THE FEDERAL FLOOD CONTROL ACT: CONGRESSIONAL DEVELOPMENT OF A MODERN-DAY ARK

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I. INTRODUCTION

Without question, the flood of 1993[1] will go down in history as one of this country's worst natural disasters.[2] The economic damages, personal injuries, and

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1. This flood was actually a series of floods which occurred in July and August of 1993, affecting people, property, and businesses in nine states. *U.S.-Floodtoll*, UPI, Aug. 5, 1993, *available in* WESTLAW, Newswires, UPI File. The list of flood-stricken states included Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin. *Id.*

2. The American Red Cross ranked the flood as the worst national disaster of 1993, as measured by the number of families assisted by the organization. AMERICAN RED CROSS, NEWS RELEASE, Dec. 30, 1993. The flood was also the "worst" by many other measures. The Mississippi

deaths it caused are still being tabulated.[3] Many are still struggling to put their lives back together.[4] These floods show that even modern technology and engineering cannot completely prevent catastrophic natural disasters. In light of these events, perhaps it is finally time for Congress to review and reevaluate the Federal Flood Control Act (FCA)[5] and the inequities it produces.

Federal courts have interpreted FCA to immunize the federal government from suit for any damages resulting from negligence in flood-control related activities.[6] Is this interpretation warranted? This line of reasoning makes the liability of the federal government for negligence in water management projects dependent on the purpose for which the project is constructed.[7] For example, if the purpose of the project is flood control, the federal government is absolutely immune from suit.[8] But if the purpose of the project is something other than flood control, such as navigation or hurricane protection, the federal government may be sued and recovery of damages is possible.[9] In view of larger and more costly public works programs, it is difficult to understand why flood-control activities have been singled out for immunity.

This Note discusses FCA and its interpretation by the federal courts as a general grant of sovereign immunity to the United States Government and its employees from suits for property damages and personal injuries[10] resulting from flood-control related activities.[11] The Note focuses on how these interpretations conflict with the Act's legislative history, which does not support extending governmental immunity to personal injury suits.[12] In addition, the Act's interpretation by the federal courts is inconsistent with modern notions of governmental accountability.[13] Finally, this Note discusses other factors which

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River crested at forty-six feet above normal, three feet above the highest level ever recorded. George J. Church, *Flood, Sweat and Tears*, TIME, July 26, 1993, at 23. Nearly 17,000 square miles of land were inundated by floodwaters. *Id.* Early government estimates of property damage approached $8 billion. *Id.* Despite the record property loss, the death count remained relatively low. *Id.*

3. Morrie Goodman, chief spokesperson for the Federal Emergency Management Agency (FEMA) said, "Coming up with an accurate flood-damage estimate now is like a waiter giving you a restaurant check before you've even ordered the meal. . . . There is no official estimate of the Federal Government—it could be $10 billion, it could be $15 billion." Christopher John Farley, *May We Have the Check, Please?*, TIME, Aug. 9, 1993, at 29. So far, the flood contributed to forty-three deaths in eight states. *Id.*

4. Even though the initial crisis is over, the Red Cross stated it will continue to provide assistance and support services to flood victims for months, and possibly years to come. *See* AMERICAN RED CROSS, *supra* note 2.

5. The Flood Control Act of 1928, 33 U.S.C. §§ 701-709 (1988).

6. *See infra* Part II.C.1 and text accompanying notes 162-66.

7. *See infra* text accompanying notes 108-12.

8. *See infra* text accompanying notes 108-12.

9. *See infra* text accompanying notes 103-07.

10. *See infra* text accompanying notes 31-34. Although the federal courts have extended the immunity under FCA to personal injury suits, neither the legislative history, nor the Act itself explicitly provides for this immunity.

11. *See infra* Part II.

12. *See infra* Part III.A.2.

13. *See infra* Part IV.

support the conclusion that the Act was not intended to provide the federal government with absolute immunity.[14] It concludes that congressional action should be taken to end FCA's current inequitable results and limit sovereign immunity to property damage suits.

II. FEDERAL FLOOD CONTROL ACT OF 1928

A. *Immunity Provisions—Section 702c*

Section 702c of FCA contains the controversial immunity provision. Paragraph two of this section provides:

> 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,*** [t]hat if in carrying out the purposes of . . . this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable 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 banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceeding 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.[15]

Although the first "disclaimer" phrase is traditionally cited as the law governing governmental liability under FCA, it is important to consider the "proviso" language which follows as well.[16] Courts have often cited the disclaimer while ignoring the proviso.[17] The proviso provides, however, a meaningful context in which the disclaimer must be construed.[18]

B. *Legislative History*

The federal courts have traditionally held section 702c immunizes the federal government from suit for any damages resulting from negligence in flood control-related activities.[19] Is this conclusion supported by the legislative history of the Act? Although scant legislative history exists regarding section 702c, certain details of the legislative history illuminate the immunity provision, providing a meaningful context in which to construe the provision.

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14. *See infra* Part VI.
15. 33 U.S.C. § 702c (1988).
16. *See infra* text accompanying notes 33-34; Part III.A.3.
17. *See infra* text accompanying notes 33-34; Part III.A.3.
18. *See infra* text accompanying notes 33-34; Part III.A.3.
19. *See infra* Part II.C.1.

FCA was enacted in 1928 in response to the devastating flood of the Mississippi River Valley in 1927.[20] It provided for a comprehensive program of flood control projects, including the building of dikes, dams, levees, and related works.[21] The program represented the largest public works effort in the United States until that time.[22] Due to the flood control project's broad scope, Congress naturally intended to limit the federal government's liability.[23] The debate over apportionment of the project's costs led to the adoption of section 702c.[24] This does not necessarily mean, however, that Congress intended the federal government to be absolutely immune from all liability for any flood damage. Section 702c could also be viewed as an allocation of the project's costs between the federal, state, and local governments.[25]

Debate over the Act started in February of 1928 and continued until May of 1928, when the final version of section 702c was passed.[26] Significantly, the immunity provision was not introduced until the very end of the debates.[27] Little discussion of the provision occurred; some legislators even thought the provision unnecessary with existing sovereign immunity.[28]

The Act has subsequently been interpreted to apply to all federal flood control projects but is limited to the Mississippi River projects contemplated by the original Act.[29] Some courts have questioned whether this is a reasonable interpretation.[30]

FCA's legislative history clearly reveals the intent to immunize the government from property damage, not personal injury claims. Each time liability is discussed in the records of congressional debates, it is done in the context of

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20. United States v. James, 478 U.S. 597, 606 (1986). The flood caused over $200 million in property damage, nearly 200 deaths, and left almost 700,000 people homeless. *Id.* (citing S. REP. No. 619, 70th Cong., 1st Sess. 12 (1928)).

