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OFF WITH HIS HEAD: THE KING CAN DO NO WRONG, HURRICANE KATRINA, AND THE MISSISSIPPI RIVER GULF OUTLET

Christopher R. Dyess^{*}

“[I]f a team of top-flight engineers had been assigned to build an instrument for the quick and effective flooding of New Orleans; they could not have come up with a better design than the [Mississippi River Gulf Outlet].” – *Douglas Brinkley*¹

ABSTRACT

Congress passed the Federal Tort Claims Act in 1946 to provide a legal remedy to citizens for torts committed by the Federal Government. Prior to the act, United States citizens were mostly prohibited from filing suits against the government for torts committed by government employees. However, Congress when passing the act realized that some government actions are the result of considered policy judgment for what is in the best interest of the citizenry as a whole. In order to prevent the government from being sued for such actions, Congress included what is referred to as the Discretionary Function Exception. If a government employee’s action falls within the parameters of the Discretionary Function Exception the government is immune from tort liability. This Article argues that courts have interpreted the Discretionary Function too broadly such that it now excuses the government from egregious unjustifiable harms to the American public.

The Article explores this topic using a recent example in which the Fifth Circuit Court of Appeals, in a confused opinion, denied relief to victims of Hurricane Katrina. Even though the Army Corps of Engineers—who is

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¹ DOUGLAS BRINKLEY, *THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST* 219 (2006).

responsible for a navigational canal found to be the cause of multiple levee breaches—admitted wrongdoing, the Fifth Circuit used the broad application of the Discretionary Function Exception to deny liability for the government. After reviewing the jurisprudential history of the Federal Tort Claims Act, the Article argues that a doctrinal application of the Discretionary Function Exception should find that the government is not immune from liability. Finally, the Article reviews the purposes and policy justifications for tort law and concludes that the only just result in the Hurricane Katrina case is a finding of liability.

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INTRODUCTION

Hurricane Katrina ravaged the Gulf Coast of the United States when it made landfall on August 29, 2005. The storm killed 1,836 people, cost an estimated

\$110 billion, and destroyed or otherwise made uninhabitable 275,000 homes.² Many people who were following the events initially believed that the damage caused by the storm was solely the result of Katrina's unprecedented power.³ In the months and years that followed, however, it became clear that this was a manmade disaster created by a levee system that was improperly built and maintained.⁴ The citizens of New Orleans quickly identified the United States Army Corps of Engineers ("Army Corps" or "Corps"), the federal agency charged with maintaining and operating the levee system that protects New Orleans, as the culprit.⁵

Shortly thereafter, New Orleanians began displaying the slogan "Hold the Corps Accountable" on t-shirts and yard signs.⁶ Citizens openly blamed the Army Corps in conversations about the storm.⁷ Many believed that the Army Corps should be held liable for much of the damage caused by the failure of the levees.⁸ Those who felt this way were quickly disappointed to learn that, traditionally, governments have escaped liability to their own citizens through the long-held doctrine of sovereign immunity.

For nearly two centuries, American citizens were de facto precluded from suing the federal government for traditional torts.⁹ This changed in the middle of the twentieth century when Congress passed the Federal Tort Claims Act (FTCA).¹⁰ Prior to the passage of the FTCA, the federal courts were not involved

² Taraka Anada, Comment, *The Perfect Storm, An Imperfect Response, and A Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?*, 35 PEPP. L. REV. 279, 281-383 (2008).

³ See Joseph B. Treaster and Kate Zernike, *Hurricane Slams into Gulf Coast; Dozens are Dead*, N.Y. TIMES, August 30, 2005, at A1 (largely blaming the damage and death caused by the storm in New Orleans on the hurricane's 100 mile per hour winds and 15 foot storm surge).

⁴ See John Schwartz, *Engineers Faulted on Hurricane System*, N.Y. TIMES, July 11, 2007, at A13 (reporting that the levee system originally designed was very different from the one the Corps ultimately built); see also John Schwartz, *Army Builders Accept Blame Over Flooding*, N.Y. TIMES, June 2, 2006, at A1.

⁵ See *id.*

⁶ See Michael Abromowitz & Peter Whoriskey, *New Orleans Honors Its Dead*, WASH. POST, Aug. 30, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/29/AR2006082900515.html>.

⁷ See e.g. David Corn, *Harry Shear v. the Army Corps of Engineers*, MOTHER JONES, Aug. 28, 2010, available at <http://www.motherjones.com/politics/2010/08/harry-shearer-army-corps-engineers-hurricane-katrina-documentary> (discussing a documentary by a New Orleans citizen that openly blames the Army Corps for levee failures in the city).

⁸ See Leslie Eaton, *New Orleans Files Claim Against Corps for Billions*, N.Y. TIMES, May 3, 2007, at A12 (reporting that the city and thousands of residents were seeking compensation from the Army Corps of Engineers for losses due to Hurricane Katrina).

⁹ See *infra* subpart I(A), at 5-8.

¹⁰ See Pub. L. No. 79-753, 60 Stat. 812 (1946).

in tort claims against the federal government.¹¹ If the federal government harmed one of its own citizens, the only remedy was to petition Congress to pass a bill providing relief.¹² After the passage of the FTCA, citizens were permitted to sue the federal government in a federal court in tort.¹³

Theoretically, under the FTCA, the citizens of New Orleans could sue the federal government for negligent construction and maintenance of levees that failed during Hurricane Katrina. In the case of flooding in New Orleans, it was more complicated because the Flood Control Act of 1928 (FCA) specifically indemnified the federal government for flooding damage related to the construction of levees.¹⁴ Specifically § 702(c) of the FCA was enacted in response to massive flooding that occurred along the Mississippi River in 1927.¹⁵ The flood caused more than \$200 million in property damage (approximately \$2.6 billion in 2012 dollars adjusted for inflation), accounted for nearly 200 deaths, and left 700,000 people homeless.¹⁶ To prevent a similar level of devastation from happening in the future, the federal government implemented a massive flood control initiative.¹⁷ Congress included the construction of a levee system to protect the City of New Orleans in the flood control measures.¹⁸

This massive undertaking by the federal government created fear among some members of Congress. Legislators saw the potential for a surge of litigation against the United States in the event that another flood overwhelmed the government-maintained system.¹⁹ Representative Bertrand Snell of New York stated, “I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government [sic] for the next 10, 20, or 50 years.”²⁰

In order to indemnify the government from lawsuits, thereby allowing the government to get into the business of flood control, Congress included § 702(c) in the FCA. This section 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

¹¹ See *infra* subpart I(A), at 5-8.

¹² See *Id.*

¹³ See Pub. L. No. 79-753, 60 Stat. 812 (1946).

¹⁴ 33 U.S.C.A. § 702c (West)

¹⁵ Kent C. Hofman, *An Enduring Anachronism: Arguments for the Repeal of the § 702(c)*

Immunity Provision of the Flood Control Act of 1928, 79 TEX. L. REV. 791, 793 (2001); see S. REP. NO. 70-619, at 12 (1928) (discussing the devastation caused by the flood).

¹⁶ See S. REP. NO. 70-619, at 12 (1928).

¹⁷ See Hofman, *supra* note 15, at 793.

¹⁸ See David M. Stein, *Flood of Litigation: Theories of Liability of Government Entities for Damages Resulting from Levee Breaches*, 52 LOY. L. REV. 1341, 1338-39 (2006) (discussing that the New Orleans levee system was included in the Flood Control Act).

¹⁹ See 69 CONG. REC. 6640 (1928).

²⁰ *Id.*

any place,”²¹ so long as the breached levee was constructed in relation to flood-control activity. As a result of this legislation, the citizens of New Orleans were unable to sue the federal government for the negligent operation of the levee system, which was constructed to control flooding in the city.²²

With § 702(c) precluding suits based on failed levees built around the city, the citizens of New Orleans could not sue for negligent design of the levee system, regardless of the FTCA. The only option for the citizens of New Orleans was a suit under the FTCA for levee failures built along the Mississippi River Gulf Outlet (MRGO). MRGO is a navigational canal constructed by the Army Corps to create a shortcut from the Gulf of Mexico—through miles of marsh—to the Port of New Orleans.²³ As Hurricane Katrina came ashore, the channel acted as a funnel directing Katrina’s storm surge into the levee system and ultimately causing multiple breaches.²⁴ Since MRGO is a navigational channel—not constructed for the purpose of flood-control activity—the FCA does not apply.²⁵ Without the shield of § 702(c) of the FCA, citizens of New Orleans who suffered property damage due to levee failures caused by water surging through MRGO should have been free to sue the Army Corps.²⁶ Any successful suit, however, would have to be based on the government’s waiver of sovereign immunity and the broad exceptions granted the government under the FTCA.²⁷

This Comment will analyze the FTCA and its purposes in relation to recent litigation concerning the operation and maintenance of MRGO. Part I will provide background information on sovereign immunity within the US, the FTCA, and the Discretionary Function Exception (DFE). Part II will review and critique the recent decision in *In Re Katrina Canal Breaches Litigation*,²⁸ where the court held that the government was shielded from liability for negligent maintenance of MRGO. Part III will analyze the Army Corps’ actions in the context of traditional tort law doctrine and will suggest that the Army Corps should be held liable. Part IV will conclude that federal courts have broadened the DFE such that it no longer achieves the original intent of Congress.

