such as Hurricane Katrina.<sup>24</sup> The statute provides in relevant part:

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17. For a discussion of potential claims, see *infra* notes 76-119 and accompanying text.

18. For a discussion of the conclusions reached concerning relief under the FTCA, see *infra* notes 120-38 and accompanying text.

19. See Knabb, et al., *supra* note 1, at 10-13 (discussing overall impact of Hurricane Katrina). Hurricane Katrina’s first landfall strength was a Category One. See *id.* It then strengthened to a Category Five hurricane while crossing the Gulf of Mexico and weakened to a Category Three before hitting land on the northern Gulf Coast, which is an area particularly vulnerable to storm surge. See *id.* at 10. Although Katrina is known to be one of the most deadly storms to ever hit the United States, an exact comparison cannot be made due to the unknown number of actual deaths caused by this hurricane and the unknown number of fatalities caused by past hurricanes. See *id.* at 11.

20. See Facts at a Glance: American Red Cross Response to Hurricane Katrina and Rita (2006), [http://www.redcross.org/news/ds/hurricanes/katrina\\_facts.html](http://www.redcross.org/news/ds/hurricanes/katrina_facts.html) (providing damage estimates of Hurricane Katrina).

21. See HURRICANE KATRINA INFORMATION, DISASTER DECLARATIONS (2006), <http://www.fema.gov/hazard/hurricane/2005katrina/index.shtml> (providing disaster declarations).

22. See Knabb, et al., *supra*, note 1, at 27 (discussing devastating effects of Hurricane Katrina).

23. See *Views from Elsewhere: Break the Katrina Code*, THE TOWN TALK (2005), <http://www.thetowntalk.com/apps/pbcs.dll/article?AID=/20060218/OPINION/602180330/1014> (discussing citizen reaction to storm devastation).

24. See 42 U.S.C. § 5173 (2000) (providing agency authority under Disaster Relief and Emergency Assistance Act).

a) Presidential Authority. The President, whenever he determines it to be in the public interest, is authorized—

(1) through the use of Federal departments, agencies, and instrumentalities, to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters . . . .<sup>25</sup>

The language of the statute gives the president the explicit right to order the removal of hurricane debris.<sup>26</sup> It specifically states that “departments, agencies, or instrumentalities” of the government should remove debris in the event of a “major disaster.”<sup>27</sup> Hurricane Katrina is a major disaster, giving the president the authority to order the removal of any debris.<sup>28</sup> Relief statutes, such as the DREAA, consider public policy and concern for the well-being of United States citizens.<sup>29</sup> Regardless of the good intentions underlying the enactment of this statute, applicable exceptions coupled with sovereign immunity have the potential to further devastate those in dire need of assistance.<sup>30</sup>

### C. The Federal Tort Claims Act

In 1946, Congress enacted the FTCA, which enables an individual to sue the government for loss of property resulting from government agents negligently causing harm through wrongful acts or omissions in the exercise of the agents’ enumerated goals.<sup>31</sup> The controlling statute for hurricane debris removal is the DREAA.<sup>32</sup> One of the FTCA’s enumerated purposes is to “compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative

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25. *See id.* (providing text of statute).

26. *See id.* (referring to text of statute focused on presidential authority).

27. *See id.* (stating specific entities responsible for cleaning up debris).

28. *See id.* (concluding applicability based on entire text of statute).

29. *See* 42 U.S.C. § 5173 (a) (referring to purpose of statute).

30. *See* 28 U.S.C. § 2680(h) (2000) (providing exceptions to statute).

31. *See id.* § 2679 (providing exclusive remedy of statute); *see also* Erin K. Hayner, *Failure to Warn and the Federal Tort Claims Act: An Overview of Potential Claims of Lower Manhattan Residents in the Wake of the World Trade Center Disaster*, 10 ALB. L. ENVTL. OUTLOOK J. 115, 125-26 (2005) (discussing New York state law and FTCA). The FTCA also affords an individual the ability to bring suit against the government for personal injury or loss of property. *See id.* at 125.

