

Catholic University Law Review

Volume 37
Issue 1 Fall 1987

Article 10

1987

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Recommended Citation

Michael S. Levine, *United States v. James: Expanding the Scope of Sovereign Immunity for Federal Flood Control Activities*, 37 Cath. U. L. Rev. 219 (1988).

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UNITED STATES v. JAMES: EXPANDING THE SCOPE OF SOVEREIGN IMMUNITY FOR FEDERAL FLOOD CONTROL ACTIVITIES

The doctrine of sovereign immunity, rooted in the feudal theory of kingship, effectively bars suit against the sovereign absent its consent.¹ The early American judiciary accepted sovereign immunity because it feared government would be incapable of performing its duties and functions without the protection immunity offered.² At the same time, it was clear that sovereign immunity was fundamentally at odds with democratic notions of government accountability.³ Congress first acknowledged this tension when it enacted the Tucker Act in 1887.⁴ The Tucker Act waived sovereign immunity for contract and other nontort actions.⁵ Congress further waived sovereign

1. "Based on the medieval notion that the King can do no wrong, sovereign immunity precludes a litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to the suit." *Principe Compania Naviera, S.A. v. Board of Comm'rs*, 333 F. Supp. 353, 355 (E.D. La. 1971); C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 151-52 (1972).

2. *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) (discussing the threat to the public service if the sovereign could be subject to suit); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868) ("but for the protection which [sovereign immunity] affords, the government would be unable to perform the various duties for which it was created"). In other cases, the judiciary contented itself with reliance on hollow justifications for sovereign immunity. See *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) ("It is not necessary that we should enter upon an examination of the reason or expediency of [sovereign immunity] . . . It is enough for us to declare its existence."). Kenneth Culp Davis, a widely recognized authority on sovereign immunity, characterizes the rationale in support of immunity as based upon "historical accident, habit, a natural tendency to favor the familiar, and inertia." K. DAVIS, *ADMINISTRATIVE LAW TEXT* 499 (3d ed. 1972).

3. The lack of sound justification for sovereign immunity in a democratic society has led to severe criticism. "[Immunity] is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of moral responsibility of the State." *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting). "A basic objection to [sovereign immunity], of course, is that the immunity doctrine, when applied, frustrates the performance of one of the most essential government functions, the dispensation of justice according to law . . ." C. JACOBS, *supra* note 1, at 153. For a related discussion supporting government liability, see generally Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 60 (1972).

4. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (1982)).

5. The Tucker Act is the remedy available for contract actions brought against the United States. *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351, 358 (5th Cir.), *cert. denied*, 382 U.S. 829 (1965).

immunity in 1946 when it enacted the Federal Tort Claims Act (FTCA).⁶ The FTCA subjected the United States to liability for the tortious conduct of its employees.⁷

Despite federal legislation to limit sovereign immunity, the United States continues to enjoy immunity against liability for claims relating to flood control activities.⁸ Historically, section 702c of the Flood Control Act of 1928 (the 1928 Act or the Flood Control Act) has barred landowners' claims for property damage against the government.⁹

In *United States v. James*,¹⁰ the United States Supreme Court significantly expanded the traditional scope of section 702c immunity. The *James* Court held that the scope of section 702c immunity covers not only claims of property damage but also claims of personal injury.¹¹

James arose from two similar accidents at federal flood control projects.¹² The discharge of water from each of the flood control projects caused per-

6. 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-2680 (1982). The Federal Tort Claims Act (FTCA) was enacted originally as title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 401-424, 60 Stat. 812, 842-847. The FTCA waives the United States' tort immunity. It states in part that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1982). For a discussion of litigation of tort claims against the government, see generally P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983) and W. WRIGHT, *THE FEDERAL TORT CLAIMS ACT* (1957).

7. 28 U.S.C. § 2674.

8. The Flood Control Act of 1928, 33 U.S.C. § 702c (1982). Paragraph two of this section states that:

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however*, That if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h, 702i, 702j, 702k, 702l, 702m, and 704 of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impractical to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite bank of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

Id. (emphasis in original).

9. See generally *infra* note 11 and accompanying text.

10. 106 S. Ct. 3116 (1986). In *James*, the Supreme Court first construed § 702c.

11. *Id.* at 3123. Prior to *James*, § 702c immunity had never been applied to a personal injury claim. Federal courts have construed § 702c in 23 cases. Of these, 21 were actions brought to recover for property damage. The remaining two were decided on other grounds. See *James v. United States*, 760 F.2d 590, 599 n.16 (5th Cir. 1985) (en banc), *rev'd*, 106 S. Ct. 3116 (1986).

12. 106 S. Ct. at 3118.

sonal injury and death.¹³ Plaintiffs sued the United States under the FTCA.¹⁴ In each case, the trial court found the government negligent in failing to warn of existing dangers.¹⁵ Despite the finding of negligence, the Supreme Court invoked section 702c of the 1928 Act to bar these claims against the government.¹⁶

The United States Court of Appeals for the Fifth Circuit consolidated the two cases on appeal.¹⁷ The Fifth Circuit, constrained by precedent, affirmed the judgments of the lower district courts.¹⁸ In dictum, the court expressed its dissatisfaction with the prior case law construing section 702c, suggesting that the legislative history of the 1928 Act did not justify application of section 702c immunity to personal injury claims.¹⁹

The Fifth Circuit granted a rehearing en banc to define the scope of sovereign immunity under section 702c.²⁰ The en banc court reversed the earlier Fifth Circuit judgment,²¹ rejecting section 702c immunity when the government permits the public to enter a flood control project and negligently "create[s] a danger or . . . fail[s] to warn of a danger."²²

The United States Supreme Court reversed,²³ holding that section 702c immunizes the government from both property damage and personal injury claims.²⁴ The *James* majority relied upon the statutory language²⁵ and legis-

13. The flood control project in Arkansas promoted recreational activities such as fishing, swimming, boating, and waterskiing. *Id.* Four people were waterskiing without any warning of flood control activity. *Id.* The strong currents created by the discharge of water pulled the water-skiers into the reservoir's tainter gates. *Id.* One person drowned and two were injured. *Id.*

On the Louisiana flood control project, two people fishing in a boat were unaware of ongoing flood control activities. *Id.* at 3119. Water discharge caused the boat to become lodged in the tainter gates. *Id.* One of the two boaters "was thrown into the approach basin and drowned while being pulled through a 220-foot-long barrel." *Id.*

14. 28 U.S.C. §§ 1346(b)-2671 (1982).

15. *James*, 106 S. Ct. at 3118-20.

16. *Id.*

17. *James v. United States*, 740 F.2d 365 (5th Cir. 1984) (en banc), *rev'd on rehearing en banc*, 760 F.2d 590 (5th Cir. 1985), *rev'd*, 106 S. Ct. 3116 (1986).

18. *Id.* at 373.

19. *Id.* at 370. Following an extensive analysis of legislative history, the court encouraged respondents to petition for a rehearing en banc. *Id.* at 374.

20. *James v. United States*, 760 F.2d 590 (5th Cir. 1985) (en banc) *rev'd*, 106 S. Ct. 3116 (1986).

21. *Id.* at 604. The en banc court of appeals believed that Congress was concerned with shifting the costs of flood damage to property rather than shielding the government employees' negligent acts. *Id.* at 599.

22. *Id.* at 603.

23. *United States v. James*, 106 S. Ct. 3116 (1986).

24. *Id.* at 3123.

25. *Id.* at 3121.

lative history²⁶ of section 702c to support its application of immunity to personal injury claims.

The dissent in *James* argued that Congress, consistent with the FTCA, did not intend the government to evade personal injury claims under section 702c.²⁷ To justify its conclusion that the section applies only in property damage cases, the dissent focused on the latent ambiguity in section 702c's language.²⁸

This Note will review the decline of sovereign immunity in the United States under the Tucker Act and the FTCA. It will then examine and explore the legislative history of section 702c of the Flood Control Act of 1928. Next, the Note will examine the scope of section 702c immunity as the federal court system defined it prior to *James*. The Note will then analyze the Supreme Court's decision in *James* to extend section 702c immunity to personal injury actions. The analysis will focus on the majority's adherence to the "plain meaning" doctrine and its failure to interpret accurately the legislative intent behind section 702c. This Note will conclude by discussing the ramifications of *James* and potential models of reform for section 702c immunity.

