Water, Water Everywhere, and Not a Bite to Eat: Sovereign Immunity, Federal Disaster Relief, and Hurricane Katrina*

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I. INTRODUCTION

On Tuesday, August 23, 2005, Tropical Depression Twelve formed near Nassau in the Bahamas.[1] Six days later, the storm made landfall in southeastern Louisiana as Hurricane Katrina, a category four hurricane with sustained winds up to 135 miles per hour.[2] New Orleans Mayor C. Ray Nagin issued a voluntary evacuation on Saturday, August 27, followed by a mandatory evacuation order the following day.[3] Eighty percent of the New Orleans population heeded these evacuation orders prior to Hurricane Katrina's arrival, but as many as 100,000 remained.[4] Those who remained behind, through choice or lack of available transportation, rode out the storm in their neighborhoods or designated refuges.[5]

Hurricane Katrina left massive destruction in its wake: over one thousand dead,[6] over $35 billion in insured property damage,[7] and over $60 billion appropriated by Congress for rebuilding efforts.[8] The size

1. *Oversight Hearing on NOAA Hurricane Forecasting Before the H. Select Comm. for Hurricane Katrina*, 109th Cong. 8 (2005) (written testimony of Max Mayfield, Director, Tropical Prediction Center/National Hurricane Center), *available at* http://www.legislative.noaa.gov/Testimony/mayfieldhouse92205.pdf [hereinafter *Oversight Hearing*]. A tropical depression is a storm that forms over a tropical ocean with a core warmer than the surrounding atmosphere and fastest sustained surface winds of less than thirty-nine miles per hour. BOB SHEETS & JACK WILLIAMS, HURRICANE WATCH 319 (2001).

2. *Oversight Hearing*, *supra* note 1, at 12. The Saffir-Simpson scale categorizes hurricanes on a scale of one to five, with five being the most severe. *See* SHEETS & WILLIAMS, *supra* note 1, at 319. Wind speed is the determining factor in the scale, which is used to estimate potential property damage and flooding expected along the coast from a hurricane landfall. The Saffir-Simpson Hurricane Scale, http://www.nhc.noaa.gov/aboutsshs.shtml (last visited Aug. 7, 2006).

3. Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at A1 [hereinafter Lipton et al., *Hurricane to Anarchy*]. Nagin initially directed his staff to issue a mandatory evacuation order on Saturday, but debates over whether to exempt hospitals delayed the order until Sunday. Eric Lipton, *White House Knew of Levee's Failure on Night of Storm*, N.Y. TIMES, Feb. 10, 2006, at A1 [hereinafter Lipton, *Levee's Failure*].

4. Lipton et al., *Hurricane to Anarchy, supra* note 3, at A1.

5. Black or African Americans constitute 67.3% of the New Orleans population, according to the 2000 census. U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/index.html (follow links to *Louisiana* then *New Orleans*). Over one-quarter of the population lives below the poverty line. *Id.*

6. CNN.com, Katrina's Official Death Toll Tops 1,000, http://www.cnn.com/2005/US/09/21/katrina.impact/ (last visited July 15, 2006).

7. H.R. Res. 477, 109th Cong. (2005). Recent figures estimate the damage at $81.2 billion, making it the costliest hurricane in U.S. history. Hurricane Katrina, http://en.wikipedia.org/wiki/Hurricanekatrina (last visited Aug. 7, 2006).

8. Congress initially provided $10.5 billion for Hurricane Katrina relief in a bill which President Bush signed into law on September 2, 2005. Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina, 2005, Pub. L. No. 109-61, 119 Stat. 1988. President Bush immediately requested an additional $51.8 billion. Congress provided this additional funding through a second bill that President Bush signed into law on September 8, 2005. Second

and scope of Hurricane Katrina's wreckage prompted a national response. A major disaster or state of emergency was declared in forty-six of the fifty states and the District of Columbia.[9] Former Presidents Clinton and George H.W. Bush spearheaded a private fundraising effort, and communities throughout the country opened their homes and wallets to support the relief effort.

In contrast to the commendable outpouring of support by individuals, domestic and worldwide, the initial response from the federal, state, and local governments was roundly criticized. Media coverage excoriated officials from President George W. Bush and then-Federal Emergency Management Agency Director Michael Brown, to Louisiana Governor Kathleen Babineaux Blanco and New Orleans Mayor C. Ray Nagin.[10] Criticisms focused on the uncoordinated response, raising questions about national emergency preparedness in a post-September 11th context.[11]

The colossal size and scope of wreckage should not overshadow the immeasurable losses sustained on an individual level by Katrina victims. Nevertheless, the United States has mechanisms in place to cope with the long-term impacts of Hurricane Katrina. Public officials announced their commitment to rebuild communities destroyed in the Gulf coast region.[12] The political process can hold decisionmakers accountable for their shortcomings.[13] Congressional investigations are bringing to light

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Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina, 2005, Pub. L. No. 109-62, 119 Stat. 1990.

9. Fed. Emergency Mgmt. Agency, 2005 Federal Disaster Declarations, http://www.fema.gov/news/disasters.fema?year=2005 (last visited July 15, 2006). Major disaster declarations were issued as a direct result of Katrina's impact in Louisiana, Mississippi, Alabama, and Florida. *Id.* Katrina's direct impact also resulted in a state of emergency declaration for Arkansas and Texas. *Id.* The remaining emergency declarations arose from evacuation efforts. Only Alaska, Hawaii, Vermont, and Wyoming did not request emergency assistance as a result of Katrina. *Id.* The difference between major disasters and emergencies is discussed *infra,* Part III.B., text accompanying notes 117-19.

10. *See, e.g.*, David D. Kirkpatrick & Scott Shane, *Ex-FEMA Chief Tells of Frustration and Chaos*, N.Y. TIMES, Sept. 15, 2005, at A1; Jennifer Steinhauer & Eric Lipton, *FEMA, Slow to the Rescue, Now Stumbles in Aid Effort*, N.Y. TIMES, Sept. 17, 2005, at A1.

11. *E.g.*, *Who's in Charge?*, USA TODAY, Sept. 19, 2005, at A20; Philip Shenon, *Commission Criticizes Storm Response*, N.Y. TIMES, Sept. 15, 2005, at A23.

12. For example, President Bush stated that efforts to rebuild the Gulf Coast region would be "one of the largest reconstruction efforts the world has ever seen." President George W. Bush, Address from Jackson Square (Sept. 15, 2005), www.whitehouse.gov/news/releases/2005/09/; *see also* Elisabeth Bumiller, *Bush Pledges Federal Role in Rebuilding Gulf Coast*, N.Y. TIMES, Sept. 16, 2005, at A1.

13. President Bush's approval ratings dropped to 41% in the wake of Hurricane Katrina, the lowest level his presidency had seen at the time. James G. Lakely, *Bush's*

lessons learned from this tragedy.[14] Aid programs will assist victims in piecing their lives and families back together.

A separate question, however, is whether these mechanisms are sufficient in light of the admittedly inadequate initial response.[15] For many Katrina victims, these ex post systems do not address the injuries suffered at the peak of the crisis. One of the most alarming images from Katrina's aftermath depicted displaced victims unable to receive emergency food and water supplies.[16]

This Comment contends that judicial review should be available to Katrina victims whose injuries arose from failure to receive emergency food supplies. Reviewing the liability landscape in its entirety would require investigation of laws, regulations, and plans on the federal, state, and municipal levels.[17] Instead, this Comment focuses specifically on claims that New Orleans residents might pursue against the federal government for its failure to provide adequate food.[18]

Part II discusses the doctrine of sovereign immunity, a jurisdictional bar to claims against the government. It reviews the English common law history of sovereign immunity before analyzing the doctrine's application in the American legal regime. Part II pays particular attention to the "discretionary function" exception of the Federal Tort Claims Act and federal disaster relief legislation.