²¹ 33 U.S.C. § 702(c) (2012).

²² *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d 644, 699 (E.D.La. 2009).

²³ *History of MRGO*, UNITED STATES ARMY CORPS OF ENGINEERS NEW ORLEANS DIVISION, http://mrgo.gov/MRGO_History.aspx (last visited January 23, 2013).

²⁴ See Joby Warrick & Michael Grunwald, *Investigators Link Levee Failures to Design Flaws*, WASH. POST, Oct. 24, 2005, at A1.

²⁵ *In re Katrina Canal Breaches*, 647 F.Supp.2d at 699.

²⁶ See *id.* at 699.

²⁷ *Id.* at 699-701.

²⁸ *In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

I. SOVEREIGN IMMUNITY, THE FEDERAL TORT CLAIMS ACT AND THE
DISCRETIONARY FUNCTION EXCEPTION

A. *The History of Sovereign Immunity in the United States*

The concept of sovereign immunity derives from the common law maxim “the King can do no wrong.”²⁹ The essential notion is that it is a contradiction of the King’s sovereignty to allow him to be sued in his own courts.³⁰ In the context of a monarchy, this makes sense because the King is all-powerful and his subjects must bend to his will. However, in our constitutional democracy, the power of the sovereign is derived directly from the people, and the judicial limitation on suits against the federal government creates tension between two elements of constitutionalism: government accountability and the need to shield the government from limitless tort litigation.³¹ As Professor Vicki Jackson has written:

On the one hand, constitutionalism entails a commitment that government should be limited by law and accountable . . . for the protection of fundamental rights; if the “essence of civil liberty” is that the law provide remedies for violations of rights, immunizing government from ordinary remedies is in considerable tension with all but the most formalist understandings of law and rights.³²

How this monarchist doctrine survived in our representative democracy remains rather obscure.³³ But, there is no doubt that sovereign immunity remains a part of American jurisprudential theory. As Justice Holmes said, “there can be no legal right as against the authority that makes the law on which the right depends.”³⁴ Initially, sovereign immunity was expressed as a denial of a right to sue.³⁵ However, the mere denial of a right evolved into a substantive immunity when the Supreme Court held that the federal government was immune from all liability in tort.³⁶

²⁹ VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ’S TORTS 638-39 (10th ed. 2000).

³⁰ *Id.*

³¹ See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 521 (2003).

³² *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1809)).

³³ SCHWARTZ ET AL., *supra* note 29, at 638.

³⁴ *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

³⁵ *Gibbons v. United States*, 75 U.S. 269; see SCHWARTZ ET AL., *supra* note 29, at 638.

³⁶ See SCHWARTZ ET AL., *supra* note 29, at 638.

It remains a matter of scholarly debate whether or not the Founding Fathers accepted sovereign immunity at the time of the drafting of the U.S. Constitution.³⁷ Nevertheless, it has been accepted by the Supreme Court that “[w]hen the Constitution was ratified, it was well established in English law that the crown could not be sued without consent in its courts.”³⁸ This understanding of American legal history is supported by the historical record, which shows that many esteemed Founders endorsed the concept of sovereign immunity.

In *Federalist No. 81*, Alexander Hamilton wrote, “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”³⁹ The first Chief Justice of the Supreme Court, John Marshall, calmed the fears of the Virginia Delegation during ratification by saying “[i]t is not rational to suppose that the sovereign power should be dragged before a court.”⁴⁰ Arguably, recognition of sovereign immunity, at least at the state level, was essential to the ratification of the Constitution.

Prior to the enactment of the Federal Tort Claims Act in 1946, which waived the Government’s immunity for certain tort actions, it was “a well settled rule of law that the government [was] not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress.”⁴¹ The injured party’s appeal to Congress for a redress of grievances meant requesting that a private bill be enacted providing relief from the government’s harmful action. Since appealing to Congress was the only method of seeking justice, Congress was quickly inundated with requests.⁴² As a result, Congress became an adjudicator for a variety of claims filed against the United States.⁴³

John Quincy Adams, as a member of Congress, complained about the private bill process, writing, “[i]t is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed

³⁷ Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443 (2005).

³⁸ *Alden v. Maine*, 527 U.S. 706, 715 (1999).

³⁹ THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

⁴⁰ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (photo. reprint 1941) (Jonathan Elliot ed., 2d ed., Lenox Hill Pub. & Dist. Co. 1974) (1836).

⁴¹ *German Bank v. United States*, 148 U.S. 573, 579 (1893).

⁴² William G. Weaver & Thomas Longoria, *Bureaucracy that Kills: Federal Sovereign Immunity and the Discretionary Function Exception*, 96 AM. POLITICAL SCI. REV. 335, 340 (2002) (noting that an 1848 House report on private bills in the previous decade showed 16,573 private bills introduced).

⁴³ *See Id.* at 340-41.

by it, and there is no common rule of justice for any two of the cases decided.”⁴⁴ In response, the legislature created the Court of Claims in 1855, which provided a judicial forum in Congress for some claims against the United States.⁴⁵ However, members of Congress shared the view of John Quincy Adams and objected to their involvement with private claims.⁴⁶

By the twentieth century, the process for dealing with private claims was well established but tedious and inefficient.⁴⁷ Congress was not able to effectively decide tort claims on their merits.⁴⁸ Service on the Committee of Claims, which was responsible for determining government liability, was considered arduous because careful consideration could not be given to the thousands of claims submitted to Congress.⁴⁹ For decades, Congress debated various proposals for a general tort claims act that would remove the burden of contending with private bills.⁵⁰

B. *The Federal Tort Claims Act*

The private bill system was eliminated in 1946 when Congress passed the FTCA as Title IV of the Legislative Reorganization Act.⁵¹ The FTCA’s grant of jurisdiction states that

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would

⁴⁴ 8 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848 480 (Charles Francis Adams, ed., J.B. Lippincott & Co. 1874).

⁴⁵ See Weaver & Longoria, *supra* note 42, at 340-41.

⁴⁶ PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT 6 (2012).

⁴⁷ See Weaver & Longoria, *supra* note 42, at 340-41.

⁴⁸ See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1888-92 (2010); see also Adams, *supra* note 44, at 480.

⁴⁹ See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Bills to Provide for the Adjustment of Certain Torts Claims Against the United States Before H. Comm. on the Judiciary 77th Cong., 2d Sess. 49-55 (1942)* (“Criticism by Congressmen of Existing Procedure of Relief by Private Claim Bills”).

⁵⁰ FIGLEY, *supra* note 46, at 7.

⁵¹ Pub. L. No. 79-753, 60 Stat. 812 (1946).

be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁵²

This waiver of the long-held doctrine of sovereign immunity appears on its face to be astounding. The FTCA not only waived sovereign immunity, but also subjected the federal government to the common law of torts in the state where the alleged wrong occurred as long as the redress sought was monetary.

However, the waiver of sovereign immunity provided by the FTCA was not limitless. Congress provided for several statutory exceptions that preclude the liability of the federal government in tort. Examples of these exceptions include “[a]ny claim arising out of the combatant activities of the military . . . during time of war,”⁵³ “[a]ny claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system,”⁵⁴ and “[a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States.”⁵⁵ These exceptions are very specific and were designed to prevent the federal government from being sued while performing essential governmental duties.

The broadest exception is referred to as the Discretionary Function Exception and it shields the federal government from

[a]ny 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.⁵⁶

These exceptions function to reassert sovereign immunity when a court determines that the harmful act at issue falls within the exception’s scope. The result is the immediate dismissal of the claim.⁵⁷ The exceptions protect not only the United States from suit, but also individual governmental actors.⁵⁸ Once the

⁵² 28 U.S.C. § 1346(b)(1)(2006).

⁵³ *Id.* § 2680(j).

⁵⁴ *Id.* § 2680(i).

⁵⁵ *Id.* § 2680(f).

⁵⁶ *Id.* § 2680(a).

⁵⁷ Jonathan R. Bruno, Note, *Immunity for “Discretionary” Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 421 (2012).