I. GOVERNMENT LIABILITY CLASHES WITH SECTION 702C IMMUNITY

A. *Origins of Government Liability*

The doctrine of sovereign immunity is rooted in the feudal theory of kingship.²⁹ Its purpose is to bar an individual from bringing suit against the sovereign, absent its consent.³⁰ Ratification of the eleventh amendment to the Constitution firmly established sovereign immunity in the United States.³¹ The eleventh amendment provided immunity to both federal and state governments.³²

Congressional support for the doctrine of sovereign immunity waned in the late 1800's and early 1900's. As the activities of the federal government

26. *Id.* at 3125.

27. *Id.* at 3126 (Stevens, J., dissenting). Justice Stevens filed the dissenting opinion, in which Justices Marshall and O'Connor joined. *Id.* at 3125 (Stevens, J., dissenting).

28. *Id.* at 3126 (Stevens, J., dissenting).

29. *See supra* note 1. For a discussion tracing the historical origins of sovereign immunity, see C. JACOBS, *supra* note 1, at 151-52.

30. *Feres v. United States*, 340 U.S. 135, 139 (1950); C. JACOBS, *supra* note 1, at 151-52.

31. U.S. CONST. amend. XI. Prior to the passage of the eleventh amendment, the Supreme Court expressed negative sentiments concerning sovereign immunity. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456 (1793) (rejecting sovereign immunity defense as unjust and unfair). Following the amendment's passage, the Supreme Court expressed support for sovereign immunity. *See Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

32. *Hans*, 134 U.S. at 11.

expanded, so did the number of remediless wrongs.³³ Significant public outcry called for governmental accountability.³⁴ In addition, Congress needed to limit the growing number of private relief bills it faced.³⁵ As a result, legislative remedies were created to mitigate the consequences of sovereign immunity.

In 1887, Congress passed the Tucker Act,³⁶ permitting individuals to bring suit against the federal government for private actions arising out of contract and other nontort actions.³⁷ This legislative waiver of sovereign immunity prevented the government from "taking" private land for public use without paying compensation.³⁸ Under the Tucker Act, a private landowner would be entitled to compensation where the "taking" was so significant that it amounted to an implied contract to pay for the land.³⁹ The

33. W. WRIGHT, *supra* note 6, at 2; *see also* 2 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* § 52 (1986).

34. Public policy considerations that persuaded Congress to enact the FTCA included:

- (1) a desire on the part of the federal government in the interests of justice and fair play to permit a private litigant to satisfy his legal claims for injury or damage suffered at the hands of a United States employee acting in the scope of his employment;
- (2) the need of the Congress to be relieved of the burden imposed by multitudinous bills for private relief arising from tort claims against government employees;
- (3) the advantage of an impartial judicial forum for both the complainant and the government in which to discover the facts in the same manner as private lawsuits;
- (4) a desire of Congress to expedite the payment of just claims.

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *SOVEREIGN IMMUNITY: THE TORT LIABILITY OF GOVERNMENT AND ITS OFFICIALS* 43 (1979); *see also supra* notes 1-3. For a discussion concerning the decline of support for sovereign immunity in the federal courts, *see generally* *United States v. Muniz*, 374 U.S. 150 (1963) and *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 201-05 (1970) (statement of Kenneth Culp Davis, Professor of Law, The University of Chicago).

35. 1 L. JAYSON, *supra* note 33, § 65.01. Prior to enactment of the FTCA, the burden of private relief bills was heavy on Congress. "Congress has so much business of a public character that it is impossible it should give much attention to mere private claims, and their accumulation is now so great that many claimants must despair of ever being able to obtain a hearing." W. WRIGHT, *supra* note 6, at 4. For a related discussion highlighting congressional disdain for the heavy burden of private relief bills, *see* H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2 (1945).

36. Ch. 359, 24 Stat. 505 (codified as amended at 28 U.S.C. § 1491 (1982)). For an historical analysis of "takings" under the Tucker Act, *see generally* R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

37. *See* 28 U.S.C. § 1491; *see also* *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351, 358 (5th Cir.), *cert. denied*, 382 U.S. 829 (1965).

38. The Supreme Court has determined that if an action rises to the level of a "taking" the federal government is required to provide compensation. *Bedford v. United States*, 192 U.S. 217, 224 (1904).

39. *United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 335 (1920). An important distinction exists between a "taking," entitling a party to compensation and consequential damages, and partial injury to property, not entitling a party to compensation. *United States v. Lynah*, 188 U.S. 445, 472 (1903).

landowner had the burden of proving that the "taking" substantially deprived him of the use of his property.⁴⁰ This was a difficult burden to establish because the federal courts narrowly distinguished contract law and tort law to limit government liability.⁴¹ Under the Tucker Act, a landowner who suffered property damage because of government action could not recover compensation based on tort theory. The Tucker Act provided compensation only where a contractual obligation could be established.⁴² Nevertheless, the Tucker Act represented one of the first significant legislative responses to the tension created by the existence of governmental immunity in a democratic society.⁴³

In 1946, Congress expanded the liability of the federal government by enacting the Federal Tort Claims Act.⁴⁴ The FTCA's primary purpose was to create a legislative remedy for the torts of federal government employees.⁴⁵ Prompted by compelling public policy considerations of justice⁴⁶ and private relief bills,⁴⁷ Congress enacted the FTCA to act as a broad waiver of sovereign immunity.⁴⁸ The FTCA went so far as to expressly repeal certain immunity statutes.⁴⁹ Under the FTCA, the federal government is subject to liability as if it were a private individual in similar circumstances.⁵⁰

40. In order to constitute a "taking" that entitles a party to compensation, the value of the property must be substantially destroyed. *Lynah*, 188 U.S. at 470. Under the Act, only flooding that causes a permanent deprivation of land value requires compensation. *Id.* at 472.

41. *Bedford*, 192 U.S. at 224 ("A distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision"). The courts could limit the federal government's liability for compensation by narrowly construing the term "taking." See Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 29-32 (1924).

42. See *supra* note 39 and accompanying text. See generally Borchard, *The Federal Tort Claims Bill*, 23 AM. J. INT'L LAW 610 (1929) (emphasizing the need for Congress to provide a federal remedy for government caused torts); McGuire, *Tort Claims Against The United States*, 19 GEO. L.J. 133 (1931) (emphasizing the need for a comprehensive federal tort claims bill).

43. See *supra* notes 1-3 and accompanying text.

44. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 401-424, 60 Stat. 812, 842-47 (codified as amended at 28 U.S.C. §§ 1291, 1346, 1402, 2401-2402, 2411-2412, 2671-2680 (1982)); see also *supra* note 6 and accompanying text.

45. 28 U.S.C. § 2674; see also *supra* note 6 and accompanying text.

46. See *supra* note 34 and accompanying text.

47. See *supra* note 35 and accompanying text.

48. *Spelar v. United States*, 171 F.2d 208, 209 (2d Cir. 1948), *rev'd*, 338 U.S. 217 (1949).

49. Pub. L. No. 79-601, §§ 401-24, 60 Stat. 812, 842, 846-47 (codified as amended at 28 U.S.C. § 2680 (1982)).

50. See 28 U.S.C. § 2674. The FTCA is not, however, an absolute waiver of sovereign immunity. See 28 U.S.C. § 2680 for enumerated exceptions to the FTCA. In addition, plaintiffs who have a remedy under the FTCA are precluded from presenting Congress with private relief bills. 2 U.S.C. § 190(g) (1982). Prior to filing a claim under the FTCA, plaintiffs are required to file for an administrative determination of their claims by the appropriate federal agency. 28 U.S.C. § 2401(b). For a related discussion on the adjudication of tort claims in the

The federal judiciary has adopted a liberal interpretation of the FTCA⁵¹ to effectuate the public policy considerations supporting government liability.⁵² The government has been held liable under the FTCA for major activities and functions. For example, in *Dye v. United States*,⁵³ a case involving facts strikingly similar to those in *James*,⁵⁴ the United States Court of Appeals for the Sixth Circuit held the federal government liable under the FTCA for its negligent failure to warn boaters of a federal navigation project's dangers.⁵⁵ In *Eastern Airlines, Inc. v. Union Trust Co.*,⁵⁶ the United States Court of Appeals for the District of Columbia held the federal government liable under the FTCA for negligence in air traffic control activities.⁵⁷ Similarly, in *Rayonier, Inc. v. United States*,⁵⁸ the Supreme Court held the federal government liable under the FTCA for negligence in forest firefighting activities.⁵⁹ These are just a few examples⁶⁰ of the courts' willingness to subject the federal government to liability under the FTCA for high risk

federal agencies see generally Bermann, *Federal Tort Claims Act At The Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. 509 (1985).