Approval At Lowest Level Yet, WASH. TIMES (D.C.), Sept. 16, 2005, at A14, *available at* http://washingtontimes.com/ (search *long term archives* for the article title). FEMA Director Michael Brown was forced to resign his post. Peter Eisler & Mimi Hall, *New FEMA Chief Takes Center Stage After Years in Wings*, USA TODAY, Sept. 13, 2005, at A2, *available at* http://usatoday.com (search for the article title). While public opinion of Brown plummeted, former FEMA director James Lee Witt's reputation soared. *See* Leslie Wayne & Glen Justice, *FEMA Leader Under Clinton Makes It Pay*, N.Y. TIMES, Oct. 10, 2005, at A1.

14. *See* H.R. REP. NO. 109-396 (2006), *available at* http://www.gpoaccess.gov/congress/house/katrina/index.html (last visited Oct. 27, 2006).

15. *Bush Admits Katrina Response Was Inadequate*, INT'L HERALD TRIB., Sept. 16, 2005, *available at* http://www.iht.com/articles/2005/09/16/europe/web.0915kat1.php (last visited Oct. 27, 2006).

16. Lipton et al., *Hurricane to Anarchy*, *supra* note 3, at A1.

17. For an exploration of issues surrounding the relationship between federal and state governments responding to catastrophic public health emergencies, see Michael Greenberger, *The Role of the Federal Government in Response to Catastrophic Health Emergencies: Lessons Learned from Hurricane Katrina* (Univ. of Md. Sch. of Law, Research Paper No. 2005-52 (2005), *available at* http://papers.ssrn.com/paper.taf?abstractid=824184 (download from links at the bottom of the page).

18. This Comment also notes possible claims Hurricane Katrina victims might bring alleging discrimination on the part of the federal government in providing disaster assistance. See *infra* notes 127, 183. Nonpartisan polls showed that "[t]wo-thirds of African-Americans said the government's response to [Hurricane Katrina] would have been faster if most of the victims had been white, while 77 percent of whites disagreed." Elisabeth Bumiller, *Gulf Coast Isn't the Only Thing Left in Tatters; Bush's Status with Blacks Takes a Hit*, N.Y. TIMES, Sept. 12, 2005, at A17.

Part III describes the development and growth of federal disaster relief. It focuses on the Robert T. Stafford Disaster Relief Act,[19] the legislation which drives federal disaster relief, and specifically on provisions regarding food commodities[20] and federal government liability.[21]

Part IV examines how the doctrine of sovereign immunity interacts with the Stafford Act. Issues of proof are not addressed because sovereign immunity is a jurisdictional question. Instead, tentative lines of argument are sketched to address whether the federal government may be held liable for failing to provide adequate food supplies for victims in the immediate aftermath of Hurricane Katrina.

Part V discusses two potential vehicles for recovery: a victims' compensation fund similar to that created for the victims of the September 11th World Trade Center attacks,[22] and a class action. Assuming Hurricane Katrina victims' claims overcome the doctrine of sovereign immunity, Part V recommends that Hurricane Katrina victims seek recovery through class action litigation due to the problems inherent in a victims' compensation fund and the efficiency gains made possible by a class action.

This Comment is not intended to heap further blame on public officials. Political recriminations remain properly with the respective actors in the political arena. Rather, this Comment concerns itself with the legal implications of the federal government's response—whether the doctrine of sovereign immunity shields the government from liability for failing to provide adequate food.

II. SOVEREIGN IMMUNITY

The doctrine of sovereign immunity provides a jurisdictional bar to suits brought against the government. Originating in English law, sovereign immunity was subsequently infused into the American legal regime. Legislation in the twentieth century waived sovereign immunity for certain claims, most notably through the Federal Tort Claims Act

19. Robert T. Stafford Disaster Relief Act of 1974, 42 U.S.C. §§ 5121-5206 (2000).

20. *Id.* § 5180 (food commodities).

21. *Id.* § 5148 (liability of the government). The Stafford Act also prohibits discrimination in providing disaster relief. *See id.* § 5151.

22. The Air Transportation Safety and System Stabilization Act, codified as amended at 49 U.S.C. § 40101, provided incentives to channel tort claims to the Fund. Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769 (2003).

(FTCA).[23] The FTCA partially retains sovereign immunity through a variety of exceptions. Most relevant for present purposes is the "discretionary function" exception, which shields the government from liability for policy-driven decisions of government agents.[24] Federal disaster relief legislation contains a similar exception.[25]

To successfully pursue claims against the federal government, New Orleans's Hurricane Katrina victims must first establish that sovereign immunity does not bar them. The following discussion outlines the origins of the doctrine of sovereign immunity, its application in American law, and the retention of sovereign immunity via the discretionary function exception.

A. Roots in English Common Law

The doctrine of sovereign immunity stemmed from the "necessary and fundamental" principle of the English Constitution that "the king can do no wrong."[26] By this principle, the King could not be held personally liable for any injury arising from the conduct of public affairs, though his ministers could be held accountable for such conduct.[27] Nor could the King be held liable for any personal injuries suffered by individual citizens.[28] The distance between the sovereign and his subjects made it unlikely that the King would come in contact with an ordinary subject; the law extended this into a blanket immunity for private injuries.[29]

The King could do the people no harm because the royal prerogative was created to serve their best interests.[30] Moreover, the King could not be commanded by a higher authority—"for who shall command the king?"—without infringing the dignity and sovereignty of the royal person.[31] Subjects could inform the King of their injury, however, at which time he could order his judges to resolve the harm suffered by the

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23. Federal Tort Claims Act, Pub. L. No. 79-753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).
24. *See infra* Parts II.C., III.D.
25. 42 U.S.C. § 5148.
26. WILLIAM BLACKSTONE, 3 COMMENTARIES *254-55. Some may argue that this phrase could be interpreted to mean that a remedy must exist against the sovereign, because it would be a "wrong" for a harm to go unremedied. *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 n.1 (2001). Others argue that English sovereign immunity was more focused on the method of obtaining redress of injuries than an absolute prohibition on redress itself. *E.g.*, Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 542 (2003).
27. BLACKSTONE, *supra* note 26, at *254-55.
28. *Id.* at *255.
29. *Id.*
30. *Id.*
31. *Id.*

aggrieved subject.[32] This practice grew into the common law rule that a sovereign may not be sued without its consent.[33]

B. Incorporation in American Law

American law incorporates certain principles of sovereign immunity.[34] The government has replaced the King as sovereign and may not be sued without its own consent.[35] This immunity extends to federal agencies.[36] The federal and state governments can consent to suit through statutes enacted by their respective legislatures.[37] Consent to suit is also referred to as a waiver of sovereign immunity.[38] Waiver of the government's sovereign immunity operates very narrowly: the waiver must be "unequivocally expressed" in the statutory language,[39] courts construe a waiver of sovereign immunity strictly in favor of the government,[40] and courts will not enlarge the waiver beyond the requirements of the statutory language.[41]

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32. *Id.* Blackstone's Commentaries view the King as a benevolent person for whom "[t]o *know of* an injury and to *redress* it are inseparable. . . ." *Id.*

33. *See* United States v. Sherwood, 312 U.S. 584, 586 (1941); *see also* Douglas Kahle, Note, United States v. Nordic Village, Inc.: *"Unequivocal," Yet Unwarranted, Support for Sovereign Immunity*, 25 U. TOL. L. REV. 325, 326-27 (1994).

34. Sovereign immunity in the United States was initially a result of the judicial conclusion that Article III was subject to common law, relying primarily on statements made in the Federalist Papers and the ratification debates. *See* Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 10-12 (2002). The first Supreme Court opinion addressing the issue held that sovereign immunity had not been transplanted from English common law. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471-72 (1793). The Court abandoned this position by 1834 and held that the doctrine protected the federal government from civil liability. *See* Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1289 (2002).

35. *Sherwood*, 312 U.S. at 586 ("[T]he terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.").

36. *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 475 (1994) (citing Fed. Hous. Admin. v. Burr, 309 U.S. 242, 244 (1940)).

37. Waiver of the federal government's sovereign immunity thus requires an act of Congress. *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 515 (1940).

38. *E.g.*, Alden v. Maine, 527 U.S. 706, 737 (1999).

39. *See Sherwood*, 312 U.S. at 586; *see also* United States v. Thompson, 98 U.S. 486, 489 (1878) (describing the "basis of universal consent and recognition" as attributes of sovereignty that the federal government possesses, and that justify the unequivocal expression requirement).