21. National Mfg. Co. v. United States, 210 F.2d 263, 270 (8th Cir.), *cert. denied*, 347 U.S. 976 (1954).

22. Early estimates of the project's cost totaled $325 million. H.R. REP. NO. 1101, 70th Cong., 1st Sess. 13 (1928). This amount is almost four times the cost of the Panama Canal. James v. United States, 760 F.2d 590, 596 (5th Cir. 1985) (citing 69 CONG. REC. 6640 (1928) (statement of Rep. Snell)), *rev'd*, 478 U.S. 597 (1986).

23. National Mfg. Co. v. United States, 210 F.2d at 270; *see infra* Part III.A.2 and text accompanying notes 102-06.

24. *See infra* Part III.A.2, text accompanying notes 102-07.

25. *See infra* Part III.A.2, text accompanying notes 102-07.

26. James v. United States, 760 F.2d at 597.

27. *Id.* at 598 (citing 69 CONG. REC. 7022 (1928)). The language employed by § 702c was first proposed on April 23, 1928, by Congressman Reid, Chairman of the House Flood Control Committee. *See* 69 CONG. REC. 7022 (1928).

28. James v. United States, 760 F.2d 590, 598 (5th Cir. 1985) (citing 69 CONG. REC. 7028 (1928) (statement of Rep. Spearing)), *rev'd*, 478 U.S. 597 (1986).

29. *See* C.S. Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1086 (6th Cir. 1978); Clark v. United States, 218 F.2d 446, 451-52 (9th Cir. 1954); National Mfg. Co. v. United States, 210 F.2d 263, 274 (8th Cir.), *cert. denied*, 347 U.S. 976 (1954).

30. *See infra* note 105.

property damage.[31] Nowhere does any reference to personal injuries appear.[32] In addition, the Act's legislative history shows the disclaimer and the proviso were intended to be read together.[33] Because the proviso provides for compensation by the federal government for certain damage to property, arguably, the disclaimer was merely intended as a limit on liability imposed by the proviso.[34]

Notably, FCA was enacted before the Federal Tort Claims Act (FTCA).[35] Therefore, it could not have intended to immunize the government from the negligent acts of its employees because no such liability existed at that time.[36] In enacting FTCA, Congress expressly listed statutes repealed by the Act.[37] This list did not include section 702c.[38]

C. *Early Judicial Interpretations*

The early judicial decisions construing section 702c can generally be grouped into two categories. In the first category, section 702c is interpreted as a broad, absolute immunity. The second line of cases, however, recognizes important limitations on this immunity.

1. *Broad Interpretations of Immunity*

In the seminal case of *National Manufacturing Co. v. United States*,[39] owners of property along the Kansas River sued the United States for damage to their property.[40] The suit was based on the negligence of government weather forecasters and other governmental agencies in failing to warn the plaintiffs of a flood and failing to assure them of the safety of their property.[41] The U.S. Court

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31. *See, e.g.*, 69 CONG. REC. 8188 (1928) (discussing the extent of the federal government liability for flowage rights); *id.* at 7024 (discussing property damage resulting from the construction of spillways); *id.* at 7023 (discussing property damage rising to the level of a constitutional taking); *id.* at 6999 (discussing property damage due to floodways); *id.* at 6712 (discussing indirect property damage); *id.* at 5485-86 (discussing how to fairly provide for flowage rights and rights of way).

32. Even those who believe § 702c immunity applies to personal injury suits have not found any reference to personal injuries in the congressional debates on the FCA. *See infra* note 97.

33. *See* 69 CONG. REC. 7022 (1928). Although the disclaimer and proviso were introduced by different congressmen, the proviso was offered as an amendment to the disclaimer.

34. *See infra* text accompanying notes 102-07 and Part III.A.2.

35. 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2411, 2412, 2671-2680 (1988).

36. *See infra* Part IV.B.2.

37. *See* Pub. L. No. 79-601, §§ 401-424, 60 Stat. 812, 842, 846-47 (codified as amended at 28 U.S.C. § 2680 (1988)).

38. *Id.*

39. National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954). This case was the first to deal extensively with § 702c. James v. United States, 760 F.2d 590, 600 (5th Cir. 1985), *rev'd*, 478 U.S. 597 (1986).

40. National Mfg. Co. v. United States, 210 F.2d at 268-69.

41. *Id.* at 269. Significantly, the plaintiffs did not seek to hold the United States liable because the Kansas River flooded, but rather, for the negligence of its employees in failing to warn of the impending flood in time for them to safely relocate their movable property. *Id.*

of Appeals for the Eighth Circuit held when Congress enacted FCA, 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."[42] In addition, the court found section 702c "does not limit the bar against such recovery to cases where floods or flood waters are the sole cause of damages . . . but it goes further and in addition it bars liability for damages that result (even indirectly) 'from' floods."[43] Thus, because the flooding of the river was a cause of the property damage—although the negligence of the forecasters in failing to adequately warn the property owners was another significant cause—the government was absolutely immune from liability.[44]

Only the Eighth,[45] Tenth,[46] and Second[47] Circuits closely followed the broad interpretation of section 702c immunity set forth in *National Manufacturing*. Significantly, none of these cases broadly interpreted section 702 to include immunity from personal injuries.[48]

2. *Narrow Interpretations of Immunity*

Other courts recognized significant limits on the governmental immunity conferred by section 702c. In *Peterson v. United States*,[49] the Ninth Circuit held immunity under the FCA did not extend to acts of negligence "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control."[50] The court agreed with the *National Manufacturing* decision, holding the willingness of Congress to fund flood control projects was conditioned on the immunity of the federal government from damage which occurred despite the flood control effort.[51] The court interpreted this, however, to mean only negligent governmental acts associated with flood control projects were immunized.[52] Thus, because the negligence of government engineers in dynamiting an ice jam,

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42. *Id.* at 270.

43. *Id.* at 271. To support its holding, the court made several major initial findings. First, the court believed, as a matter of economic policy, Congress intended to condition federal flood control expenditures of the Act on absolute immunity. *Id.* at 270-74. Second, the court found § 702c was carried forward into later flood control acts so that it applied nationwide. *Id.* at 274. Third, the court found the Federal Tort Claims Act did not repeal FCA. *Id.* at 274-75. These interpretations were criticized as major misconstructions by the Fifth Circuit in *James v. United States*. *See infra* Part III.B.

44. National Mfg. Co. v. United States, 210 F.2d 263, 271 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954).

45. *See* Portis v. Folk Constr. Co., 694 F.2d 520 (8th Cir. 1982); Burlison v. United States, 627 F.2d 119 (8th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); Taylor v. United States, 590 F.2d 263 (8th Cir. 1979). *But see* Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977).

46. Callaway v. United States, 568 F.2d 684 (10th Cir. 1978).

47. Parks v. United States, 370 F.2d 92 (2d Cir. 1966).

48. *See infra* note 61.