⁵⁸ See, e.g., Robert D. Lee, Jr., *Federal Employees, Torts, and the Westfall Act of 1988*, 56 PUB. ADMIN. REV. 334 (1996).

suit has been dismissed, the party's only option is to seek redress directly from Congress, making them no better off than they were prior to the FTCA.⁵⁹

1. *Interpreting the Scope of the Discretionary Function Exception – Dalehite v. United States*

In the years following the enactment of the Federal Tort Claims Act, the Court left open the question of what conduct fell within the scope of the DFE.⁶⁰ The FTCA provided a broad waiver of immunity with exceptions in very specific circumstances.⁶¹ It appeared initially that the Supreme Court would take a conservative approach to the DFE, believing that courts should not expand the exceptions through statutory construction.⁶² The Supreme Court therefore would permit claims brought against the federal government as long as the exceptions in the statute did not preclude them.⁶³

*Dalehite v. United States*⁶⁴ was the first in a series of cases that contributed to modern DFE jurisprudence. The litigation in *Dalehite* was brought about by the Texas City disaster in 1947. As a result of famine after World War II, the United States Government began the production and distribution of explosive-grade fertilizer to Europe.⁶⁵ While sitting in port waiting to be shipped to Europe, three thousand tons of fertilizer exploded injuring three thousand people, killing at least 581, and destroying the harbor.⁶⁶ The district court found for the plaintiffs on the theory that the government was negligent "in drafting and adopting the fertilizer export plan as a whole," in failing to properly supervise the loading of the fertilizer, and for negligent manufacture.⁶⁷ After the appellate court reversed, the Supreme Court granted *certiorari* in order to consider the scope of the DFE.⁶⁸

Justice Reed's opinion upheld the appellate court's ruling that the DFE precluded the government from liability. He began by turning to the legislative history to assess Congressional intent in drafting the FTCA.⁶⁹ Justice Reed stated that the DFE's purpose was to ensure that the bill protected "the Government against tort liability for errors in the administration or in the exercise of

⁵⁹ *See Id.*

⁶⁰ *See* Lawrence Kaminski, Comment, *Torts – Application of Discretionary Function Exception of Federal Tort Claims Act*, 36 MARQ. L. REV. 88, 88 (discussing the puzzlement over scope of the Discretionary Function Exception).

⁶¹ *See* 28 U.S.C. §§ 2680(a), (f), (i), (j) (2006).

⁶² *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 370 (1949).

⁶³ *Id.*

⁶⁴ *Dalehite v. United States*, 346 U.S. 15 (1953).

⁶⁵ *Id.* at 19-20.

⁶⁶ Bruno, *supra* note 57, at 424.

⁶⁷ *Dalehite*, 346 U.S. at 23.

⁶⁸ *See id.* at 17.

⁶⁹ *See id.* at 24-30.

discretionary functions.”⁷⁰ He then stated, “it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.”⁷¹ Providing his own definition for how broadly the DFE should be applied, he said that it

includes more than the initiation of programs and activities. It also includes determinations made by executives and administrators in establishing plans, specifications or schedules of operation. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.⁷²

In his view, the DFE was very broad and covered not only high-level planning, but also the implementation of those plans by low-level bureaucrats.

Justice Jackson wrote a sharp dissent, arguing that this manmade disaster was “caused by forces set in motion by the government, [and] completely controlled or controllable by it.”⁷³ He started by pointing out that the civil damages action was “one of the law’s most effective inducements to the watchfulness and prudence necessary to avoid calamity from hazardous operations in the midst of an unshielded populace.”⁷⁴ In his view, a broad interpretation of the DFE would allow the government to “clothe official carelessness [in] a public interest.”⁷⁵

One consideration for Justice Jackson was that because the government knew that the fertilizer was explosive, there was a duty to protect the public.⁷⁶ Arguing essentially that the government was in a better position to prevent the injury than the general public was, he said, “[w]here experiment or research is necessary to determine the presence or degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or technical knowledge to learn for itself of . . . dangers.”⁷⁷ Justice Jackson was concerned that precluding the government from liability would not appropriately discourage risky behavior.⁷⁸

⁷⁰ *Id.* at 26-27.

⁷¹ *Id.* at 28.

⁷² *Id.* at 35-36.

⁷³ *Id.* at 48.

⁷⁴ *Id.* at 49.

⁷⁵ *Id.* at 50.

⁷⁶ *See id.* at 52.

⁷⁷ *Id.*

⁷⁸ *See id.*

Justice Jackson then clarified his position by arguing that the DFE was meant to apply to governmental officials and agencies when they are performing work that is governmental in nature.⁷⁹ His example was that of an attorney general who could not be held liable for false arrest even when a private person would.⁸⁰ However, government officials frequently “deal only with the housekeeping side of federal activities.”⁸¹ In these cases, he said, “there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts if done without appropriate care for the safety of others.”⁸² He concluded by saying that if the DFE is to be read as broadly as the majority had read it, then “the ancient and discredited doctrine that ‘The King can do no wrong’ has not been uprooted; it has been merely amended to read, ‘The King can do only little wrongs.’”⁸³

It would be another three decades before the Supreme Court ruled on the DFE again.⁸⁴ In the meantime, the lower federal courts struggled to adjudicate the DFE, because the scope was unclear.⁸⁵

The Supreme Court provided some clarity in *Berkovitz v. United States*.⁸⁶ In *Berkovitz*, Justice Marshall offered a two-prong test for judges interpreting the DFE. First, the judge must determine whether “the action is a matter of choice for the [Government] employee.”⁸⁷ This step is required because the language of the exception states that the Government’s conduct must involve discretion.⁸⁸ If the authorizing source for the government mandates a particular course of action, then there is no discretion to act otherwise.⁸⁹ Therefore, a finding that the government failed to perform a mandated activity leaves the challenged act outside the scope of the DFE and the suit against the government can proceed.

However, after the court finds under the first prong that the government did have discretion in choosing a course of action, the court must analyze the second prong of the test.⁹⁰ In this case, the judge must determine “whether the allegedly tortious decision was ‘based on considerations of public policy’”⁹¹ or

⁷⁹ See *id.* at 59.

⁸⁰ *Id.*

⁸¹ *Id.* at 60.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Berkovitz v. United States*, 486 U.S. 531 (1988).

⁸⁵ See Harold J. Krent, *Preserving Discretion without Sacrificing Deterrence: Federal Liability in Tort*, 38 UCLA L. REV. 871, 880 (1991).

⁸⁶ *Berkovitz*, 486 U.S. 531.

⁸⁷ *Id.* at 536.

⁸⁸ 28 U.S.C. § 2680 (2006) (DFE immunity applies to “any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty”).

⁸⁹ *Berkovitz*, 486 U.S. at 536.

⁹⁰ *Id.* at 537.

⁹¹ *Id.*

“incorporates considerable ‘policy judgment.’”⁹² If the decision falls into either category, then the DFE applies and the suit should be dismissed.⁹³

One remaining question after *Berkovitz* was whether the government had to show that the decision to take the challenged action was actually the result of policy analysis. The Supreme Court clarified this point in *United States vs. Gaubert*.⁹⁴ In *Gaubert*, the Court feared “a full-scale trial in every case that involves the raising of the defense of [the DFE].”⁹⁵ The Court held that the Government did not have to show actual policy analysis but rather could show that the decision could have been the result of policy analysis. Justice White wrote that “[t]he focus of the inquiry is not on the agent’s subjective intent in exercising the discretion . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis.”⁹⁶ It is within this framework of FTCA and DFE interpretation that the citizens of New Orleans would have to operate in their attempt to hold the Army Corps accountable for losses sustained due to the failure of the levees.

II. THE CITIZENS SPEAK: *IN RE: KATRINA CANAL BREACHES LITIGATION*

A. *The Construction and Maintenance of the Mississippi River Gulf Outlet*

In 1943, Congress requested a report from the Secretary of the Army on the viability of building a shipping channel from the Gulf of Mexico to the Port of New Orleans.⁹⁷ Congress had two good reasons to request the report. First, the Government realized during World War II that the Port of New Orleans, Mississippi River, and the Gulf of Mexico played an important role in the deployment of military supplies.⁹⁸ For national security reasons, the Government wanted to increase the efficiency of supply routes at the Port of New Orleans, which were “overtaxed” during the war.⁹⁹ The second reason was purely economical. By decreasing the distance from the port to the Gulf, the maritime industry would save a significant amount of money.¹⁰⁰

⁹² *Id.* at 545.

⁹³ *Id.* at 537 (“In sum, the [DFE] insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.”).

⁹⁴ *United States vs. Gaubert*, 499 U.S. 315 (1991).

⁹⁵ Oral Argument at 21:12, *United States v. Gaubert*, 499 U.S. 315 (1991) (No. 89-1793), available at http://www.oyez.org/cases/1990-1999/1990/1990_89_1793.

⁹⁶ *Gaubert*, 499 U.S. at 324-25.

⁹⁷ H.R. Doc. No. 82-245 at 41 (1951).

⁹⁸ *Id.*

⁹⁹ *Id.* at 41.

¹⁰⁰ *Id.* at 35-36.

On September 25, 1951, the Chief of Engineers for the US Army sent the completed report to the House of Representatives for review.¹⁰¹ The report recommended the construction of a deep draft channel on the east side of the Mississippi River connecting New Orleans to the Gulf of Mexico.¹⁰² The Chief of Engineers instructed that the channel was to be 36 feet deep and 500 feet wide near the city, and would gradually expand to 38 feet deep and 600 feet wide near the Gulf.¹⁰³ It was stipulated that construction should be done “in accordance with the plans of the division engineer and with such modifications . . . in the discretion” of the Secretary of the Army acting through the Chief Engineer.¹⁰⁴

The Army Corps knew, however, that the channel would need maintenance because of the fragile geography of Southeastern Louisiana, created by wetlands and swamp. One issue was the need for foreshore protection¹⁰⁵ along the banks of MRGO due to wave wash.¹⁰⁶ On its way to New Orleans, MRGO cut through “virgin coastal wetlands,”¹⁰⁷ which were largely composed of “fat clay.” Fat clay is fine gray clay that contains a lot of water, making it susceptible to lateral displacement¹⁰⁸ and withering away. Without protection, the banks of MRGO would gradually widen overtime. During Hurricane Katrina, the widened channel created a “funnel effect” and intensified the velocity of each surge of water into the New Orleans levee system.¹⁰⁹ Some estimates show that this increased the initial storm surge into New Orleans by twenty percent.¹¹⁰

As early as 1958, the Army Corps recognized that this type of soil would “displace laterally under fairly light load.”¹¹¹ The Army Corps was also aware that due to wave wash interacting with the fat clay, the channel would gradually widen. The Army Corps wrote,

¹⁰¹ H.R. Doc. No. 82–245 at 1 (1951).