40. *E.g.*, United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992).

41. *See* United States v. Kubrick, 444 U.S. 111, 117-18 (1979). The Court in *Kubrick* stated, "we should not take it upon ourselves to extend the waiver beyond that

The doctrine of sovereign immunity creates tension between several important policies. Sovereign immunity is said to promote government efficiency.[42] Eliminating suits leaves the government free and unfettered in the pursuit of its official business,[43] and avoids frivolous litigation.[44] On the other hand, eliminating suits impedes the democratic notion that the government and governmental officials should be held accountable for their decisions.[45] The threat of damages creates an incentive for the government to comply with the law.[46] Sovereign immunity may therefore lead to a lower quality of government decisionmaking and reduced accountability.

Sovereign immunity also operates to protect the public treasury; permitting lawsuits against the government could lead to a raid on the treasury with the costs passed along to the taxpaying public.[47] This goal also results in undesirable outcomes. Instead of distributing the costs of improper governmental action equally among the taxpayers, the injured individual bears the entire loss.[48] Additionally, sovereign immunity shifts claims for money damages to individual officers whom the doctrine does not protect.[49]

Separation of powers, including principles of judicial restraint, provides a final justification for sovereign immunity.[50] This justification contradicts

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which Congress intended." *Id.* In the event the Court construes the waiver too narrowly, the Court leaves to Congress the option of extending the waiver further. *Id.* at 125.

42. *See* Randall, *supra* note 34, at 100-01.

43. *See, e.g.*, Littell v. Morton, 445 F.2d 1207, 1214 (4th Cir. 1971).

44. *See* Chemerinksy, *supra* note 26, at 1219 (noting the claim implicit in arguments supporting sovereign immunity that adequate alternatives obviate the need for governmental liability); *cf. infra*, Part V.A. (examining the likelihood and desirability of a victim compensation fund as an alternative to liability).

45. *See* Randall, *supra* note 34, at 100-01; *see also* Chemerinsky, *supra* note 26, at 1214.

46. Chemerinsky, *supra* note 26, at 1214.

47. *See* Alden v. Maine, 527 U.S. 706 (1999):

> Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.

Id. at 749. Professor Chemerinsky criticizes the Court's statement in *Alden* as elevating fiscal concerns over the need for governmental accountability. Chemerinsky, *supra* note 26, at 1217.

48. Chemerinsky, *supra* note 26, at 1217.

49. *See id.* at 1218-19.

50. "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief . . . ." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949), *superceded in part by statute*, 5 U.S.C. § 702, Pub. L. 89-554, 80 Stat. 392 (quoting Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840)); *accord* Littell v. Morton, 445 F.2d 1207, 1214 (1971) ("The rationale for sovereign immunity essentially boils down to substantial bothersome interference with the operation of government.").

the judiciary's role in holding the other branches accountable for their actions.[51] Furthermore, separation of powers does not operate to insulate the activities of the government from judicial review.[52]

Sovereign immunity may also be challenged on constitutional and historical grounds.[53] Sovereign immunity arguably violates the Supremacy Clause of the Constitution by allowing a common law doctrine to trump the Constitution and federal law.[54] One may also question whether the Founders intended to maintain this vestige of the government they had just overthrown, and they may have understood ratification of the Constitution to provide the consent necessary to waive sovereign immunity on the part of the States.[55] These criticisms have led some to advocate the total abolishment of sovereign immunity, though others recognize that the doctrine is too firmly entrenched to eliminate.[56]

C. The Federal Tort Claims Act and the Discretionary Function Exception

In the mid-twentieth century, Congress exercised its prerogative to waive sovereign immunity and permitted citizens to sue the federal government.[57] The Federal Tort Claims Act[58] (FTCA) allowed suits against the government in situations where a private individual would be

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This defense has also been described as a fear of replacing the democratic process with "government through litigation." Niles, *supra* note 34, at 1312.

51. *See* Jackson, *supra* note 26, at 573 (stating that a principal argument in favor of an independent judiciary is its ability to hold government accountable and render impartial justice between the government and the people).

52. *See* Chemerinsky, *supra* note 26, at 1218.

53. *See, e.g.*, Randall, *supra* note 34, at 1 (attacking the historical basis for sovereign immunity and suggesting that prudential doctrines can sufficiently protect separation of powers). *See generally* Chemerinsky, *supra* note 26 (arguing that sovereign immunity cannot be justified on either originalist or non-originalist grounds).

54. *See, e.g.*, Chemerinsky, *supra* note 26, at 1211-12.

55. *See, e.g.*, Randall, *supra* note 34, at 26, 31.

56. *Compare* Chemerinsky, *supra* note 26, at 1224 (predicting that the Court will abolish sovereign immunity), *with* Randall, *supra* note 34, at 104 (suggesting prudential doctrines such as political question, common law duty, and discretionary function exceptions can sufficiently ensure separation of powers). Professor Jackson suggests the courts originally invoked sovereign immunity in part to sustain judicial independence. Jackson, *supra* note 26, at 608. She notes that because defiance of judgments has diminished, the doctrine should not restrain courts from providing remedies to address violations of legal rights. *Id.* at 609.

57. *See supra* text accompanying notes 35-41.

58. Federal Tort Claims Act, Pub. L. No. 79-753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

liable for similar actions.[59] Certain exceptions apply, including claims for punitive damages.[60] More importantly, the FTCA retains immunity for acts of government employees in the execution of statutes or regulations, and for acts based on the exercise of a discretionary function.[61]

Congress went through several drafts of the FTCA before settling on the final language of the discretionary function exception. Attempts to enunciate the degree to which the FTCA retained sovereign immunity covered a wide range of possible language. One draft of the FTCA did not enumerate an exception at all, assuming that courts would recognize the bill did not extend to discretionary administrative actions.[62] Other proposals exempted specific spheres of federal activity from liability, such as postal service.[63] The final version of the FTCA presented the discretionary function exception as a clarifying amendment to assure protection against tort liability for errors in administration or in the exercise of discretionary functions.[64]

Even with explicit language, judicial interpretation of the discretionary function exception has followed a tortuous path. The first case involving

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59. *See* 28 U.S.C. § 1346(b)(1) (2000). The FTCA was not the first legislative waiver of sovereign immunity. The Tucker Act, enacted in 1887, waived sovereign immunity for claims against the United States founded either upon the Constitution, any act of Congress, any regulation of an executive department, any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. Tucker Act, ch. 359, § 1, 24 Stat. 505, 505 (1887) (current version at 28 U.S.C. § 1346 (2000)). The FTCA added to these statutes by allowing suits alleging tort liability on the part of the government. *See* 28 U.S.C. § 1346(b)(1).

60. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, *but shall not be liable* for interest prior to judgment or *for punitive damages*." 28 U.S.C. § 2674 (2000) (emphasis added). The Supreme Court has interpreted "punitive damages" to mean the recovery amount legally considered "punitive damages" under traditional common law principles. *See* Molzof v. United States, 502 U.S. 301, 312 (1992). The Court in *Molzof* rejected the argument that § 2674 bars recovery for any damages beyond the plaintiff's actual loss. *Id.* at 306.

61. 28 U.S.C. § 2680(a) (2000).

> The provisions of this chapter and section 1346(b) of this title 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.

Id.

62. *See* Dalehite v. United States, 346 U.S. 15, 26 (1953).

63. *Id.* Other protected spheres included the activities of the Securities and Exchange Commission and the collection of taxes. *Id.* The final version of the discretionary function exception retained specific protections for postal service, tax and customs, imposition of a quarantine, the fiscal operations of the Treasury Department and certain banks, the Tennessee Valley Authority, and the Panama Canal Company. 28 U.S.C. § 2680(b)-(n) (2000).

64. *Dalehite,* 346 U.S. at 26-27.

the discretionary function exception failed to clarify the exception's scope and created a "quagmire" of amorphous distinctions.[65] The Court later clarified the policies behind the exception but still failed to enunciate a workable approach.[66] After forty years of judicial floundering, the courts created and proceeded to refine a two-part test, which now governs the discretionary function exception.