49. Peterson v. United States, 367 F.2d 271 (9th Cir. 1966).

50. *Id.* at 275.

51. *Id.* at 275-76.

52. *Id.*

which caused flooding downstream, proved to be "wholly unrelated" to flood control, the government was not immune from the property damage suit.[53]

In *Graci v. United States*,[54] the Fifth Circuit agreed with the lower court, which held section 702c "should not be construed to be a wholesale immunization of the Government from all liability for floodwater damage unconnected with flood control projects."[55] Hence, where the negligent construction of a *navigation* project caused flooding of the plaintiff's property, section 702c did not bar the suit.[56]

The Fourth Circuit narrowed the immunity of section 702c even further by restricting it to the statute's specific purpose of flood control.[57] Thus, the government would only be immune if its negligent actions occurred in the management of floodwaters.[58]

These decisions place important limits on governmental immunity under FCA. Furthermore, they demonstrate the lack of unanimous agreement on the interpretation of FCA and its legislative history. Again, it is important to note none of the decisions considered section 702c in the context of a personal injury suit.[59]

III. RETURN TO ABSOLUTE IMMUNITY—*UNITED STATES V. JAMES*

The U.S. Supreme Court significantly expanded governmental immunity under FCA in *United States v. James*.[60] In *James*, the Supreme Court extended section 702c immunity to protect the federal government from liability for personal injury suits.[61] The Court overruled the Fifth Circuit's finding of governmental liability.[62] The decisions of the two courts reflect completely opposite interpretations of the statutory language, the legislative history of the Act, and prior case law.

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53. *Id.*
54. Graci v. United States, 456 F.2d 20 (5th Cir. 1971).
55. *Id.* at 27.
56. *Id.*
57. Hayes v. United States, 585 F.2d 701, 702-03 (4th Cir. 1978).
58. *Id.*
59. *See infra* note 61.
60. United States v. James, 478 U.S. 597 (1986).
61. Prior to *James*, the federal appellate courts only applied § 702c immunity to property damage claims. *See* James v. United States, 760 F.2d 590, 599 n.16 (5th Cir. 1985) (en banc), *rev'd*, 478 U.S. 597 (1986). Of the 23 cases construing § 702c immunity, 21 were property damage suits. *Id.* The remaining two cases were personal injury suits, but were decided on other grounds. *Id.*
62. United States v. James, 478 U.S. at 612.

A. *Interpretation by the Fifth Circuit*

In *James*, the Fifth Circuit consolidated two similar cases involving personal injuries and death that occurred at federal flood control projects.[63] The Plaintiffs brought suit against the federal government under the FTCA.[64] In both cases, the flood control projects were open to the public and served recreational as well as flood control purposes.[65] Recreational users suffered personal injuries when the flood control structures opened without warning, discharging large amounts of water.[66] In each case, the trial court found the government negligent for failing to warn of the dangerous conditions present.[67] Despite the findings of negligence, the government escaped liability because the trial court in each case held section 702c barred the claim.[68]

The Fifth Circuit expressed dissatisfaction with prior case law interpreting section 702c, but felt constrained by precedent to uphold governmental immunity.[69] On rehearing en banc, the court reversed its earlier decision and held FCA did not provide the federal government with absolute immunity.[70] Specifically, the court held:

> Because of section 702c, the government's acts to store, divert, and release waters to further flood control are subject to no risk of liability. If, however, the government allows people to come upon those waters or nearby shores for purposes of recreation, section 702c grants no immunity for government fault in creating a danger or in failing to warn of danger to the public. If a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters, and the

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63. *Id.* at 599-602. The two cases consolidated for hearing were *James v. United States* and *Clardy v. United States*. *Id.*

64. *Id.* at 600.

65. In *James*, the Arkansas project was promoted as a recreational area, and the public was encouraged to water-ski in the reservoir area. *Id.* at 599. In *Clardy*, the decedent and his father were fishing in the Louisiana project. *Id.* at 601.

66. *Id.* at 599. In *James*, Charlotte James and Kathy Butler fell while water-skiing and began drifting toward the "tainter gates." *Id.* Eddy Butler dove into the water in an attempt to save his wife, but was overcome by the strong current. *Id.* at 600. The two women were injured and Mr. Butler drowned. *Id.* In *Clardy*, Joseph and Kenneth Clardy were fishing when their boat was swept suddenly into dangerous waters. *Id.* at 601. Kenneth drowned after being thrown from the boat and pulled through a two hundred and twenty foot-long drainage structure. *Id.*

67. *Id.* at 600-02.

68. *Id.*

69. James v. United States, 740 F.2d 365, 373 (5th Cir. 1984) (en banc), *rev'd on reh'g en banc*, 760 F.2d 590 (5th Cir. 1985), *rev'd*, 478 U.S. 597 (1986). In dictum, the Fifth Circuit suggested the legislative history of § 702c did not merit its application to personal injury claims. *Id.* at 370. After an extensive review of the legislative history of the Act, the court encouraged respondents to petition for a rehearing en banc. *Id.* at 374 (Goldberg, J., concurring).

70. James v. United States, 760 F.2d 590, 603-04 (5th Cir. 1985), *rev'd*, 478 U.S. 597 (1986).

> presence or movement of water for flood control purposes merely furnishes a condition of the accident, there is no section 702c immunity.[71]

The court found the projects served a variety of purposes besides flood control. This determination, in addition to the findings of negligence by the lower courts, was central to the court's holding.[72] In reaching its ultimate finding of liability, the court analyzed three factors: (1) the statutory language of the immunity provision itself; (2) the legislative history of the 1928 Act; and (3) early judicial interpretations of the immunity provision.[73]

1. *Statutory Language of the Act*

The *James* court characterized the language of section 702c as "ambiguous."[74] The court warned many crucial terms of the statute might seem clear-cut or obvious upon initial examination, but were actually imprecise and capable of more than one meaning.[75] For instance, the court noted it was not clear whether "floodwaters" meant "waters that are out of control" or "water at a flood control project."[76] The term "damage" did not necessarily include injuries to persons.[77] Furthermore, it was unknown whether the use of "at any place" was intended to modify "damage" or "floods."[78] Arguably, Congress could have intended to "exclude the liability for *damage to any place*."[79]

Another important ambiguity of the statute was it did not "define the nature of the relation between the floodwaters and flood control projects on the one hand, and the activities of the United States on the other."[80] This ambiguity left the question of whether the United States remained absolutely immune from damage attributable to floodwaters in doubt.[81]

Another interpretative problem arose when damage occurred due to floodwaters at a flood control project, but was merely incidental to the governmental

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71. *Id.* at 603.

72. *Id.* at 603-04. In *James*, the district court judge found "the facts of this case constitute a classic example of death and injuries resulting from conscious governmental indifference to the safety of the public. This case goes beyond gross negligence." *Id.* at 603.