¹⁰² *Id.* at 2.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d 644, 653 (E.D. La. 2009).

Foreshore protection refers to reinforcing the sides of a levee or other water channel with concrete or a similar protective substance to prevent erosion.

¹⁰⁶ *Id.* Wave wash is the degradation on the banks of a channel caused by the wake of water created as large shipping vessels move through the channel.

¹⁰⁷ *Id.* The Environmental Protection Agency defines wetlands as areas so inundated by surface or ground water as to support the conditions necessary to support vegetation and animals adapted for life in saturated soil conditions. In Louisiana, the wetlands are largely composed of swamps and marshes.

¹⁰⁸ *Id.* Lateral displacement occurs when a force is put on the soil causing it to compress.

¹⁰⁹ See Douglas A. Kysar & Thomas O. McGarity, *Did NEPA Drown New Orleans?: The Levees, the Blame Game, and the Hazards of Hindsight*, 56 DUKE L.J. 179, 196-97 (2006).

¹¹⁰ *Id.*

¹¹¹ U.S. ARMY ENGINEER WATERWAYS EXPERIMENT STATION, *GEOLOGICAL INVESTIGATION OF THE MISSISSIPPI RIVER GULF OUTLET CHANNEL* Plate 5 (1958).

erosion due to wave wash in open areas can be expected . . . where the peat and highly organic clays are exposed. Protection for this area can be provided if and when the need for it becomes necessary. No channel protection is included in the overall cost estimate.¹¹²

Thus, the Army Corps was aware that eventually MRGO would require additional protection to prevent wave wash from widening its banks. In addition, without adequate protection, excavation, and dredging, the intrusion of saltwater would cause erosion of the banks of MRGO.¹¹³ MRGO was completed in 1968,¹¹⁴ but foreshore protection was not added until 1986.¹¹⁵ By the time protection was built for MRGO, it had grown to an average of 1,970 feet wide, nearly three times its original design width.¹¹⁶

The expansion allowed by the Army Corps had three consequences. First, the lateral displacement caused a reduction in the height of the levees along MRGO that made them more susceptible to breaching.¹¹⁷ Judge Duvall likened the reduction in levee height to the Greek myth of Sisyphus¹¹⁸ stating,

the channel was dug through soil that has a known propensity to laterally displace The soil removed from the channel was placed on the west bank of the MRGO placing weight or “loading” the marsh. In turn, that action would cause [fat clay] to slough back into the channel which would then require it to be dredged again, creating a never ending cycle which significantly contributed to the sinking of the MRGO Levee.¹¹⁹

As a result, by the time Hurricane Katrina came ashore, the levee along MRGO had decreased to approximately 1.5 feet below its design target.¹²⁰

The second consequence of the increased width of MRGO was berm reduction.¹²¹ The increasing width of MRGO caused the berm to reduce from an

¹¹² *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 699 (citing PX-0699 (MRGO Design Memorandum 1-B (Revised 1959))).

¹¹³ *Id.* at 666.

¹¹⁴ *Id.* at 650.

¹¹⁵ *Id.* at 665-66.

¹¹⁶ *Id.* at 671.

¹¹⁷ *Id.* at 653-54.

¹¹⁸ In Greek mythology, Sisyphus was a king who was punished by being forced to roll a boulder up a hill, only to watch it roll back down, and repeat this process forever.

¹¹⁹ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 674.

¹²⁰ *Id.* at 673-74 (citing Trial Transcript, Bea at 1114-15).

¹²¹ A berm is an additional earthen barrier that extends from the start of the levee to the water. *See Berm Definition*, OXFORD DICTIONARIES,

average of 500 feet to approximately 200 to 300 feet.¹²² The reduction in distance of the berm made breaching more probable because it contributed to the reduction in levee height.¹²³

Finally, the increased width of MRGO caused a greater “fetch.”¹²⁴ Fetch is defined as “the width of open water that the wind blows over to affect the motion of the water.”¹²⁵ The wave height created by Katrina was a function of the depth of the water and the impact of the winds on the fetch.¹²⁶ The greater the fetch, the more powerful the storm surge as a hurricane comes on shore. Since MRGO had grown to nearly three times its design width, a significantly larger fetch was created. As a result, the intensity of the wave strength that attacked the MRGO levees was similarly increased, which made the levees more susceptible to breaching.¹²⁷

B. In re Katrina Canal Breaches Consolidated Litigation: The District Court Finds the Government Liable Under the FTCA

The Plaintiffs in *Katrina Canal Breaches* filed negligence actions against the United States of America and the United States Army Corps of Engineers under the FTCA’s waiver of immunity. The heart of the complaint was that the Army Corps of Engineers was liable for damage because MRGO was negligently “designed, constructed, and maintained.”¹²⁸ According to the complaint, the injury to the Plaintiff’s resulted from “one of the most predictable and preventable catastrophes in American History.”¹²⁹

In an opinion that spanned ninety-three pages of the Federal Reporter, Judge Stanwood Duvall, a federal district court judge in the Eastern District of Louisiana, began by recounting the history and maintenance of MRGO.¹³⁰ Judge Duvall then concluded that the Army Corps of Engineers’ negligence in maintaining MRGO was a “substantial cause” of the breaching of certain levees

http://www.oxforddictionaries.com/us/definition/american_english/berm (last visited Jun. 15, 2014).

¹²² *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 674 (citing Trial Transcript, Bea at 1159-60).

¹²³ *Id.* at 674-75.

¹²⁴ *Id.* at 675.

¹²⁵ *Id.*

¹²⁶ *Id.* at 674 (citing Trial Transcript, Morris at 175).

¹²⁷ *Id.* at 675 (citing Trial Transcript, Morris at 175).

¹²⁸ Complaint at 12, *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d 644 (E. D. La. 2009).

¹²⁹ *Id.* at 1.

¹³⁰ See *supra* subpart II(A); see also *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 648-51.

during the storm.¹³¹ He went on to say, “[t]his court is utterly convinced that the Corps’ failure to provide timely foreshore protection doomed [MRGO] to grow to two to three times its design width.”¹³² The increased width, he concluded, destroyed banks that would have helped the levee withstand the hurricane and added fetch that created a more forceful attack on the levee.¹³³

Having found the Army Corps negligent, the next step was to address the FCA and the exceptions to the FTCA. Judge Duvall quickly rejected the Government’s contention that it was immune based on § 702(c) of the FCA.¹³⁴ According to Judge Duvall, the failure to provide foreshore protection did not concern flood control activity.¹³⁵ Highlighting the original “Design Memorandum,” he noted that the Army Corps’ decisions were made in the context of the MRGO project—construction of a shipping channel.¹³⁶ Therefore, § 702(c) did not apply because none of the decisions involved flood-control activity.¹³⁷

The Government sought immunity from liability under the FTCA’s Due Care Exception and the DFE.¹³⁸ Like the DFE, the Due Care Exception is found in 28 U.S.C. § 2680(a).¹³⁹ In order to show immunity under the Due Care Exception, the Government was required to show that 1) the authorization to build MRGO mandated a particular course of action, and 2) if there was a mandate, show that due care was taken during execution.¹⁴⁰ In applying this test, Judge Duvall found that the Due Care Exception did not apply.¹⁴¹

In so finding, Judge Duvall distinguished design and construction of MRGO from maintenance and operation. He wrote,

[A]s concerned the initial design and construction of MRGO, these actions were shielded by the [DFE]. . . . [T]here was no violation of any mandate However, with respect to the issue of the maintenance and operation of the MRGO . . . [t]he Corps’ mandate

¹³¹ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 697.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 699.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 697.

¹³⁸ *Id.* at 702.

¹³⁹ 28 U.S.C. § 2680(a) (2006) (“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”).

¹⁴⁰ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 701-02 (citing *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005)).

¹⁴¹ *Id.* at 702 (“Due care was clearly absent in the Corps’ actions as to the maintenance and operation of the MRGO. This exception is unavailable to the Corps.”).

was to create, dredge and maintain a deep-draft channel [that] . . . was to be 36 feet deep and 500 feet wide, increasing . . . to 38 feet deep and 600 feet wide. Nothing was presented at trial that . . . with this mandate, the Corps was also given the latitude to allow the channel to multiply in width This grant did not and could not have given the Corps the ability to ignore the unbridled growth of [MRGO].¹⁴²

The finding of a mandate to maintain MRGO at its design parameters makes logical sense. It would be an odd result to hold that Congress would authorize the building of a sixty-six mile channel at certain dimensions, but not require the maintenance of that channel at those same dimensions. Thus, Judge Duvall concluded that there was a mandate for the Army Corps to maintain MRGO at its design dimensions and “[d]ue care was clearly absent,”¹⁴³ so the Due Care Exception was not available to the Government.

