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Immunity Provision of the Flood Control Act: Does It Have a Proper Role after the Demise of Sovereign Immunity, The

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The Immunity Provision of the Flood Control Act: Does It Have a Proper Role After the Demise of Sovereign Immunity?

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TABLE OF CONTENTS

* J.D., University of the Pacific, McGeorge School of Law, to be conferred 2000; B.A., Government, University of Redlands, 1996. Thanks to my Mom and Dad, Mama and Papa, and Grandma and Grandpa, without all of whom I never would have made it through law school.

I. INTRODUCTION

Jackie and her family decided to cool off at the local lake last summer during one of the many sweltering days when the temperature was over 100 degrees. Early in the morning, they loaded up the jet skis and headed off. Later, while enjoying her day on the lake, Jackie jumped off her jet ski for a dip in the cool water. Unfortunately, Jackie and her family did not realize how dangerously close they were to the dam, a federally funded public works project having flood control as one of its purposes. There had been no signs or buoys marking the point beyond which skiing would be dangerous. The federal employees working at the dam that morning had forgotten to put out the buoys. Unfortunately, because water was being released from the lake for irrigation purposes, Jackie was sucked into the gates of the dam. Her dad jumped in to try to pull her back, but the suction from the dam was too strong. Neither Jackie nor her father made it out alive. Despite the fact that Jackie's mother appears to have a valid wrongful death claim against the federal government under the Federal Torts Claims Act (FTCA),[1] she might never get her day in court due to a broad immunity the government enjoys under § 702c of the Flood Control Act of 1928 (FCA).[2]

Section 702c of the FCA provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." This Comment will argue that modern recognition of § 702c creates injustice on two levels. First, on a general level, the broad sovereign immunity recognized under that provision is inconsistent with the FTCA. When Congress passed the FTCA eighteen years after it passed the FCA, it made a policy decision

1. Federal Tort Claims Act, 28 U.S.C.A. § 2671-2680 (West 1994); *see infra* Part II.B (explaining the history behind the FTCA, which allows tort claims to be brought by private citizens against the federal government).

2. Flood Control Act, 33 U.S.C.A. § 702c (West 1986). The fact pattern described is a hypothetical situation, based loosely on *United States v. James*, 478 U.S. 597 (1986), which held that § 702c of the Flood Control Act immunized the government from a wrongful death claim on essentially the same facts. *See infra* Part IV (discussing the facts of *James* and illustrating how the protection of § 702c was applied to those facts).

to waive sovereign immunity in the area of tort claims.[3] Despite Congress' intent to waive immunity in the governmental tort context, the judiciary continues to recognize under § 702c an absolute immunity that bars otherwise-legitimate claims for "personal injury and death caused by federal negligence, gross negligence, and even 'conscious governmental indifference to the safety of the public.'"[4]

Secondly, even if a sound policy reason exists for continuing to recognize § 702c immunity,[5] the federal circuit courts apply the immunity provision so inconsistently that a more specific inequity has been created.[6] A plaintiff's ability to withstand a motion to dismiss for lack of jurisdiction over a tort claim connected to government flood control projects depends on the circuit in which the suit arises.[7] The inconsistency occurs because each circuit utilizes its own test for determining the facts to which the immunity provision will apply.[8] Furthermore, the U.S. Supreme Court has not only failed to resolve the inconsistency, but has added to the confusion with its opinion in *United States v. James*,[9] the only case the Court has decided regarding § 702c immunity questions.[10] As this Comment will demonstrate, either congressional action or reinterpretation of § 702c by the Supreme Court is urgently needed. This Comment will suggest that Congress should amend the FTCA to make clear that it was intended to repeal § 702c in favor of the "discretionary function" exception.[11] In the absence of such congressional action, the inequity created by modern interpretations of § 702c demands that the Supreme Court narrowly construe the statute. A narrow interpretation will limit its application to those situations in which immunity is necessary to encourage future funding of flood control projects.[12] Such a narrow interpretation by the Supreme Court would also provide a consistent test for the circuit courts to use when determining whether

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3. *See infra* Part II.C (explaining the policy behind the passage of the FTCA).

4. Hiersche v. United States, 503 U.S. 923, 924 (1992) (quoting United States v. James, 478 U.S. 597, 600 (1986)) (acknowledging that after *United States v. James*, § 702c provides a complete defense against these types of claims).

5. Noticeably, no such special immunity is recognized in other public works contexts.

6. *See infra* Part III (describing the different tests used by the various circuit courts, and how each test results in an inconsistent application of the immunity provision).

7. *See infra* Part III.A (discussing how some circuit courts use § 702c to provide a broad-based immunity, and how others give it a narrow application for policy reasons).

8. *See infra* Part IV.E (explaining the splits between the circuit courts over the proper scope of § 702c).

9. 478 U.S. 597 (1986).

10. *See infra* Part IV.D (describing how the Court's opinion in *United States v. James* not only failed to resolve the split between the circuits, but also created a new split through its use of overly broad language).

11. *See infra* Part V (suggesting that the FTCA can provide the necessary protection for governmental anti-flooding activities for which § 702c was originally enacted to provide).

12. *See infra* Part VI (arguing that, due to the injustice created by the unequal use of the immunity provision among the circuits, the Supreme Court should narrowly interpret § 702c so as to limit it to the situations wherein the policy supporting it is implicated).

the immunity applies. Thus, reinterpretation of § 702c by the Supreme Court would, at least in part, alleviate both levels of inequity created by § 702c.[13]

In Part II, this Comment discusses the legislative history of the FCA and illustrates how modern recognition of a broad immunity is inconsistent with the policy behind the enactment of the FTCA.[14] Part III analyzes the judicial treatment of § 702c of the FCA, and describes the original disagreement between the circuits over the proper interpretation of that section.[15] Part IV illustrates how the Supreme Court's ruling in *United States v. James*[16] failed to resolve the original circuit split, and created the basis for some circuits to expand the scope of the immunity to its outermost limits.[17] Part V explains the role of the "discretionary function" exception to the FTCA, and proposes that the necessary protection for governmental anti-flooding activities be determined under that provision.[18] Part VI concludes by suggesting a resolution to that conflict through a narrow Supreme Court interpretation of the FCA.[19]

II. THE FLOOD CONTROL ACT AND THE FEDERAL TORT CLAIMS ACT

A. The Historical Background of the 1928 Flood Control Act

In 1927, a massive flood left the Mississippi River Valley area economically devastated.[20] In response, Congress began debating the possibility of funding a flood control project for that region in order to prevent such disasters in the future.[21] The project was one of the largest and most expensive federally funded public works programs to date in the United States.[22] Due to the expense of the intended project, however, Congress was concerned with the need to limit any potential liability of the federal government that might result from such an immense flood control project.[23]

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13. *See infra* Part V (concluding that because of the inequities created by the current use of the FCA immunity provision, it should be repealed, amended, or narrowed by either Congress or the Supreme Court).

14. *See infra* Part II (explaining the reasons for the 1928 Flood Control Act and its immunity provision).

15. *Infra* Part III.

16. 478 U.S. 597 (1986).

17. *Infra* Part IV.

18. *Infra* Part V.

19. *See infra* Part VI (asserting that in the absence of congressional action, the immunity provision of the FCA should be narrowly interpreted to apply only when the policy reasons supporting the need for the immunity are implicated).

20. United States v. James, 478 U.S. 597, 606 (citing S. REP. NO. 70-619, at 12 (1928)).

21. *Id.* (citing S. REP. NO. 70-619, at 12 (1928)).

22. *See id.* (citing 6640 CONG. REC. (1928)) (noting that the flood control project would "cost four times as much as the Panama Canal").

23. *See id.* at 607 (asserting that Congress must have been concerned with limiting governmental spending on flood control because of the magnitude of the contemplated project, and therefore intended to limit the government's liabilities to direct expenditures on the project).

Congress debated over the Mississippi River Valley Flood Control Act from February to May 1928.[24] The possibility of an immunity provision was not introduced until the end of the debate.[25] Little legislative history exists regarding the immunity provision.[26] Due to this scarcity of direct legislative history, the courts were forced to develop their own interpretation of the intent behind § 702c.[27] Some legislators thought the provision was unnecessary because, at the time of the debate, the federal government still operated under the common law sovereign immunity doctrine.[28] At common law, unless the federal government consented to being sued, it was immune from all liability.[29] Nonetheless, most congressional members were concerned that if the federal government were to undertake the duty of flood control, it would be liable for any damage that may occur when a flood control project fails to control a flood.[30] In order to quash those fears and encourage future funding of other necessary flood control projects,[31] Congress included the immunity provision in the final version of the FCA.[32]

Although the FCA was only enacted to provide flood control in the Mississippi River Valley, the limited immunity provided in § 702c has been extended to apply

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24. *Id.* at 606.

25. *See* Graci v. United States, 456 F.2d 20, 23 (5th Cir. 1971) ("The immunity provision was not introduced into the flood control bill until shortly before the final version of the bill was enacted into law.").

26. *See id.* (finding that the legislative history of the adoption of the immunity provision is "unrevealing," and such adoption was done with "little or no discussion").

27. *See James*, 478 U.S. at 607 (remarking that statements made during the debate support the majority's interpretation of the intent behind § 702c); *see also id.* at 614 (Stevens, J., dissenting) (finding that "neither the plain language of the statute nor the legislative history behind it supports" the majority view); *see generally* Sarah Juvan, Note, *The Federal Flood Control Act: Congressional Development of a Modern-Day Ark*, 44 DRAKE. L. REV. 303 (1996) (discussing the varying interpretations given by different courts of the intent behind § 702c).

28. *See James*, 478 U.S. at 608 (citing 69 CONG. REC. 7028 (1928)) ("While 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 [tort] damages.").

29. *See infra* Part II.B (describing the doctrine of sovereign immunity).

30. *See* Guy F. Atkinson Co. v. Merritt, Chapman, & Scott Corp., 126 F. Supp. 406, 408 (N.D. Cal. 1954) (finding that the purpose of § 702c was to ensure that the government would not be liable for future flood damage just because it took on a project of controlling floods; it could not control all floods which were bound to occur).