73. *Id.* at 593, 596, 600.

74. *Id.* at 593. The court pointed out that even in the original congressional debates, objections were raised to the ambiguities and uncertainty created by the language of the Act. *Id.* at 594 n.5.

75. *Id.* at 594.

76. *Id.* at 594 n.6.

77. *Id.* at n.7.

78. *Id.* at n.8.

79. *Id.* This argument can be maintained if "at any place" was intended to describe *what* sustained the damage instead of the *location* of the damage. *Id.* (emphasis added).

80. *Id.* at 595.

81. *Id.* The court believed the government could only enjoy absolute immunity if all of the statutory language other than the one-sentence disclaimer of liability, the legislative history, and the underlying purpose of the statute could be ignored. *Id.*

fault.[82] Because the court found the statutory language unclear, it referred to the legislative history and purpose of the statute for clarification.[83]

2. *Legislative History of the Act*

Given the magnitude of the project, the court found it understandable that Congress would want to limit liability of the federal government to pay for its costs.[84] The court, however, believed construing 702c as a disclaimer of any type of liability resulting from floods or floodwaters would provide a much broader immunity provision than Congress ever intended.[85]

The court believed the immunity provision could best be explained as the result of the debate over who should pay for the general costs of this major public works project.[86] In other words, the question before Congress was not "*whether* government would compensate for private damages and expenses . . . but *which* government would pay—federal or state and local."[87] Specifically, the court noted legislative history showing the concern over allocating the program's costs between the federal and state and local governments.[88] Section 702c replaced a very generous earlier provision which would have required the federal government to pay "just compensation . . . for all property used, taken, damaged, or destroyed in carrying out the flood control plan."[89] Both the president and members of Congress criticized the plan as federal largess which would give greater benefits to the railroad and lumber companies than the actual flood sufferers, whom the Act was intended to protect.[90] Furthermore, it would subject the federal government to "prodigious" liabilities.[91] Thus, the court held section 702c was designed to counter these criticisms by immunizing the federal government from liability for floodwater inundation or damage.[92] The court found the overall purpose of section 702c shifting some of the project's costs to local entities rather

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82. *Id.* at 596. For instance, would the government be immune from liability if an air traffic controller's negligence caused a plane to crash into a flood control project? *Id.* The court stated, "The bald language of the immunization might suggest no government liability," implying this was not an intended result of the Act. *Id.*

83. *Id.* at 593-94. The court stated, "Although we hold the statutory language paramount in this case, we have recourse to the history and purpose of the statute to elucidate what we consider to be latent ambiguities." *Id.*

84. *Id.* at 596-98.

85. *Id.* at 595.

86. *Id.* at 594-97.

87. *Id.* at 598 n.13 (emphasis added).

88. *Id.* at 596-99.

89. *Id.* at 597 (quoting S. 3740, 70th Cong., 1st Sess. 54, 69 CONG. REC. 5483 (1928)). In the House of Representatives, the original version of the Act also required the federal government to pay "just compensation for all rights of way and damages, including expenses to railroads or states in changing their property." *Id.* (citing H.R. REP. NO. 1100, 70th Cong., 1st Sess. 12 (1928)).

90. *Id.* at 598-99 n.15. One congressman went so far as to suggest the provision must have "'originated in some railroad office,' because it '[gave] the railroads in the Mississippi Valley an unfair and unjust advantage.'" *Id.* at 598 (quoting 69 CONG. REC. 6712 (1928)).

91. *Id.*

92. *Id.* at 599.

than shielding the federal government from the negligent or wrongful acts of its employees in the construction or continued operation of the project.[93]

In addition, the court held the legislative history of section 702c did not justify its application to personal injury suits.[94] The "costs," over which Congress expressed concerns in regard to allocation, included the construction costs of the project, the acquisition of property rights, and damage to the land.[95] The court noted the records of congressional debates clearly showed the Act's intent to immunize the government from damages to land.[96] There were, however, no references to personal injuries in any of the congressional debates prior to the Act's passage.[97] Furthermore, the court observed Congress inserted "the latter part of the last paragraph of the section [the proviso] so as to clarify the meaning."[98] Because the proviso dealt only with property damage and takings, principles of statutory construction led to the logical conclusion that the immunity provision also applied to governmental liability for property damage.[99]

3. *Characterization of Earlier Judicial Interpretations*

The court discredited the *National Manufacturing* line of cases, characterizing these decisions as overbroad interpretations of section 702c.[100] It criticized these decisions for concentrating solely on the one-phrase disclaimer and for failing to consider it in the context of the attached proviso language.[101] The court noted the *National Manufacturing* decision relied heavily on public policy, rather than legislative history, to support its conclusion.[102] The court thought the willingness of Congress to undertake flood control programs was conditioned on immunity from floodwater damage caused by flood control projects.[103] It agreed with other courts, however, which recognized limits on section 702c immunity: "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.'"[104] This position was strengthened by the fact Congress did not re-enact section 702c when it addressed

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93. *Id.*
94. *Id.* at n.16.
95. *Id.* at 598-99.
96. *Id.* at 595, 597-98.
97. Even the dissenters could not find legislative history to support their opposition to the majority's holding. Judge Gee admitted the statements of legislative history, which he relied on to support his view, were taken from passages discussing land, not personal injuries. *Id.* at 605 n.3 (Gee, J., dissenting). Judge Higginbotham was even less convincing. He found, "At its best the legislative history does not disprove the purposes found by my brothers in dissent," but did not agree the dissent's interpretation of § 702c was the only possible reading of the statute. *Id.* at 606 (Higginbotham, J., dissenting).
98. *Id.* at 594 (citing 69 CONG. REC. 8119 (1928)).
99. *Id.* at 599 n.16.
100. *Id.* at 601.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* (quoting Graci v. United States, 456 F.2d 20, 26 (5th Cir. 1971)).

nationwide flood protection in the 1936 Act.[105] The court held section 702c immunity does not apply when the government allows recreational use of a flood control project.[106] The court stated its holding reinforced the legislative history of the Act and overrode "a judicial misconstruction compounded through the years."[107]

B. *Interpretation of the Act by the United States Supreme Court*

The United States Supreme Court reversed the Fifth Circuit's decision in *United States v. James*.[108] The Court recognized that under FTCA, the federal government would normally be liable for its negligent failure to warn of the dangerous conditions created by the release of floodwaters.[109] Thus, the case presented the issue of whether the FCA protected the federal government regardless of any FTCA liability.[110] The immunity provision provided absolute immunity to the federal government from any damage related to flood control activities.[111] The Court further held "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project."[112] Thus, the government was immune from suit.