32. *See* 42 U.S.C. § 5122 (2000) (providing definitions).

burden of individual private laws.”<sup>33</sup> This goal is vital in considering whether relief may be granted under the FTCA.<sup>34</sup>

In the context of Hurricane Katrina clean-up efforts, the government could potentially be liable for any damage an individual would be liable for, if that individual’s actions resulted in further loss or property damage.<sup>35</sup> Speculative damages include further damage to the structural integrity of real property, contamination of groundwater and failure to clean-up areas that the government stated it would.<sup>36</sup> Unfortunately, after analyzing potential relief avenues, recovery is unlikely for any claims on these grounds.<sup>37</sup> The following sections discuss possible statutory impediments to collecting monetary damages from the government under the FTCA.

*i. Discretionary Function Exception to the FTCA*

Under the FTCA, the government is liable to the harmed party when the United States is treated by the courts as a liable individual.<sup>38</sup> The law where the act or omission occurred determines the possibility of an individual lawsuit.<sup>39</sup> The following section limits the overall reach of the FTCA:

The provisions [of the FTCA] shall not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>40</sup>

The statute defines “agency” to include executive departments, judicial and legislative branches, military departments, independent establishments of the United States and corporations primarily act-

33. See Hayner, *supra* note 31, at 126 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 68-9 (1955)) (discussing purpose of FTCA). In *Indian Towing Co.*, the Supreme Court held the government liable for its negligent operation of a lighthouse that resulted in damage. See *id.* at 127 (describing holding of case).

34. See 28 U.S.C. § 2674 (implicating purpose in application).

35. See *id.* (discussing circumstances in which government would be held liable).

36. See Hayner, *supra* note 31, at 126 (enumerating potential claims).

37. See 28 U.S.C. § 2680 (stating exceptions that limit recovery under FTCA).

38. See Hayner, *supra* note 31, at 126 (discussing when government is liable).

39. See 28 U.S.C. § 1346(b)(1) (providing jurisdictional limitations).

40. See *id.* § 2680(a) (setting forth text of statute).

ing as instrumentalities or agencies of the United States.<sup>41</sup> Under the statute, the phrase “employee of the government” includes officers or employees of federal agencies, members of the military or naval forces, members of the National Guard and persons acting on behalf of a federal agency in an official capacity.<sup>42</sup> The phrase “acting within the scope of employment” is defined as acting “in [the] line of duty.”<sup>43</sup>

The Supreme Court established a two-part test to determine whether an act falls within the Discretionary Function Exception, and therefore bars an individual’s recovery.<sup>44</sup> In *Berkovitz v. United States (Berkowitz)*,<sup>45</sup> the Supreme Court established the reviewing court must first decide whether Congress intended to exclude the act or omission.<sup>46</sup> This includes analyzing whether the conduct involves elements of judgment or choice, or whether the conduct is directed by a statute or regulation.<sup>47</sup> Specifically, the relevant inquiry involves determining whether a controlling statute or regulation mandates governmental action be performed in a specific manner.<sup>48</sup> Second, the Supreme Court stated the reviewing court must decide whether the action involves legislative or administrative decisions based on social, economic and public policy.<sup>49</sup>

If the action either fails this two-part test or falls under one of the enumerated exceptions to the FTCA, the claim must be dis-

41. *See id.* § 2671 (defining words used in statute).

42. *See id.* (defining words used in statute).

43. *See id.* (defining words used in statute).

44. *See Berkovitz v. United States*, 486 U.S. 531, 536-39 (1988) (establishing two-part test for determining whether Discretionary Function Exception is applicable to suit).

45. *See id.* at 536-37 (providing holding).

46. *See id.* (holding Congress has marked boundaries upon willingness to extend tort liability through Discretionary Function Exception).

47. *See Daniels v. United States*, 967 F.2d 1463, 1464-65 (10th Cir. 1992) (providing illustrative example of proper judgment and choice authorized under Discretionary Function Exception to FTCA); Hayner, *supra* note 31, at 133 (discussing process under which FTCA is analyzed); *see also* *Zumwalt v. United States*, 928 F.2d 951, 954-55 (10th Cir. 1991) (providing illustrative example of gray area in determining whether conduct is discretionary).

48. *See Sunrise Vill. Mobile Home Park v. Phillips & Jordan, Inc.*, 960 F. Supp. 283, 286 (S.D. Fla. 1996) (quoting *Powers v. United States*, 996 F.2d 1121, 1125 (11th Cir. 1993)) (discussing elements of choice).