1. The Quagmire of Early Doctrine

The Supreme Court first addressed the discretionary function exception in *Dalehite v. United States*.[67] Two ships docked in Texas City, Texas, caught fire, and exploded, leveling much of the city and killing many people.[68] The ships carried ammonium nitrate, a substance long used as a component in explosives.[69] Plaintiffs alleged negligence on the part of the federal government for shipping such cargo to a congested area without warning of the possibility of explosion.[70]

In a narrow decision,[71] *Dalehite* held the negligence alleged fell within the discretionary function exception.[72] The Court focused its discussion of the exception on whether the acts were of a governmental nature or function, but it shed little insight on the scope of the exception.[73] The

65. *See* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955); *see also* Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 367 (1995) (characterizing the guidance *Dalehite* provided for other cases as "somewhat muddled").

66. United States v. Varig Airlines, 467 U.S. 797 (1984); *see also* Zillman, *supra* note 65, at 370.

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

68. *Id.* at 23. The explosion resulted in 8500 plaintiffs seeking $200 million in damages. Zillman, *supra* note 65, at 368.

69. *Dalehite*, 346 U.S. at 21. Timothy McVeigh used ammonium nitrate in the in the 1995 Oklahoma City bombing. *See Scientist Details Oklahoma City Bomb Residue*, N.Y. TIMES, Apr. 30, 2004, at A20. Federal officials and employees were involved in a program to produce fertilizer grade ammonium nitrate (FGAN) as part of the post-World War II effort to stabilize the agricultural economies of Germany, Japan, and Korea. John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223, 226 (1992).

70. *Dalehite*, 346 U.S. at 23.

71. *Dalehite* was decided four-to-three, with Justices Douglas and Clark not participating in the decision. *Id.* at 45.

72. *Id.*

73. *Id.* at 36. The Court reasoned that because the FTCA only provides for liability in situations where a private person would be liable, the FTCA did not apply to uniquely governmental functions in which a private person could not engage. *Id.* at 27-28.

Court viewed the exception broadly, such that any decision which originated at the executive level remained shielded from liability.[74] The dissenting opinion applied the governmental/non-governmental function analysis but argued that the case involved actions akin to those of a private manufacturer, contractor, or shipper.[75] Later cases criticized the governmental/non-governmental distinction as a "quagmire."[76]

Nearly thirty years after *Dalehite*, the scope of the discretionary function exception remained undefined.[77] In *United States v. Varig Airlines*,[78] the Court continued an expansive view of the levels at which policymaking occurred, which prevented it from describing the outer limits of the exception. The Court enunciated some of the policies furthered by the exception, but the test it promulgated provided little guidance to future cases.[79]

The *Varig* Court characterized the exception as an attempt to prevent judicial second-guessing of legislative and administrative decisions through the medium of tort actions.[80] In other words, Congress created the discretionary function exception to promote governmental efficiency.[81]

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74. "It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Id.* at 36. The broad view of the exception illustrated in *Dalehite* nearly reached the traditional limits on government liability. *See* Niles, *supra* note 34, at 1318.

75. *Dalehite*, 346 U.S. at 60 (Jackson, J., dissenting). The dissent reasoned that "[t]he Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons." *Id.* The balancing of considerations by officials was no different than the balancing which citizens do "at their peril." *Id.* The *Dalehite* decision would likely have come out differently today; "the handling techniques used and [ammonium nitrate's] storage near other explosives would probably be classified outside the policy making realm." *See* Bagby & Gittings, *supra* note 69, at 228.

76. *See* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955). The Court in *Indian Towing* characterized the distinction as an "irreconcilable conflict" that "plagued the law of municipal corporations," and was rendered unnecessary by the FTCA. *Id.*

77. No clear description of the scope of the FTCA discretionary function exception emerged from the cases decided in the period between *Dalehite* and *Varig*. In fact, some cases seemed to point in different directions, prompting the *Varig* Court to admit that the Supreme Court's reading of the FTCA had "not followed a straight line. . . ." United States v. Varig Airlines, 467 U.S. 797, 811 (1984); *see also* Zillman, *supra* note 65, at 369 (noting that lower federal courts between 1953 and 1984 applied the discretionary function exception by interpreting the language of *Dalehite*).

78. 467 U.S. 797 (1984).

79. Plaintiffs in *Varig* alleged negligence on the part of the Civil Aeronautics Agency, a predecessor of the Federal Aviation Administration, in inspecting and issuing a certificate to an aircraft that did not comply with fire safety requirements. *Id.* at 800-01. A fire broke out in one of the aircraft lavatories. The smoke filled the cabin and cockpit, and "124 of the 135 persons on board died from asphyxiation or the effects of toxic gases produced by the fire." *Id.*

80. *Id.* at 814. This statement reflects separation of powers concerns and fear of "government through litigation." *See supra* note 50 and accompanying text.

81. *Varig*, 467 U.S. at 814.

The Court attempted to isolate factors describing the reach of the discretionary function exception. While those factors were of little use, they helped set the stage for a more workable approach by describing the purpose behind the exception.[82]

2. Berkovitz*: A Two-Part Test Emerges*

A few years later, the Court clarified and expanded on *Varig* to create a more workable approach to the discretionary function exception. In *Berkovitz v. United States*,[83] Justice Marshall enunciated the first version of the two-part test for determining application of the exception. First, a court must consider whether the action is a matter of choice for the governmental employee.[84] The exception will not apply if the relevant federal statute, regulation, or policy prescribes a specific course of action.[85] Second, if the challenged conduct does involve an element of judgment, that judgment must be of the type the exception was designed to shield.[86]

The Court summarized the discretionary function exception as insulating the government from liability "if the action challenged in the case involves the permissible exercise of policy judgment."[87] In order for the exception to apply, the government must prove that the decision

82. The "factors" identified in *Varig* were hardly factors at all. All that one can glean from the *Varig* opinion is that the discretionary function exception protects acts that Congress intended to shield, and that the exception encompasses the discretionary acts of the Government acting in its role as regulator of the conduct of private individuals. *See id.* at 813-14. Finding that both of these "factors" existed, the Court held the discretionary function exception barred plaintiffs' claims. *Id.* at 821.

83. 486 U.S. 531 (1988). Plaintiffs in *Berkovitz* alleged wrongful approval and release of a polio vaccine which, rather than vaccinating their child, caused him to contract the disease. *Id.* at 533.

84. *Id.* at 536.

85. *Id.* The Court found that the discretionary function exception did not bar plaintiffs' allegation that the vaccine was wrongly approved and licensed because the statute and regulations at issue required that the agency receive certain test data as a precondition to licensing. *Id.* at 542-43. The agency had no discretion to approve and license the vaccine without first receiving the test data. *Id.*

86. *Id.* at 536-37. The Court noted in dicta that the discretionary function exception would bar claims challenging the agency's policy formulations of the appropriate way to regulate the release of vaccines. *Id.* at 546. The Court noted that the regulatory scheme governing release of vaccines was substantially similar to the certification process discussed in *Varig*. *Id.*

87. *Id.* at 537.

involved an element of judgment, and that the judgment was based on considerations of public policy.[88]

Cases after *Berkovitz* further developed the two-part test and broadened the protection offered by the discretionary function exception. The Court in *United States v. Gaubert*[89] created a "strong presumption" that an act authorized by a regulation involves considerations of policy if the regulation allows the employee discretion.[90] Additionally, the first prong of the test now includes examination of whether a statutory duty provides a "fixed or readily ascertainable standard" to guide a government official in performing those duties.[91] A statute or regulation meets this standard if it "mandates that a government agent perform his or her function in a specific manner."[92]

III. FEDERAL DISASTER RELIEF LEGISLATION

Before examining the details of the Katrina response, it is important to provide a basic overview of the primary source of federal disaster assistance. Centralized federal disaster relief legislation began with the Disaster Relief Act of 1950.[93] Revisions to that act culminated with the Robert T. Stafford Disaster Relief Act of 1974 (Stafford Act).[94] The Stafford Act improved upon earlier disaster relief legislation and expanded the federal role in disaster relief.