1. *Statutory Language of the Act*

In contrast to the Fifth Circuit's interpretation of section 702c as "ambiguous," the Supreme Court found the language to be a clear, expansive statement of immunity.[113] Focusing solely on the one-phrase disclaimer of liability, the Court held, "[i]t is difficult to imagine broader language."[114] The Court, however, failed to consider the disclaimer in the context of the following proviso

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105. *Id.* The court disagreed with the *National Manufacturing* line of cases, holding § 702c was re-enacted in the 1936 Act. *Id.* at n.23. It found that although the 1936 Act did not repeal or amend the 1928 Act, provisions of the 1928 Act were not carried forward into the 1936 Act. *Id.* The immunity provision of the later Act was much more specific in defining governmental immunity:

> [N]o money appropriated under authority of section 701f of this title shall be expended on the construction of any project until States, political subdivisions thereof, or other responsible local agencies have given assurances satisfactory to the Secretary of the Army that they will . . . hold and save the United States free from damages due to the construction works.

Id. (quoting 33 U.S.C. § 702c(b) (1988)).

106. *Id.* at 603.
107. *Id.* at 602.
108. United States v. James, 478 U.S. 597, 612 (1986).
109. *Id.* at 598-99. For a discussion of liability under FTCA, see *infra* Part IV.B.
110. United States v. James, 478 U.S. at 598-99.
111. *Id.* at 608, 612.
112. *Id.* at 610.
113. *Id.* at 604.
114. *Id.*

language.[115] The proviso provided for compensation by the federal government for certain damage to property.[116] Without the proviso, the disclaimer would be ambiguous and broad.[117] When read in conjunction with the proviso, however, the disclaimer limits the liability of the federal government to compensate property damage provided by the section as a whole.[118] By not considering the proviso language, the Court took the disclaimer out of its intended context—compensation for damage to property.[119] Thus, the Court's holding was necessarily overbroad.

In addition, the Court found no uncertainty in the meaning of the terms "floodwaters," and "damage."[120] The Court disagreed with the Fifth Circuit's argument that "damage" referred only to property.[121] It went on to state "damages" had historically been interpreted to mean both injury to property and injury to person.[122] In analyzing the definition of "damages," however, the Court misread the statute, an error sharply criticized by the dissent.[123] The statute refers only to "damage," not "damages."[124] While it is true that "damages" may be used to refer to compensation for an injury to person, as the dissent noted, at the time the FCA was enacted "damage" had traditionally referred only to injury to property.[125]

2. *Legislative History of the Act*

The Court interpreted the legislative history of the statute as supportive of its holding.[126] It rejected the argument that section 702c was intended only to immunize the federal government from liability for certain property damage.[127] Although the Court admitted congressional records gave numerous examples of

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115. *Id.* In characterizing the language of § 702c as "sweeping," the Court referred only to the phrase "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or floodwaters at any place." *Id.* The Court believed this phrase, "on its face," covered the plaintiffs' injuries. *Id.*

116. *See* 33 U.S.C. § 702c (1988).

117. *See supra* text accompanying notes 33-34; *see supra* Part III.A.3.

118. *See supra* text accompanying notes 33-34; *see supra* Part III.A.3.

119. *See supra* text accompanying notes 84-85.

120. James v. United States, 478 U.S. 597, 605 (1986). Because the Act covered floodwaters at flood control projects, the Court held it was "clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *Id.* If this term is "clear," then why is there so little agreement on its definition? The Fifth Circuit considered the terms as capable of having more than one meaning. *See supra* text accompanying note 64. The Court did not address the Fifth Circuit's contention that the term "place" was also ambiguous. *See supra* text accompanying notes 66-67.

121. James v. United States, 478 U.S. at 605.

122. *Id.*

123. *Id.* at 614-16 (Stevens, J., dissenting).

124. *See* 33 U.S.C. § 702c (1988).

125. James v. United States, 478 U.S. 597, 615 (1986) (Stevens, J. dissenting).

126. *Id.* at 606.

127. *Id.* at 610-12.

the use of the terms "liability" and "damage" to refer only to property damage, it discredited these examples as "fragments of legislative history" that "do not constitute 'a clearly expressed legislative intent contrary to the plain language of the statute.'"[128] These examples were characterized as mere "fragments," however, the Court did not offer a single example of legislative history that supported the statute's application to personal injury suits. In light of the extensive documentation of legislative history, which showed the absence of consideration in regard to liability for personal injuries,[129] the majority's characterization of such history lacks a logical basis. Furthermore, the dissent pointed out it would have been "barbaric" for members of Congress to spend days debating the liability of the government to compensate property damage, while excluding injured parties and their survivors from any recovery without so much as one word of disagreement.[130]

In addition, the dissent noted the legislative history of section 702c provided no support for the importance the majority attached to the immunity provision.[131] The immunity provision was not introduced until very late into the debates, and little discussion occurred.[132] Had Congress intended this provision to be particularly significant, it is likely the provision would have been more extensively debated.[133]

3. *Characterization of Earlier Judicial Interpretations*

The majority gave great weight to the jurisdictions which agreed with its interpretation of section 702c, and even characterized prior judicial decisions as unanimous in upholding absolute immunity.[134] The Court's review of prior judicial history, however, is selective.[135] The Court failed to mention that the cases it relied upon all considered section 702c immunity in the context of property damage, not personal injuries.[136] As noted by the Fifth Circuit, it is possible to explain these broad holdings as merely an erroneous original interpretation, compounded over the years.[137]

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128. *Id.* at 612.
129. *See supra* notes 31-32.
130. James v. United States, 478 U.S. 597, 620 (1986) (Stevens, J., dissenting).
131. *Id.* at 606-07.
132. *See supra* text accompanying notes 27-28.
133. James v. United States, 478 U.S. at 602.
134. *Id.* at 603.
135. *See id.* at n.4. Most notably, in listing prior case law interpreting § 702c, the Court omitted any reference to decisions recognizing limits on immunity under the Act. *See supra* Part II.C.2. The Court further undermined its own argument by stating, "We granted certiorari to resolve the resultant split among the Circuits." *Id.* at 603. This indicates the Court recognized prior judicial decisions lacked unanimity.
136. *See supra* text accompanying note 61.
137. *See supra* Part III.A.3.

IV. INCONSISTENCY OF FCA INTERPRETATION WITH MODERN GOVERNMENT ACCOUNTABILITY[138]

A. *Sovereign Immunity*

The doctrine of sovereign immunity originates in feudal times and is based on the old adage that "the king can do no wrong."[139] Under this doctrine, the sovereign is absolutely immune from suit unless it consents.[140] At first, early American courts followed the doctrine of sovereign immunity because of the fear that government action would be rendered ineffective by the threat of suit.[141] Since feudal times, however, the growing trend is toward government accountability.[142] Thus, the continuation of sovereign immunity for flood-control activities by the *James* Court is inconsistent with modern notions of government accountability.