49. *See id.* (examining second prong of Discretionary Function Exception). This test is derived from ample precedent defining the role of the Discretionary Function Exception. *See id.* at 285 (citing *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-39 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-15 (1984); *Autery v. United States*, 992 F.2d 1523, 1527-31 (11th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994)).

missed for lack of subject matter jurisdiction.<sup>50</sup> An inherent exception to the FTCA is “where a regulation or statute authorizes a federal agency or employee to make decisions of a policy nature, the decisions are immune from judicial review because of the need to avoid seriously handicapping efficient government operations.”<sup>51</sup> Additionally, the FTCA exception extends to abuse of discretion policy judgments.<sup>52</sup> When faced with redevelopment, rehabilitation or clean-up activities, the courts generally hold the government’s conduct to be within the Discretionary Function Exception to the FTCA’s waiver of sovereign immunity, thereby barring the claimant’s chance of relief.<sup>53</sup>

In general, the government is protected under the Discretionary Function Exception if: (1) its conduct and/or omission was based on public policy considerations or (2) its actions were to further the agency’s agenda.<sup>54</sup> The Discretionary Function Exception shields public policy decisions from liability.<sup>55</sup> These cases provide great hurdles for those harmed parties seeking relief for further

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50. See *Sunrise*, 960 F. Supp. at 284 (explaining procedural process for FTCA claims).

51. See *id.* at 285 (citing *United States v. Muniz*, 374 U.S. 150, 163 (1963)) (discussing policy issues).

52. See *Autery*, 992 F.2d at 1528 (11th Cir. 1993) (quoting *Dickerson, Inc. v. United States*, 875 F.2d 1577, 1581 (11th Cir. 1989)) (discussing standard for determining Discretionary Function Exception).

53. See 28 U.S.C. § 2680(a) (2000) (providing statutory text of statute). See also *United States v. Green*, 33 F. Supp. 2d 203, 222-23 (W.D.N.Y. 1998) (holding claim barred under Discretionary Function Exception); *Sayre v. United States*, 282 F. Supp. 175, 190-91 (N.D. Ohio 1967) (finding government owed no duty to plaintiff); *United States v. Amtreco, Inc.*, 790 F. Supp. 1576, 1581-83 (M.D. Ga. 1992) (holding Discretionary Function Exception to government’s waiver of sovereign immunity was applicable); *Sunrise Vill. Mobile Home Park v. Phillips & Jordan, Inc.*, 960 F. Supp. 283, 286 (S.D. Fla. 1996) (finding no subject matter jurisdiction because alleged governmental negligence in monitoring and supervising its contractor was within FTCA’s Discretionary Function Exception); *Goddard v. Dist. of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345-46 (D.C. Cir. 1961) (holding suit was based on discretionary actions of governmental employees and barred by FTCA); but see *Clark v. United States*, 660 F. Supp. 1164, 1175-77 (W.D. Wash. 1987) (ruling for plaintiffs where contamination of well water resulted from hazardous waste dump sites and burn pits on Air Force base adjacent to plaintiff’s property); *Melton v. United States*, 488 F. Supp. 1066, 1071-75 (D.D.C. 1980) (ruling Discretionary Function Exception did not apply where government negligently selected contractors to rehabilitate homeowner’s property and negligently supervised rehabilitation project).

54. See *Hayner*, *supra* note 31, at 131 (discussing conduct covered by Discretionary Function Exception).

55. See *id.* (discussing exception when effort based on public policy). In *Dube v. Pittsburgh Corning*, the First Circuit stated the Discretionary Function Exception is a narrow one, and is only applicable to actual decisions based on public policy. See *Dube v. Pittsburgh Corning*, 870 F.2d 790, 796 (1st Cir. 1989).



property damage caused by governmental negligence in natural disaster clean-up.