31. *See Graci*, 456 F.2d at 26 ("'[I]mmunity from liability for flood water damage arising in connection with flood control works was the condition upon which the government decided to enter into the area of nationwide flood control programs.'" (quoting Graci v. United States, 301 F. Supp. 947, 952 (1969))); National Mfg. Co. v. United States, 210 F.2d 263, 271 (8th Cir. 1954) (finding that "absolute freedom of the government from liability for flood damages is and has been a factor of the greatest importance in the extent to which [C]ongress has been and is willing to make appropriations for flood control and to engage in costly undertakings to reduce flood damage").

32. *See* Peterson v. United States, 367 F.2d 271, 275-76 (9th Cir. 1966)

> ([I]t is clear that Congress intended by the enactment of § 702c in the Act of May 15, 1928, . . . to be an integral part of a plan or policy on the part of the Government to embark on a vast construction program to prevent or minimize the incidences of loss occurring from floods and flood waters by the building of dikes, dams, levees, and related works, and to keep the Government entirely free from liability for damages when loss occurs, notwithstanding the works undertaken by the Government to minimize it.).

to all federally funded flood control projects.[33] Furthermore, some modern interpretations of § 702c provide absolute immunity for claims of negligent and intentional tortious acts committed by federal employees working at any public works project with flood control as one of its purposes.[34] Thus, immunity is applied regardless of whether a flood or flood control activity was the cause of such damage.[35]

The Congress of 1928 could not have anticipated the breadth or types of projects to be built in the "power generation."[36] Today, public works projects are built for many reasons, flood control being just one of them.[37] These projects commonly combine flood control, recreation, and conservation purposes.[38] Thus, the 1928 Congress could not have intended § 702c to immunize the government from claims of personal injury and death by recreational users of a public works project that happens to have flood control as one of its many purposes.[39]

B. The Federal Tort Claims Act and Doctrine of Sovereign Immunity

The doctrine of sovereign immunity originated at English common law.[40] Under this doctrine, the sovereign could not be sued without its consent, because "the King could do no wrong."[41] Because this concept was part of the common law before the ratification of the Constitution, the judiciary adopted the doctrine into the new American common law.[42] Despite that adoption, the doctrine of sovereign immunity could not rest on the idea that "the King could do no wrong."[43] Instead, the modern recognition of sovereign immunity in America is usually justified as necessary to

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33. *See National Mfg.*, 210 F.2d at 274 (holding that use of the words "at any place" implies that Congress intended the immunity under § 702c to apply to all flood damage, not just that on the Mississippi River).

34. *See* Hiersche v. United States, 503 U.S. 923, 926 (1992) (discussing the injustice created by continued recognition of immunity under § 702c due to the changed circumstances since its adoption).

35. *Id.*

36. *See id.* at 925 (discussing the different purposes for which public works projects are built today, as compared to 1928, when § 702c was passed).

37. *Id.*

38. *Id.*

39. *See id.* at 926 ("Today this obsolete legislative remnant is nothing more than an engine of injustice.").

40. *See* Nevada v. Hall, 440 U.S. 410, 414 (1978) (acknowledging the doctrine's roots in the English feudal system).

41. *See id.* at 415 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *246) ("The King, moreover, is not only incapable of doing wrong, but even thinking wrong; he can never mean to do an improper thing.").

42. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., concurring in part and dissenting in part), *overruled on other grounds by* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (noting the Court's observation in Hans v. Louisiana, 134 U.S. 1 (1890), that the doctrine still applied because sovereign immunity "was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away").

43. *See Hall*, 440 U.S. at 415 (recognizing the historical reasoning for sovereign immunity, but rejecting the notion that wrongs could not be committed by a sovereign).

ensure that the government can operate effectively.[44] The government cannot run efficiently if people can sue it for every wrong inflicted during a necessary governmental function.[45] If that were possible, the government would not have enough money to do the things a government is formed to do.[46] For many people, though, this was still not enough to justify complete federal immunity from liability for damage caused by a government employee.[47]

Many viewed absolute sovereign immunity as contrary to the American democratic notion of accountability.[48] In recognition of that view, Congress passed the FTCA, waiving sovereign immunity with respect to private tort claims against the federal government.[49]

C. The Policy Behind the Federal Tort Claims Act

In 1946, Congress passed the Legislative Reorganization Act.[50] Title IV of that Act, commonly known as the FTCA, waived sovereign immunity in the realm of tort claims against government agents.[51] The FTCA provides that the federal government is liable "in the same manner and to the same extent as a private individual under like circumstances" for the torts of its employees.[52] Prior to the passage of the FTCA, the only redress for people damaged by the tortious conduct of government employees was to petition Congress to pass a bill to provide for the private relief of the petitioner.[53]

The use of the private bill system to provide relief for private tort victims was inefficient.[54] That inefficiency forced Congress to recognize the need for a more

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44. *See* Gibbons v. United States, 75 U.S. 269, 275 (1865) (finding that sovereign immunity is necessary because the government should not be liable for torts which occur when employees are engaged in their "official duties").

45. Fitts v. McGhee, 172 U.S. 516 (1899).

46. *Id.*

47. *See, e.g.*, C. Jacobs, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 153 (1972) (stating that the application of sovereign immunity hinders the "performance of one of the most essential government functions, the dispensation of justice according to law").

48. *See, e.g.*, Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting) ("[Immunity] is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of moral responsibility of the State.").

49. Dalehite v. United States, 346 U.S. 15, 24 (1953).

50. 28 U.S.C.A. §§ 2671-2680 (West 1994).

51. *Id.* at 24-25.

52. 28 U.S.C.A. § 2674 (West 1994).

53. Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311, 322 (1942).

54. *See* Dalehite, 346 U.S. at 24, 25 & n.9 (1953) (stating that the old system was "notoriously clumsy," and citing the increasing number of private bills which were introduced in Congress, yet never discussed than the private bill system).

effective way to redress the claims of the victims of governmental torts,[55] which were increasing in number as the government increased in size.[56] Subjecting the government to civil liability for its own torts provided the best way for victims to obtain the necessary relief. Furthermore, by enacting the FTCA, Congress acknowledged that absolute sovereign immunity was contrary to modern notions of democracy.[57] "The Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work."[58]

Despite the waiver of sovereign immunity in the tort context under the FTCA, the judiciary continues to recognize an absolute immunity in § 702c.[59] That immunity has been interpreted to apply to tortious acts committed by federal employees of a public works project having flood control as one of its purposes.[60] The continued recognition of such a broad immunity under § 702c, despite the subsequent enactment of the FTCA, becomes significant given the fact that immunity for flood control activities was contemplated during the debate over the FTCA's discretionary function exception.[61] Moreover, the inequity created by the broad modern interpretation of § 702c is glaringly inconsistent with the policy behind the FTCA: waiving sovereign immunity in the tort arena so as to make the government accountable for its own wrongs.[62]

III. EARLY JUDICIAL INTERPRETATION OF THE FCA IMMUNITY PROVISION

After Congress passed the FTCA in 1946, plaintiffs began suing the government for damages caused by negligent failures to warn of floods, or by negligent construction, maintenance, or design of flood control projects which resulted in flooding and property damage.[63] As a defense to these suits, the

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55. *Id.* at 24-25 (explaining that the FTCA arose out of a recognition that the government should be liable for damage caused by its employees, and thus, providing access to the courts for redress of such claims was a better way to provide the necessary relief).

56. 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, 222-23 (1987).

57. *Id.* at 219.

58. *Dalehite*, 346 U.S. at 24.

59. *See infra* Part IV.E (discussing the various circuit court interpretations of § 702c and how each circuit recognizes a broad-based immunity).

60. *Supra* note 32 and accompanying text.

61. *See infra* notes 211-12 (citing language from the Attorney General discussing the discretionary function exception, which contemplates immunity for flood control activities).

62. *Supra* notes 42-45 and accompanying text.

63. *See, e.g.*, Clark v. United States, 218 F.2d 446, 448 (9th Cir. 1954) (asserting a claim under FTCA by alleging that construction and maintenance of a federal dam on the Columbia River caused the dam to break and flood the plaintiff's property); National Mfg. Co. v. United States, 210 F.2d 263, 269, 274 (8th Cir. 1954) (dismissing an action under the FTCA alleging that plaintiffs were injured when they were lulled into a false sense of safety due to the government's negligent failure to warn of an impending flood); Guy F. Atkinson Co. v. Merritt, Chapman, & Scott Corp., 126 F. Supp. 406, 407-08 (N.D. Cal. 1954) (discussing plaintiff's FTCA claim

government raised § 702c of the FCA, arguing that it had not been repealed by the subsequent passage of the FTCA.[64]

For the most part, the federal circuit courts were in agreement that § 702c remained a valid defense and that the government must make a certain threshold showing in order to invoke the protection of § 702c. The government had to prove two elements: (1) that the flood or flood waters that had damaged the plaintiff were connected to a federally funded flood control project; and (2) that the damage was caused in part or in full by a flood or flood waters.[65]

The circuit courts required the first element because the immunity provision was enacted as part of a federal bill authorizing the funding of a flood control project.[66] Hence, for the plaintiff to legitimately raise the issue of immunity under § 702c, the flood must have been connected to a federally funded flood control project.[67] Also, because the courts interpreted the policy behind § 702c to be aimed at providing the government with enough protection from potential flood liability to encourage the future funding of such necessary projects, the immunity would only apply when the flood or flood waters that had damaged the plaintiff had been connected to a flood control project.[68] As for the second element, the language of the provision itself required that the damage be caused by "floods or flood waters."[69]

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alleging that the negligent construction of the federally funded Folsom Dam caused his downstream construction site to be inundated with water, thus damaging his property).