The finding of a mandate to maintain and operate MRGO within its original design functions should have been dispositive to the question of whether the DFE applied. As Judge Duvall correctly stated, the Supreme Court in *Gaubert* established a two-part test to determine whether the DFE applies.¹⁴⁴ The first inquiry requires that the challenged act must involve an element of judgment.¹⁴⁵ If a statute, regulation, or policy prescribes a course of action (i.e. contains a mandate) then the employees acting on behalf of the government have no choice but to adhere to it.¹⁴⁶ If Judge Duvall found while analyzing the Due Care Exception that the “Corps’ mandate was to create, dredge, and maintain a deep-draft channel [that] . . . was to be 36 feet deep and 500 feet wide, increasing . . . to 38 feet deep and 600 feet wide,”¹⁴⁷ then the government had no choice but to ensure that the channel did not widen. Eliminating the first prong of the *Gaubert* test, Judge Duvall should have ruled that the DFE did not apply.¹⁴⁸

One possible response is that Judge Duvall was only referring to a mandate to construct MRGO within those dimensions. However, Judge Duvall explicitly states that there is a difference between the construction and design (for which he found no mandate to build foreshore protection) and maintenance and

¹⁴² *Id.* at 702.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 703.

¹⁴⁵ *Id.* (citing *United States vs. Gaubert*, 499 U.S. 315, 322 (1991)).

¹⁴⁶ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 703. (citing *United States vs. Gaubert*, 499 U.S. 315, 322 (1991)).

¹⁴⁷ *Id.* at 702.

¹⁴⁸ *United States vs. Gaubert*, 499 U.S. 315, 322 (1991) (Noting that the judgment or choice requirement is not met if there is a mandate because the employee has no other option but to adhere to the directive.).

operation.¹⁴⁹ The mandate to *maintain* MRGO necessarily must include keeping it within reasonable dimensions. It would be hard to imagine a mandate to maintain a navigational channel that allowed the channel to nearly triple in width. The failure of the Army Corps to adhere to this mandate causes the government's use of the DFE to collapse.

Another possible rejoinder is that there was no mandate concerning *how* the Army Corps was to ensure that MRGO's expansion be controlled. Therefore, the Army Corps had some discretion in maintaining MRGO. This argument, however, puts the cart before the horse. If the Army Corps had a mandate to maintain the channel at a certain width, it does not matter *how* it was to be accomplished. It only matters that the channel width be maintained. Once it has been determined that there was a mandate to maintain MRGO's dimensions, the Army Corps "ha[d] no rightful option but to adhere to the directive."¹⁵⁰

Judge Duvall's analysis of the first prong of the DFE did not recognize his previous conclusion that the Army Corps had a mandate to maintain MRGO within its original design specifications. While Judge Duvall did not find for the plaintiffs based on negligent maintenance, he did rule for the plaintiffs by focusing on the Army Corps' failure to prepare impact statements under the National Environmental Protection Act (NEPA).¹⁵¹ NEPA requires all agencies of the federal government to "include in every recommendation or report on proposals for legislation and other Federal actions significantly affecting the quality of the human environment, a detailed statement" on various impacts the proposed action would have on the environment.¹⁵² Because the Army Corps failed to provide such reports, Judge Duvall ruled that the DFE was not available to the Army Corps.¹⁵³

Judge Duvall also ruled in the plaintiff's favor under the second prong of *Gaubert* ruling that the decision not to provide foreshore protection was not policy based, but was the result of "[t]echnical, [e]ngineering, and [p]rofessional [j]udgments."¹⁵⁴ Here, Duvall essentially argued that the failure to provide protection could not have been a policy decision because the Army Corps admitted that it did not think MRGO created an additional hazard during a hurricane.¹⁵⁵ Since they were unaware that MRGO would create a hazardous condition during a hurricane, their failure to provide protection was based on an erroneous scientific judgment, not on policy.¹⁵⁶ Indeed, Judge Duvall referred to a

¹⁴⁹ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 702.

¹⁵⁰ *Gaubert*, 499 U.S. at 322 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

¹⁵¹ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp. 2d at 724-25.

¹⁵² 42 U.S.C. § 4332(c) (2006).

¹⁵³ *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp. 2d at 725.

¹⁵⁴ *Id.* at 705.

¹⁵⁵ *See generally id.* at 705-17.

¹⁵⁶ *Id.*

lower court case to support the proposition that, “‘engineering judgment’ [is] not a ‘matter of policy’ or an ‘exercise of policy judgment.’”¹⁵⁷

In rejecting the government’s use of the DFE, Judge Duvall commented on the broadness of the government’s position and of the DFE in general:

the Government’s position is . . . overly broad—that is that all [of the Corps’] actions taken implicate[] the Government’s policy with respect to maintenance of the MRGO. . . . In the event the Corps’ monumental negligence here would somehow be regarded as “policy” then the exception would be an amorphous incomprehensible defense without any discernable contours.¹⁵⁸

Thus, Judge Duvall rejected the government’s use of the DFE because to allow the government to use the DFE in this context would render the waiver of sovereign immunity meaningless in the most important cases. As Justice Jackson warned in *Dalehite*, an expansive application of the DFE does not waive sovereign immunity in the most egregious case, but waives it only in the most trivial.¹⁵⁹

C. In re: Katrina Canal Breaches Consolidated Litigation: The Appellate Court’s Arbitrary Decisions and Faulty Reasoning

On appeal, the Fifth Circuit applied a *de novo* standard of review to the district court’s finding.¹⁶⁰ Initially, the Fifth Circuit affirmed the district court’s finding that the government negligently maintained MRGO by failing to provide timely foreshore protection.¹⁶¹ However, in a rather bizarre turn of events several months later, the Fifth Circuit reversed its initial finding. Unfortunately, it is unclear why the Fifth Circuit made such a stark reversal. The revised opinion relied on conclusory statements with little legal analysis.

Judge Jerry Smith’s affirming opinion, released on March 2, 2012, addressed the three arguments analyzing the DFE.¹⁶² First, he disagreed with Judge Duvall’s analysis of the first prong of *Berkovitz*, arguing that NEPA was a procedural statute that did not mandate particular results.¹⁶³ Under NEPA, the government is allowed to undertake projects destructive to the environment as long as the agency studies and disseminates information about the environmental

¹⁵⁷ *Id.* at 710 (citing *Cope v. Scott*, 45 F.3d 445, 452 (D.C. Cir. 1995)).

¹⁵⁸ *Id.* at 712, 717.

¹⁵⁹ *Dalehite v. United States*, 346 U.S. 15, 60 (1953).

¹⁶⁰ *In re Katrina Canal Breaches Consol. Litig.*, 673 F.3d 381, 386 (5th Cir. 2012).

¹⁶¹ *Id.* at 395-96.

¹⁶² *Id.* at 391-99.

¹⁶³ *Id.* at 393 (citing *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d at 717).

consequences.¹⁶⁴ The statute only mandates the process that must be taken.¹⁶⁵ The ultimate decision to act upon information provided by NEPA would have rested with the Army Corps.¹⁶⁶ Thus, Judge Smith found that “[a]t most the Corps ha[d] abused its discretion [in deciding not to act on the information]—an abuse explicitly immunized by the DFE.”¹⁶⁷

On appeal, the plaintiffs directly addressed Judge Duvall’s finding that the Army Corps violated a mandate to maintain MRGO within its design specifications.¹⁶⁸ Judge Smith’s analysis of the first prong of *Berkovitz* was thus forced to deal with this issue. The government argued that because a previous plan during the construction phase of MRGO anticipated some erosion, the Fifth Circuit should find no maintenance mandate existed.¹⁶⁹ The plaintiffs responded by citing government documents identifying the authorized channel width as 500 feet and referencing Judge Duvall’s finding that Congress did not allow the expansion of MRGO.¹⁷⁰ Judge Smith found for the United States in two paragraphs with limited reasoning. He wrote that although MRGO nearly tripled in size,

[t]he district court recognized . . . that the design for MRGO expressly contemplated erosion from wave wash and did not provide for armoring the banks. [Judge Duvall] held that these design features were ‘shielded by the [DFE],’ a ruling . . . not challeng[ed] on appeal. Logically, therefore the absence of armoring . . . [could not] have violated a mandate sufficient to negate the first *Berkovitz* prong.”¹⁷¹

At best, Judge Smith’s analysis shows that he did not understand the issue. Judge Smith failed to recognize Judge Duvall’s explicit differentiation between *design* and *maintenance* of MRGO. These two concepts are not the same; indeed, they are mutually exclusive. Failing to provide for foreshore protection at the design phase is not equivalent to the failure to maintain MRGO within its design

¹⁶⁴ *Id.* (citing Sabine River Auth. v. U.S. Dep’t of Interior, 951 F.2d 669, 676 (5th Cir. 1992)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Reply Brief for Plaintiffs-Appellees at 8, *In re Katrina Canal Breaches Litig.*, 673 F.3d 381 (5th Cir. 2012) (No. 10-30249).

¹⁶⁹ See Response and Reply Brief for the United States at 39, *In re Katrina Canal Breaches Consol. Litig.*, 673 F.3d 381 (5th Cir. 2012) (No.10-30249), 2011 WL 2526556.