This Part reviews previous disaster relief legislation and describes provisions of the Stafford Act particularly relevant to a claim Hurricane Katrina victims might bring against the federal government for inadequate supplies of food commodities.[95] It also discusses a provision of the Stafford Act similar to the discretionary function exception of the FTCA.[96]

A. Early Disaster Relief

Congress passed the first federal disaster relief act in 1950.[97] The primary purpose of the bill was to provide a general congressional policy with respect to federal disaster relief.[98] The Disaster Relief Act of 1950

88. *Id.*
89. 499 U.S. 315 (1991).
90. *Id.* at 324. For a discussion of the extent to which this presumption broadens the reach of the discretionary function exception, see Niles, *supra* note 34, at 1328-34.
91. Powers v. United States, 996 F.2d 1121, 1124 (11th Cir. 1993).
92. *Id.* at 1124-25.
93. Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109.
94. Robert T. Stafford Disaster Relief Act of 1974, 42 U.S.C. §§ 5121-5206 (2000).
95. *Id.* § 5180. This Comment also refers to § 5151 of the Stafford Act, which requires nondiscrimination in disaster assistance. *See infra* notes 127, 183.
96. 42 U.S.C. § 5148.
97. Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109.
98. § 1; 96 CONG. REC. 11896 (1950) (statements of Rep. Whittington).

(DRA) authorized the President to coordinate all governmental agencies in major disasters.[99] The DRA established a fund enabling the government to give direct relief to disaster areas when disasters arose, rather than requiring Congress to respond to each situation individually.[100]

Prior to the DRA, Congress would appropriate varying amounts on an ad hoc basis in response to particular disasters.[101] The DRA intended to centralize funding and create a more systematic approach to disaster relief.[102] In subsequent years, Congress revised and expanded upon the DRA in 1966,[103] 1969,[104] and 1970.[105]

B. The Robert T. Stafford Disaster Relief Act of 1974

The 1970 Act was frequently used and sometimes criticized during the three years of its existence.[106] In 1973, the Senate Subcommittee on

99. § 5(a), 64 Stat. at 1110 ("In the interest of providing maximum mobilization of Federal assistance under this Act, the President is authorized to coordinate in such manner as he may determine the activities of Federal agencies in providing disaster assistance"); 96 CONG. REC. 11895 (1950) (statements of Rep. Cox).

100. The 1950 DRA established a fund of $5 million. § 8, 64 Stat. at 1111. From 1803 to 1947, Congress enacted approximately 128 specific relief acts. *See* PETER J. MAY, RECOVERING FROM CATASTROPHES 20 (1985).

101. RUTH M. STRATTON, DISASTER RELIEF 31 (1989). The prevailing view was that disaster relief was a state and local responsibility. *Id.* For an overview of late nineteenth and early twentieth-century disaster relief appropriations, see Michele Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387 (2005). *Cf.* Howard Gillman, *Disaster Relief, "Do Anything" Spending Powers, and the New Deal*, 23 LAW & HIST. REV. 443 (2005) (questioning Dauber's claim that constitutional issues related to disaster relief offered a significant foundation for New Deal legislation); *see also* Michele L. Landis, *"Let Me Next Time Be 'Tried By Fire'": Disaster Relief and the Origins of the American Welfare State, 1789-1874*, 92 NW. U. L. REV. 967 (1998) (arguing the origin of the American welfare state lies in eighteenth and early nineteenth-century disputes over disaster relief).

102. *See* MAY, *supra* note 100, at 23. May characterizes pre-1950 disaster policy as "distributing relief assistance in a pork-barrel fashion." *Id.* at 21.

103. Disaster Relief Act of 1966, Pub. L. No. 89-769, 80 Stat. 1316. The 1966 Act made amendments to the 1950 Act extending disaster-specific provisions. MAY, *supra* note 100, at 24. Notable provisions of the 1966 Act made rural communities eligible for assistance and provided funding for damage to higher education facilities and for repair of public facilities under construction. *Id.*

104. Disaster Relief Act of 1969, Pub. L. No. 91-79, 83 Stat. 125. The 1969 Act was limited to fifteen months in duration. MAY, *supra* note 100, at 24.

105. Disaster Relief Act of 1970, Pub. L. No. 91-606, 84 Stat. 1744. The 1970 Act was an outgrowth of the Hurricane Camile response and included most provisions of the expiring 1969 Act, with an emphasis on expanding relief assistance for individuals. MAY, *supra* note 100, at 25.

106. S. REP. NO. 93-778, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 3070, 3070. Under the 1970 Act, the President declared 111 major disasters in forty-one different states. *Id.*

Disaster Relief held field hearings in four cities that suffered severe losses in major disasters.[107] This investigation resulted in the Stafford Act.[108] The Stafford Act retained the basic pattern of public and private assistance seen in the 1970 Act.[109] It refined the 1970 Act by modifying its provisions in response to changing conditions and resources.[110]

The Stafford Act covers a broad range of topics: disaster preparedness and mitigation assistance,[111] major disaster and emergency assistance administration,[112] and major disaster assistance programs.[113] The Stafford Act aimed to increase the ability of the federal government to respond effectively and to expedite long-range recovery operations.[114] Congress intended "to provide an orderly and continuing means of assistance by the Federal Government to state and local governments in carrying out their responsibilities to alleviate [disaster-related] suffering and damage. . . ."[115]

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107. The hearings took place in Biloxi, MS (following Hurricane Camile), Rapid City, SD (flooding), Wilkes-Barre, PA (Hurricane Agnes), and Elmira, NY (Hurricane Agnes). *See* 120 CONG. REC. 10509, 10510 (1974). At the time, Hurricane Agnes was the worst disaster in U.S. history, causing $3.5 billion in storm damage (in 1972 dollars) and 122 deaths. Bartlett C. Hagemeyer & Scott M. Spratt, *Thirty Years After Hurricane Agnes: The Forgotten Florida Tornado Disaster*, http://www.srh.noaa.gov/mlb/agnes30.html (last visited Oct. 27, 2006).

108. Robert T. Stafford Disaster Relief Act of 1974, 42 U.S.C. §§ 5121-5206 (2000); *see also* S. REP. NO. 93-778, at 3 (1974).

109. Both the 1970 and Stafford Acts authorized the President to provide disaster preparation assistance to local and state governments. *See* Disaster Relief Act of 1970 §§ 206(a), (b); 42 U.S.C. §§ 5131(a), (b). Both Acts also allowed for a federal role in providing temporary housing and rental assistance to private individuals. *See* Disaster Relief Act of 1970 § 226; 42 U.S.C. § 5174.

110. The previous disaster relief acts created a pattern of expanded benefits, resulting in forty-eight disaster declarations and an expenditure of $713,889,127 from the Disaster Fund in 1972. STRATTON, *supra* note 101, at 45. The Nixon administration sought to transfer direct management of disaster programs back to the state governments, in keeping with the "New Federalism" approach of the early Nixon years, but Congress rejected the proposal. *Id.* The philosophical issues surrounding the appropriate scope and amount of federal disaster assistance remain debatable subjects. *See* MAY, *supra* note 100, at 40. May notes that every disaster act beginning with the 1950 DRA explicitly stated that federal relief was "supplemental" to state and local relief efforts, but what that means in terms of state and federal responsibilities has been unclear. *Id.* at 26.

111. 42 U.S.C. §§ 5131-34.

112. *Id.* §§ 5141-65(c).

113. *Id.* §§ 5170-97. Major disaster assistance programs include emergency assistance programs and emergency preparedness. *See id.* §§ 5191-93, 5195-97(h).

114. S. REP. NO. 93-778, at 22 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 3070, 3090.

115. 42 U.S.C. § 5121(b) (2000). The 1970 Act contained identical language. Disaster Relief Act of 1970 § 101(b), Pub. L. No. 91-606, 84 Stat. 1744. The 1970 and Stafford Acts emerged from an era of congressional generosity toward disaster victims, and thus expanded federal disaster assistance beyond the limits of prior disaster relief acts. *See* STRATTON, *supra* note 101, at 45-47.