#### D. Cases Barring Relief

In *Sunrise Village Mobile Home Park v. Phillips & Jordan, Inc. (Sunrise)*,<sup>56</sup> the plaintiff property owners alleged governmental negligence in the supervision of their contractors during removal of hurricane debris.<sup>57</sup> In response, the United States filed both a motion to dismiss and in the alternative, a motion for summary judgment.<sup>58</sup> The contents of the claim “necessarily” arose out of the FTCA and its express waiver of sovereign immunity.<sup>59</sup> Recognizing the limitations of the FTCA and the Discretionary Function Exception of the FTCA, the court dismissed the case for lack of subject matter jurisdiction.<sup>60</sup>

In applying the two-part test, the court found: (1) the DREAA gives agencies permission to contract for debris removal and (2) the government’s decisions concerning the timing, location and the process of how to remove debris after a major disaster are the type of policy decisions that fall within the Discretionary Function Exception.<sup>61</sup> Additionally, the court said absent a “fixed or readily ascertainable standard” providing a guide for government conduct, the government’s decisions are discretionary.<sup>62</sup> Because the plaintiffs did not allege facts to support findings that governmental discretion in debris removal was not grounded in public policy or that negligence was related to debris removal, the court found the government’s actions to fall within the Discretionary Function Exception and dismissed the suit accordingly.<sup>63</sup>

In *Devito v. United States (Devito)*,<sup>64</sup> plaintiffs alleged the Army Corps of Engineers negligently conducted three projects to combat

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56. 960 F. Supp. 283 (S.D. Fla. 1996).

57. *See id.* at 283 (reviewing claims and posture of case).

58. *See id.* at 284 (setting forth United States’ procedural actions taken in response to plaintiff’s claims).

59. *See id.* (providing background information on plaintiff’s claim on United States’ negligence in removing debris from plaintiff’s property).

60. *See id.* (providing holding of case in favor of United States).

61. *See Sunrise*, 960 F. Supp. at 284 (applying two-part test to determine whether conduct was within Discretionary Function Exception).

62. *See id.* at 286 (quoting *Powers v. United States*, 996 F.2d 1121, 1125 (11th Cir. 1993)) (providing standard for determining whether government conduct is discretionary).

63. *See id.* at 286-87 (stating holding of case in favor of government because Discretionary Function Exception applies).

64. 12 F. Supp. 2d 269 (E.D.N.Y. 1998).

hurricane damage by stabilizing certain shorelines.<sup>65</sup> The court ruled that the Corps's decision regarding the proper method to combat hurricane damage satisfied the Discretionary Function Exception's two-part test and thus barred the plaintiffs' recovery.<sup>66</sup> First, the court determined that an element of choice still remained in policies for stabilizing shorelines, and the effects therefore involved the requisite requirement of judgment or choice.<sup>67</sup> Second, the court determined a wide range of policy considerations were included in the Corps's tactical decisions.<sup>68</sup>

In *Easton v. Gilbert S. Corp. (Easton)*,<sup>69</sup> the government and a corporation deposited hurricane debris on the plaintiff's real property.<sup>70</sup> The plaintiff brought action to hold the government, the corporation and the insurer liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for response costs associated with evaluating the threatened release of hazardous waste at the property site.<sup>71</sup> The magistrate found the government immune from suit, because disposing hurricane debris was a discretionary function under the DREAA, and therefore, sovereign immunity applied.<sup>72</sup>

The Discretionary Function Exception to the DREAA is similar to the Discretionary Function Exception under the FTCA, and states the following:

The Federal Government shall not be held liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the Federal agency or an employee of the Federal Government in carrying out the provisions of this Chapter.<sup>73</sup>

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65. *See id.* at 269-70 (providing plaintiff's claims for relief for damages and accelerated erosion violating FTCA).

66. *See id.* at 270-72 (holding in favor of United States because Discretionary Function Exception granted immunity).

67. *See id.* at 272 (discussing element of choice which allows government to use its discretion and providing immunity for its actions).

68. *See id.* (discussing policy considerations that justify government's decision not to use sand fills or sand bypassing).

69. 1994 U.S. Dist. LEXIS 20564, at \*1 (S.D. Fla. Nov. 23, 1994).

70. *See id.* at \*\*1-2 (providing facts of case where harmful substances were deposited on plaintiff's property).

71. *See id.* (discussing case background entailing violation of CERCLA and resulting liability for costs created).

72. *See id.* at \*12 (concluding that DREAA's Discretionary Function Exception provided immunity).

73. *See id.* at \*\*2-3 (noting similarities between Discretionary Function Exception provisions in DREAA and FTCA).