B. *Inroads on Sovereign Immunity*

Congress recognizes limitations on sovereign immunity.[143] In 1887, the Tucker Act was enacted to enable individuals to sue the federal government for contract and other nontort actions.[144] This Act requires the federal government to compensate private individuals for government action that amounts to the "taking" of their land.[145] The Tucker Act represented one of the first significant waivers of sovereign immunity.

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138. For an in-depth discussion of the clash between FCA and the modern decline of the doctrine of sovereign immunity, see Michael S. Levine, Note, *United States v. James: Expanding the Scope of Sovereign Immunity for Federal Flood Control Activities*, 37 CATH. U. L. REV. 219, 222-26 (1987).

139. Principe Compania Naviera, S.A. v. Board of Comm'rs, 333 F. Supp. 353, 355 (E.D. La. 1971).

140. United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. Shaw, 309 U.S. 495, 500-01 (1940); Minnesota v. United States, 305 U.S. 382, 388-89 (1938).

141. The Siren, 74 U.S. (7 Wall.) 152, 154 (1868) (indicating public service will be threatened if the sovereign is subject to suit); Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868) (noting the government would be unable to perform its duties without sovereign immunity). The reasoning of such cases, however, was often weak. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1890) (stating "[i]t 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.").

142. *See infra* Part IV.B. For a discussion of the decline of support for sovereign immunity in the federal courts, see generally United States v. Muniz, 374 U.S. 150, 152-58 (1963) (finding federal prisoners can bring suit under FTCA for personal injuries negligently inflicted during their incarceration).

143. *See* 28 U.S.C. § 1491(a) (1994) (giving the United States Claims Court jurisdiction over suits against the United States founded upon the Constitution or an Act of Congress).

144. *See id.*; *see also* Blanchard v. St. Paul Fire & Marine Ins. Co., 341 F.2d 351, 358 (5th Cir.), *cert. denied*, 382 U.S. 829 (1965) (finding the Tucker Act constitutes the only basis for a contract suit against the United States).

145. *See* Bedford v. United States, 192 U.S. 217, 224 (1904).

Another example of the decline of sovereign immunity is the civil rights statute of section 1983.[146] Section 1983 subjects public officials to personal liability when their actions deprive others of their constitutional rights.[147] Despite the fear of lawsuits[148] and social costs[149] associated with this waiver of sovereign immunity, section 1983 is representative of the trend toward greater government accountability. There is a growing recognition that "[w]hen government officials abuse their offices, 'actions for damages may offer the only realistic avenue for vindication of constitutional guarantees.'"[150]

The sovereign immunity waiver most closely related to flood-control liability, however, was enacted in 1946 when Congress passed FTCA.[151] Although the federal courts have held FTCA does not invalidate FCA,[152] a comparison of the two statutes highlights the inequitable and contrary results produced. FTCA makes the federal government "liable to the same extent as a private person for certain torts of federal employees acting within the scope of their employment."[153] Thus, individuals may bring tort claims for negligent acts of the federal government and its employees.

FTCA does contain important exceptions to governmental liability. Significant to this analysis[154] is the "discretionary function" exception. This exception is contained in 28 U.S.C. section 2680(a) and exempts from liability under FTCA

> [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 abuse.[155]

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146. 42 U.S.C. § 1983 (1988).

147. *Id.*

148. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807-08 (1982).

149. *Id.* at 814.

150. Anderson v. Creighton, 483 U.S. 635, 638 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. at 814).

151. 28 U.S.C. §§ 1346-2671 (1988).

152. National Mfg. Co. v. United States, 210 F.2d 263, 274-75 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954). FTCA, enacted 18 years after FCA, lists statutes which it declares "are hereby repealed." *Id.* This list does not include § 702c of the FCA. *Id.* Thus, the federal courts have held there should be no repeal by implication given the existence of the express listing. *Id.*

153. United States v. Orleans, 425 U.S. 807, 813 (1976); Layton v. United States, 984 F.2d 1496, 1499 (8th Cir.), *cert. denied*, 114 S. Ct. 213 (1993); *see* 28 U.S.C. § 2674 (1994) (permitting the United States to be held liable for tort claims in the same manner as an individual).

154. *See infra* text accompanying notes 165-66.

155. 28 U.S.C. § 2680(a) (1994).

Thus, if an employee or agency of the federal government causes injury while performing or failing to perform a "discretionary function," no liability is created, even if the employee or agency abused its discretion.[156]

The question is whether the governmental act or omission is "discretionary." Because nearly every act or omission upon which a tort claim might be based could arguably involve some type of "discretion" by the government, the Supreme Court has provided some guidance in defining this term. In *Dalehite v. United States*,[157] the Court differentiated between the type of discretion exercised by lower level employees charged with the execution of the operational, daily details necessary to effectuate government projects or programs, and the higher level planning or policy-making discretion necessary to initiate and promulgate such projects or programs.[158]

Many courts have applied the discretionary function exception to preclude governmental liability in cases involving the construction of maintenance of public property.[159] Applying this exception to flood-control projects, one would think the federal government could be held liable for negligence occurring at the operational level. For example, the day-to-day management and maintenance of the project—but not at the planning level. In fact, this is true of structures that are not specifically classified as "flood control" projects.[160]

In addition, the federal courts have often ruled claims based on the failure of the government to warn of dangerous conditions do not fall within the discretionary function exception.[161] Significantly, in *Dye v. United States*,[162] a case

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156. Dalehite v. United States, 346 U.S. 15, 34-35, *reh'g denied*, 346 U.S. 841, *reh'g denied*, 346 U.S. 880 (1953), *reh'g denied*, 347 U.S. 924 (1954).

157. Dalehite v. United States, 346 U.S. 15, *reh'g denied*, 346 U.S. 841, *reh'g denied*, 346 U.S. 880 (1953), *reh'g denied*, 347 U.S. 924 (1954).

158. *Id.* at 35-36. The *Dalehite* Court held "determinations made by executives or administrators in establishing plans, specifications or schedules of operations" were "discretionary" actions, and thus protected by the discretionary function exception to FTCA liability. *Id.* Furthermore, the Court stated, "Where there is room for policy judgments and decision there is discretion. It necessarily followed that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Id.*

159. *See* Jean F. Rydstron, Annotation, *Claims Based on Construction and Maintenance of Public Property As Within Provision of 28 U.S.C. § 2680(a) Excepting From Federal Tort Claims Act Claims Involving "Discretionary Function or Duty,"* 37 A.L.R. FED. 409, 537 (1986).