To trigger the assistance of the federal government, the Governor of the affected state must request one of two declarations by the President.[116] The Governor may request either a "major disaster" declaration or an "emergency" declaration.[117] This two-tiered system represents one of the changes the Stafford Act made to the system of disaster relief; previous disaster relief acts only provided for a declaration of a major disaster.[118] The distinction created under the Stafford Act allows the federal government to extend help during emergencies that do not rise to the level of a "major disaster."[119] Once the Governor submits her request, the President then decides what declaration to make, if any, in response to the request.[120]

If the President grants the request, the Associate Director of the Readiness, Response, and Recovery Directorate designates both the types of assistance available and the areas eligible for assistance.[121] The FEMA Director then notifies the Governor of this designation.[122] The FEMA Director also appoints a Federal Coordinating Officer who is charged with ensuring that federal assistance is provided.[123]

116. 42 U.S.C. § 5170 ("Based on the request of a Governor under this section, the President may declare under this chapter that a major disaster or emergency exists."). For further explanation of the declaration process and available assistance, see FEMA, A Guide to the Disaster Declaration Process and Federal Disaster Assistance, *available at* http://www.fema.gov/pdf/rebuild/recover/dec_proc.pdf.

117. 42 U.S.C. § 5170.

118. *See, e.g.*, Disaster Relief Act of 1970 § 102(1); Disaster Relief Act of 1966, Pub. L. No. 89-769, § 2, 80 Stat. 1316 (repealed 1970).

119. S. REP. NO. 93-778, at 3, *as reprinted in* 1974 U.S.C.C.A.N. 3070, 3072. Technical assistance, advisory personnel, equipment, food, other supplies, personnel, medical care, and other essentials are provided in an emergency declaration. 44 C.F.R. § 206.62 (2005). Assistance authorized by an emergency declaration is limited to immediate and short-term aid. *Id.* § 206.63. Other benefits, such as loan assistance, are not provided unless the President declares a major disaster. *See id.* § 206.361.

120. 42 U.S.C. § 5170. Whether a governor requests a major disaster or emergency declaration, the President may always deny the request. 44 C.F.R. § 206.38 (2005). If a governor requests a major disaster declaration, the President may choose to make an emergency declaration instead of granting or denying the request outright. *Id.*

121. 44 C.F.R. § 206.40(a)-(b) (2005).

122. *See id*. § 206.39(c). The notification comes from either the director of the regional FEMA office or the associate director of the Readiness, Response and Recovery Directorate. *Id.* §§ 206.2, 206.39(c).

123. *Id.* § 206.41(a).

C. Food Commodities and the Stafford Act

The provision of the Stafford Act particularly pertinent to this discussion describes the federal government's role in providing food commodities to disaster victims.[124] Section 5180 provides a basis for Hurricane Katrina victims' claims if it can be shown to fall outside of the discretionary function exception.[125]

The Stafford Act expanded the federal role in providing food commodities to disaster victims.[126] Section 5180 assigns responsibility to the President to prepare for emergency mass feeding or distribution of food in any area suffering a major disaster or emergency.[127] The Secretary of Agriculture is to use funds to purchase any necessary food supplies.[128]

Section 5180 was one of the more significant amendments proposed by the Stafford Act.[129] The 1950 and 1966 Disaster Acts did not contain any provisions regarding food commodities.[130] The 1969 and 1970 Acts

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124. 42 U.S.C. § 5180(a) (2000) ("The President is authorized and directed to assure that adequate stocks of food will be ready and conveniently available for emergency mass feeding or distribution in any area of the United States which suffers a major disaster or emergency.").

125. Hurricane Katrina victims might also base a claim on Stafford Act § 5151, which prohibits discrimination in disaster assistance. Section 5151 states:

> The President shall issue, and may alter or amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.

42 U.S.C. § 5151(a). The import of § 5151 is unclear. On the one hand, § 5151 seems to incorporate into the Stafford Act certain protections afforded under the Constitution. *E.g.*, The Equal Protection Clause, U.S. CONST. amend. XIV. By that reading, § 5151 adds little to the Stafford Act. On the other hand, § 5151 might be read to go further than the Fourteenth Amendment, insofar as it prohibits discrimination on the basis of economic status.

126. *See* STRATTON, *supra* note 101, at 47.

127. 42 U.S.C. § 5180(a).

128. *Id.* § 5180(b) ("The Secretary of Agriculture shall utilize funds appropriated under section 612c of title 7, to purchase food commodities necessary to provide adequate supplies for use in any area of the United States in the event of a major disaster or emergency in such area."). Section 612c of Title 7 establishes a fund to which 30% of gross receipts from duties collected under customs laws. *See* 7 U.S.C. § 612c (2000) (amended 2002). Money from the fund may be used to encourage the exportation or domestic consumption of agricultural commodities, and to reestablish farmers' purchasing power. *See id.*

129. S. REP. NO. 93-778, at 1-2 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 3070, 3070-71.

130. *See* Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109; Disaster Relief Act of 1966, Pub. L. No. 89-769, § 2, 80 Stat. 1316 (repealed 1970). The 1970

authorized the President to distribute food coupons and surplus commodities but left distribution to his discretion.[131] A "lack of surplus commodities . . . raised questions about [the government's] ability to provide sufficient supplies for mass feeding and for home use after major disasters."[132] The drafters of the Stafford Act noted the essential nature of food stuffs following a disaster,[133] and believed § 5180 "clearly delineate[s]" federal responsibilities in the areas of food assistance and mass feeding.[134]

Section 5180 has not garnered much attention from courts or executive agencies. No case law exists interpreting the food commodities provision. Regulations promulgated under the Stafford Act repeat the main statutory language and delegate responsibility to the Associate Director for Homeland Security.[135] Despite the scarcity of judicial or administrative materials interpreting § 5180, established methods of statutory interpretation reveal a few key features of the provision. The plain language of the statute, applicable canons of construction, and the legislative history of the Stafford Act all support the conclusion that § 5180 places a mandatory duty on the President to provide adequate food to disaster victims.

Unlike many portions of the Stafford Act, the statutory language of § 5180 is mandatory in nature.[136] The President is "directed" to assure

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and Stafford Acts, in comparison, were more generous and extensive, and provided more benefits to victims of catastrophes. *See* STRATTON, *supra* note 101, at 47.

131. Disaster Relief Act of 1969, Pub. L. No. 91-79, § 11(a), 83 Stat. 125, 129; Disaster Relief Act of 1970, Pub L. No. 91-606, § 238(a), 84 Stat. 1744, 1755 (repealed 1974).

132. S. REP. NO. 93-778, at 7, *as reprinted in* 1974 U.S.C.C.A.N. 3070, 3076. The decision to replace the USDA family food distribution program with food stamps exacerbated these concerns. *Id.*

133. 120 CONG. REC. 10509, 10511 (1974) ("Use of surplus food stuffs for mass feeding . . . is especially essential . . . after a . . . catastrophe when thousands may be dislocated and the normal economy has seriously disrupted.") (statement of Sen. Burdick); *see also* S. REP. NO. 93-778, at 7, *as reprinted in* 1974 U.S.C.C.A.N. 3070, 3076.

134. 120 CONG. REC. 10509, 10513 (1974) ("Sections 409 and 410 clearly delineate federal responsibilities in the areas of food assistance and mass feeding. These are areas in which the impending lapse of certain legislative authorities could have resulted in insurmountable administrative problems.") (statement of Sen. Domincini).

135. 44 C.F.R. § 206.151(a) (2005) ("The Associate Director will assure that adequate stocks of food will be ready and conveniently available for emergency mass feeding or distribution in any area of the United States which suffers a major disaster or emergency.").

136. Most substantive provisions of the Stafford Act contain permissive language such as "may" or "is authorized to." *See, e.g.*, Robert T. Stafford Disaster Relief Act of

availability of food supplies, and the Secretary "shall" utilize funds to purchase such supplies.[137] Turning first to the plain meaning of the words, we see that the President is given authority to provide food commodities and also commanded to use that authority.[138] The term *directed* should be interpreted separately, in order to avoid surplusage.[139] To read § 5180 as anything other than a mandatory command would render *directed* meaningless.[140] Section 5180 must therefore be read as giving the President authority to make food commodities available, and making exercise of that authority mandatory.