64. *See Clark*, 218 F.2d at 452 (1954) (holding that § 702c barred recovery under these facts); *National Mfg.*, 210 F.2d at 274 (applying the protection of § 702c to bar the plaintiffs' FTCA claim). *But see Guy F. Atkinson*, 126 F. Supp. at 409-10 (finding that the government was not entitled to summary judgment because it had not proven that the flood that damaged the plaintiff was of the type intended to be protected under § 702c).

65. *See* Portis v. Folk Constr. Co., 694 F.2d 520, 522-23 (8th Cir. 1982) (asserting that the determination of whether immunity applied rested on two separate issues: whether the structure in question "was a 'flood control' project for purposes of . . . § 702c . . . , [and] whether 'flooding' within the meaning of that statute occurred"); Morici Corp. v. United States, 681 F.2d 645, 648 (9th Cir. 1982) ("Since in this case the project was authorized by Congress for flood control purposes, and the flooding was related to use of that project, the immunity continues to attach."); Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184, 1191 (5th Cir. 1975) ("[T]he United States is protected from liability for damages caused by 'floods or flood waters' in connection with flood control projects, even when the government's own negligence has caused or aggravated the losses.").

66. *See National Mfg.*, 210 F.2d at 270-71 ("[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 . . . .").

67. *See* Peterson v. United States, 367 F.2d 271, 275 (9th Cir. 1966) (refusing to apply the protection of § 702c because the flooding that had damaged the plaintiff was "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control"). *But see National Mfg.*, 210 F.2d at 271 (holding that the government is immune from paying for damage caused by floods or flood waters at any place, "in spite of and notwithstanding federal flood control works").

68. *See National Mfg.*, 210 F.2d at 271 (expressing "that absolute freedom of the government from liability for flood damages is and has been a factor of the greatest importance in the extent to which Congress has been and is willing to make appropriations for flood control and to engage in costly undertakings to reduce flood damage").

69. *See* Flood Control Act, 33 U.S.C.A. § 702c (West 1999) ("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 . . . .").

A. The Circuits Split over the First Element: How Much of a Nexus is Needed?

Although the circuits agreed that a connection needed to exist between the flood or flood waters and a federally authorized flood control project,[70] they disagreed as to the type of nexus necessary to invoke the protection of the provision.[71] The disagreement becomes significant when determining the proper scope of the immunity provision: today, public works projects are used not only for flood control, but also to create hydroelectric power and to create lakes for recreation and conservation.[72] Thus, if a tight nexus is required, the government has to show that the damage was caused by the project being used specifically for flood control.[73] On the other hand, a broad nexus requirement is satisfied when the public works project has flood control as one of its purposes.[74]All of the circuit courts did agree, however, that if the negligent conduct is "wholly unrelated" to a federally funded project having flood control as one of its purposes, that conduct will not be protected under § 702c and the government therefore could be liable for any damage caused by its negligence.[75]

1. The Broad Nexus Requirement

All the circuit courts agreed that a flood "wholly unrelated" to a federally funded flood control project was not protected under § 702c.[76] On the other hand, some of the circuit courts broadly held that as long as an injury had *not* been "wholly unrelated" to a federally funded public works project having flood control

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70. Although *National Manufacturing Co. v. United States*, 1210 F.2d 263 (8th Cir. 1954), broadly construed § 702c to immunize the government against liability for any flood damage notwithstanding a flood control project, no other court has agreed with that interpretation. *See* Levine, *supra* note 56 at 231 (stating that the broad scope under *National Manufacturing* has been limited by subsequent interpretations).

71. *See, e.g.*, Washington v. East Colum. Basin Irrigation Dist., 105 F.3d 517, 519 (9th Cir. 1997) (discussing the difference between the Fourth Circuit nexus requirement and that of the Ninth Circuit, and adopting its own as the proper standard despite any claims that *United States v. James*, 478 U.S. 597 (1986), had resolved the conflict).

72. Hiersche v. United States, 503 U.S. 923, 925 (1992).

73. *See infra* Part III.A.2 (discussing the standard under the *Hayes* nexus requirement).

74. *See infra* Part II.A.1 (explaining the broad nexus standard requirements).

75. *See* Hayes v. United States, 585 F.2d 701, 702 (4th Cir. 1978) (agreeing with *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971), and stating that no immunity attaches "for flooding caused by a federal project unrelated to flood control"); Graci v. United States, 456 F.2d 20, 26-27 (5th Cir. 1971) (holding that because the federal project, which allegedly caused the flooding that had damaged the plaintiff, was built for navigational purposes as opposed to flood control purposes, the protection of § 702c did not attach and the government was open to suit under an FTCA claim); *see also* Peterson v. United States, 367 F.2d 271, 275 (9th Cir. 1966) (finding that no immunity applied where the decision to blast an ice jam which caused flooding downstream was wholly unrelated to a congressional act authorizing a flood control project); Parks v. United States, 370 F.2d 92, 93 (2nd Cir. 1966) (adopting the rule of *Peterson* that flood damage wholly unrelated to flood control projects is not protected by 702c).

76. *Supra* note 75 and accompanying text.

as one of its purposes, the immunity would apply.[77] Hence, as long as flood control had been at least one of the reasons the federal project had been built, these circuits will apply the immunity provision, even if it was not a flood control activity that had caused the flooding.[78] "It is the relationship between the flooding and a project [c]ongressionally authorized for flood control which is the controlling factor" under this nexus test, not whether an actual anti-flooding activity caused the flooding.[79] For example, the collapse of the Teton Dam in 1976 caused severe flooding throughout Idaho's Teton Basin.[80] The legislation that enabled the construction of the Teton dam listed multiple purposes for the project, but flood control was not among them.[81] Despite that fact, the appellate court held that the immunity provision in § 702c applied, thereby barring the plaintiff's suit because it found that "flood control was on the minds of the members of Congress when passing the legislation."[82] If the legislative intent behind § 702c indeed had been to make sure the government would not be liable for its specific anti-flooding activities, this test seems inconsistent with that narrow intent requirement.

2. *The Fourth Circuit Requires a Tighter Nexus*

In *Hayes v. United States*,[83] the Fourth Circuit found the "not wholly unrelated" standard, discussed above,[84] to be too broad.[85] The court was concerned that such a broad application of § 702c immunity was contrary to congressional intent, especially after the enactment of the FTCA,[86] which expressed a policy disapproving of sovereign immunity in the realm of tort claims.[87] Because the purpose of the immunity provision was to protect the government from extensive liability arising out of its flood control activities, the immunity should only apply

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77. *Supra* note 75 and accompanying text.

78. *See* Morici Corp. v. United States, 681 F.2d 648 (9th Cir. 1982) (finding that even if the project were being operated for a purpose other than flood control at the time of the negligence, the immunity would still attach because the conduct had been "not wholly unrelated" to a project with flood control as one of its purposes).

79. *Id.* at 648.

80. Aetna Ins. Co. v. United States, 628 F.2d 1201, 1203 (9th Cir. 1980).

81. *Id.*

82. *See id.* (discussing the comments relating to flood control made by members of Congress during the debate over the Teton Dam project, and finding that "flood control was beyond question a purpose of the project"; thus, § 702c immunity would apply).

83. 585 F.2d 701 (4th Cir. 1978).

84. *Supra* Part III.A.1.

85. *See Hayes*, 585 F.2d at 704 (holding that the trial court erred when it dismissed the plaintiff's claim on a summary judgment motion because the plaintiff had offered evidence showing that some of the water released by the public works project which flooded his property had been released for a non-flood control purpose; if that were found to be true, then § 702c would not apply).

86. *See id.* at 702 (explaining that after the enactment of the FTCA, the use of § 702c immunity should be confined to damage specifically caused by federal flood control activities).

87. *See infra* Part II.B (explaining the policy behind the enactment of the FTCA).

to conduct in furtherance of anti-flooding activity.[88] Therefore, in *Hayes*, the Fourth Circuit determined that a tighter nexus between the negligent conduct and the flood control project needed to be shown before the government could claim immunity under § 702c.[89]

Under this standard, if the plaintiff's damage had been caused by the operation of the public works project for a non-flood control purpose, although flood control may have been one of the general purposes of the project, then § 702c would not apply, and the government would still be held liable.[90] However, if the government could prove that the plaintiff's damage had been caused when the project was specifically being used for the purpose of flood control, then the immunity provision would still apply.[91] Thus, the appellate court remanded the case to the trial court, which had dismissed the case on summary judgment in favor of the government due to the government's claim of immunity under § 702c.[92] The trial court was instructed to make a fact-sensitive determination, and if it found that some of the waters that damaged the plaintiff had been released for purposes other than flood control, the immunity was not to apply.[93]

On the other hand, under the "not wholly unrelated" standard, as long as the government conduct had been related to a project which had flood control as one of its purposes, the conduct was protected, regardless of whether the specific conduct had been related to flood control.[94] A determination under the Fourth Circuit standard becomes very fact sensitive, because the court scrutinizes each case to determine whether, under the particular facts, the plaintiff's damage had actually been caused by a federally funded flood control activity, rather than simply determining whether flood control had been one of the project's general purposes.[95] Although the Fourth Circuit has not had another occasion to employ this fact-sensitive determination, the "not wholly unrelated" circuits are fully aware of and continue to acknowledge the split the Fourth Circuit created.[96] Furthermore, the latter circuits criticize the *Hayes* standard as being contrary to the broad language

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88. *Hayes*, 585 F.2d at 702.

89. *See id.* at 703 (reversing the grant of summary judgment for the government on the basis of § 702c immunity because the government had not shown that the project was being specifically used for a flood control activity when the plaintiff's land was flooded by water negligently released by that project).

90. *See Hayes*, 585 F.2d at 702-03 ("If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c.").

91. *Id.*

92. *Id.* at 703.

93. *Id.*

94. *See supra* Part III.A.1 (explaining that some of the circuit courts only required a tenuous connection between the plaintiff's damage and a federally authorized flood control project).

95. *See Hayes*, 585 F.2d at 702-03 (remanding the case to the trial court to make the fact-sensitive determination of whether the plaintiff's damage was actually caused by a flood control activity before deciding if § 702c was to apply).