51. *Spelar*, 171 F.2d at 209.

52. The Supreme Court has acknowledged that significant policy considerations justify government liability. *Feres v. United States*, 340 U.S. 135, 139-40 (1950); see also *supra* notes 34-35 and accompanying text.

53. 210 F.2d 123 (6th Cir. 1954).

54. See *supra* note 13 and accompanying text. In *Dye*, two persons drowned when the dam wickets on a federal navigation project opened, causing them to be swept over the dam. 210 F.2d at 124-26.

55. 210 F.2d at 128.

56. 221 F.2d 62 (D.C. Cir.), *rev'd*, 350 U.S. 907 (1955).

57. *Id.* at 74.

58. 352 U.S. 315 (1957).

59. *Id.* at 319-21.

60. The federal government has been subjected to liability under the FTCA for a broad range of high risk activities. See, e.g., *Bulloch v. United States*, 133 F. Supp. 885, 893 (D. Utah 1955) (federal government liable under the FTCA for negligently conducting nuclear weapons testing), *rev'd*, 721 F.2d 713 (10th Cir. 1983), *aff'd on rehearing en banc*, 763 F.2d 1115 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 862 (1986); see also *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (federal government liable under the FTCA for the negligent operation of lighthouse facilities); *Butler v. United States*, 726 F.2d 1057, 1064 (5th Cir. 1984) (federal government liable under the FTCA for its failure to provide adequate warnings to the public of the dangers caused in the repairs made to seawall); *Seaboard Coast Line R.R. v. United States*, 473 F.2d 714, 716 (5th Cir. 1973) (federal government liable under the FTCA for negligent design of a drainage ditch built in connection with an aircraft facility); *Pigott v. United States*, 451 F.2d 574, 575 (5th Cir. 1971) (federal government liable for its negligence arising out of NASA rocket launchings); *Price v. United States*, 530 F. Supp. 1010, 1017 (S.D. Miss. 1981) (federal government liable under the FTCA for its negligent failure to insure public safety at a recreational beach), *modified sub nom. Butler v. United States*, 726 F.2d 1057 (5th Cir. 1984). For a detailed analysis of the interplay between the FTCA and government liability in the context of federal recreational parks, see generally Note, *Protecting Visitors to National Recreation Areas Under the Federal Tort Claims Act*, 84 COLUM. L. REV. 1792 (1984).

activities.⁶¹ Despite the liberal interpretation given to the FTCA by the judiciary, the federal government continues to enjoy immunity from liability for its negligence related to flood control activity.⁶²

B. Legislative History and Purpose of the Flood Control Act of 1928

Congress enacted the Flood Control Act of 1928 in response to the growing need for adequate flood protection that existed in the early 1900's.⁶³ Section 702c of the 1928 Act, which provides sovereign immunity for flood damage,⁶⁴ emerged from extensive debate concerning the enormous proposed cost of the Flood Control Act.⁶⁵ Paragraph two of section 702c consists of an immunity provision and an attached proviso.⁶⁶ The provision states that the United States is not liable for any damage caused by "floods" or "flood waters."⁶⁷ The attached proviso states that where it is impractical

61. *Spelar v. United States*, 171 F.2d 208, 209 (2d Cir. 1948), *rev'd*, 338 U.S. 217 (1949). In *Spelar*, the court commented:

When after many years of discussion and debate Congress has at length established a general policy of governmental generosity towards tort claimants, it would seem that that policy should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself.

Id.

62. *See* *United States v. James*, 106 S. Ct. 3116 (1986); *see also* The Flood Control Act of 1928, 33 U.S.C. § 702c (1982); *supra* note 11 and accompanying text.

63. S. REP. NO. 619, 70th Cong., 1st Sess. 9 (1928). This report outlines in great detail the economic history of the Mississippi River Valley.

The Mississippi River has been one of America's greatest natural resources. *Id.* The river and adjoining valley region provide rich farmland, drainage, navigation, water supply, and power. *Id.* at 21. The river directly provides these benefits to over 40% of the nation. *Id.*

In the past, the river valley has been vulnerable to destructive flooding. *Id.* at 22. This flooding posed a constant threat to the benefits derived from the river. As the population and economy of the region grew, so did the need for adequate flood protection. *United States v. Sponenbarger*, 308 U.S. 256, 261 (1939). Attempts by Congress in the early 1900's to provide this protection were insufficient. *Id.* The devastating flood of 1927 compelled Congress to reaffirm the nation's dedication to providing the region with effective flood protection. The congressional debates on the Flood Control Act of 1928 often reflected a humanitarian desire and concern for effective flood control. For example,

those of you who just a year ago witnessed the mad rush of the mighty Father of Waters, sweeping like a destroying angel over hundreds of proud cities . . . and millions of acres of fertile fields, or who later visited the stricken area to view the scenes of the greatest peace-time disaster this country has ever experienced, know . . . the horror and agony left in the wake of the 1927 flood.

69 CONG. REC. 6706 (1928) (statement of Rep. Gregory).

64. *See* 33 U.S.C. § 702c.

65. Early estimates of the cost of the project were 325 million dollars. H.R. REP. NO. 1100, 70th Cong., 1st Sess. 13 (1928). This cost is almost four times greater than the cost of the Panama Canal. 69 CONG. REC. 6640 (1928) (statement of Rep. Snell).

66. 33 U.S.C. § 702c.

67. *Id.*

to build flood control structures, the federal government will assume the obligation to acquire such lands.⁶⁸ The congressional record on the immunity provision is not expansive and does little to lay a foundation for an adequate analysis of *James*. Rather, examination of section 702c as a whole provides an understanding of the purpose of the immunity provision.

In conjunction, the immunity provision and the proviso of section 702c reflect legislative concern for allocating the costs of flood control between federal, state, and local governments.⁶⁹ Congress sought to place a limit on the expenditures of the federal government.⁷⁰ Despite the immunity provision, the proviso specifies those expenditures for which Congress intended the federal government to be liable. The expenditures include construction costs,⁷¹ rights of way over land,⁷² and takings of land that are constitutionally required to be compensated.⁷³ Apart from these expenditures, the immunity provision shields the federal government from liability for damage caused by flood control activities.⁷⁴ Records of congressional debates reveal that when Congress spoke of damage in this context, it referred to harm caused to land that was not expressly excepted by the 1928 Act.⁷⁵ Congress inserted the sentence disclaiming liability for any damage to provide assurance that the federal government would not be liable for damage to land caused by such forces.⁷⁶

68. *Id.*

69. *James v. United States*, 760 F.2d 590, 599 (5th Cir. 1985) (en banc), *rev'd*, 106 S. Ct. 3116 (1986). Congress debated whether the legislation should require local contribution to the project. See 69 CONG. REC. 7105 (1928) (statement of Rep. Tilson). Congress understood that potential liability would attach to the entity funding the project. Congress wanted to provide funding for the project's construction without consenting to additional government liability. "If we go down there and furnish protection to these people—and I assume it is a national responsibility—I do not want to have anything left out of the bill that would protect us now and for all time to come." *Id.* at 6641 (statement of Rep. Snell).

70. See *supra* note 69.

71. H.R. REP. NO. 1100, *supra* note 65, at 3, 12.

72. *Id.*

73. The "taking" issue raised concern in Congress. Congress agreed that where the federal government used or damaged land so as to constitute a constitutional "taking," the federal government would be obligated to pay compensation. 69 CONG. REC. 7023 (1928) (statement of Rep. Cox). Congress then went on to debate whether it had to wait until land is "taken" or pay up front for potential "takings." *Id.* at 7105-06. For a discussion on the "takings" issue, see *supra* notes 36-42 and accompanying text.

74. See 33 U.S.C. § 702c.

75. The meaning of "damage" as used in the immunity provision can be discerned by examining a proposed amendment which adopted the same immunity provision. 69 CONG. REC. 7028 (1928). Although the amendment was eventually rejected, debate on it defined what Congress meant by "damage." See *id.* at 7022-28. The debate identifies the damage spoken of as injury to land. *Id.*

76. See *id.* at 7026-28.

In light of the legislative discussions and debates, it appears that Congress intended the immunity clause and the proviso for acquiring lands to be read together.⁷⁷ Within the same discussion of section 702c, the proviso was proposed as an amendment to the immunity provision, which was itself an amendment.⁷⁸ Congress considered the two together before they were jointly passed as part of the 1928 Act, and members of Congress acknowledged the close relationship between the two.⁷⁹

The FTCA did not exist when the Flood Control Act was drafted in 1928.⁸⁰ Therefore, the federal government, shielded by sovereign immunity, did not have to concern itself with potential tort liability. Congress was aware that inserting the immunity clause was unnecessary, but nevertheless wise.⁸¹ Congress relied on the immunity provision to indicate that the federal government was not to pay those property damage costs not rising to the level of a constitutional “taking.”⁸²

77. *Id.* at 7022. The sponsor of the proviso amendment, Representative Garrett, expressly emphasized that the proviso was to be considered in conjunction with the immunity provision. *Id.*

78. *Id.* This is the first time that the immunity provision appears in the records concerning the Act. The immunity provision was an amendment proposed by Representative Reid. *Id.* The proviso was proposed as an amendment to Representative Garrett’s immunity provision. *Id.*

79. *Id.*

80. The FTCA was enacted by Congress as title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 401-424, 60 Stat. 812, 842-47 (codified as amended at 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-2680).