¹⁷⁰ Reply Brief for Plaintiffs-Appellees/Cross-Appellants at 8-9, *In re Katrina Canal Breaches Consol. Litig.*, 673 F.3d 381 (5th Cir. 2012) (No. 10-30249), 2011 WL 3464539.

¹⁷¹ *In re Katrina Canal Breaches Consol. Litig.*, 673 F.3d at 393 (emphasis added) (citations omitted).

specifications. The simple fact that Judge Duvall found that the DFE applied to the design of MRGO does not “logically” require that it apply to the failure to maintain the channel. In Judge Smith’s defense, the plaintiffs could have provided a more forceful and affirmative argument on this point. A reading of the brief leaves those who believe this argument to be the most powerful wanting.

Finally, Judge Smith addressed the argument raised by the plaintiffs that the DFE does not shield the Government under the second prong of *Berkovitz*. Addressing the question of whether or not the decision not to armor MRGO was susceptible to policy analysis or “involves only the application of scientific principles,”¹⁷² Judge Smith found the latter.¹⁷³ Relying, in part, on a 1958 Army Corps design memorandum, Judge Smith found that “the Corps labored under the mistaken scientific belief that the MRGO would *not* increase storm surge risks.”¹⁷⁴ He then pointed to the United States’ own words at oral argument in the district court to the same effect. There the United States argued that the Army Corps “determined that MRGO played no role in major hurricane events . . . [and] for that reason, the Corps saw no reason” to address armoring.¹⁷⁵

Judge Smith continued in his criticism over the government’s position that the decision was policy based saying it was “[a]gainst the considerable evidence.”¹⁷⁶ Pointing to a quote by the Government arguing that the Army Corps failed to provide protection because they were protecting scarce resources, Judge Smith said “[t]his . . . is the closest the government comes to arguing that it had policy reasons—and not faulty scientific ones—for delaying MRGO’s armoring.”¹⁷⁷ He finished by saying, “[t]his is not a situation where the Corps recognized a risk and chose not to mitigate it out of concern from some other public policy []; it flatly failed to gauge the risk.”¹⁷⁸ Accordingly, Judge Smith held that the government’s claim to immunity under the DFE failed the second prong of *Berkovitz* and immunity did not apply.¹⁷⁹

This victory for the plaintiffs was short-lived. On September 24, 2012, six months and twenty-two days after finding that the DFE did not immunize the Government from suit, the Fifth Circuit abruptly withdrew the previous

¹⁷² *Id.* at 394.

¹⁷³ *Id.* at 394-96 (“The . . . plaintiffs have mustered enough record evidence to demonstrate that the Corps’s negligent decisions rested on applications of objective scientific principles and were not susceptible to policy considerations.”).

¹⁷⁴ *Id.* at 394.

¹⁷⁵ *Id.* at 395.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 395-96.

¹⁷⁹ *Id.* at 396.

opinion.¹⁸⁰ Judge Smith’s opinion reversing the finding for the plaintiffs was identical to the opinion that previously found the government liable except that the seven paragraphs in the affirming opinion that convincingly argued that the Army Corps’ decisions were not policy based were deleted. In their place, Judge Smith added three paragraphs which started by stating “[a]s discussed above, there is ample record evidence indicating the public-policy character of the Corps’ various decisions contributing to the delay in armoring [MRGO].”¹⁸¹

When read together with the March 2012 opinion affirming the district court, the September 2012 opinion is confusing, unprincipled, and lacks reasoned analysis. The most obvious source of puzzlement is trying to discern a principled reason why the court made such a stark reversal. It is as though the final portion of the opinion dealing with prong two of *Berkovitz* was written by a different court.

The pendulum swung from “the Corps decisions were grounded on an erroneous scientific judgment, not policy considerations”¹⁸² to “[t]he Corps’ actual reasons for the delay are varied and sometimes unknown, but . . . the decisions here were susceptible to policy considerations.”¹⁸³ This recognition of the *Gaubert* “susceptible to policy judgment” analysis is misguided. As the court points out, “[i]f [the decision to not armor MRGO] is susceptible only to the application of scientific principles . . . [the Government] is not immune [from suit].”¹⁸⁴ In the March opinion, the court made it perfectly clear that the failure to armor MRGO was only based on scientific principles.¹⁸⁵

In the first opinion, the court spent 7 paragraphs and 968 words (compared to the same section in the new opinion that was 3 paragraphs and 354 words long where the court rejected its court’s own reasoning in March) arguing that the Government had not even shown it was aware that there was an issue regarding foreshore protection.¹⁸⁶ Indeed the court recognized that “plaintiffs can defeat the presumption [of susceptibility to policy analysis] by showing, as a matter of fact, that the government’s actual decision was not a policy-based one.”¹⁸⁷ In March, the court was certain that the plaintiffs had done just that.¹⁸⁸

¹⁸⁰ *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 441 (5th Cir. 2012) (recognizing the petition for an *en banc* rehearing and reversing the judgment for the plaintiffs).

¹⁸¹ *In re Katrina Canal Breaches Litig.*, 696 F.3d at 451.

¹⁸² *In re Katrina Canal Breaches Consol. Litig.*, 673 F.3d 381, 394 (5th Cir. 2012).

¹⁸³ *In re Katrina Canal Breaches Litig.*, 696 F.3d at 451.

¹⁸⁴ *Id.*

¹⁸⁵ *In re Katrina Canal Breaches Consol. Litig.*, 673 F.3d at 394-96.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 394.

¹⁸⁸ *Id.* at 394-95 (noting that the Corps conducted a scientific study in 1996 on whether MRGO would create a funnel effect during a hurricane and concluded the channel would be “of no consequence”) (noting that even as the channel continued to widen the Corps continued to believe

Furthermore, the court stated that “although the Corps appears to have appreciated the benefit of foreshore protection . . . it also had reason to consider alternatives [for preventing channel widening].¹⁸⁹ Thus, the court now believed the decision was susceptible to policy analysis and was shielded by the DFE under *Gaubert*.

This analysis is problematic for two reasons. First, as already noted,¹⁹⁰ it does not matter what measures the Army Corps decided or did not decide to undertake to prevent the banks of MRGO from widening. What matters is that the Army Corps violated its mandate to maintain the channel at its design specifications. The court presented no analysis of how the Army Corps overcame this initial hurdle.

Second, at oral argument, the Army Corps made it clear that they took *no* steps to remediate the dangers posed by MRGO because they did not know any dangers existed.¹⁹¹ If the decision to do nothing to prevent MRGO from widening was susceptible to policy analysis, the implied policy analysis had nothing to do with dangers posed by a hurricane.¹⁹² Using this logic, the government would rarely be found liable for a tort. Consider an obvious case of negligence such as an automobile accident involving a government truck whose brakes failed due to lack of routine maintenance. Based on the Fifth Circuit’s logic, the government would only need to argue that checking the brakes and replacing them is susceptible to policy analysis because the driver was free to consider other ways of stopping the car.¹⁹³ This approach to the *Gaubert* policy analysis test is astoundingly broad.

What is remarkable is that the court chose to simply delete its previous reasoning rather than justify the revision with principled analysis and logic. There was virtually no analysis provided in the updated opinion. The court simply restated the *Gaubert* “susceptible to policy analysis” test and indicated that the Army Corps’ actions passed this hurdle.¹⁹⁴ Without any indication from the court

the channel would not cause increased water levels even though other scientific techniques found otherwise) (citing the Government’s multiple admissions that the Corps believed MRGO would play no significant role during a hurricane event) (noting that the Government produced no record evidence that the Corps even considered budgets or other policy constraints in its failure to provide foreshore protection).

¹⁸⁹ *In re Katrina Canal Breaches Litig.*, 696 F.3d at 451.

¹⁹⁰ *See supra* subpart II(B).

¹⁹¹ *In re Katrina Canal Breaches Consol. Litig.*, 673 F.3d at 395.

¹⁹² The court had already ruled out in the March opinion that the Corps actually had a policy reason for not armoring MRGO. *See id.* at 394-95.

¹⁹³ Of course, the analogy assumes that the government would have passed the first prong of *Berkovitz* requiring a showing of judgment or choice.

¹⁹⁴ *Id.* at 394-96.

as to why it chose to take such an unprincipled stand, one can only infer that the court had its own policy reasons for reversing the decision.

III. APPLYING RATIONALES FOR GOVERNMENT IMMUNITY UNDER THE DISCRETIONARY FUNCTION EXCEPTION IN KATRINA CANAL BREACHES

A. Congressional Intent

The reasoning and logic in *Katrina Canal Breaches* raises a larger question: why do the federal courts interpret the DFE to provide such a broad immunity from suit for the United States even when negligence is shown? One reason they have the latitude to do so is a function of the ambiguity of the statute itself.¹⁹⁵ The cost of the federal courts' interpretation is a widening of the application of the DFE from what Congress originally intended.¹⁹⁶ The legislative history shows that Congress intended to prohibit the FTCA from being used to sue the government where no negligence had been shown, and the only grounds to sue was that the same conduct by a non-governmental actor would be actionable.¹⁹⁷

Viewing the scope of the DFE with this lens, the purpose of the DFE was to provide a procedural advantage,¹⁹⁸ allowing the Government to dismiss cases on the merits early on in the litigation if no negligence was shown.¹⁹⁹ However, the Congressional reports also show that the DFE was intended to shield the United States from claims based on the "abuse of discretionary authority . . . whether or not negligence is alleged to have been involved."²⁰⁰ This language tends to lean in the direction of a broader application of the DFE.