On the other hand, canons of construction are not mandatory rules and do not foreclose alternative readings.[141] One can frequently point to opposing canons with respect to the same principle of statutory construction.[142] For example, plain language may not be given effect if literal interpretation would lead to absurd consequences, and words inadvertently inserted or repugnant to the rest of the statutes may be rejected as surplusage.[143] Thus, the conclusion that § 5180 prescribes a

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1974, 42 U.S.C. § 5152 (2000) (authorizing the President to enter into agreements with disaster assistance organizations); *id.* § 5170a ("In any major disaster, the President *may* . . . ." (emphasis added)); *id.* § 5173 (authorizing the President to clear debris "whenever he determines it to be in the public interest"). Mandatory language is more common in procedural provisions. *See, e.g.*, *id.* § 5156 ("The President *shall* establish comprehensive standards [for] assess[ing] . . . efficiency and effectiveness . . . ." (emphasis added)); *id.* § 5143 ("[T]he President *shall* appoint a Federal coordinating officer to operate in the affected area." (emphasis added)).

137. *Id.* § 5180.

138. "The President is *authorized* and *directed* . . . ." *Id.* (emphasis added).

139. "It is, moreover, 'a cardinal principle of statutory construction that a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.'" Alaska Dept. of Envtl. Conservation v. EPA, 540 U.S. 461, 489 n.13 (2004) (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)); *see also* HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 165-67 (2d ed., 1911).

140. *Cf.* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166 (2004) ("[Respondent's] reading would render part of the statute entirely superfluous, something we are loath to do.").

141. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001). The Court in *Chickasaw Nation* addressed a conflict between competing canons of construction: one assumes statutes should be interpreted to benefit Native American tribes, but another warns against interpreting statutes as providing tax exemptions. *See id.* at 95. The Court concluded that the only reasonable reading of the statute at issue required it to reject certain language as surplusage. *Id.* at 86.

142. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 521-35 (1960). Professor Llewellyn juxtaposes competing constructions as "thrust[s]" and "parr[ies]" in argument. *Id.* at 522-28.

143. *Id.* at 524, 525. Justice Scalia criticizes several of Llewellyn's thrust/parry dichotomies as lacking proper support. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25-26 (Amy Gutmann ed., 1997); *cf.* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805 (1983) (noting the gap between scholarly criticism of the canons and their practical use in judicial opinions).

mandatory course of action should not rest on canons of construction alone.

The legislative history of the Stafford Act supports an interpretation of § 5180 as mandatory. The 1970 Disaster Relief Act gave the President authority to distribute food coupons and surplus food stuffs but left the exercise of that authority to his discretion.[144] Congress believed that § 5180 was one of the significant improvements on the 1970 Act,[145] and that its language clearly delineated federal responsibility vis-à-vis feeding disaster victims.[146] Because Congress intended § 5180 to require more of the President than the 1970 Act, the mandatory language of the section should not be discarded and ignored. Rather, § 5180 should be read in a manner consistent with its plain language, recognized canons of construction, and the legislative history of the Stafford Act.

D. The Stafford Act and the Discretionary Function Exception

Stafford Act § 5148 contains a discretionary function exception similar to that of the FTCA.[147] Understanding the Stafford Act discretionary function exception is necessary before examining the claims Hurricane Katrina victims can bring against the federal government. Judicial interpretation of the Stafford Act discretionary function exception has followed a path similar to that of the FTCA discretionary function exception. Early decisions did not result in a clear rule or reason, but recent cases utilize the two-part test promulgated in *Berkovitz*.[148]

Recognizing the similarity between the FTCA and Stafford Act discretionary function exceptions, a majority of courts apply the FTCA

144. *See* Disaster Relief Act of 1970, Pub. L. No. 91-606, § 238(a), 84 Stat. 1744, 1755.

145. *See* S. REP. NO. 93-778, at 2, 7-8 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 3070, 3071.

146. *See supra* note 134.

147. The Stafford Act discretionary function exception states:

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

42 U.S.C. § 5148 (2000). This language parallels that of 28 U.S.C. § 2680(a) (exempting discretionary functions from the FTCA general waiver of sovereign immunity). The Stafford Act discretionary function exception has been part of federal disaster legislation since the 1950 Act. *See* Disaster Relief Act of 1950, Pub. L. No. 81-875, § 3, 64 Stat. 1109. 1110.

148. *See, e.g.*, Dureiko v. United States, 209 F.3d 1345, 1351 (Fed. Cir. 2000).

two-part test to determine whether § 5148 applies in claims arising from disaster relief.[149] The exception shields from review determinations of eligibility for disaster relief and benefits,[150] decisions regarding funding,[151] and certain decisions regarding debris removal.[152] The exception does not bar claims of negligent operation of a vehicle by a government employee,[153] nor does it apply to funding decisions when specific award conditions have been set.[154]

The first case to address the discretionary function exception of the Stafford Act involved an effort to recover Emergency Feed Program disaster assistance payments.[155] The court in *Ornellas v. United States* held that the discretionary function provision precluded liability for any actions or inactions involving disaster relief.[156] The court deemed disaster assistance a "gratuity," and held that liability should not be imposed for discretionary acts under gratuitous programs.[157] The court also found support for this view in the Stafford Act's legislative history.[158]

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149. *See, e.g.*, *id.* at 1351, 1353; Sunrise Vill. Mobile Home Park v. Phillips & Jordan, Inc., 960 F. Supp. 283, 285 (S.D. Fla. 1996).

150. *See* City of San Bruno v. FEMA, 181 F. Supp. 2d 1010 (N.D. Cal. 2001).

151. *See* Burgos-Montes v. Municipality of Yauco, 294 F. Supp. 2d 141 (D.P.R. 2003); California-Nevada Methodist Homes, Inc. v. FEMA, 152 F. Supp. 2d 1202 (N.D. Cal. 2001).

152. *See Sunrise Village*, 960 F. Supp. at 286 (involving cleanup efforts in the wake of Hurricane Andrew).

153. *See* Torres v. United States, 979 F. Supp. 1054, 1056 (D.V.I. 1997) (holding the exception inapplicable notwithstanding fact that the government employee was driving between FEMA sites).

154. *See* Graham v. FEMA, 149 F.3d 997, 1006-07 (9th Cir. 1998).

155. Ornellas v. United States, 2 Cl. Ct. 378, 379 (1983). The Emergency Feed Program was initially implemented under the provisions of the Stafford Act, and was subsequently replaced by a similar program under the Food and Agricultural Act. *Id.* at 379 n.1. Under this program, farmers could receive disaster payments for the cost of cattle feed. *Id.* at 378. The Food and Agriculture Act did not contain a discretionary function exception. *Id.* at 379 n.1. The court rejected plaintiffs' contention that the latter act should govern because: (1) the eligibility regulations were in effect at the time of plaintiffs' applications; and (2) the applications were submitted before the Food and Agricultural Act took effect. *Id.*

156. *Id.* at 379.

157. *Id.* at 380 (citing D.R. Smalley & Sons, Inc. v. United States, 372 F.2d 505, 507-08 (Cl. Ct. 1967)).

158. *Id.* The court relied on the following statement as evidence of Congress's intent to bar all claims regarding disaster relief:

> We have further provided that if the agencies of the Government make a mistake in the administration of the Disaster Relief Act that the Government may not be sued. Strange as it may seem, there are many suits pending in the Court of Claims today against the Government because of alleged mistakes made in the administration of other relief acts, suits . . . because citizens have averred that the agencies and employees of Government made mistakes. We have put a stipulation in here that there shall be no liability on the part of the Government.

Ornellas reached the correct result, but through a misguided interpretation of § 5148. The court erroneously interpreted § 5148 as barring all claims arising from disaster relief.[159] This approach read the word *discretionary* out of the statute. If all disaster relief is discretionary, the word *discretionary* becomes mere surplusage.[160] The presence of the word *discretionary* infers that some acts of the federal government in providing disaster relief are non-discretionary.[161] There is no need to resort to legislative history if a statute is plain on its face.[162] Finally, the notion that the federal government should not be liable for "gratuitous" programs has little judicial authority[163] and invites the same sort of quagmire as the governmental/non-governmental distinction that arose from early FTCA cases.[164]

The *Ornellas* court reached the correct decision despite its faulty reasoning. Although the Stafford Act does not bar all claims arising from disaster relief, determinations of eligibility under the Emergency Feed Program are discretionary functions under the two-part test. In the absence of clear and mandatory guidelines, determinations of eligibility for disaster relief and benefits involve policy judgments.[165]

Id. (quoting 96 CONG. REC. 11895, 11912 (1950) (statement of Rep. Whittington)). The statement came from debates regarding the Disaster Relief Act of 1950, in which the discretionary function exception first appeared. *See* Disaster Relief Act of 1950, Pub. L. No. 81-875, § 3, 64 Stat. 1109, 1110. The court took this statement to mean Congress intended to raise a statutory barrier to all judicial review. *Ornellas*, 2 Cl. Ct. at 380.