81. Referring to the immunity provision, Representative Spearing commented that “[w]hile it is wise to insert that provision in the bill, it is not necessary, because the Supreme Court of the United States has decided . . . that the Government is not liable for any of these damages.” 69 CONG. REC. 7028 (1928) (statement of Rep. Spearing).

The “damages” referred to by Representative Spearing were those “damages” to land that did not rise to the level of a constitutional “taking” under the fifth amendment. See *supra* notes 38 and 40 for a discussion explaining what constitutes a “taking” requiring compensation. As far as Congress was concerned, aside from construction costs and rights of way over land, the federal government would not be liable for property damage unless the project perpetually flooded the land. 69 CONG. REC. 7106 (1928) (statement of Rep. Cox).

82. Towards the closing of debate on the proposal to adopt § 702c as an amendment to the Flood Control Act, Representative Cox commented:

Now, here is the meaning of this amendment: The Government may come in and turn all of these waters into these flood ways, which will result in damage to the owner of the property, and yet because the lands are not perpetually flooded and therefore their value not totally destroyed, there is no taking on the part of the Government within the meaning of the fifth amendment.

69 CONG. REC. 7106 (1928) (statement of Rep. Cox). At the time Congress was drafting the Flood Control Act, it was aware that a significant amount of property damage would result from both the construction of the projects and from the sheer mechanics of using land for flood plains. However, members of Congress emphasized that the federal government could not be held liable for damages that were intermittent rather than permanent. *Id.* Evidently, § 702c was adopted to provide assurance to skeptical members of Congress, as well as to the constitu-

Overall, section 702c's legislative history marks a willingness and desire on the part of Congress to create a federal flood protection plan.⁸³ The enormous cost of the plan led to congressional attempts to insure that the federal government would not be liable for all damages to land that might result.⁸⁴ There is nothing in the legislative history to suggest that Congress intended, or even considered, personal injuries to be included in the scope of section 702c immunity.⁸⁵

C. Interpretation of Section 702c by the Federal Judiciary

1. "Broad-based" Immunity in the Federal Courts

Prior to the Supreme Court's decision in *James*, the federal courts had generally interpreted section 702c as providing the United States with "broad-based" immunity.⁸⁶ In other words, the courts construed section 702c to provide absolute immunity against liability for property damage from flood waters.⁸⁷ Notably, before *James*, the federal judiciary had never

ency, that the federal government would not be plagued with massive property damage liability. For an examination of the prevailing case law at that time construing the "taking" issue, see *supra* notes 38-41 and accompanying text.

83. See *supra* note 63 and accompanying text.

84. The congressional record on the 1928 Act is silent on the personal injury liability issue. When liability is discussed, it is always done so in the context of damage to land. See, e.g., 69 CONG. REC. 8188 (1928) (discussion of the extent of the federal government liability for flowage rights); *id.* at 7024 (discussion of property damage caused by the construction of spillways); *id.* at 7023 (discussion of property damage rising to the level of a constitutional taking); *id.* at 6999 (discussion of property damage caused by flood ways); *id.* at 6712 (discussion of whether the government should permit certain indirect property damage claims); *id.* at 5485 (discussion of how to fairly provide flowage rights and rights of way).

85. See *supra* note 84.

86. *National Mfg. Co. v. United States*, 210 F.2d 263, 270 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954).

87. *Id.* The court believed that Congress intended, as a matter of economic policy, that the federal government should not be liable for damage to land. *Id.* The court's legislative analysis concluded that federal contribution to flood control was conditioned upon nonliability for flood damages. *Id.* at 271. In addition, the *National Manufacturing* decision held that § 702c was carried forth by subsequent flood control acts so that it had nationwide application. *Id.* Finally, the *National Manufacturing* court determined that the FTCA's enactment did not repeal § 702c immunity. *Id.* at 274.

The *National Manufacturing* court heralded § 702c as part of Congress' fundamental policy of providing flood control. *Id.* at 270.

[W]hen Congress entered upon flood control on the great scale contemplated by the [Flood Control Act] it safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language. The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them.

Id.

construed section 702c in a personal injury context.⁸⁸ Application of section 702c to actions brought to recover damage for personal injuries or death had never been contemplated. In addition, most courts interpreted section 702c based solely on the immunity provision without regard to the attached proviso.⁸⁹

In *National Manufacturing Co. v. United States*,⁹⁰ the United States Court of Appeals for the Eighth Circuit held that section 702c provides “broad-based” immunity.⁹¹ This landmark case construed section 702c as providing the federal government with absolute protection against liability for property damage caused by flooding.⁹² Although some of the later decisions accepted, and in part expanded, the idea of “broad-based” immunity,⁹³ they never construed this immunity broadly enough to include personal injuries.⁹⁴ Case law adopting the approach set forth in *National Manufacturing* does not help in determining whether section 702c immunity shields the government from liability for personal injury actions arising from flood control activities.

2. *The Narrowing of National Manufacturing*

The concept of “broad-based” immunity⁹⁵ has only been followed by the

88. See *United States v. James*, 106 S. Ct. 3116 (1986); see also *supra* note 11 and accompanying text.

89. *James v. United States*, 760 F.2d 590, 600 n.17 (5th Cir. 1985) (en banc), *rev'd*, 106 S. Ct. 3116 (1986).

90. 210 F.2d at 263. In *National Manufacturing*, plaintiffs' property was damaged when he relied on negligent government weather forecasting. *Id.* at 267.

91. *Id.* at 270.

92. *Id.*

93. Several decisions have been rendered that effectively maintain or expand the “broad-based” immunity doctrine of *National Manufacturing*. See *Aetna Ins. Co. v. United States*, 628 F.2d 1201, 1204 (9th Cir. 1980) (drawing distinctions between man-made flooding and natural flooding in order to impose liability would frustrate the government pursuit of flood control), *cert. denied*, 450 U.S. 1025 (1981); *Burlison v. United States*, 627 F.2d 119, 121 (8th Cir. 1980) (section 702c immunity applies even where sole cause of damage is government negligence), *cert. denied*, 450 U.S. 1030 (1981); *Taylor v. United States*, 590 F.2d 263, 267 (8th Cir. 1979) (for the purposes of § 702c immunity, no distinction should be recognized between “backwater” and “floodwater”); *Florida E. Coast Ry. v. United States*, 519 F.2d 1184, 1192 (5th Cir. 1975) (no distinction should be recognized between “washouts” and “floodwater”); *Morici Corp. v. United States*, 491 F. Supp. 466, 481 (E.D. Cal. 1980) (no distinction should be recognized between “seepage” and “floodwater”), *aff'd*, 681 F.2d 645 (1982); *Sanborn v. United States*, 453 F. Supp. 651, 659 (E.D. Cal. 1977) (where a federal facility serves purposes other than flood control, such as water storage or recreation, § 702c immunity applies if the action causing damage was in furtherance of any of the functions).

94. See *United States v. James*, 106 S. Ct. 3116 (1986).

95. See *supra* notes 86-90 and accompanying text.

Second, Eighth, and Tenth Circuits.⁹⁶ Although the remaining circuits have not construed section 702c in a personal injury context, they have adopted a more limiting interpretation of the section.