96. *Morici Corp.*, 681 F.2d at 647.

used in the immunity provision and for making the government's burden of proof too difficult to carry.[97]

B. *"Damage from or by Floods or Flood Waters"*

All of the circuit courts agreed that once the government proved the requisite nexus, whichever nexus that may be, it would also have to prove a second element: that "floods or flood waters," as understood under § 702c, had damaged the plaintiff.[98] The language of the provision itself states the immunity only protected the government from liability for "damage from or by floods or flood waters."[99] Section 702c was not intended to protect the government from every conceivable type of water damage; instead, it was created to protect the government from liability for damage resulting from "events properly described as floods."[100]

The earlier courts deciding this issue declared that the 1928 Congress had only intended a "natural" or "Act of God" flood, which the government's flood control projects could not control, to be protected under § 702c as a flood or flood water.[101] Natural floods were determined to be those resulting from "unusual or extraordinary climatic conditions" which inundated an area of the surface of the earth with water where water ordinarily would not be expected to be.[102] The government could also prove the necessary "flood" if the climatic conditions were so unusual that a flood was likely to occur.[103] Eventually, though, the circuit courts found this definition to be too narrow, and thus contrary to the broad intent behind § 702c.[104] Therefore,

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97. *See id.* at 648 (arguing that the evidentiary difficulties created by the Fourth Circuit standard support the "not wholly unrelated" standard as the correct one); *see also* Washington v. East Colum. Basin Irrigation Dist., 105 F.3d 517, 519 (9th Cir. 1997) (acknowledging that the circuit split over the proper standard was never resolved in *James*).

98. *See* Stover v. United States, 204 F. Supp. 477, 482-83 (N.D. Cal. 1962) (stating that the causation issue did not depend on which part of the government's negligence had caused the damage, but rather depended on whether the damage was caused at all by floods or flood waters).

99. Flood Control Act, 33 U.S.C.A. § 702c (West 1989); *see id.* ("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 . . . .").

100. Guy F. Atkinson Co. v. Merritt, Chapman, & Scott Corp., 126 F. Supp. 406, 409 (N.D. Cal. 1954).

101. *See id.* at 408 (finding that the purpose of § 702c was not to protect the government from liability for everything which could be classified as a "flood," but rather to protect only those "Act of God" floods which the government could not control); *see also* National Mfg. Co. v. United States, 210 F.2d 263, 270 (8th Cir. 1954) (expounding upon the legislative intent in including § 702c in the FCA, and referring to the devastation wreaked by "Acts of God" floods and governmental inability to control them as a main concern behind the inclusion of § 702c).

102. *Stover*, 204 F. Supp. at 484; *see also Guy F. Atkinson*, 126 F. Supp. at 409 (stating that the legislative intent behind the immunity provision was to make sure the government would not be held liable for "Acts of God" disasters which its flood control projects could not control; liability should not attach merely because the government undertook the responsibility of trying to control future floods in some areas).

103. *Stover*, 204 F. Supp. at 484.

104. *See* Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184, 1192 (5th Cir. 1975) (rejecting the contention that the definition of "floods or flood waters" was limited only to "natural floods" after concluding that Congress had intended the immunity provision to apply broadly, and therefore that the narrow definition was

under this extended definition, § 702c was applied to protect the government from liability for damage caused by both man-made and natural floods.[105] Again, both types of floods must occur in connection with a flood control project to even reach this question.[106]

The courts extended the original definition because they found that requiring the government to prove the flooding was natural rather than man-made undermined the purpose of protecting the government from liabilities arising out of its flood control activities.[107] Under the "man-made" flooding definition, an inundation of water caused by the negligent design, construction, operation, or maintenance of a flood control project is protected by § 702c, provided that the requisite nexus between the negligent conduct and the flood control activity existed.[108] However, even under this extended definition, finding that the waters in question were "floods or flood waters" still required proof that an inundation of water or waters had caused the damage to the plaintiff. [109]

IV. THE FORK IN THE STREAM: *UNITED STATES V. JAMES*

United States v. James[110] was the first U. S. Supreme Court case to speak on the issue of immunity under § 702c. Notably, the case was also the first time § 702c

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contrary to such congressional intent).

105. *See* Burlison v. United States, 627 F.2d 119, 121 (8th Cir. 1980) (finding that a flood did not have to be caused by "extraordinary climatic conditions" in order to fall under the protection of § 702c); *Florida E. Coast Ry.*, 519 F.2d at 1192 (holding, despite the fact that the water originated from a place where it was ordinarily expected to be, that the phrase "floods and flood waters" included an "extraordinary rising of waters" caused by constant rain falling in the channels of a flood control project, when the water overflowed the project walls, damaging the plaintiff); Graci v. United States, 456 F.2d 20, 25 (5th Cir. 1971) (holding that floods caused by "flood control project[s] [that] had been negligently designed, constructed, operated, or maintained" were covered under § 702c, as the requisite flood or flood waters); *Stover*, 332 F.2d 204, 208 (9th Cir. 1964) (affirming the district court's application of § 702c to the facts of that case, but finding that the determination of the immunity issue did not depend on a classification of the flood as a "natural" flood).

106. *See supra* notes 65-68 and accompanying text (explaining the necessity of a connection between the flood and a federally funded flood control project).

107. *See* Aetna Ins. Co. v. United States, 628 F.2d 1201, 1204 (9th Cir. 1980) (explaining that requiring the court to determine whether the flood had been "natural" or "man-made" would frustrate the purpose of § 702c and would create too difficult a test for the court to apply, "lead[ing] the court[s] into the morass of 'contributing causes,' 'superseding causes,' and 'intervening causes'") (quoting Lunsford v. United States, 570 F.2d 221, 229 n.13, which in turn quotes Lunsford v. United States, 418 F. Supp. 1045, 1054 (D. S.D. 1976)).

108. *See Graci*, 456 F.2d at 25 (asserting that "several courts have extended [§ 702c] immunity to bar suits against the United States on the theory that a flood control project had been negligently designed, constructed, operated, or maintained").

109. *See Florida E. Coast Ry.*, 519 F.2d at 1192 (explaining that although the plaintiff's land was not inundated by the water that had overflowed the federal project, the presence of those waters around the plaintiff's property had caused the roadbed supporting the train tracks to erode and eventually wash out, and therefore, because the damage was caused by the presence of flood waters, § 702c would apply). Also significant is the fact that the court made a point of noting that the area in which the roadbed was located had been designated a flood disaster area. *Id.*

110. 478 U.S. 597 (1986) [hereinafter *James III*].

was applied to immunize the government from liability for personal injury damages.[111] Despite the opportunity for the Supreme Court to definitively settle any questions about the proper scope of § 702c, the opinion left three issues unresolved. First, the Court failed to resolve the pre-existing circuit split over the nexus issue,[112] despite the fact that the adoption of a narrow nexus was the basis for the Fifth Circuit decision.[113] Second, the Court rejected the Fifth Circuit's finding that the words of § 702c were ambiguous and thus subject to interpretation, despite the fact that the other circuits had freely interpreted those words differently from each other, thereby illustrating the ambiguity.[114] Third, the Court's discussion regarding the lack of ambiguity in the language of § 702c was so broad and ambiguous itself that it has created a new split among the circuits over the definition of "floods and flood waters."[115]

A. Procedural and Factual Background

United States v. James[116] was a consolidation of two cases.[117] Both plaintiffs brought wrongful death claims against the government, alleging that the negligence of government employees caused the decedents to be swept through the retaining structures of a federal dam and killed.[118] Both decedents were recreational users of a lake created by a federally funded dam which had flood control as one of its purposes.[119] Furthermore, in both situations, the government employees of those lakes had negligently failed to warn the decedents of the dangers from the current which was caused by open flood control gates.[120]

The district courts held that the immunity provision applied in both cases, and therefore summarily dismissed the plaintiffs' cases for lack of jurisdiction.[121] On

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111. *See* James v. United States, 760 F.2d 590, 599 n.16 [hereinafter *James II*] (explaining that out of the 23 appellate cases that had interpreted the immunity provision, 21 had dealt with property damage, and the other two were resolved on different grounds).

112. *See James III*, 478 U.S. at 603-06 (citing *Hayes* and *Morici Corp.* in footnote 7 as if those cases agreed with each other, and failing to acknowledge in footnote 4 that the circuits had already split regarding the proper application of § 702c).

113. *See id.* at 602-03 (holding that the Fourth Circuit had utilized the correct test to determine when the immunity applied, and adopting the same test for its analysis because that test "restricted the immunity more closely to the limited purpose of the statute").

114. *See supra* notes 65-67 and accompanying text (illustrating why other courts must have found the language ambiguous).

115. *See infra* Part IV.E (demonstrating how, because of the Supreme Court's *United States v. James* opinion, the circuit courts now disagree over whether or not the definition of floods or flood waters includes water which is merely contained in a flood control project).

116. 478 U.S. 597 (1986).

117. *Id.* at 597 (pre-opinion syllabus).

118. *Id.* (pre-opinion syllabus).

119. *Id.* (pre-opinion syllabus).

120. *Id.* (pre-opinion syllabus). .

121. *Id.* (pre-opinion syllabus).

appeal, the Fifth Circuit affirmed both of the district court decisions.[122] The Fifth Circuit then reheard the appeal en banc and reversed itself, holding that the immunity provision did not apply.[123] Upon appeal, the Supreme Court granted certiorari to review the decision.[124]

B. *The Fifth Circuit Adopts the Broad Nexus Test*

In the first appellate decision, a Fifth Circuit panel used the two-part test[125] to determine if the immunity provision applied.[126] It adopted the Ninth Circuit broad nexus standard to determine whether the conduct was connected to flood control,[127] requiring only that the negligent conduct be "not wholly unrelated" to any act of Congress authorizing expenditures of federal funds for flood control.[128] Under this standard, "the purpose of the project, rather than the purpose of the employee's conduct, determines the government's immunity."[129] Therefore, because the government proved that one of the purposes of the project was flood control, the court found that the requisite nexus between the project and the employee's conduct had been met.[130]

Next, the panel held that the damage was caused by the requisite "floods or flood waters." It held that this element had been proven because the water in which the decedents had drowned was in the public works project as a result of "flood conditions."[131] This interpretation of § 702c "flood and flood waters," however, was unprecedented, and not supported by the cases cited by the majority.[132] In neither

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122. James v. United States, 740 F.2d 365 (5th Cir. 1984), *rev'd*, 760 F.2d 590 (5th Cir. 1985), *rev'd*, 578 U.S. 597 (1986) [hereinafter *James I*].