160. *See* Mocklin v. Orleans Levee Dist., 690 F. Supp. 527, 533-34 (E.D. La. 1988) (holding the decision of the Corps of Engineers to use flotation channels in hurricane protection projects was a policy decision taken in exercise of agency discretion), *aff'd*, 877 F.2d 427 (1989); Bevilacqua v. United States, 122 F. Supp. 493, 496 (W.D. Pa. 1954) (holding failure of lower-level employee to keep lock illuminated in federal navigation project did not involve use of discretion). Failure to warn of existing dangers has been classified as negligence at the operational level, and thus the government has been held liable for such omission. *See infra* text accompanying notes 164-65.

161. *See* Summers v. United States, 905 F.2d 1212, 1215-16 (9th Cir. 1990) (holding failure to post warnings not covered by discretionary function exception); Caplan v. United States, 877 F.2d 1314, 1316 (6th Cir. 1989) (holding failure to warn of dangerous condition in forest not within discretionary function exception); Mandel v. United States, 793 F.2d 964, 967 (8th Cir. 1986) (holding failure to warn of subsurface rocks in river not within the discretionary function exception

with facts nearly identical to *James*,[163] the Sixth Circuit held the government liable for its negligent failure to warn boaters of dangerous conditions.[164] In *Dye*, the purpose of the federal project was navigation, but in *James*, it was flood control.[165] In determining whether the survivor may bring a suit to recover for the death of the decedent, this distinction seems irrelevant, especially because the same negligent action caused both accidents. This analysis is significant because if the federal government would normally be liable under FTCA for failing to warn of dangerous conditions, it must next look to FCA for immunity. *United States v. James* directly addresses this issue.[166]

Thus, both the Tucker Act and the FTCA represent Congress' recognition of the tension between the traditional doctrine of sovereign immunity and the democratic principles of government accountability. These statutes show Congress did not believe the government should be immune from suit, but should be held accountable for damages resulting from its wrongful or negligent actions. The Supreme Court avoided, however, any discussion of the decline of sovereign immunity and how its decision in *James* fits into this trend. The holding of the Fifth Circuit best resolved this tension between sovereign immunity and government accountability when it held FCA immunity applied to flood control activities, but when recreational users were permitted on flood control projects, this immunity did not extend to the negligent failure to warn of dangerous conditions.[167]

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to liability); Henretig v. United States, 490 F. Supp. 398, 404 (S.D. Fla. 1980) (holding failure to maintain path in public recreation area not within the discretionary function exception). Other courts have held, however, failure to warn is protected by the discretionary function exception. *See* Graves v. United States, 872 F.2d 133, 136-38 (6th Cir. 1989) (holding the Corps of Engineers exercised policy discretion in arriving at appropriate type of warnings needed at site of closed lock); Miller v. United States, 710 F.2d 656, 665 (10th Cir.) (noting when governing statute provided no clear standards, decision not to post warnings was discretionary), *cert. denied*, 464 U.S. 939 (1983); Chrisley v. United States, 620 F. Supp. 285, 289-90 (D.S.C.), *aff'd without opinion*, 791 F.2d 165 (4th Cir. 1985) (holding decision of water resource manager not to restrict area or post-warning signs was discretionary);. These cases focus on the decision not to warn at the planning or implementation level.

162. Dye v. United States, 210 F.2d 123 (6th Cir. 1954).

163. *See supra* notes 62-66 and accompanying text. In *Dye*, two boaters were swept over a dam and drowned when water was discharged through a federal navigation project. Dye v. United States, 210 F.2d at 124.

164. Dye v. United States, 210 F.2d at 128-29.

165. *Id.* at 127; United States v. James, 478 U.S. 597, 599 (1986).

166. In *James*, the United States Supreme Court considered:

> [W]hether the Flood Control Act's immunity provision in 33 U.S.C. § 702c . . . bars recovery where the Federal Government would otherwise be liable under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., for personal injury caused by the Federal Government's negligent failure to warn of the dangers from the release of floodwaters from federal flood control projects.

United States v. James, 478 U.S. at 598-99.

167. *See supra* text accompanying notes 70-72.

V. DID *JAMES* RESOLVE ANYTHING? CRITICISM OF *JAMES*

Even after the Supreme Court's decision in *James*, the federal circuit courts still differ over when immunity should be granted under FCA.[168] The uncertainty persists because flood control projects typically serve purposes other than purely flood control, such as conservation and recreation. The circuit courts are split over whether a project's flood-control purpose lends immunity even though the injuries were associated with another purpose.[169] The language of *James* did not resolve this issue.[170]

The approach to this issue still varies among the circuits. The Tenth[171] and Fourth[172] Circuits do not allow the government to claim flood-control immunity as a defense when the injury was caused by government conduct unrelated to any flood-control purpose.[173] The Ninth Circuit allows governmental immunity when flood control was one of the purposes for which Congress authorized the project.[174] In the Seventh Circuit, the test is whether the flood-control activities

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168. *See, e.g.*, Zavadil v. United States, 908 F.2d 334 (8th Cir. 1990) (holding one purpose of the dam was flood control, so the government was immune from suit), *cert. denied*, 498 U.S. 1108 (1991); *c.f.* Williams v. United States, 957 F.2d 742 (10th Cir. 1992) (holding because a dam was not involved in flood control, the government was not immune under FCA).

169. *See infra* text accompanying notes 171-75.

170. As one court recently put it:

> While the *James* decision provided some guidance to the lower courts when faced with § 702c applicablity, the various district and circuit courts reached inconsistent results in applying the rule of *James*. Each case wherein the government invokes § 702c's cloak of immunity involves a fact sensitive process. This is best illustrated by a review of district court and circuit court treatment of § 702c following the *James* decision.

In re Arkansas River Co. v. United States, 840 F. Supp. 1103, 1108 (N.D. Miss. 1993). The Seventh Circuit described the state of the law after the *James* decision:

> Despite the evident breadth of *James*, the circuits have declined to treat it as an absolute bar to any suit for personal injuries resulting in some way from the management of a flood control project. These courts have taken their cue from a footnote in *James* that distinguished two cases finding an exception to immunity where the cause of injury was "wholly unrelated" or "without relation" to flood control. . . . [The resulting cases] have reached inconsistent results.

Bailey v. United States, 35 F.3d 1118, 1120 (7th Cir. 1994) (citations omitted).

171. *See* Boyd v. United States *ex rel.* U.S. Army Corps of Engineers, 881 F.2d 895, 900 (10th Cir. 1989).

172. *See* Hayes v. United States, 585 F.2d 701, 702 (4th Cir. 1978).

173. *Id.* at 702-03; Boyd v. United States *ex rel.* U.S. Army Corps of Engineers, 881 F.2d at 900.

174. *See* McCarthy v. United States, 850 F.2d 558, 562 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *see also* Zavadil v. United States, 908 F.2d 334, 335-36 (8th Cir. 1990) (per curiam) (finding the government is immune from liability when government control of waters is a substantial factor in causing injury), *cert. denied*, 498 U.S. 920 (1991); Mocklin v. Orleans Levee Dist., 877 F.2d 427, 430 (5th Cir. 1989) (finding the government is protected from liability in the construction phase of flood-control projects as well as the maintenance of completed projects).

increased the probability of injury.[175] Thus, depending on which circuit the case arises in, the outcome on governmental immunity may differ.