The Ninth Circuit created a major limitation on section 702c immunity in *Peterson v. United States*.⁹⁷ In *Peterson*, plaintiffs' property was damaged when government agents dynamited an ice jam, causing flooding.⁹⁸ The actions by the government did not relate to any flood control activities.⁹⁹ Although flood waters caused the accident,¹⁰⁰ the court refused to apply section 702c immunity.¹⁰¹ Unlike the Eighth Circuit in *National Manufacturing*, the *Peterson* court did not view section 702c as providing the federal government absolute immunity against liability for property damage caused by flooding unrelated to flood control project activities.¹⁰² The court maintained that the legislature intended immunity to be limited to the goal sought to be achieved; namely flood control.¹⁰³ The *Peterson* decision refused to apply section 702c immunity where the government-caused flooding was unrelated to flood control.¹⁰⁴

The United States Court of Appeals for the Sixth Circuit recognized another limitation to section 702c immunity in *Lenoir v. Porters Creek Watershed District*.¹⁰⁵ In *Lenoir*, the court held that section 702c immunity would not apply where the sole cause of the injury was government negligence.¹⁰⁶ The *Lenoir* court avoided an overly broad interpretation of section 702c. It reasoned that the purpose sought to be achieved by section 702c could be satisfied if limited to instances where climatic conditions, in whole or in part, caused flooding.¹⁰⁷ It found, however, no basis to shield the United States from liability where government negligence caused the injury.¹⁰⁸

The two limitations on section 702c immunity established in *Peterson* and *Lenoir* reflect a judicial awareness of the tension between governmental im-

96. *James v. United States*, 760 F.2d 590, 601 nn.19-20 (5th Cir. 1985) (en bac), *rev'd*, 106 S. Ct. 3116 (1986).

97. 367 F.2d 271 (9th Cir. 1966).

98. *Id.* at 273.

99. *Id.* at 275.

100. *Id.* at 272. The blasting of the ice jam resulted in an unnatural accumulation of water, which rushed downriver, and damaged plaintiffs' vessels. *Id.* at 273.

101. *Id.* at 276.

102. *Id.* at 275.

103. *Id.* at 275-76.

104. *Id.* at 275.

105. 586 F.2d 1081 (6th Cir. 1978).

106. *Id.* at 1086.

107. *Id.*; see also *Stover v. United States*, 204 F. Supp. 477, 484 (N.D. Cal. 1962), *aff'd*, 332 F.2d 204 (9th Cir.), *cert. denied*, 379 U.S. 922 (1964); *Guy F. Atkinson Co. v. Merritt Chapman, & Scott Corp.*, 126 F. Supp. 406, 408-09 (N.D. Cal. 1954).

108. *Lenoir*, 586 F.2d at 1086.

munity and governmental accountability.¹⁰⁹ It is apparent that the circuits do not agree as to whether section 702c provides the federal government absolute immunity from liability for property damage caused by flood control activities. These cases are noteworthy because they limit what would otherwise be an absolute protection against governmental liability. However, they do not dispose of the issue of whether section 702c applies to actions brought to recover for personal injuries. Instead, in order to determine whether section 702c immunity applies to personal injury claims, it is necessary to return to the source of the immunity provision and its legislative history.

3. *The Fifth Circuit Reexamines James*

The applicability of section 702c immunity to actions brought against the government to recover for personal injuries was considered for the first time in *James v. United States*.¹¹⁰ In *James*, two recreational users of federal flood control projects were injured and one drowned during the operation of the projects as flood control facilities.¹¹¹ Despite the fact that the federal government failed to provide adequate warnings to the public,¹¹² the Fifth Circuit barred the claim based on section 702c.¹¹³

On rehearing en banc, the Fifth Circuit reversed.¹¹⁴ No authority on point existed in prior case law. Even those cases recognizing limitations on the scope of section 702c immunity did not contemplate the applicability of the section to actions arising from personal injuries caused by flood control activities.¹¹⁵ Following an extensive analysis of section 702c's legislative history and an examination of existing case law, the court decided that the provision's immunity did not attach to "the fault of government employees who fail to warn the public of the existence of hazards to the accepted use of governmentally impounded water."¹¹⁶

The en banc court began its analysis with an examination of the statutory language.¹¹⁷ It analyzed and evaluated several latent ambiguities arising

109. See *supra* note 3 and accompanying text.

110. *James v. United States*, 740 F.2d 365 (5th Cir. 1984), *rev'd on rehearing en banc*, 760 F.2d 590 (5th Cir. 1985), *rev'd*, 106 S. Ct. 3116 (1986).

111. *Id.* at 367; see also *supra* note 13 and accompanying text.

112. See *supra* note 13 and accompanying text.

113. *James*, 740 F.2d at 373.

114. *James v. United States*, 760 F.2d 590, 604 (5th Cir. 1985) (en banc), *rev'g* 740 F.2d 365 (5th Cir. 1984), *rev'd*, 106 S. Ct. 3116 (1986).

115. See *supra* notes 97-108 and accompanying text.

116. *James*, 760 F.2d at 603. The en banc court did not preclude § 702c immunity for all personal injury claims, only those covered by their interpretation. *Id.*

117. *Id.* at 593.

from section 702c's language.¹¹⁸ These ambiguities involved the precise meaning of the terms "floodwaters," "damage," and "place."¹¹⁹ The court, taking into account the legislative discussions, construed section 702c's language as immunizing the United States against property damage claims from the inundation of water which a flood control project could not contain.¹²⁰ The court concluded that the only reasonable expansion of the section would be to follow the statutory language without regard to congressional intent.¹²¹ The court determined that a strict interpretation of the letter of the statute would result in the construction of a broader immunity provision than Congress ever intended.¹²²

An additional ambiguity recognized by the en banc court was whether immunity should apply when the water at a flood control project merely furnishes a condition incidental to the government fault that is unrelated to flood control.¹²³ For example, under section 702c, the federal government would apparently be immune from a federal air traffic controller's negligence that resulted in a plane crashing into a flood control project.¹²⁴ The court

118. *Id.* at 593-94. The en banc court believed that the latent ambiguities they saw undermined the plain meaning of the statute by subjecting it to the possibility of overbroad construction. *Id.* at 595.

119. *Id.* at 594. The en banc court was not certain whether "floodwaters" meant waters out of control or water at a flood control facility. *Id.* at 594 n.6. Similarly, "damage" could have referred to land, person, or both. *Id.* at 594 n.7. Finally, the court found that the use of the word "place" was unclear. *Id.* at 594 n.8. Damage could modify "floods" or "place." Congress may have intended to provide immunity where floods damaged a "place." *Id.*

120. *Id.* at 595. The en banc court was concerned that the true intent of § 702c has not been followed because interpretations had been too literal. *Id.* at 595 nn.9-10.

121. *Id.* at 595. In other words, § 702c provides "broad-based" immunity only when read literally without regard to congressional intent. The court recognized the congressional intent as protecting the United States from liability for certain land damages. *Id.* A literal reading of § 702c can lead to absurd results. For example, if a park ranger negligently causes a stream to flood a campground and kill people, § 702c immunity could apply. *Id.* at 595. Or, suppose a government agent on a flood control project runs his boat over a swimmer while replacing warning buoys, § 702c could apply. *James v. United States*, 740 F.2d 365, 370 (5th Cir. 1984), *rev'd on rehearing en banc*, 760 F.2d 590 (5th Cir. 1985), *rev'd*, 106 S. Ct. 3116 (1986). Moreover, if the same government agent drives a jeep over a fisherman on the shore of the flood control project, immunity may not apply. *Id.* The en banc court was motivated by such possibilities. *James*, 760 F.2d at 595.

It would be unreasonable to believe that Congress would intentionally create a statute subject to such ambiguous applications. In the past, the Supreme Court has acknowledged that it is among its responsibilities "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purpose that Congress manifested." *Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957)).

122. *James*, 760 F.2d at 595.

123. *Id.* at 596.

124. *Id.* In this example, the flood water actually causing the damage to the plane was merely incidental to government negligence unrelated to flood control. *Id.* A strict interpreta-

closely examined the section's legislative history to determine Congress' precise objective.¹²⁵

The en banc court believed that the immunity clause settled the debate as to who should bear the costs of property damage caused by flooding.¹²⁶ The immunity clause, adopted just prior to passage of the Flood Control Act, disclaimed liability for property damage because of the tremendous construction costs the federal government had to pay.¹²⁷ Moreover, the court interpreted the immunity clause as repudiating the provision it superseded.¹²⁸ The earlier provision would have significantly increased federal liability for property damage.¹²⁹ When Congress adopted the immunity provision, it shifted those costs associated with property damage to private individuals.¹³⁰ The court was satisfied that any latent ambiguities present in section 702c could be resolved through reference to the purpose and intent behind the statute.