123. *James II*, 760 F.2d 590 (5th Cir. 1985), *rev'd*, 478 U.S. 597 (1986).

124. *James III*, 578 U.S. at 603.

125. *See supra* note 65 and accompanying text (explaining the elements of the two-part test).

126. *James I*, 740 F.2d at 370 (finding that the negligence was connected to a federal project with flood control as one of its purpose, and also that there was damage by flood waters).

127. *See infra* Part III.A.1 (discussing the broad nexus requirement).

128. *See James I*, 740 F.2d at 369 (citing *Florida East Coast Railway*, 519 F.2d 1184, 1191 (5th Cir. 1975), as support for the proposition that the Fifth Circuit had adopted the "not wholly unrelated" standard). Ironically, the *Florida East Coast Railway* case had only agreed with the first part of the Ninth Circuit standard—that conduct "wholly unrelated" to a federal flood control project was not covered under the immunity provision. *Florida E. Coast Ry.*, 519 F.2d at 1191.

129. *See James I*, 740 F.2d at 369 (rejecting the Fourth Circuit standard from *Hayes*, which would not apply the immunity if the employee's negligent conduct pertained to a recreational purpose rather than a flood control purpose).

130. *Id.* at 369-70.

131. *See id.* at 370 n.3 (citing *Aetna Insurance Co. v. United States*, 628 F.2d 1201 (9th Cir. 1980), and *Burlison v. United States*, 627 F.2d 119 (8th Cir. 1980), as support for the proposition that waters contained within a flood control project qualify as "flood waters" as intended under the FCA).

132. *See id.* (defining the waters in question as the requisite "flood waters" merely because they were contained in a public works project which had flood control as one of its purposes). The court extended the definition even further when it held that the immunity does not depend on whether the damage was caused by "floods or flood waters," and would apply to waters in a "placid lake on a summer day," as long as the damage

of the cases cited was the injury to the plaintiff caused while the water was still contained in the flood control project.[133] Rather, the damage in those cases was caused when the waters which had been contained by a federal project escaped and inundated the plaintiffs' land, either through the negligence of the government, or because the project could not contain the flood waters.[134] Those cases stood for the proposition that "man-made" floods were protected under the immunity provision just as were "natural" floods, not that waters within such a project are the requisite "flood waters" merely because they are contained in a public works project.[135]

Despite the fact that its definition of "flood or flood waters" was unsupported, and essentially combined the two elements into one, the first Fifth Circuit decision held that both elements of the test had been met.[136] Because the court found both elements had been proven, it applied the protection of § 702c and affirmed the dismissal of the plaintiffs' claims.[137] A rehearing was granted, however, and the Fifth Circuit reversed itself en banc, disagreeing with the very analysis used to determine whether the immunity applied.[138]

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was related to a public works project having flood control as one of its purposes. *Id.* at 370. This proposition is unfounded and unsupported by any language of the statute or by any case interpreting the statute. *See supra* Part III.B (explaining the prior interpretations of "floods or flood waters").

133. *See* Aetna Ins. Co. v. United States, 628 F.2d 1201, 1204 (9th Cir. 1980) (holding that when the Teton Dam collapsed and flooded the plaintiff's downstream property, the result was a "flood" under § 702c, even though the accident had been caused by government negligence). Although the court said that the level of water being stored in the project was affected by rainfall, it merely did so to elucidate why it is too difficult to narrowly define "floods" as only those caused by natural conditions: "any flood caused by government negligence is also caused in part by natural conditions." *Id.* at 1204; *see also* Burlison v. United States, 627 F.2d 119, 121 (8th Cir. 1980) (holding that, for § 702c purposes, there is no difference between flooding "caused by unusual or extraordinary climatic conditions," those caused by government negligence, and damage created by "back waters" which inundate the plaintiff's property). Again, this case involved waters which overflowed their natural channels because of a government flood control project which was negligently maintained or constructed, and did not involve damage caused by waters contained in a channel. *Id.* at 120. The waters became flood waters when they left their channel, regardless of whether the cause was "man-made" or natural. *Id.* at 121.

134. *Burlison*, 627 F.2d at 121.

135. *Id.*

136. *James I*, 740 F.2d at 370.

137. *Id.* at 373.

138. *Id.* at 374.

C. The Fifth Circuit Reverses Itself: The Hayes *Test Is the Proper Standard*

When the Fifth Circuit reviewed the earlier holding en banc, it rejected the proposition that conduct "not wholly unrelated" to a flood control project would be immune.[139] Instead, it adopted the Fourth Circuit's fact-sensitive analysis from *Hayes*.[140] However, before it addressed this issue, it had to justify the multiple interpretations of the proper test for § 702c immunity by finding that the language of § 702c was ambiguous.[141] Thus, because the language of the statute was ambiguous and could not be given its plain meaning, it was subject to interpretation, and the court was free to adopt the interpretation it found most consistent with the legislative intent of § 702c.[142] After reviewing the history and purpose of the statute, the en banc decision found that the standard developed by the Fourth Circuit under *Hayes* was the better standard because it was more closely related to the en banc's interpretation of the history and purpose of § 702c.[143]

Under the *Hayes* test, the immunity provision would only apply if the government had undertaken the conduct at issue specifically for a flood control purpose.[144] The Fifth Circuit looked to the facts of each case to decide if the conduct at issue was specifically related to the negligent employee's flood control duties, rather than the employee's recreational duties.[145] After reviewing the specific facts of each case, the court found that the summary judgments against the plaintiffs were improper because the damage was or could have been caused by the employees' failure to warn recreational users of known dangers on the lake.[146] Therefore, its conduct was not protected under § 702c.[147]

As for the second element—whether "flood or flood waters" caused the injury to the plaintiff—the court assumed, without actually deciding, that this element had been proven.[148] Proof was unnecessary because the court's decision rested on the

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139. *See James II*, 760 F.2d 590, 601 (5th Cir. 1985) (finding that the broad interpretation taken by *National Manufacturing* and subsequent cases does not fit with the legislative intent behind § 702c).

140. *See id.* at 602-03 (holding that the narrow Fourth Circuit nexus standard was more consistent with legislative intent, and therefore adopting it as the proper standard); *see also supra* Part III.A.2 (explaining the *Hayes* case and its nexus requirement).

141. *See James II*, 760 F.2d at 593-94 (explaining that although the starting point was the language of the statute itself, the court was justified in using the history and purpose of the statute to interpret the statute's scope because of the latent ambiguities in its language).

142. "Our duty is to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Id.* at 596 (internal quotation marks omitted).

143. *Id.* at 602.

144. *See supra* notes 83-86 and accompanying text (discussing the analysis under the Fourth Circuit test).

145. *James II*, 760 F.2d at 603.

146. *Id.*

147. *Id.*

148. *See id.* at 594 n.6 (suggesting that "flood waters" is an ambiguous term and subject to many definitions, such as "waters that are out of control" or "water at a flood control project," but refusing to adopt either definition).

finding that the requisite connection to a flood control project had not been shown.[149] The court merely assumed that "flood waters" existed under these facts so as to facilitate part of its argument that the language of the immunity provision was ambiguous and therefore open to multiple interpretations.[150]

The Fifth Circuit believed that applying the immunity provision to these facts would be contrary to legislative intent because "Congress had not intended 'to shield the negligent or wrongful acts of government employees—either in the construction or in the continued operation' of flood control projects, including the failure 'to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land.'"[151] It would also create an unjust "absolute immunity where there would otherwise be liability under the [FTCA] for personal injury resulting from government employees' negligent failure to warn of government-created hazards to known recreational users."[152] Apparently, it was the Fifth Circuit's holding that the plain language of the provision was ambiguous that got the attention of the Supreme Court.[153]

D. What Did the Supreme Court Hold?

1. The Court Failed to Acknowledge the Nexus Split Created by Hayes *and Adopted by the Fifth Circuit*

According to the Supreme Court, before the Fifth Circuit reversed itself and refused to grant the government immunity, all other appellate courts would have agreed that the protection of § 702c applied to the facts of *James*.[154] That assumption, however, completely ignored the split created by the Fourth Circuit opinion in *Hayes*.[155] In fact, in a footnote, the Court cited *Hayes* and *Morici Corp.*

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149. *See id.* at 603-04 (concluding that the immunity does not attach where the fault was the result of employee failure to warn recreational users of the "accepted use of government-impounded water").

150. *See id.* at 593-96 (listing the interpretive ambiguities arising from the language of the provision in order to justify looking to the legislative history of the provision for the correct interpretation).

151. *James III*, 478 U.S. 597, 603 (1986) (citation omitted) (quoting *James II*, 760 F.2d 590, 599, 603 (5th Cir. 1985)).

152. *James II*, 760 F.2d at 592; *see id.* (stating the issue as whether or not the creation of such an absolute immunity had been the intention of the framers of the FCA § 702c immunity provision).

153. *See infra* Part IV.D.2 (explaining that the focus of the Supreme Court opinion in *James III* was on whether or not the language of § 702c was ambiguous).

154. "All other Courts of Appeals that have interpreted § 702c—and, prior to this case, the Court of Appeals for the Fifth Circuit . . . have held that § 702c grants immunity to the Federal Government from damages caused by flood[ ]waters from a flood control project." *James III*, 478 U.S. at 603-04 n.4.