In recognizing the similarities between the FTCA and the DREAA, the court employed the same two-part test to determine whether the acts were discretionary under the DREAA, just as it did under the FTCA.<sup>74</sup> The court dismissed the complaint, finding the removal of hurricane debris within the ambit of the DREAA's Discretionary Function Exception because (1) there was no mandated course of action for removing debris and (2) the removal of debris implicated the policy decisions the exception was designed to protect.<sup>75</sup>

### III. ANALYSIS

After Hurricane Katrina, many citizens are concerned with the potential for further damage to their real property.<sup>76</sup> Determining whether a lawsuit may be brought against the United States under the FTCA requires a case-by-case analysis. Consequently, it is uncertain what claims would result in relief to those adversely affected by clean-up initiatives.<sup>77</sup>

#### A. Application of Discretionary Function Exception of the Disaster Relief and Emergency Assistance Act

##### 1. *The First Prong: The Element of Choice*

As discussed previously, the reviewing court must first determine whether the activity involves any element of judgment or choice.<sup>78</sup> Judgment or choice is directly related to whether statute or regulation require the conduct at issue.<sup>79</sup> Few cases successfully show a clear violation of mandatory guidelines by the appropriate person, and therefore, few cases overcome the first hurdle of the two-prong Discretionary Exception Function test.<sup>80</sup>

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74. See *Easton*, 1994 U.S. Dist. LEXIS at \*\*3-4 (employing two-part test from FTCA discretionary exception to sovereign immunity).

75. See *id.* at \*\*7-8 (providing holding of case).

76. For a discussion of Hurricane Katrina's impact, see *supra* note 1 and accompanying text.

77. See Hayner, *supra* note 31, at 135 (citing *Redland Soccer Club v. Dep't of the Army*, 835 F. Supp. 803, 808 (1993) (noting determinations of whether case fell under Discretionary Function Exception is fact specific).

78. See *id.* (discussing first part of FTCA's Discretionary Function Exception two-part test).

79. See *id.* at 146 (analyzing first part of Discretionary Function Exception test).

80. See *id.* (discussing cases deciding whether clear mandatory guideline has been violated by governmental employee).

In *Zumwalt v. United States (Zumwalt)*,<sup>81</sup> the court determined the National Park Service's seemingly clear policies for dangerous trail repair involved an element of judgment or choice.<sup>82</sup> The court grounded its decision on the fact that the policies did not specifically address how to determine what constituted a dangerous park trail, including what improvements must be made to rectify danger and the location of the improvements.<sup>83</sup> Similarly, in *Daniels v. United States (Daniels)*,<sup>84</sup> the court determined a regulation instructing that the edge of trimmers be guarded still involved some element of judgment or choice because the type of guard to be used was unspecified.<sup>85</sup>

In evaluating claims related to hurricane clean-up, validity of the claims is based on the FTCA or the DREAA, both of which contain equivalent exceptions to the waiver of sovereign immunity.<sup>86</sup> Regardless of the applicable statute, the same two-part test applies.<sup>87</sup>

The DREAA only mandates removal; it does not provide specific, mandatory instructions for how that debris should be removed.<sup>88</sup> Judgment or choice is inherent in the lack of proscribed instructions.<sup>89</sup> After the government decides to remove debris, the agencies have the choice of how to remove the debris, including when to remove the debris, what manner to remove the debris and where to deposit the debris.<sup>90</sup>

The Southern District of Florida and the Eastern District of New York have both held that disaster relief efforts innately include

81. 928 F.2d 951, 951 (10th Cir. 1991).

82. *See id.* (laying groundwork for analyzing first part of Discretionary Function Exception analysis); *see also* Hayner, *supra* note 31, at 146 (citing same illustrative case to demonstrate where procedures contain elements of judgment or choice).

83. *See Zumwalt*, 928 F.2d at 951 (explaining judgment or choice involved).

84. 967 F.2d 1463 (10th Cir. 1992).

85. *See id.* at 1465 (discussing situation where governmental activities involved element of judgment or choice); *see also* Hayner, *supra* note 31, at 147 (discussing elements of judgment and choice); *Autery v. United States*, 992 F.2d 1523, 1528 (11th Cir. 1993) (explaining significance of *Zumwalt*).

86. *See* 42 U.S.C. § 5173(a) (2000) (providing guidelines for debris removal).

87. *See* Hayner, *supra* note 31, at 130 (discussing FTCA).