Finally, the en banc court examined the existing case law dealing with section 702c. It criticized the case law for interpreting the immunity provision without reference to the attached proviso.¹³¹ The court recognized that prior case law rendered "broad-based" interpretations because it independently construed the immunity provision from the attached proviso.¹³² Absent the attached proviso, the immunity provision appeared to broadly disclaim all possible liability.¹³³ The court disagreed with holdings support-

tion of § 702c would hold the government immune from liability for its negligence because the damage was caused by flood waters. See 33 U.S.C. § 702c.

125. *James*, 760 F.2d at 596.

126. *Id.* at 597.

127. *Id.* at 598; see also 33 U.S.C. § 702c.

128. *James*, 760 F.2d at 598.

129. *Id.* The repudiated provision was criticized by members of Congress as unnecessarily providing extraconstitutional compensation for the railroads of the Mississippi Valley region. 69 CONG. REC. 6712 (1928). "The purpose of that section is to give the railroads in the Mississippi Valley an unfair and unjust advantage. If left in the bill it will make the railroads a present of many millions of dollars over and above just compensation." *Id.* (statement of Rep. Kopp). It was recognized that the language of the repudiated provision "include[d] remote and indirect damages . . ." and thus "would lay down a broader rule of damages than the courts have heretofore fixed." *Id.* (statement of Rep. Kopp). Clearly, Congress sought to limit the liability of the federal government to those situations where a "taking" was effected.

130. *James*, 760 F.2d at 599. The en banc court believed that "Congress shifted most of the risks and costs connected with flooding onto local entities and private owners, or both. It seems doubtful that Congress intended to shield the negligent or wrongful acts of government employees—either in the construction or in the continued operation of the Mississippi plan." *Id.*

131. *Id.* at 600 n.17.

132. *Id.* at 600.

133. See 33 U.S.C. § 702c.

ing such a "broad-based" interpretation of section 702c.¹³⁴ Based upon its legislative analysis, the court held that Congress did not intend section 702c to provide the government with absolute immunity from personal injury claims.¹³⁵

The court went on to analyze the case law that had introduced limited section 702c immunity.¹³⁶ The court realized that these limitations did not define sufficiently the precise scope of the section. The court further limited the scope of the immunity provision by denying application of section 702c immunity to situations where the government permits recreational use of a flood control project.¹³⁷ The *James* court held that the government is immune from government agents' actions that are related to flood control,¹³⁸ but when recreational users are involved, the negligent failure to warn recreational users of such danger on the flood control project should subject the government to liability.¹³⁹ In other words, section 702c does not create governmental immunity from damage claims if the public is permitted on the flood control project and is not adequately warned of danger.¹⁴⁰ This interpretation comes closest to resolving the tension between governmental immunity and governmental accountability.¹⁴¹

II. *UNITED STATES V. JAMES*: REVIVING GOVERNMENTAL IMMUNITY FOR FLOOD CONTROL ACTIVITY

A. *Reliance on the "Plain Meaning" Doctrine Inappropriately Preserves "Broad-based" Immunity*

In *United States v. James*,¹⁴² the Supreme Court for the first time addressed the issue of sovereign immunity under section 702c. The Court considered whether section 702c of the Flood Control Act bars recovery for personal injuries caused by the federal government's negligent failure to

134. *James*, 760 F.2d at 601. The en banc court concluded that "it is simply impossible 'to accept this immunity provision, reasonably related to government involvement in flood control programs, as an absolute insulation from liability for all wrongful acts in other situations.'" *Id.* (quoting *Graci v. United States*, 301 F. Supp. 947, 954 (E.D. La. 1969)). As a result of its legislative analysis, the en banc court believed that § 702c provides a much more limited scope of immunity. *Id.* at 601-02.

135. *Id.*

136. *Id.* at 602; see also *supra* notes 95-108 and accompanying text. The en banc court refused to follow the "broad-based" *National Manufacturing* immunity stance. Instead, it felt compelled to ameliorate the rule's harshness. *James*, 760 F.2d at 602.

137. *James*, 760 F.2d at 603.

138. *Id.*

139. *Id.*

140. *Id.*

141. See *supra* notes 2-3.

142. 106 S. Ct. 3116 (1986).

warn recreational users of the dangers of flood control activities.¹⁴³

The majority held that section 702c bars recovery for personal injury claims.¹⁴⁴ However, a sharply worded dissent maintained that the section should not extend immunity to the United States to bar any personal injury claims.¹⁴⁵

Writing for the majority, Justice Powell began the Court's section 702c analysis by examining the statute's plain language.¹⁴⁶ Focusing only upon the immunity provision, he found that the provision clearly covered the accidents involved.¹⁴⁷ The Court understood words such as "damage," "flood," and "floodwaters" to be unambiguous¹⁴⁸ and, thus, gave effect to the plain language of the immunity provision.¹⁴⁹

The majority's reliance on that interpretation of section 702c's language raises two problems. First, the majority greatly relied upon the "plain meaning" doctrine;¹⁵⁰ however, it failed to interpret accurately the words of the statute. The majority found the word "damages" to be unambiguous.¹⁵¹ It concluded that "damages" have been "historically awarded both for injury to property and injury to person."¹⁵² However, section 702c contains the

143. *Id.* at 3118.

144. *Id.* at 3125. Justice Powell delivered the majority opinion, joined by then Chief Justice Burger and Justices Brennan, White, Blackmun, and Rehnquist. *Id.* at 3118.

145. *Id.* at 3126 (Stevens, J., dissenting). Justice Stevens wrote the dissenting opinion, joined by Justices Marshall and O'Connor. *Id.* at 3125 (Stevens, J., dissenting).

146. *Id.* at 3121. The majority was convinced that the plain meaning of the statute should be given effect. *Id.* The Court found it unnecessary to construe the statute beyond its face. *Id.*; see also *infra* notes 149-50 and accompanying text.

147. *James*, 106 S. Ct. at 3121.

148. *Id.* Contrast this interpretation with the attempt by the en banc court to provide meaning to these words. See *supra* notes 117-22 and accompanying text.

149. *James*, 106 S. Ct. at 3121. The majority repeatedly emphasized case law that discouraged any judicial interpretation of a statute beyond its face. See, e.g., *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("we assume that the legislative purpose is expressed by the ordinary meaning of the words used"); *Rubin v. United States*, 449 U.S. 424, 430 (1981) ("[w]hen . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances'" (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978))). *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (statutory interpretation begins with "the language of the statute itself"); *Rothschild v. United States*, 179 U.S. 463, 465 (1900) (where the words of a statute are clear "it requires some ingenuity to create ambiguity").

150. The "plain meaning" doctrine dictates that where the words of a statute are expressed in "plain and unambiguous language, . . . [the] duty of the courts is to give it effect according to its terms." *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409 (1914). The "plain meaning" doctrine should not, however, be used when a literal construction of a statute yields absurd results. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 204-05 (1978).

151. *James*, 106 S. Ct. at 3121.

152. *Id.*

word "damage" and not "damages."¹⁵³ The dissenting opinion sharply criticized this error.¹⁵⁴ There is a distinct difference in meaning between "damage" and "damages," as "damage" can mean "loss, injury or deterioration."¹⁵⁵ In contrast, "damages" refers to what a person receives as "compensation in money for a loss or damage."¹⁵⁶ The majority's reliance on the term "damages" rather than "damage" is a major oversight demonstrating a weakness in its interpretation of section 702c.

The dissent attempted to establish that at the time the Flood Control Act of 1928 was enacted, the accepted meaning of "damage" referred only to injury to property.¹⁵⁷ In 1987, however, "damage" may refer to property, personal injury, or both.¹⁵⁸ The dissent's definition of "damage," however, is supported by section 702c's legislative history.¹⁵⁹ These records consistently show that "damage" referred only to property damage¹⁶⁰ and never referred to personal injury. Furthermore, Congress did not have to address the possibility of governmental tort liability when it enacted the Flood Control Act, because the FTCA had not yet become law.¹⁶¹ The majority's construction of the term "damages" to include personal injuries further weakens

153. See 33 U.S.C. § 702c.

154. *James*, 106 S. Ct. at 3127 (Stevens, J., dissenting).

155. BLACK'S LAW DICTIONARY 351 (5th ed. 1979).

156. *Id.* In the past, the Supreme Court has recognized a distinction between "damage" and "damages." *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 450 & n.6 (1947). In *American Stevedores*, a statute used the word "damages." *Id.* at 450. The Court construed "damages" to include personal injuries so as to permit suit against the federal government. *Id.* The passage of the FTCA persuaded the Court to put aside the government's sovereign armor and compel the government to accept liability for its tortious conduct. *Id.* at 453.