155. *See supra* Part III.A.2 (discussing the split created when the Fourth Circuit refused to uphold the district court's application of the immunity).

v. United States[156] as if they were consistent with each other.[157] Given this failure to even acknowledge the split, it is inconceivable that the Court resolved the conflict, favoring one nexus standard over another, as has been claimed by some circuit courts.[158] Although the Court did address a claim raised by the respondents that the negligent conduct was "wholly unrelated" to flood control—which sounds like they were trying to make a *Hayes*-type argument—the wholly unrelated standard is distinct from the nexus requirement.[159] The *Hayes* court disagreed with the other circuit courts over the nexus issue, not the "wholly unrelated" standard.[160] Hence, despite the holding that a negligent failure to warn was part of the management of a flood control project, it was not favoring the *Hayes* standard over the broad standard; rather, it was illustrating that a connection existed between the conduct and flood control.[161] It did not analyze the nature of that connection, as would be required under the tight nexus standard.[162]

Finally, although the Court held that the suction created by the release of the waters to prevent flooding was a cause of the decedents' death,[163] this again raised a nexus issue which the Court failed to answer. The release of water for flood control was merely *a* cause; a more substantial factor was the negligent and willful failure of the government employees to warn the recreational users of that danger.[164] The decedents would not have been using the waters for recreational purposes in that area if the employees had done their jobs and provided the necessary warnings.

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156. 681 F.2d 645 (9th Cir. 1982) (adopting a broad nexus standard).

157. *See James III*, 478 U.S. at 605 n.7 (citing the *Hayes* standard, which would not grant immunity merely by finding that the project has flood control as one of its purposes, as if it were consistent with the *Morici Corp.* decision, which held that the government is not liable for damage caused by flood waters at a federal public works project not wholly unrelated to flood control).

158. *See, e.g.*, Boyd v. United States, 881 F.2d 895, 900 (10th Cir. 1989) (criticizing the Ninth Circuit for continuing to use its "not wholly unrelated" nexus standard despite the *James III* opinion which, according to the *Boyd* court, adopted the more fact-sensitive nexus determination of *Hayes*).

159. *See supra* text accompanying notes 75-77 (explaining how the "wholly unrelated" test and the nexus requirement are actually two different standards: the wholly unrelated test assumes that the flood had no connection with a federally funded flood control project, whereas the nexus requirement assumes such a connection exists). The *Hayes* court disagreed with the *Morici Corp.* court over how much of a connection is needed to satisfy the nexus requirement.

160. *Supra* text accompanying notes 87-89.

161. *James III*, 478 U.S. at 610. Again, the split over the requisite nexus was never even acknowledged, so how could the Court be favoring one over the other? The Court was merely responding to a claim made by the respondents, who, unfortunately, confused the issues. *See generally* Washington v. East Colum. Basin Irrigation Dist. v. United States, 105 F.3d 517, 519 & n.3 (9th Cir. 1997) (explaining that the broad nexus standard was still good law in that circuit regardless of the claim that *James* had adopted the *Hayes* standard, because "the issue was neither presented nor decided in *James*").

162. *See supra* III.A.2 (discussing the fact-sensitive determination of *Hayes* to determine whether enough of a connection had existed between the flood damage and an anti-flooding activity).

163. *James III*, 478 U.S. at 599-601.

164. It is this type of multiple and intervening cause problem which the *Hayes* standard attempted to solve by demanding a fact-sensitive test to determine whether an anti-flooding activity was the cause of the damage. *See supra* Part III.A.2 (discussing the fact-sensitive determination of *Hayes*).

This cause, and how it relates to the nexus issue, was never addressed by the Supreme Court.

The Supreme Court opinion focused instead on the Fifth Circuit's en banc holding that the language of § 702c is ambiguous.[165] The en banc decision was not the first to have found ambiguities in the language of § 702c, as evidenced by the various interpretations of the different parts of the provision.[166] The Fifth Circuit merely illustrated § 702c's potential ambiguities. However, instead of attempting an interpretation based solely on the ambiguous text of § 702c, the Fifth Circuit used the statute's ambiguity to justify its use of legislative history to define the scope of the provision—it did this to achieve an interpretation that differed from the panel's but which was consistent with *Hayes*.[167]

2. *The Supreme Court Holds that the Language of § 702c Is Not Ambiguous*

The main thrust of the *James* majority opinion was its overruling of the Fifth Circuit's en banc holding that the language of § 702c is ambiguous. The Supreme Court not only held that the language is unambiguous and therefore must be given its plain meaning, but then went on to use legislative history to support the "plain meaning" the court had attached to the words.[168] Most of the controversy over whether or not the language is ambiguous was centered on the meaning of "damage."[169] The Court overruled the Fifth Circuit en banc ruling that damage could refer to only property damage, only personal injury damage, or both.[170] Rather than siding with the en banc opinion, the Supreme Court held that the ordinary

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165. *James III*, 478 U.S. at 604-12.

166. *See supra* Part III (discussing the differing interpretations of "floods and flood waters" and the differing nexus requirements of the circuits). This disagreement among the circuits began with *Peterson v. United States*, 367 F.2d 271 (9th Cir. 1966), which held that a flood "wholly unrelated" to a flood control project is not protected under § 702c, in contrast to the earlier holding in *National Manufacturing Co. v. United States*, 210 F.2d 263 (8th Cir. 1954), that the immunity applied notwithstanding any federal flood control project. *Supra notes* 66-67 and accompanying text.

167. *See James II*, 760 F.2d 590, 594-96 (5th Cir. 1985) (finding that the latent ambiguities in the language of the provision justified the court's use of legislative history to develop the proper scope of that ambiguous provision).

168. *James III*, 478 U.S. at 604-06. The *James III* court credited the Fifth Circuit en banc holding as being the first court opinion to hold that no immunity attached when damages were caused by flood water from a flood control project, and, not acknowledging the split previously created by the Fourth Circuit in *Hayes*, the Court assumed that all courts would agree that these facts presented the requisite connection to flood control and that these were flood waters. *Id.* at 603-04 n.4.

169. *See generally id.* at 614-16 (Stevens, J., dissenting) (criticizing the majority's construction of "damage" to apply to personal injury, because the majority had used the word "damages" rather than "damage" (without an "s"), which Justice Stevens saw as significant because, historically, "damage" referred only to property damage. Furthermore, the dissent opined that § 702c must be read in connection with the proviso which deals with "takings," a property issue, and thus the section was intended only to immunize the government from liability for property damage caused by flooding.); Juvan, *supra* note 27, at 306-07, 316 (suggesting that the real intent behind § 702c was to immunize the government from property damage only).

170. *James III*, 478 U.S. at 605.

meaning of the word must include both property and personal injury damages.[171] The Fifth Circuit had also held that the phrase "flood and flood waters" was ambiguous.[172] Again, the Supreme Court overruled that portion of the opinion, and held that the plain language of § 702c made clear that "flood and flood waters" referred 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."[173] It is this broad definition of "floods and flood waters" that has led to a new disagreement over the proper scope of § 702c.[174]

3. Overly Broad Language and Ambiguities in the Opinion

The Court held that the meaning of "flood waters" was not ambiguous.[175] In doing so, it assumed that all waters contained in a public works project which has flood control as one of its purposes are "flood waters" within the meaning of § 702c.[176] Thus, taken out of context, that assumption could mean that if water within a public works project were to play a role in causing damage to a plaintiff, the government could claim immunity for any liability under § 702c.[177] On the other hand, whether or not the Court intended such a broad interpretation is uncertain, because the Court noted in the corresponding footnote, and continuously throughout the opinion, that the waters in question were at "flood stage" and were being released for flood control purposes.[178]

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171. *See id.* (explaining that "[d]amages 'have historically been awarded both for injury to property and injury to the person'" (quoting American Stevedores, Inc. v. Porello, 330 U.S. 446, 450 (1947), and citing Webster's Third New International Dictionary and Black's Law Dictionary as support for the broad definition of damage)).

172. *See James II*, 760 F.2d at 594 n.6 (finding that multiple definitions could be attached to "flood waters" as used in the statute); *see also id.* at 596 (describing another ambiguity caused by the use of the phrase "flood water": it could be read to immunize the government from liability when the flood water is only an incidental condition to the governmental fault—e.g., an air traffic controller negligently causes a plane to crash into a flood control lake).

173. *James III*, 478 U.S. at 605.

174. *See infra* Part IV.E (discussing the disagreement between the circuits post-*James III* over whether that language is limited by the fact that the Supreme Court had already found the waters within those projects to be at flood stage, or whether water in a project with flood control as a purpose is considered "flood water" at *all* times, regardless of whether it is at "flood stage" or is released for flood control purposes).

175. *James III*, 478 U.S. at 605.

176. *See id.* (stating in broad 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," thereby condensing the two issues into one).

177. *See* Reese v. South Fla. Water Management Dist., 59 F.3d 1128, 1130 (11th Cir. 1995) (holding that even if the water had been released "solely for" irrigation or other purposes, it was still the requisite "flood water," because the clear holding of *James III* was that if the water was contained in a federal project which has flood control as one of its purposes, it is "flood water").

178. *See James III*, 478 U.S. at 605 n.7 (noting that the district court had found that the waters were released to prevent flooding (if it is preventing flooding, meaning there has been no flood, how can they be flood waters?!)); *id.* at 612 (finding that the gates had been opened to control flooding, and holding that the waters must be in the project "for purposes of flood control or related to flood control").

Notably, even if the Court intended to define flood waters as merely waters contained in a flood control project at flood stage—which is merely a measure of the level of water currently contained in the project, and not a determination that a flood is occurring—that is the same definition offered by the Fifth Circuit decision, which was unsupported by precedent or legislative history.[179] Similarly, the cases cited by the Supreme Court as support for that definition never dealt with waters that had been contained in the flood control project, but rather dealt only with waters that escaped or were uncontrolled by such a project.[180] This uncertainty over the Court's use of such broad language is the basis of a new disagreement between the circuits: a disagreement over the proper interpretation of the Supreme Court holding.[181] If the Court did intend such a broad definition, the inequity created becomes obvious. Under that definition, if a family were swimming in a lake created by a federal flood control project and a government plane negligently crashed into the lake, killing the family, § 702c immunity would apply because (1) the waters would be considered flood waters, and (2) a connection would have existed between the flood waters and the deaths (i.e., the family would not have been killed in the lake but for swimming in those waters).