88. *See* 42 U.S.C. § 5173(a) (providing text of statute). This conclusion is based on the lack of procedural requirements provided in the statute. *See id.*

89. *See id.* (providing text of statute). This statement is evidenced by the fact that even though the statute fails to specify the manner in which the debris should be removed, debris removal is still required under the statute. *See id.*

90. *See* 42 U.S.C. § 5173 (providing text of statute).

an element of judgment or choice.<sup>91</sup> In *Sunrise*, the court held removal of hurricane debris from Hurricane Andrew contained the requisite element of judgment under the DREAA.<sup>92</sup> Similarly, in *Easton*, the court found there was no mandate for hurricane debris removal.<sup>93</sup> The court said that the DREAA did not govern the specifics of how debris was to be removed, and the federal agency charged with removal used judgment in choosing how to remove it.<sup>94</sup> Absent clear-cut guidelines governing the how, what and where of debris removal, courts reviewing Hurricane Katrina relief cases will presumably also find an element of judgment or choice.

Likewise, in *Devito*, the court also found projects aimed at alleviating hurricane damage contained elements of choice.<sup>95</sup> Despite the procedures for stabilizing shorelines, the court determined an element of choice was involved because the federal agency had to choose which procedure to implement.<sup>96</sup> Therefore, even with clear-cut guidelines for debris removal, if there is more than one removal option, a court will likely find an element of choice in the removal of Hurricane Katrina debris.

Based on these cases, it is apparent that hurricane debris removal and actions taken to alleviate hurricane destruction generally involves the judgment of the parties.<sup>97</sup> Consequently, an action brought by a citizen for further damage resulting from hurricane debris removal must satisfy an exceptionally high threshold to pass the first prong of the Discretionary Function Exception analysis.<sup>98</sup>

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91. See *Sunrise Vill. Mobile Home Park v. Phillips & Jordan*, 960 F.2d at 285 (S.D. Fla. 1996) (holding hurricane clean-up efforts included element of judgment or choice); *Devito v United States*, 12 F. Supp. 2d 269, 269 (E.D.N.Y. 1998) (holding efforts to combat hurricane damage included element of judgment or choice); *Easton v. Gilbert S. Corp.*, 1994 U.S. Dist. LEXIS 20563 at \*1 (S.D. Fla. Nov. 23, 1994) (holding deposit of hurricane debris onto private property included element of judgment or choice).

92. See *Sunrise*, 960 F. Supp. at 270 (providing overview of case facts and holding).

93. See *Easton*, 1994 U.S. Dist. LEXIS at \*7 (providing holding of case).

94. See *Sunrise*, 960 F. Supp. at 285 (discussing elements of judgment or choice).

95. See *Devito*, 12 F. Supp. 2d at 269-70 (providing facts of case).

96. See *id.* at 269 (providing holding of case).

97. See *Sunrise*, 960 F. Supp. at 285 (discussing choice of parties chosen for debris removal); *Devito*, 12 F. Supp. 2d at 270 (providing holding of case); *Easton*, 1994 U.S. Dist. LEXIS at \*7 (holding element of choice in debris removal).

98. See Hayner, *supra* note 31, at 130 (analyzing Discretionary Function Exception).

If the first prong is satisfied, the next step is to analyze the judgment exercised by governmental agencies.<sup>99</sup>

## 2. *The Second Prong: Discretionary Function Exception Protection*

To pass the second prong of this test, the court must determine whether the Discretionary Function Exception protects the judgment or choice exercised.<sup>100</sup> Protected choices include those based on policy considerations.<sup>101</sup> The court is directed and guided by Congress's intention to prevent the judiciary from second-guessing decisions based on social, economic and public policy considerations.<sup>102</sup>

In the wake of a natural disaster affecting millions of people and costing billions of dollars, social, economic and public policy issues are inarguably considerations in cleaning up the aftermath.<sup>103</sup> Overarching social considerations include preventing mayhem and providing quick responses to facilitate the survival of those left homeless and hungry by the hurricane destruction.<sup>104</sup> In *Sunrise*, the court held the DREAA implicitly included public safety and health policies after a natural disaster.<sup>105</sup> The court further stated no facts, other than the action charged related to hurricane clean-up, were necessary to determine whether policy considerations were involved.<sup>106</sup>

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99. *See id.* at 133 (describing scope of second prong of Discretionary Function Exception test).

100. *See id.* (discussing scope of second prong).

101. *See id.* at 135 (discussing protected governmental choices).