157. *James*, 106 S. Ct. at 3126-27 (Stevens, J., dissenting). The dissent contends that "damage" traditionally only referred to injury to property. *Id.* at 3126 (Stevens, J., dissenting). Rules of construction state that statutory language should be understood in light of the time of enactment. *Fieldcrest Dairies, Inc. v. City of Chicago*, 122 F.2d 132, 135 (7th Cir. 1941). An early edition of *Bouvier's Law Dictionary*, relied upon by the dissent, *James*, 106 S. Ct. at 3126 (Stevens, J., dissenting), suggests that some English courts did not recognize "damage" as describing an action brought to recover for personal injuries. BOUVIER'S LAW DICTIONARY 749 (1914). An early edition of *Black's Law Dictionary*, however, does not recognize any distinction in "damage" as to personal or property injury. BLACK'S LAW DICTIONARY 313 (2d ed. 1910). Evidently, the context in which the word is used must be considered.

The dissent held that the majority had no basis on which to conclude that the term "damage" included personal injuries. *James*, 106 S. Ct. at 3127 (Stevens, J., dissenting). "If 'plain meaning' is our polestar, the immunity provision does not bar respondents' personal injury suits." *Id.* (Stevens, J., dissenting).

158. *James*, 106 S. Ct. at 3127 (Stevens, J., dissenting).

159. There is no indication in the congressional records that when Congress spoke of "damage" it was referring to personal injuries. For examples of the context in which Congress used the word "damages," see *supra* note 84.

160. See *supra* note 84.

161. *James*, 106 S. Ct. at 3128 (Stevens, J., dissenting).

its interpretation of the immunity provision.¹⁶²

The majority's attempt to ascribe meaning to the plain language of the statute gave rise to yet another error. The majority attempted to interpret section 702c by analyzing only the immunity provision without regard to the accompanying proviso for acquisition of certain lands.¹⁶³ Reading the immunity provision of section 702c in conjunction with the attached proviso, as suggested by the dissent,¹⁶⁴ reveals that the immunity provision serves to bar only certain types of property damage claims against the federal government. The majority rejected this reading of the statute,¹⁶⁵ and erroneously maintained that the provision and the proviso were to be interpreted separately.¹⁶⁶

As the dissent observed, the two clauses were in fact closely connected.¹⁶⁷ As indicated by the legislative history, Congress intended the proviso to serve as an authorization for governmental compensation of property damage while the immunity provision limits that authorization.¹⁶⁸ When read separately, the immunity provision appears unambiguous and broad. However, in conjunction with the proviso, the immunity provision serves as a limitation on the compensation for property damage authorized in the section as a whole.¹⁶⁹

The majority failed to discern the relationship between the immunity provision and the attached proviso of section 702c from its analysis of the section's legislative history.¹⁷⁰ The majority began its analysis by reviewing the disastrous effects of flooding and identifying congressional concern for providing widespread flood protection.¹⁷¹ It recognized that Congress added section 702c to the Flood Control Act in order to limit the federal government's financial liability for flood control project construction and operation

162. See *supra* note 81 and accompanying text.

163. *James*, 106 S. Ct. at 3121; see also 33 U.S.C. § 702c. In fact, the majority considered taking the proviso into account but decided against it. *James*, 106 S. Ct. at 3123-24. Under rules of statutory construction, provisos should be interpreted as restricting or qualifying the effect of the language of the provision to which it is attached. *Calvin Tomkins Co. v. Clifford F. MacEvoy Co.*, 137 F.2d 565, 568 (3rd Cir. 1943), *rev'd on other grounds sub nom.* *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102 (1944). Congress was well aware of this rule of construction. See generally *supra* note 77.

164. *James*, 106 S. Ct. at 3127-28 (Stevens, J., dissenting).

165. *Id.* at 3123.

166. *Id.* Evidently, the majority concluded that no relationship existed between the immunity provision and the attached proviso without examining comprehensively the legislative records.

167. *Id.* at 3127 n.5 (Stevens, J., dissenting); see *supra* note 78.

168. See *supra* notes 69-76 and accompanying text.

169. *James*, 106 S. Ct. at 3128 (Stevens, J., dissenting).

170. *Id.* at 3122.

171. *Id.*; see also *supra* note 63.

costs.¹⁷² However, assuming that the immunity provision was intended to be read along with the proviso, the congressional concern over these costs seems limited to property damage. The proviso recognizes that the federal government will compensate for certain damage to property.¹⁷³ Aside from these isolated examples, the federal government refused to accept liability for any other land damage.¹⁷⁴ The majority did not reach this conclusion because it chose not to read the immunity provision along with the attached proviso.¹⁷⁵

The dissent suggested that section 702c's legislative history reflects a congressional desire to invoke immunity as a bar to governmental liability for certain types of property damage.¹⁷⁶ Given the section's language and congressional debates concerning it, the more plausible interpretation of section 702c immunity is that it applies to property damage. The legislative history shows congressional concern with the various costs associated with the "taking" and the damaging of property.¹⁷⁷ The congressional debates reveal a humanitarian desire to provide relief from devastating floods.¹⁷⁸ This obvious humanitarian concern is in sharp contrast with the minimal legislative reference to the immunity provision. If Congress ascribed great importance to the immunity provision, the dissent noted, one would expect that it would have been more thoroughly debated.¹⁷⁹ The principle intent of Congress to provide relief should not be circumscribed by an interpretation unsupported by evidence or reason.¹⁸⁰ The immunity provision can be most reasonably understood as limiting the compensation authorized in the attached proviso.¹⁸¹

The majority rejected an argument that would have narrowed the scope of section 702c immunity to flood control activities¹⁸² and subjected government agents to potential tort liability under the FTCA for actions diverging

172. *James*, 106 S. Ct. at 3123.

173. *See* 33 U.S.C. § 702c.

174. *See James*, 106 S. Ct. at 3128 (Stevens, J., dissenting); *see also supra* note 169 and accompanying text.

175. *See James*, 106 S. Ct. at 3128 (Stevens, J., dissenting); *see also supra* notes 163-66 and accompanying text.

176. *James*, 106 S. Ct. at 3127 (Stevens, J., dissenting); *see also supra* notes 77-78.

177. *See supra* notes 81-84.

178. *See supra* note 63.

179. *James*, 106 S. Ct. at 3129 (Stevens, J., dissenting).

180. A similar analysis of legislative history, in a different context, was proffered by Judge Starr in *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1561 (D.C. Cir. 1985). The immunity provision takes on even less importance considering passage of the FTCA.

181. *James*, 106 S. Ct. at 3128 (Stevens, J., dissenting).

182. *Id.* at 3124.

from the ordinary scope of flood control activities.¹⁸³ Respondents argued that their injuries resulted from the government's mismanagement of recreational activities.¹⁸⁴ The majority disagreed, refusing to narrow the scope of section 702c immunity because it categorized the management of recreational activities as the management of the flood control activities.¹⁸⁵ By refusing to limit the scope of immunity, the majority facilitated federal pursuit of flood control activities unfettered by potential liability. The desirability of immunity depends upon the necessity of accepting liability without forfeiting the pursuit of flood control. Supporters of the FTCA suggest that immunity unnecessarily shields the federal government's wrongful acts because ample resources exist to compensate for its negligence.¹⁸⁶

Finally, the majority rejected respondent's argument that section 702c was enacted only to counteract the costs arising from liability for certain damage to property.¹⁸⁷ This argument, supported by both the en banc court of appeals¹⁸⁸ and the dissent,¹⁸⁹ would hold the government liable for personal injuries caused by negligent failure to warn the public of danger.¹⁹⁰ In rejecting this argument, the majority once again emphasized that Congress intended to protect the federal government with broad immunity.¹⁹¹ The majority conceded that the congressional record referred only to liability for property damage, but concluded that such references were only "fragments of legislative history."¹⁹² This conclusion lacks justification as the legislative

183. *Id.* This was essentially the same argument proffered by the en banc court. See *James v. United States*, 760 F.2d 590, 603 (5th Cir. 1985) (en banc), *rev'd*, 106 S. Ct. 3116 (1986). Cases decided subsequent to the Supreme Court's decision in *James*, however, have limited the scope of § 702c immunity by drawing a distinction between government negligence pursuant to flood control purposes and nonflood control purposes. *Pueblo de Cochiti v. United States*, 647 F. Supp. 538, 539-42 (D.N.M. 1986); *Denham v. United States*, 646 F. Supp. 1021, 1025-27 (W.D. Tex. 1986).

184. *James*, 106 S. Ct. at 3124. The "mismanagement" described by respondents was the government's negligence in failing to warn of dangers. *Id.*; see also *supra* notes 12-15 and accompanying text.