E. The Scope of the Immunity Provision After James

United States v. James[182] failed to develop a consistent approach to the application of the immunity provision.[183] Not only did *James* fail to resolve the pre-existing circuit split over the required nexus, but the subsequent circuit court interpretations of the *James* opinion have led to an even wider chasm between the circuits over the proper standard for determining the applicability of § 702c.[184] Some of the circuits assert that the Supreme Court adopted the "not wholly

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179. *See supra* Part IV.D.3 (illustrating how the broad definition given to "flood waters" is unsupported by precedent and legislative history); *see also supra* Part II.A (discussing the legislative history behind the passage of § 702c).

180. *See James III*, 478 U.S. at 605 n.7 (citing *Morici Corp.* and *Hayes*, neither of which dealt with damage caused while the waters were still contained in a federal project which had flood control as one of its purposes).

181. *See infra* Part IV.E (discussing the disagreement between the circuits over the proper interpretation of that broad language).

182. 478 U.S. 597 (1986).

183. *See, e.g.*, Hiersche v. United States, 503 U.S. 925, 923 (1992), *denying cert.* to 933 F.2d 1014 (9th Cir. 1991) (Stevens, J., dissenting) (referring to the continuing conflict between the circuit courts over the proper application of the immunity provision despite the Supreme Court's opinion in *James III*).

184. *See generally* Washington v. United States, 105 F.3d 517, 519 (9th Cir. 1997) (citing the continued split between the Ninth Circuit nexus requirement and the Fourth Circuit nexus requirement); Cantrell v. United States, 89 F.3d 268, 271-73 (6th Cir. 1996) (citing the conflicting circuit court standards for determining the requisite nexus, and explaining its reason for adopting a totally different standard); Fryman v. United States, 901 F.2d 79, 82 (7th Cir. 1990) (declining to adopt either of the pre-*James III* nexus standards, but rather creating its own standard to decide whether the necessary connection has been shown).

unrelated" standard.[185] Others argue that the split over the requisite nexus standard was not resolved under *James* because it was never even raised.[186] Another group of circuit courts has found that the holding of *James* was too ambiguous and confusing to apply literally, so they have developed their own nexus standards.[187]

Furthermore, the broad language used in *James* to define "flood waters" created a new split among the circuits.[188] Some circuits now hold that all waters contained within a public works project which has flood control as one of its purposes are "flood waters" for § 702c purposes.[189] Other circuits recognize, though, that despite

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185. *See* Reese v. South Fla. Water Management Dist., 59 F.3d 1128, 1129 (11th Cir. 1995) (relying on *James III* for the proposition that the immunity provision applies regardless of whether flood control was the specific use of the project when the damage occurred); Dawson v. United States, 894 F.2d 70, 73-74 (3d Cir. 1990) (finding that *James III* requires the immunity provision to apply unless the conduct causing injury is "wholly unrelated" to a flood control project); McCarthy v. United States, 850 F.2d 558, 561 (9th Cir. 1988) (holding that "in light of James," its pre-*James III* holding from *Morici Corp.* applied, and immunity attached as long as the conduct is related to a project which has flood control as one of its purposes).

186. *See Washington*, 105 F.3d at 519 n.3 (stating that the court was free to use the "not wholly unrelated" standard developed pre-*James III* because the "issue was neither presented nor decided in *James* [*III*]").

187. *See Cantrell*, 89 F.3d at 270-72 (holding that *James III* never defined the requisite nexus and developing a standard under which the focus is on the causal connection between the alleged tortious act and the injury caused, which standard the court states is consistent with the outcome in *James III*); *Fryman*, 901 F.2d at 81 (finding that *James III* held that there was no liability for damage connected to the management of a project having flood control as one of its purposes, but that this holding was "so broadly written that it could" not be applied literally," because a literal application would protect the government from damage caused when a "tree-trimmer's car . . . careen[ed] through some picnickers [at a flood control project]); *see also* Boyd v. United States, 881 F.2d 895, 900 (10th Cir. 1989) (stating that despite the Ninth Circuit's continued adherence to the "not wholly unrelated" standard, *James III* did not require such a broad standard to be used, nor was the standard consistent with Congress' intent when it adopted the immunity provision, and moreover, that the requisite nexus had not been met under its facts).

188. *Compare Washington*, 105 F.3d at 519 (citing *James III* for the proposition that "all waters contained in or carried through a federal flood control project for purposes of or related to flood control . . . [are] considered 'flood waters' if [they are] part of the project," regardless of whether the waters are merely within the project or are actually waters the project cannot control), *and Reese*, 59 F.3d at 1130 (stating that all waters contained within a multi-purpose federal flood control project were "flood waters" for immunity purposes, regardless of whether those waters were released "solely for" or "only for" irrigation or other purposes, because "periodic release of water is fundamental to the operation of a flood control project"), *and* Zavadil v. United States, 908 F.2d 334, 335-36 (8th Cir. 1990) (holding that because the water was contained within a multi-purpose federal flood control project and was "being monitored for flood control and navigational purposes," it was "flood waters" as defined in *James III* for immunity purposes), *with Boyd*, 881 F.2d at 900 (stating that the Ninth Circuit had misconstrued the broad language used by *James III* to define "flood waters" because it failed to recognize that the Court had noted more than once that the waters were, at the time of the injury, being released for flood control and, furthermore, that the Court had specifically limited the broad language when it cited *Hayes* while defining flood waters for the proposition that the immunity would not apply if the water was being used for non-flood control purposes).

189. *See Reese*, 59 F.3d at 1130 ("*James* [*III*] clearly held that all water in a federal flood control project is considered 'flood water' if it is part of the project); *McCarthy*, 850 F.2d at 560-61 (declaring that *James III* held that "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," are "flood waters" (quoting *James III*, 478 U.S. 597, 605 (1986) (internal quotation marks omitted))); *see also Fryman*, 901 F.2d at 80-81 (agreeing that, under *James III*, "every drop of water" within any public works project having flood control as one purpose will be "flood water," but criticizing the *James* opinion as "too broad to apply literally").

the broad language in the main text of the opinion, the Supreme Court did note that the waters within the project were at "flood stage" and were being released in order to prevent flooding.[190]

Today, the circuit courts are consistently inconsistent with each other with regards to when the immunity provision will apply and when it will not.[191] Alleging the same set of facts, a plaintiff could be barred from one circuit court due to the immunity provision, yet get redress despite the provision in another circuit court.[192] The inequities created by the use of the immunity provision in general and the unfortunate decision in *James* has even been criticized by one of the Supreme Court's own.[193]

V. THE FTCA AND THE FCA: WERE THEY NOT MEANT TO WORK TOGETHER?

A. Should the Judiciary Have Decided So Summarily that § 702c Was Not Repealed by the FTCA?

The FTCA was originally enacted[194] as part of the Legislative Reorganization Act of 1946.[195] Section 424 of that original Act contained language suggesting that it was repealing the immunity provision found in the 1928 FCA. Before codification, § 424(b) provided:

> [A]ll provisions of law authorizing any Federal agency to consider, ascertain, adjust, or determine claims on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment are hereby repealed in

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190. *See Boyd*, 881 F.2d at 900 (criticizing the Ninth Circuit's failure in *McCarthy* to recognize the limits the Supreme Court had put on its definition of "flood waters" when it noted that the waters were at "flood stage" and were being released in order to prevent flooding).

191. *Compare id.* (holding that plaintiff whose husband was killed after being run over by a boat while he was snorkeling in an area of an unmarked federally funded lake was not barred by § 702c from bringing a claim against the government), *and Fryman*, 901 F.2d at 81-82 (holding that plaintiff who became quadriplegic after diving into an unmarked shallow area of a lake created by a federally funded flood control project was barred by § 702c from bringing suit), *with McCarthy*, 850 F.2d at 561, 563 (holding that plaintiff who was rendered quadriplegic after diving off a wind-surf board into an area of a lake created by an improperly marked federal flood control project was barred from bringing a claim because of protections afforded the government by § 702c).

192. *See Hiersche*, 503 U.S. at 925 (theorizing that if the case had arisen in a different circuit, the plaintiff would have withstood the summary judgment motion, because a different circuit would not have applied the immunity provision under those facts).

193. Justice Stevens called the *James III* decision unfortunate. *Id.* at 925 (Stevens, J., dissenting).

194. Dalehite v. United States, 346 U.S. 15, 24 (1953).

195. Legislative Reorganization Act, ch. 753, §§ 401-424, 424(b) (1946) (current version at 28 U.S.C.A. § 2671-2680 (West 1994)).

> respect of claims cognizable under part two of this title . . . , including but without limitation, the [following] provisions . . . .[196]

The Act then expressly listed several laws which were repealed by the FTCA, while providing that the list was not exclusive.[197] However, when the FTCA was codified at 28 U.S.C. §§ 2671-2680, it did not include that language because it was "not properly a part of a code of general and permanent law."[198]

Despite that language, in *National Manufacturing Co. v. United States*,[199] the Eighth Circuit held that the FTCA did not repeal, explicitly or implicitly, the FCA, and therefore § 702c was still a valid waiver of liability.[200] However, the Eighth Circuit ignored, as have all subsequent courts which cite *National Manufacturing* for the proposition that the FTCA did not repeal § 702c, the "including but without limitation" language of § 425(b) of the Legislative Reorganization Act because that language was not codified with the rest of the Act.[201] On the other hand, those same courts did use the list of statutes which had been expressly repealed by the FTCA to imply that if Congress had meant to repeal § 702c, it would have listed the FCA expressly, even though that list was not codified either.[202] Furthermore, despite this evidence that the FTCA repealed § 702c by implication, courts refuse to recognize that implication because of the amount of precedent holding that the section was not repealed.[203] However, if the judiciary wrongly interpreted the FTCA as failing to repeal § 702c by implication, is it not its duty to correct that mistake?