102. *See Sunrise*, 960 F. Supp. at 286-87 (S.D. Fla. 1996) (dismissing suit for lack of subject matter jurisdiction because action fell within Discretionary Function Exception of FTCA).

103. *See AFTER THE STORM: WORKING THROUGH THE IMPLICATIONS OF HURRICANE KATRINA, PUBLIC AGENDA* (2005), <http://www.publicagenda.org/specials/katrina/katrina.cfm> (discussing nationwide implications of Hurricane Katrina) (last visited Oct. 30, 2006); *Public Safety Communication from 9/11 to Hurricane Katrina: Public Policy Lessons*, 109th Cong. 13-16 (2005) (statement of Kevin Martin, FCC Chairman) (discussing public policy implications of Hurricane Katrina); Mark L. Burton & Michael J. Hicks, *HURRICANE KATRINA: PRELIMINARY ESTIMATES OF COMMERCIAL AND PUBLIC SECTOR DAMAGES* (2005), <http://www.marshall.edu/cber/research/katrina/Katrina-Estimates.pdf> (discussing economic damage caused by Hurricane Katrina) (last visited Oct. 30, 2006).

104. *See New Orleans Evacuation Under Way*, CNN.com (2005), <http://www.cnn.com/2005/WEATHER/08/31/katrina.impact/> (communicating severity of situation in New Orleans).

105. *See Sunrise*, 960 F. Supp. at 286 (evaluating second prong of Discretionary Function Exception test).

106. *See id.* (stating no further pleading requirements existed other than noting action related to hurricane clean-up).

Economic considerations are also at the forefront of this analysis.<sup>107</sup> Cities that were once self-sufficient prior to the storm will require billions of dollars of investments to once again achieve stability.<sup>108</sup> Further economic interests include rebuilding what was destroyed, including homes and businesses.<sup>109</sup> Specifically, it has been estimated that there are “commercial structure damages of \$21 [b]illion, commercial equipment damages of \$36 [b]illion, residential structure and content damages of almost \$75 [b]illion, electric utility damages of \$231 [m]illion, highway damages of \$3 [m]illion, sewer system damages of \$1.2 [b]illion and commercial revenue losses of \$4.6 [b]illion.”<sup>110</sup>

In *Devito*, the court held that economic considerations alone are enough to satisfy the second prong of the Discretionary Function Exception test.<sup>111</sup> In this case, the mission statement of the Army Corps of Engineers included a cost benefit analysis statement.<sup>112</sup> The court concluded that all actions undertaken by the Army Corps of Engineers contained the necessary economic considerations to shield their actions under the Discretionary Function Exception.<sup>113</sup> Therefore, it is likely that any action based on the hurricane debris removal by a government agency would contain the requisite element of policy considerations.

In addition to both the social and economic policy matters, it is necessary to consider the public interest.<sup>114</sup> Much of the United States population was touched by Hurricane Katrina; many people lost loved ones and property.<sup>115</sup> Millions of Americans opened their hearts and wallets to contribute to the rebuilding efforts.<sup>116</sup>

107. See Burton & Hicks, *supra* note 101, at 7 (discussing economic implications of Hurricane Katrina).

108. See *id.* at 1 (estimating economic damage in wake of Hurricane Katrina).

109. See *id.* (providing specific damage estimates).

110. See *id.* (discussing economic damage caused by Hurricane Katrina).

111. See *Devito v United States*, 12 F. Supp. 2d 269, 272 (E.D.N.Y. 1998) (discussing second prong of Discretionary Function Exception test).

112. See *id.* (providing text of Army Corps of Engineers mission statement).

113. See *id.* (analyzing second prong of Discretionary Function Exception).

114. See Burton & Hicks, *supra* note 101, at 6-8 (discussing economic implications of Hurricane Katrina).

115. See FirstGov.com (2006), [http://www.firstgov.gov/Citizen/Topics/PublicSafety/Hurricane\\_Katrina\\_Recovery.shtml](http://www.firstgov.gov/Citizen/Topics/PublicSafety/Hurricane_Katrina_Recovery.shtml) (last visited Oct. 21, 2006) (providing links to those searching for loved ones missing after Hurricane Katrina).