Hiersche v. United States[176] reveals the attitude of at least one Supreme Court Justice towards this conflict among the circuit courts.[177] The facts of *Hiersche* are particularly tragic—a professional diver contracted with the government to inspect an underwater fish screen at a dam.[178] Although government employees assured the diver the dam outflow would be shut off, they negligently failed to stop the outflow.[179] The diver was killed when his head was drawn into an orifice in the fish bypass system.[180] Following the precedent of *James*, the Ninth Circuit held the government was immune from liability for all personal injuries caused by its employees at federal flood-control projects under FCA.[181]

In his Memorandum respecting the denial of certiorari, Justice Stevens[182] characterized the *James* decision as "unfortunate" and FCA as an "anachronism" and unduly harsh.[183] He called for congressional action to resolve the current injustice which results under section 702c:

> At the time of its enactment, no consideration was given to the power generation, recreational, and conservation purposes of flood-control projects, or to their possible impact on then nonexistent federal liability for personal injury and death caused by the negligent operation of such projects. Today this obsolete legislative remnant is nothing more than an engine of injustice. Congress, not this Court, has the primary duty to confront the question of whether any part of this harsh immunity doctrine should be retained.[184]

VI. PUBLIC POLICY CONSIDERATIONS SUPPORTING LIABILITY FOR PERSONAL INJURIES

In addition to the statutory language and legislative history of FCA, other public policy considerations support the conclusion that the *James* Court incorrectly interpreted the Act.

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175. *See* Fryman v. United States, 901 F.2d 79, 82 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990).

176. Hiersche v. United States, 933 F.2d 1014 (9th Cir. 1991), *cert. denied*, 503 U.S. 923 (1992).

177. Hiersche v. United States, 503 U.S. 923, 923-25 (1992) (Memorandum of Justice Stevens respecting the denial of certiorari).

178. *Id.* at 924.

179. *Id.*

180. *Id.*

181. *Id.*

182. Justice Stevens authored the dissent in *James*. United States v. James, 478 U.S. 597, 612 (1986) (Stevens, J., dissenting). Justice Marshall and Justice O'Connor joined in the dissent. *Id.*

183. Hiersche v. United States, 503 U.S. 923, 924 (1992).

184. *Id.*

A. *Multi-Purpose Flood-Control Projects*

As Justice Stevens noted in *Hiersche*, Congress did not foresee multi-purpose flood-control projects when it enacted FCA.[185] Because "the number and importance of federal flood-control projects has grown dramatically," this problem is of greater concern than ever before.[186] The *James* decision did not resolve this issue.[187]

B. *No Immunization of Other Public Works Projects*

Since enactment of FCA, the federal government has undertaken public works programs with even greater scope and expense.[188] Unlike flood control, however, these activities have not been immunized.[189] In fact, the federal judiciary has broadly construed FTCA to effectuate public policy considerations supporting government accountability.[190] The federal government has faced liability for negligent acts committed in high-risk activities ranging from NASA rocket launchings[191] to forest firefighting.[192] It is interesting to note that although these activities involve the same governmental liability concerns as flood-control projects, they are not similarly immunized. Given government liability in these and other activities, it is hard to understand why flood control has been singled out for the protection of sovereign immunity.

C. *Humanitarian Intent of Congress*

The legislative history of FCA reveals a humanitarian intent to provide effective flood control.[193] This humanitarian spirit remains today in the numerous private relief bills enacted after national disasters.[194] Congress also provided for a national flood insurance program[195] to make coverage available in high-risk,

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185. *Id.*
186. *Id.*
187. *See supra* Part V.
188. *See, e.g.*, Reyonier, Inc. v. United States, 352 U.S. 315-16 (1957); Pigott v. United States, 451 F.2d 574, 574 (5th Cir. 1971).
189. Reyonier, Inc. v. United States, 352 U.S. at 321; Pigott v. United States, 451 F.2d at 575.
190. Spelar v. United States, 171 F.2d 208, 209 (2d Cir. 1928), *rev'd*, 338 U.S. 217 (1949).
191. Pigott v. United States, 451 F.2d at 575.
192. Reyonier, Inc. v. United States, 352 U.S. at 317-18.
193. For example, one Congressman stated:

> [T]hose 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 which were left in the wake of the 1927 flood.

69 CONG. REC. 6706 (1928) (statement of Rep. Gregory).
194. National Mfg. Co. v. United States, 210 F.2d 263, 274 n.3 (8th Cir. 1954).
195. The National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4128 (1988).

high-rate areas.[196] These measures show an intent on the part of the federal government to ameliorate the harshness of FCA. Private relief bills create a huge burden on Congress.[197] Therefore, Congress should act to correct the judicial misconstruction of the Supreme Court in *James* and to expressly define FCA in terms permitting recovery for personal injuries, as it originally intended.

VII. CONCLUSION

Perhaps because of the senseless tragedy in the *Hiersche* case and other personal injury cases, there is a growing feeling that something is not right with allowing the government complete immunity simply because its negligent action occurred in connection with a project classified as a flood–control project. As discussed previously, liability of the federal government for negligence in the operation of water management projects depends on whether the project is classified as a flood-control project.[198] Thus, if the project where Hiersche suffered injury was designed for navigational or hurricane protection purposes, no such absolute immunity would attach. This distinction is senseless and unfair.

The *James* decision is completely inconsistent with the demise of sovereign immunity.[199] The original justifications for the doctrine no longer apply.[200] In our modern society, the government is increasingly held accountable for its negligent actions.[201] Under FTCA, the government may be held liable for negligent actions involving other types of public works projects.[202]

Furthermore, due to the conflict among circuit courts, the outcome of a case may depend on the circuit in which the case arises.[203] It is clearly time for Congress to take action to correct this inequitable result.[204] Congress should act to limit governmental immunity under FCA to suits for property damage. Legislative history and public policy concerns support the conclusion that private individuals should be allowed to recover for personal injuries caused by governmental negligence in flood–control related activities.

Sarah Juvan

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196. Pennsylvania v. National Ass'n, 520 F.2d 11, 16 (3d Cir. 1975).
197. *See* WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT 4 (1957).
198. *See supra* text accompanying notes 165-70.
199. *See supra* Part IV.
200. *See supra* Part IV.A.
201. *See supra* Part IV.B.
202. *See supra* Part IV.B.
203. *See supra* Part V.
204. Others have also called for Congressional action. *See* Hiersche v. United States, 503 U.S. 923, 924 (1992) (Memorandum of Justice Stevens respecting the denial of certiorari); Levine, *supra* note 138, at 242-43.