The scope of the DFE remains ambiguous and open to interpretation. It has therefore been the charge of the federal courts to determine what activity is "discretionary." As the *Katrina Canal Breaches* case shows, courts continue to struggle to define the exception's scope and the results of the use of this immunity are questionable.²⁰¹

¹⁹⁵ See Bruno, *supra* note 57, at 431 (arguing that the text of the FTCA is ambiguous).

¹⁹⁶ *Id.* at 431-432.

¹⁹⁷ *Id.* (citing *Dalehite v. United States*, 346 U.S. 15, 29 n.21 (1953)).

¹⁹⁸ *Id.* at 432.

¹⁹⁹ *Id.* (citing Restatement (Second) of Torts § 281(b) (1965)).

²⁰⁰ *Id.* at 432 (citing *Dalehite v. United States*, 346 U.S. 15, 29 n.21 (1953)).

²⁰¹ See *Frigard v. U.S.*, 862 F.2d 201 (9th Cir. 1988) (Government immune under the DFE when the CIA set up a dummy investment corporation who with government knowledge swindled private investors out of millions of dollars); *Nevin v. U.S.*, 696 F.2d 1229 (9th Cir. 1983) (Government immune under the DFE for simulating a biological attack on an unsuspecting San Francisco public utilizing bacteria known to cause death and injury); *Allen v. U.S.*, 816 F.2d 1417 (10th Cir. 1987) (Government immune under the DFE when thousands of military personnel and private citizens were exposed to radiation and the Government failed to inform them of such

B. Protecting the Public Purse

It has frequently been posited that the justification underlying most decisions to deny liability under the DFE is protecting the treasury.²⁰² In extreme situations or in the aggregate, this logic makes sense. It would be difficult to imagine a situation in which bankrupting the United States Treasury would be justified in order to compensate the victim of a government tort. One cited argument is that unlike many private actors, the Government “has the deepest pockets of all.”²⁰³ This has the practical reality of ensuring that any successful tort claims against the Government will be paid.²⁰⁴ The Government coffers, it is argued, are simply too tempting for lawyers seeking large fees and payouts and thus access must be constrained.²⁰⁵

Empirical data on this subject, however, is simply not readily available.²⁰⁶ Professor Harold Krent has estimated that the DFE saves “perhaps billions of dollars a year.”²⁰⁷ This number, while certainly correct as a practical matter, invites confusion. It is unknown whether Professor Krent is including all suits that have been dismissed because of the DFE or if this includes only those suits that may have been meritorious.²⁰⁸ Thus, the numbers provided by Professor Krent can be misleading.

Furthermore, it is not entirely clear that simply because the DFE protects the public purse it is therefore justified. One commentator has pointed out that it would also be cost effective to withhold tax refunds due to taxpayers.²⁰⁹ However, few would argue that the increased revenues to the public would justify such an action. The question therefore is one that turns on social policy. Is it justifiable to prevent government tort victims from receiving judgments because of fiscal concerns? This Comment takes the position that courts should not provide blanket immunity based on the liberal two-prong test in *Berkovitz*. Instead courts should look to the facts of each case and determine whether the denial of redress is

exposure instead using them as “guinea pigs” in long-term studies of the effects of radiation exposure).

²⁰² See Bruno, *supra* note 57, at 434-435; Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 12-16-17 (2001).

²⁰³ Peter H. Schuck, *Policymakers in the Dock*, 169 POL’Y REV. 63, 64 (2011).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See Bruno, *supra* note 57, at 434-435 (noting that arguments about the dollar amounts saved by the Discretionary Function Exception can be misleading).

²⁰⁷ James R. Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COL. L. REV. 1538, 1550 (2000) (quoting Krent, *supra* note 85, at 871).

²⁰⁸ See *id.* (stating that “Presumably Professor Kent includes massive areas of liability in which claims are never brought because of counsel’s knowledge of the FTCA’s parameters.”).

²⁰⁹ See Bruno, *supra* note 57, at 435.

defensible given the circumstances. The current system approaches the problem with the proverbial axe when a scalpel is needed.

Putting the actual dollar savings aside, this fear of fiscal annihilation may be overblown because an application of traditional tort law doctrine would thwart many tort claims against the government.²¹⁰ There are many protections built into the FTCA other than blanket immunity that provide more narrow procedural mechanisms that limit liability for the government in frivolous cases. For example, the FTCA bars trial by jury, instead requiring cases to be tried in front of a federal judge.²¹¹ This blunts the fear that an emotional jury might side with the plaintiffs more often than the government's perceived cold bureaucracy.

Further protections come in the form of limiting the type of damages that can be collected. The FTCA caps damages available as determined by laws of the state where the action is brought.²¹² In addition, punitive damages are forbidden.²¹³ Thus, there are numerous protections, other than the broad DFE, that may serve to protect the government's fiscal coffers.

The protection of the public treasury is not the only economic consideration when analyzing the use of the DFE. Behavior modification is one of the chief rationales for finding liability in tort. Along with the enforcement of criminal laws, the threat of civil monetary liability is one of the chief means of controlling behavior.²¹⁴ With respect to shaping governmental conduct, the use of monetary liability may be more effective.²¹⁵ This is because organizations tend to act in more predictable and rational ways than individuals.²¹⁶ When liability is an available remedy, administrators in institutions are forced to consider tort liability before taking action.²¹⁷

Allowing liability against the government in tort is an equally plausible alternative to protect the treasury. It may seem counterintuitive to say that allowing liability against the government would protect the treasury, but the specter of tort liability would cause governmental institutions to reduce unnecessary risk taking. This, in turn, would result in fewer damage claims for negligent conduct. Indeed this approach would have another beneficial consequence: fewer citizens would be harmed by negligent conduct authorized by the government.

²¹⁰ See *id.* at 434 (arguing that defenders of the DFE ignore other limitations on liability provided by the common law of torts).

²¹¹ 28 U.S.C. § 2402.

²¹² *Id.* at § 2674.

²¹³ *Id.*

²¹⁴ Weaver & Longoria, *supra* note 42, at 339.

²¹⁵ *Id.*

²¹⁶ *Id.*; see also WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

²¹⁷ Weaver & Longoria, *supra* note 42, at 339.

Opponents of this line of thinking point out that finding the government liable in tort may result in the government taking on fewer risky endeavors that benefit society.²¹⁸ When private firms decide to undertake a risky project, the firm weighs the legal risk of having to compensate for torts with the financial benefits to the firm.²¹⁹ If the expected value²²⁰ of the firm's risky activity outweighs the cost of compensating victims, a rational firm will undertake the action and receive the difference in value in the form of profits.

In contrast, a government actor typically has no profit motive.²²¹ Public officials are unable to appropriate for themselves the value created by undertaking risky projects such as MRGO.²²² Even if they could, society would likely view the appropriation of value as corrupt.²²³ Thus, for many public officials, taking excessive risks in pursuit of the public good is all pain and no gain.²²⁴

This argument, while technically correct and initially quite persuasive, simply misses the point. The issue in a case like *Katrina Canal Breaches* is not whether a particular official should be held accountable, but rather whether *society* should be held accountable for negligent conduct undertaken on their behalf. The Government vs. Plaintiff dichotomy presents a misleading choice. A successful suit against the government resulting in a paid judgment is really a suit against the citizens that the government represents as agent.

This Comment does not argue that individual bureaucrats should be held personally liable for government torts. The deeper question in *Katrina Canal Breaches* is whether society is willing to sacrifice citizens injured by Hurricane Katrina. This Comment argues that the answer is affirmatively no. If asked, the Author would answer that most Americans would recognize that major engineering projects undertaken for the benefit of society in the form of enhanced military capability are done on behalf of the people. Thus, the principal should, in certain cases, pay for injuries that result from the negligence of the agent.

In the wake of the district court's decision in *Katrina Canal Breaches*, the possibility of tort liability began to affect the behavior of institutional and

²¹⁸ Schuck, *supra* note 203, at 64.

²¹⁹ *Id.*

²²⁰ Expected value is calculated by multiplying each of the possible outcomes by the likelihood that each outcome will occur, and summing all of those values. By calculating expected values, investors can choose the scenario that is most likely to give them their desired outcome. *See e.g.* STANFORD UNIVERSITY, MEAN, VARIANCE AND DISTRIBUTIONS, *available at* http://www.stanford.edu/~wfsharpe/mia/rr/mia_rr1.htm#expected (last visited April 18, 2014).

²²¹ Schuck, *supra* note 203, at 64-66.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

individual actors.²²⁵ Professionals began to consider that if damages occur because of environmental degradation to waterways, then liability might attach to those responsible for operating and maintaining those structures.²²⁶ The possibility of such liability caused operators of waterways to review maintenance, inspections, and repairs to ensure they were not done negligently.²²⁷ It is reasonable to believe that a similar effect would occur in the public sector.