116. See Facts at a Glance, American Red Cross Response to Hurricane Katrina and Rita (2006), [http://www.redcross.org/news/ds/hurricanes/katrina\\_facts.html](http://www.redcross.org/news/ds/hurricanes/katrina_facts.html) (Jan. 19, 2006) (estimating Red Cross received over two billion dollars in gifts and pledges for hurricane relief).

The disaster affected the lives of all Americans in some respect, highlighting widespread public policy issues.<sup>117</sup>

The *Easton* court embraced such public policy considerations in its holding.<sup>118</sup> It stated the clean-up of hurricane debris following a natural disaster is the explicit kind of function the Discretionary Function Exception was designed to protect.<sup>119</sup> Accordingly, the court found the federal agency's actions were protected by the Discretionary Function Exception.<sup>120</sup>

Arguably, no court would find that these considerations are not policy-related and limit civilian protection by the Discretionary Function Exception.<sup>121</sup> It is also likely that claims arising out of a lawsuit for further property damage caused by debris removal will be dismissed, leaving no avenues of relief.<sup>122</sup>

#### IV. CONCLUSION

Current relief mechanisms are insufficient for recovery by those who suffered further damage from clean-up efforts of Hurricane Katrina.<sup>123</sup> The sovereign immunity that exists to protect the government disadvantages those ravaged by both a natural disaster and potentially negligent governmental activities.<sup>124</sup> The Discretionary Function Exception analysis contains numerous loopholes to protect federal agencies in the specific context of disaster clean-up.<sup>125</sup>

First, courts have failed to construe judgment or choice in favor of the complaining party, finding practically every action contains an element of judgment or choice.<sup>126</sup> An argument for change may focus on mandating specific guidelines for debris re-

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117. For a discussion of public policy issues, see *supra* note 1, at 135 and accompanying text.

118. See *Easton v. Gilbert S. Corp.*, 1994 U.S. Dist. LEXIS 20564 at \*8 (S.D. Fla. Nov. 23, 1994) (discussing second prong of Discretionary Function Exception analysis).

119. See *id.* (discussing applicability of discretion).

120. See *id.* (providing outcome).

121. For a discussion of case precedent, see *supra* notes 56-75.

122. For a discussion of relevance of subject matter jurisdiction, see *supra* note 31 and accompanying text.

123. For a discussion of current relief mechanisms, see *supra* notes 31-38 and accompanying text.

124. For a discussion of sovereign immunity, see *supra* notes 5-6 and accompanying text.

125. For a discussion of the Discretionary Function Exception, see *supra* notes 39-42 and accompanying text.

126. For a discussion of decisions involving elements of judgment or choice, see *supra* note 47 and accompanying text.



moval; however, because hurricane damage will vary based on location, specific mandates may be unreasonable. Further, having guidelines based on location would still yield a negative result for those seeking relief because having alternatives to choose from still involves an element of choice.<sup>127</sup> A court faced with this analysis is likely to find judgment or choice inherent in any clean-up decision and relief will be unavailable for those seeking it.

Second, courts have consistently held that social, economic, and public policy decisions are inherent in disaster relief efforts.<sup>128</sup> It is futile to argue that clean-up efforts in the wake of a natural disaster do not include some policy considerations.<sup>129</sup> Because policy considerations are at the heart of clean-up efforts, an action based on damage caused by removal of debris from a natural disaster will almost always be barred.<sup>130</sup>

The current Discretionary Function Exception effectually protects the government from all actions arising out of debris removal following a natural disaster.<sup>131</sup> Those who suffer property damage from clean-up efforts have no form of judicial relief.<sup>132</sup> While trying to balance the competing interests of protecting the government from frivolous suits with protecting its citizens' properties from further damage, the current legislation falls short of providing a remedy for those most in need.<sup>133</sup>

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127. For a discussion of illustrative cases, see *supra* notes 56-75 and accompanying text.

128. For a discussion of factors relevant to disaster clean-up efforts, see *supra* notes 101-02 and accompanying text.

129. For a discussion of cases illustrating futile public policy arguments, see *supra* notes 56, 64 and 69 and accompanying text.

130. *See id.* (providing illustrative cases barring relief based on public policy considerations).

131. For a discussion of the Discretionary Function Exception, see *supra* note 39 and accompanying text.

132. For a discussion of lack of relief avenues, see *supra* notes 121-22 and accompanying text.

133. For a discussion of cases barring relief under the FTCA, see *supra* notes 56, 64, 69 and accompanying text.