185. *James*, 106 S. Ct. at 3124.

186. Engdahl, *supra* note 3, at 60. "The urgent fiscal necessities that made government immunity acceptable at the outset are no longer present The United States and a growing number of states have found it financially feasible for them to accept liability for and consent to suit upon claims of negligence" *Id.*

187. *James*, 106 S. Ct. at 3125.

188. *James v. United States*, 760 F.2d 590, 599 (5th Cir. 1985) (en banc), *rev'd*, 106 S. Ct. 3116 (1986).

189. *James*, 106 S. Ct. at 3127 (Stevens, J., dissenting).

190. *Id.* at 3125.

191. Earlier portions of the majority opinion reflect the judicial disposition towards "broad-based" immunity. *Id.* at 3123 ("the sweeping language of § 702c was no drafting inadvertence"). For a discussion of § 702c's "broad-based" immunity, see generally *supra* notes 86-109 and accompanying text.

192. *James*, 106 S. Ct. at 3125.

history is replete with discussions and debates concerning where the burden of property damage should lie.¹⁹³ In fact, most of the legislative history of section 702c and the 1928 Act discusses potential liability for property damage.¹⁹⁴ It does not seem fair to ignore this by merely labeling such evidence “fragments.” The majority’s adherence to the “plain meaning” doctrine prevents it from considering the legislative history behind section 702c, which indicates that Congress never considered personal injury in its attempt to shield the government from property damage liability caused by flood control measures. Rather, the legislative history indicates that Congress, as a policy decision, chose to enact section 702c to clarify and assign the potential liabilities associated with “takings” of land.¹⁹⁵ Accordingly, the section would save the federal government from liability for mere damage to land and impose liability only when land was “taken.”¹⁹⁶

B. Judicial and Legislative Models of Reform for Section 702c

1. The Need for Judicial Narrowing of James

In *James*, the Supreme Court concluded that section 702c of the Flood Control Act of 1928 provides the federal government with sovereign immunity for both personal injury and property damage claims arising out of flood control activities.¹⁹⁷ Although this decision conforms with the “plain meaning” of the immunity provision,¹⁹⁸ it conflicts with the legislative intent behind the provision’s enactment.¹⁹⁹ As a result, the majority’s decision is unnecessarily broad.

The legislative history reveals that Congress drafted section 702c to provide the federal government with immunity from property damage claims arising out of flood control activities.²⁰⁰ The fact that the FTCA never ex-

193. See *supra* notes 69, 73, 82 & 84, and accompanying text. The soundness of the majority’s interpretation is further weakened by its failure to examine the immunity provision within the context of the congressional debate from which it arose. In 1928, Congress expressed a serious concern over whether the federal government could be held liable for “takings” of land when they embarked upon flood control. See *supra* note 82. Congress examined and discussed the state of “takings” law in 1928, and the extent to which sovereign immunity would provide the federal government with protection against liability for the anticipated damages to land. *Id.* It is erroneous to conclude that Congress intended, expressly or impliedly, to enact § 702c to immunize the government against liability from personal injury claims.

194. See *supra* notes 74-76 and accompanying text.

195. See *supra* note 81 & 193 and accompanying text.

196. See *supra* note 73 and accompanying text.

197. *United States v. James*, 106 S. Ct. 3116, 3123 (1986).

198. See *supra* note 149 and accompanying text.

199. See *supra* notes 170-81 and accompanying text.

200. *Id.*

pressly repealed section 702c²⁰¹ merely indicates that the federal government continues to enjoy immunity from such property damage claims. Thus, the Supreme Court could appropriately limit the holding of *James* so that the scope of the section's immunity only applies to the extent of property damage claims. As the dissent concludes,²⁰² such a limitation would more accurately reflect the intent of Congress. The majority's failure to recognize that section 702c grants less than absolute immunity to the government appears to demonstrate the Court's reluctance to break away from the deeply rooted doctrine of sovereign immunity.²⁰³ Although the majority does not praise the precepts of sovereign immunity, it does little to mitigate the unjust and inequitable doctrine.²⁰⁴ The Court's overly broad interpretation of section 702c inappropriately preserves governmental immunity.

2. *The Need for Congressional Response*

The *James* decision, providing the federal government with broad immunity from claims related to flood control activities,²⁰⁵ creates a public policy offending the contemporary values of government accountability and responsibility.²⁰⁶ Additionally, a policy of broad government immunity is likely to tax congressional resources by pressuring Congress to consider private relief bills.²⁰⁷ At a minimum, Congress should amend section 702c in order to allow private parties to bring personal injury claims arising from governmental flood control activities. This would permit the section to function as Congress originally intended.²⁰⁸ Such a limiting construction of the immunity provision could help eliminate some of the harshness of sovereign immunity as well as encourage government responsibility by insisting upon accountability.²⁰⁹

Moreover, because governmental immunity no longer serves any vital na-

201. *National Mfg. Co. v. United States*, 210 F.2d 263, 274 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954); *see also supra* note 82.

202. *United States v. James*, 106 S. Ct. 3116, 3127-29 (1986) (Stevens, J., dissenting).

203. *See supra* notes 1-2 and accompanying text.

204. If the majority had adopted the comprehensive analysis of the legislative history relied upon by the dissent, 106 S. Ct. at 3127 (Stevens, J., dissenting), rather than relying on the "plain meaning" doctrine, *id.* at 3121, it would not have easily upheld such a broad application of sovereign immunity, and recovery for at least personal injury might have been permitted under the FTCA.

205. *Id.* at 3123.

206. *See supra* notes 3 & 34, and accompanying text.

207. *See supra* note 35.

208. This construction of § 702c would continue to bar claims by private individuals for property damage arising out of governmental flood control activities. *See generally supra* notes 170-81 and accompanying text.

209. *See supra* notes 3 & 34.

tional purpose, Congress should consider repealing section 702c altogether. In its time, the Flood Control Act of 1928 was one of the largest and most expensive projects undertaken by the federal government.²¹⁰ To some extent, Congress based its support for the flood control project on the belief that its expenditures would not be increased by judgments for property damage.²¹¹ Since 1928, however, the activities of the federal government have dramatically expanded to include major undertakings ranging from air traffic control to rocket launching.²¹² Unlike negligence in flood control, liability attaches to the federal government for its negligence in connection with such activities.²¹³ Yet, flood control is not so distinguishable from these other government activities as to warrant granting sovereign immunity's unique protections. Congress should repeal section 702c in order to provide private individuals a remedy under the FTCA for both personal injury and property damage claims. Congress should respond promptly where, as here, the federal judiciary has effectively exposed major flaws in national public policy.²¹⁴

III. CONCLUSION

Section 702c of the Flood Control Act of 1928 immunizes the United States from liability for damage claims arising from federal flood control activities. The section has traditionally barred individual landowners' actions for the recovery of property damage. The Supreme Court's decision in *United States v. James* not only affirms the traditional application of section 702c immunity, but also extends it by prohibiting personal injury actions brought against the federal government. The decision has increased the ability of the United States to pursue flood control activities unfettered by the constraints of potential liability for tortious conduct.

The *James* Court adhered to the "plain meaning" of the Flood Control Act of 1928 in order to support broad powers of sovereign immunity. This

210. *See supra* notes 63 & 65.

211. *See supra* note 82.

212. *See supra* notes 51-61 and accompanying text.

213. *See supra* notes 53-60 and accompanying text.

214. *See supra* note 2 (public policy considerations justifying government liability). Public policy values supporting government liability are inconsistent with the line of case law holding that § 702c immunizes the federal government from liability for its negligent actions related to flood control activities. *See generally* *James v. United States*, 106 S. Ct. 3116 (1986). In upholding the immunity provision in § 702c, despite its lack of justification, the federal judiciary has drawn attention to one of the few remaining vestiges of sovereign immunity in the United States. Section 702c immunity should be repealed in its entirety. Congress has yet to show the intent or justification for § 702c so as to distinguish it from similar government activities that receive no immunity. *See supra* notes 51-60 and accompanying text. Until such justification is provided, it would be inappropriate to hold the federal government immune from tort liability.

interpretation of section 702c does not permit the vindication of just claims against the federal government for the tortious conduct of its employees. Sovereign immunity under section 702c is incompatible with the modern principles of justice and responsibility inherent under the FTCA. The Court's decision in *James* to perpetuate sovereign immunity does violence to the congressional intent behind the FTCA. Congress should act promptly to address the public policy concerns raised by *James*.

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