C. Economic Efficiency

From a purely economic point of view, the DFE often produces an inefficient result. One notorious theory of economic efficiency that has been applied to tort law is the “Coase Theorem.”²²⁸ The basic concept is that when there are no transaction costs, it makes no difference from an efficiency standpoint whether the law imposes liability on the injurer (the United States in FTCA claims) or allows the victim to absorb the damages.²²⁹ In either case, the ultimate result is that the parties will negotiate to an efficient result.²³⁰

This efficiency-centric idea is embodied in the concept that liability in tort should be imposed on the party in the best position to avoid the injury.²³¹ Justice Jackson’s dissenting opinion in *Dalehite* echoed this idea when he stated that the public should not be required “to possess the facilities or the technical knowledge to learn for itself of . . . dangers.”²³² Requiring the public to investigate the cargo of every ship in the Texas City Harbor and know the dangers involved would have been highly inefficient.

Similarly, in *Katrina Canal Breaches* an efficiency analysis cuts in favor of finding the Army Corps liable. This is because engineering and construction are highly specialized fields. Imposing damages caused by the breaching of MRGO on the citizens of New Orleans places an insurmountable burden on them. Such an imposition would create an implication that each citizen of New Orleans is required to obtain information on every levee and navigational canal that may affect him or her during a hurricane. The burden would then be placed on them to understand or hire an expert to explain the risks involved in continuing to live within that system.

²²⁵ See Laurie Jean Lichter-Heath, *What Does the Case In re Katrina Canal Breaches Consolidated Litigation Mean for Infrastructure Managers?*, 15 PUB. WORKS MGMT. & POLICY 72 (2010).

²²⁶ *Id.* at 78.

²²⁷ *Id.*

²²⁸ Marshall S. Shapo, *Responsibility for Injuries: Some Sketches*, 100 NW. U. L. REV. 481, 482 (2006).

²²⁹ *Id.* (citing Ronald Coase, *The Problem of Social Cost*, 2 J.L. & ECON. 1 (1960)).

²³⁰ *Id.* (citing Ronald Coase, *The Problem of Social Cost*, 2 J.L. & ECON. 1 (1960)).

²³¹ *Id.*

²³² 346 U.S. 15 at 52.

The more sensible approach is to place the burden of ensuring the public's safety on the Army Corps. The Army Corps, having constructed and operated MRGO for nearly half a century, had greater access to the information and expertise necessary to avoid the injury. Therefore, the Army Corps' failure to properly maintain the levee should result in government liability.

D. Beyond Economics: Justice and Moral Considerations

Focusing on the economic considerations leaves the analysis incomplete. The goals of tort law are too often boiled down to economic considerations.²³³ Tort law, like many iterations of legal doctrine, is not static.²³⁴ The adjudication of tort disputes has evolved over centuries.²³⁵ The doctrinal practices of tort law create a framework of adjudication, which then generates critical analysis of the decisions made by courts.²³⁶ These criticisms are then used to evaluate and change the doctrine.²³⁷ By restricting the analysis to the cold hard economic facts, courts interfere with this process. As a result, the adjudication of tort cases often leaves our intuitive need for justice between injurer and the injured unfulfilled.

One noneconomic theory is that of corrective justice. The theory of corrective justice ignores the economic concept of how resources should be distributed among society.²³⁸ Instead, corrective justice focuses on the equities of the tortious transaction.²³⁹ This concept embodies the intuitive nature of tort law theory that compels us to recognize an injustice and seek to correct it. The very pursuit of justice itself is an important goal that helps to maintain our society and the theoretical underpinnings of the legal system.²⁴⁰

The concept of corrective justice traces its origins back to Aristotle,²⁴¹ and has as its premise achieving individual justice between an injurer and an injured party.²⁴² Corrective justice can be criticized as impractical because of its

²³³ See Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2350 (1990) (arguing that the chief reason for a perception that the tort system has failed is confusion and disagreement over the goals of the tort system and the exclusion of the concept of corrective justice from this calculus).

²³⁴ See *id.* at 2360-64 (noting that a pragmatic approach to tort law requires an evaluation of community standards and that because community standards are constantly evolving, tort law evolves with them as standards of justice and fairness change).

²³⁵ *Id.* at 2362-63.

²³⁶ *Id.* at 2262.

²³⁷ *Id.*

²³⁸ Shapo, *supra* note 228, at 483.

²³⁹ *Id.*

²⁴⁰ Wells, *supra* note 233, at 2351.

²⁴¹ See 2 ARISTOTLE, THE COMPLETE WORKS 1786-87 (Jonathan Barnes ed., 1984).

²⁴² Shapo, *supra* note 228, at 483 (citing ERNEST WEINRAB, THE IDEA OF PRIVATE LAW 64 (1995)).

theoretical nature. In our modern society, the idea that justice can be had between two individuals is challenged by the fact that more often than not insurance companies pay restitution.²⁴³ Since insurance companies ultimately pay for the injurer (who is only required to pay premiums) justice between the parties is not achievable in the sense Aristotle had in mind.

This limited view of Aristotle is misguided. Aristotle was less concerned with the substantive requirements of corrective justice, such as who pays in a particular dispute.²⁴⁴ Instead, he was interested in how corrective justice fits into society's larger conception of virtue.²⁴⁵ A consideration from this point of view is how a society removes unfair advantages in order to achieve a higher level of virtue.²⁴⁶ This sense of corrective justice as an element of virtue must start from the top; the governing state should be the first to reject unfair advantages where they exist.²⁴⁷

From this perspective, the finding that the Army Corps was negligent requires the application of liability. To do otherwise would leave the scales of justice between the parties out of balance. The pursuit of justice itself is worth the economic disadvantage imposed on the government. Our legal institutions are dependent upon a delicate presupposition that if citizens are aggrieved, justice can at least be pursued. The *de facto* immunity granted to the government in FTCA claims undermines this fundamental premise in our society.

In addition, the practical criticism that corrective justice would not be achieved because of insurance is alleviated. Payment for damages as a result of the negligent operation of MRGO would be paid directly from the coffers of the federal government.

Of course, the reality is that the government only acts as an agent of the American people. After all, the government's money comes from its citizens in the form of tax payments. It therefore could be argued that the American people should not be required to pay for the government's negligence because, in a sense, they would be paying themselves. Closely related to corrective justice, another justice-based rationale for finding the government liable rests with the idea that responsibility in tort can be seen as community judgment for moral fault.²⁴⁸ Under this theory, the finding that the Army Corps was liable would act as a judgment by the American people rebuking the negligent conduct of the Army Corps.

²⁴³ *Id.*

²⁴⁴ Wells, *supra* note 233, at 2364.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Shapo, *supra* note 228, at 483.

Another concept of fairness and justice lies in the idea of risk and cost-spreading.²⁴⁹ The central idea is that when many people benefit from an activity that injures only a few, the costs of the injury should be spread among those who benefit.²⁵⁰ This theory fits quite nicely with the idea of finding the Army Corps liable for injuries caused by MRGO. One of the original purposes of MRGO was to provide more efficient distribution of resources in the event of war.²⁵¹ The Government, acting on behalf of the American people, found that it would be beneficial to the nation to have a shorter route from New Orleans to the Gulf of Mexico. The costs associated with the massive destruction caused by the negligent maintenance of MRGO are appropriately spread among the American citizens who benefited from greater access to the Port of New Orleans.

CONCLUSION

Hurricane Katrina and its aftermath were events that forever scarred a nation and called into question whether or not US citizens could trust their government to protect them. In light of these events and the Army Corps' negligence in maintaining MRGO, society should begin to question what Congress intended by the word "discretionary" in the DFE. Black's Law Dictionary defines discretionary as: "(Of an act or duty) involving an exercise of judgment and choice..."²⁵² Only the most formalistic interpretation of this definition would allow the Army Corps the discretion to disregard the expansion of MRGO.

Allowing the Army Corps of Engineers to escape liability for its admittedly negligent operation of MRGO is unjust. A doctrinal analysis of the facts as found by Judge Duvall and Judge Smith leads to the conclusion that the DFE should not apply. More importantly, the citizens of New Orleans deserve a ruling that recognizes the wrong committed by the Army Corps of Engineers.

There is inherent value in the recognition of a wrong in an official forum such as a court of law. It provides those injured with the dignity of an official acknowledgment of their plight. While a monetary recovery would have rebuilt homes and replaced belongings, the moral recovery that may have resulted from a finding that the Army Corps was liable, would have helped to heal the broken spirit of many New Orleanians. On June 24, 2013, the Supreme Court of the

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ DX-0573 (H.R. Doc. No. 82-245) (1951) at 41.

²⁵² Black's Law Dictionary 236 (4th pocket ed. 2011).

United States officially denied *certiorari* to hear the plaintiff's appeal.²⁵³ Thus, the task of rehabilitating the lost trust of New Orleans in the federal government will now be in the hands of the United States Congress.

²⁵³ Mark Schleifstein, *U.S. Supreme Court Lets Stand Ruling Tossing Hurricane Katrina Judgment Against Army Corps of Engineers*, THE TIMES PICAYUNE, Jun. 24, 2013, available at http://www.nola.com/environment/index.ssf/2013/06/us_supreme_court_lets_stand_ap.html.