B. The Discretionary Function Exception: Was It Meant to Take the Place of § 702c?

While the enactment of the FTCA symbolized congressional recognition that the government should be liable for its own wrongs, Congress was concerned that allowing private suits to take place would unduly burden the government.[204]

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196. *Id.*

197. *Id.*

198. *Id.*

199. 210 F.2d 263 (8th Cir. 1954).

200. *Id.* at 274.

201. *See id.* (explaining that the Act repealed certain statutes expressly, and because the FCA was not among those statutes, the court would not assume that Congress had meant to repeal the FCA by implication).

202. *See* 28 U.S.C.A. § 2680 (West 1994), Historical and Revision Notes (stating that § 424(b) of the Legislative Reorganization Act had not been codified); *see also* Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184, 1191-92 (5th Cir. 1975) (explaining that the Act contained a list of statutes which were expressly repealed, but also omitting the fact that the list was described as merely illustrative); Graci v. United States, 456 F.2d 20, 24 (5th Cir. 1971) (citing the list of statutes which were repealed, but failing to mention the fact that the list was described as merely illustrious).

203. "After 26 years of consistent interpretation, it would be the proper function of Congress and not this Court to narrow the scope of the immunity." Aetna Ins. Co. v. United States, 628 F.2d 1201, 1204 (9th Cir. 1980).

204. David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act:* Dalehite *to* Varig *to* Berkowitz, 25 IDAHO L. REV. 291, 293 (1988).

Congress feared this burden would get in the way of performing necessary governmental functions and using its necessary decision-making authority.[205] Congress addressed these fears by including the discretionary function exception in the FTCA.[206] It was viewed as a "highly important exception."[207]

The discretionary function exception has been interpreted by the Supreme Court to protect the "discretion of the executive or the administrator to act according to one's judgment of the best course."[208] Although the courts acknowledge it is impossible to define where the protected discretion begins and ends, they have listed several factors used to determine whether the necessary discretion was involved, including, for example: "the nature of the conduct, rather than the status of the actor"; and whether the government was "acting in its role as a regulator of the conduct of private individuals."[209] Moreover, "[w]here there [was] room for policy judgment and decision" in the negligent act, then the act was discretionary in nature and therefore not subject to suit under the FTCA.[210]

Significantly, there is recorded legislative history of the debate over the discretionary function exception which suggests the drafters of the FTCA intended discretionary decisions in the context of flood control to be included under that exception. During the debate, Congress adopted the Attorney General's characterization of the purpose of the discretionary function exception.[211] The Attorney General described the exception as:

> intend[ing] to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of authorized activity, such as a flood control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for the suit is the contention that the same conduct by a private individual would be tortious.[212]

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205. *See id.* at 293-94 (stating that the discretionary function exception grew out of congressional fears that waiving sovereign immunity would "interfere with governmental operations and decision-making," and furthermore that a complete waiver may present a violation of the separation of powers doctrine).

206.

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

28 U.S.C.A. § 2680 (West 1984) (paragraph structuring omitted).

207. *Dalehite*, 346 U.S. at 30 (quoting H.R. REP. NO. 77-2245, at 10 (1942)).

208. *Id.* at 34.

209. United States v. S.A. Empresa de Viacoa Aerea Rio Grandense, 467 U.S. 797, 813 (1984).

210. *Dalehite*, 346 U.S. at 36.

211. *Id.* at 30.

212. *Id.*

This specific mention of flood control suggests that Congress intended § 702c to be repealed, because the discretionary function exception would provide the necessary protection from the massive amount of liability which could otherwise attach in the face of federal anti-flooding discretionary decisions.

The discretionary function exception can provide the necessary protection for the decisions made by the government during its anti-flooding activities.[213] In fact, there is case law that analyzes a claim for negligently inflicted flood water damage under the FTCA, and that applies the discretionary function exception to the situation.[214] In these cases, the discretionary function exception provided the same liability protection for governmental anti-flooding activities as the 1928 Congress intended to provide by enacting the immunity provision in § 702c.[215] Therefore, if the discretionary function exception were allowed to do its job in the realm of flood control, as was contemplated by the framers of the exception,[216] § 702c would no longer be necessary. Allowing the discretionary function exception to provide protection for governmental anti-flooding activities renders the judicial justification for modern recognition of § 702c moot.

Using the discretionary function exception to provide the necessary immunity would also eliminate the inequities created by the modern application of § 702c. It would only be the type of claims raised in cases like *James* which would be able to proceed under the FTCA, because no discretion was involved in those decisions not to warn people about or mark dangerous areas.[217] Moreover, it is the *James*-type

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213. *Infra* note 215 and accompanying text.

214. *See* Spillway Marina, Inc. v. United States, 445 F.2d 876, 878 (10th Cir. 1971) (ruling that the discretionary function exception immunized the government from liability for damage to plaintiff's marina caused by a release of water from a federal flood control project); W.R. Cooley v. United States, 172 F. Supp. 385, 387 (D.S.D. 1959) (holding that the plaintiff's claim for damages to his property after the construction of a federal dam and reservoir caused water to inundate his land was barred due to the discretionary function exception); Thomas v. United States, 81 F. Supp. 881, 882 (W.D. Mo. 1949) (ruling that the plaintiff's claim for water damage caused by the building of a federal navigational project on the Missouri river was barred due to the discretionary function exception).

215. *See Spillway Marina*, 445 F. 2d at 878 (finding that government was not liable for flood damage caused, despite its anti-flooding activities, due to the discretionary function exception). The 1928 Congress was concerned that flooding would still occur despite the government's flood control activities. Congress did not want the government to be liable for the damage that such floods may cause merely because of the federal government's anti-flooding activities. *Supra* notes 30-32 and accompanying text.

216. *Supra* notes 197-98 and accompanying text.

217. *See generally* Cantrell v. United States, 89 F.3d 268, 274 (6th Cir. 1996) (finding that the FCA did not bar the plaintiff's claim for personal injury damages after a boat crashed on waters contained in a federal flood control project, and holding that the claim was better resolved under FTCA doctrines); Boyd v. United States, 881 F.2d 895, 898-900 (10th Cir. 1989) (ruling that neither the FCA nor the discretionary function exception to the FTCA barred the plaintiff's claim for personal injuries caused by the government's failure to warn recreational users of known dangers); Denham v. United States, 834 F.2d 518, 520-22, 523 (5th Cir. 1987) (holding that the discretionary function exception did not bar the plaintiff's claim for personal injuries resulting from a dive into an improperly marked federally funded lake); Lindgren v. United States, 665 F.2d 978, 981-83 (9th Cir. 1982) (finding that the discretionary function exception did not apply per se to the plaintiff's FTCA claim for injuries sustained when his water ski struck a river bottom in an area where there was no "shallow water" warning for recreational users).

plaintiffs who need the ability to get private relief. In the normal flooding situation, Congress usually passes emergency relief bills to fund disaster recovery, thus providing remedies for victims of true floods.[218] The plaintiffs in *James* and similar cases cannot recover under such emergency relief bills, as they were not injured by a flood.[219] Further, these emergency relief bills justify the original congressional decision to deny private indemnity for true flood damages; those injured still get public relief, and the government does not go bankrupt from thousands of private claims.[220]

Not allowing civil recovery in a *James* situation not only creates a huge inequity for that particular plaintiff, but it does nothing to further governmental anti-flooding activities. Such limited individual liability does not create the massive liability that the 1928 Congress feared would discourage the government from funding future flood control projects; therefore, in those types of situations, there is no reason for invoking the protection of § 702c.[221] Despite all of the above, the courts have held that because the FTCA did not expressly waive § 702c, courts may not infer that Congress meant to waive § 702c "by implication," because sovereign immunity must be specifically waived.[222]

VI. CONCLUSION

Section 702c is an antiquated statute which has become an engine of injustice in today's world. Instead of protecting the government from the prospect of massive liability due to the federal government's anti-flooding activities, the statute protects reckless and negligent conduct by government employees.[223] Furthermore, judicial interpretation of that provision has been so inconsistent, and has been broadened so much, that it has immunized the government against liability for tortious conduct that the provision was never intended to protect.[224] In order to rectify this situation, Congress should act and make clear that the FTCA was intended to repeal § 702c,

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218. *See* Fryman v. United States, 901 F.2d 79, 80 (7th Cir. 1990) (explaining that Congress regularly enacts legislation which provides billions of dollars in relief funds for victims of floods).

219. "Congress does not pass special legislation to assist individuals who suffer personal injury in flood-control waters as a result of Government negligence." Hiersche v. United States, 503 U.S. 923, 924 n.2 (1992).

220. *See generally* National Mfg. Co. v. United States, 210 F.2d 263, 272 n.3 (8th Cir. 1954) (explaining that, on numerous occasions, Congress has declined to depart from providing relief through emergency relief bills, and has refused to adopt an indemnification program for flood victims because of the massive amount of liability that the government would incur under such a program).

221. *See supra* notes 26-27 and accompanying text (discussing the policy for providing immunity under § 702c).

222. *See* Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184, 1192 (5th Cir. 1975) (explaining that the court will not assume that Congress intended to repeal the statute by implication); Graci v. United States, 456 F.2d 20, 24 (5th Cir. 1971) (invoking the statutory construction principle "that repeals by implication are not favored").

223. *Supra* notes 2-3 and accompanying text.

224. *Supra* notes 175-77 and accompanying text.

and that the discretionary function exception will provide the necessary protection for anti-flooding decisions.

In the absence of such congressional action, the Supreme Court should narrowly interpret the requisite nexus between the "flood and flood waters" and a flood control project. By narrowly defining the nexus, the Supreme Court can reduce the gross inequity created by modern interpretations of § 702c immunity.[225] A narrow interpretation will not only provide a consistent standard for determining when the provision applies, thus solving the disagreement among the circuits, but it will also limit the application of § 702c to those situations in which concern over government involvement in flood control is implicated.

225. *See supra* Part IV.E (exposing the inequities created by conflicting circuit court applications of § 702c after the Supreme Court's decision in *James III*).