159. *Ornellas*, 2 Cl. Ct. at 380.

160. Canons of construction require courts to give effect whenever possible to every word of the written law. *See* BLACK, *supra* note 139, at 165-67.

161. The statements from legislative history similarly render the term *discretionary* meaningless. It appears that the *Ornellas* court relied on the following statement from legislative history: "We have put a stipulation in here that there will be no liability on the part of the Government." *See Ornellas*, 2 Cl. Ct. at 380 (quoting 96 CONG. REC. 11895, 11912).

162. *See* Sunrise Vill. Mobile Home Park v. United States, 42 Fed. Cl. 392, 397 n.3 (1998). While current Justices may differ as to the usefulness of legislative history, none contend it should prevail over the statutory language when a conflict exists between the two. *Compare* SCALIA, *supra* note 143, at 17 ("It is the *law* that governs, not the intent of the lawgiver."), *with* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 866 (1992) ("I do not see how one can criticize courts that use legislative history on *conceptual* grounds.").

163. The authority upon which *Ornellas* relied in classifying emergency assistance as a gratuity involved highway construction, not disaster assistance, and was decided on the bases of contract and agency theories. *Ornellas*, 2 Cl. Ct. at 380 (citing D.R. Smalley & Sons, Inc. v. United States, 372 F.2d 505, 507-08 (Cl. Ct. 1967)).

164. *See* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

165. *See* City of San Bruno v. FEMA, 181 F. Supp. 2d 1010 (N.D. Cal. 2001) (applying the exception to a determination that the city was ineligible for disaster relief

Administrators must allocate finite resources based on disaster victims' relative needs.[166] Eligibility decisions thus meet the first prong of the *Berkovitz* test because they involve an element of judgment or choice.[167] The administrative decisions at issue in *Ornellas* would therefore be shielded from review by reason of their discretionary nature.[168]

Not all actions undertaken by the federal government in providing disaster relief are discretionary.[169] In *Dureiko v. United States*,[170] the court applied the two-part discretionary function test to a breach of contract claim.[171] There, FEMA sought sites where it could place temporary housing and operate its relief efforts.[172] Dureiko agreed to lease sites to FEMA, but only after allegedly requiring a list of assurances.[173] He then sued the United States and its subcontractors for allegedly failing to follow the agreed-upon procedures in conducting its cleanup efforts.[174]

The *Dureiko* court held that the discretionary function exception did not bar the plaintiff's contract claim.[175] Although FEMA's initial decision to contract with the plaintiff involved an element of judgment or choice; its subsequent compliance with the contract did not.[176] The court found

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following the collapse of a hillside); *cf.* Graham v. FEMA, 149 F.3d 997, 1006 (9th Cir. 1998) (finding the exception did not apply to eligibility determinations when regulations established objective requirements of the award conditions).

166. *See* Fang v. United States, 140 F.3d 1238, 1241-42 (9th Cir. 1998) ("[D]ecisions involving the allocation and deployment of limited governmental resources are the type of administrative judgment that the discretionary function exception was designed to immunize from suit.").

167. *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988).

168. *See* California-Nevada Methodist Homes, Inc. v. FEMA, 152 F. Supp. 2d 1202 (N.D. Cal. 2001) (holding the exception applied to denial of requested disaster relief funds); *City of San Bruno*, 181 F. Supp. 2d at 1015-16. In defense of the *Ornellas* decision, it should be noted that the *Berkovitz* two-part test had not yet been promulgated.

169. *See supra* text accompanying notes 153-54. Additionally, the discretionary function exception does not bar constitutional claims. Rosas v. Brock, 826 F.2d 1004, 1008 (11th Cir. 1987); *accord* Lockett v. FEMA, 836 F. Supp. 847, 854 (S.D. Fla. 1993). Adherence to constitutional guidelines is mandatory, not discretionary. *Rosas*, 826 F.2d at 1008. Plaintiff in *Rosas v. Brock* challenged a regulation defining "unemployed worker" in disaster areas, arguing that the definition violated constitutional, statutory, and regulatory provisions. *Id.* at 1006-07. The Court of Appeals affirmed dismissal of plaintiff's statutory and regulatory claims, but reversed the district court's dismissal of his constitutional claim. *Id.* at 1010. The court found no reason to believe Congress intended to grant agencies discretion to act unconstitutionally. *Id.* at 1008.

170. 209 F.3d 1345, 1351 (Fed. Cir. 2000).

171. *Id.*

172. *Id.* at 1348. Dureiko operated a mobile home park in Dade County, Florida. *Id.* FEMA personnel were in the area in response to Hurricane Andrew. *Id.*

173. *Id.* Dureiko claimed to have witnessed damage to other mobile home parks at the hands of government cleanup contractors, and thus demanded assurances. *Id.*

174. *Id.* at 1352.

175. *Id.* at 1352-53.

176. *Id.* at 1353. The court noted that the government's position would allow it to avoid paying contractors for their cleanup efforts. *Id.*

the contract was indistinguishable from a statute or regulation dictating a specific course of conduct for an employee to follow.[177] FEMA and its subcontractors had no choice but to comply with the terms of the alleged contract; there was no discretion for the exception to protect.[178]

IV. HURRICANE KATRINA: CAUSE OF ACTION?

The federal response to Hurricane Katrina was admittedly inadequate.[179] Whether the response gives rise to any liability is a separate question. This Part examines the litigation prospects for complaints filed by Hurricane Katrina victims based on the food commodities provision of the Stafford Act. Claims based on the food commodities provision must first overcome the discretionary function exception.[180] The following analysis explains why claims focusing on the inadequate quantity of food supplies, rather than the inconvenient availability of such supplies, are more likely to survive a motion to dismiss.

Section 5180 requires the President to assure adequate supplies of food are ready and conveniently available for disaster victims.[181] When Hurricane Katrina hit on Monday, August 29, close to 100,000 New Orleans residents remained in the city.[182] The number of people requiring food was both expected and predictable. One hundred thousand people remained in New Orleans after the evacuation order, a figure in line with pre-disaster scenarios and predictions, including the 2004 Hurricane

177. *Id.* The court noted that under both a contract and a regulation or statute, "the employee has no rightful option but to adhere to [its] directive[s]." *Id.* (alteration in original) (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

178. *Id.*

179. *See Bush Admits Katrina Response Was Inadequate*, *supra* note 15.

180. Claims based on the nondiscrimination provision, on the other hand, need not address the discretionary function exception because compliance with constitutional principles is never discretionary. *See* Rosas v. Brock, 826 F.2d 1004, 1008 (11th Cir. 1987). Black or African-Americans constitute 67.3% of the New Orleans population, and over one-quarter of the population live below the poverty line, according to the 2000 census. U.S. Census Bureau, *supra* note 5. These statistics suggest that the federal response had a disparate impact on minority and low-income citizens, in violation of 42 U.S.C. § 5151 (2000). Alleging a violation of § 5151 would help insulate Hurricane Katrina victims' complaints from a motion to dismiss. A claim based on § 5151 would ensure the litigation continued even if the court determined that the discretionary function exception barred other claims they raised.

181. For a discussion of § 5180, see *supra* Part III.C.

182. Lipton et al., *Hurricane to Anarchy*, *supra* note 3, at A1.

Pam exercise.[183] One in five of New Orleans's 480,000 residents did not have a car[184] and thus faced great difficulty in evacuating.

Despite this knowledge, the federal government was slow to respond. "[There was] no evidence that food and water supplies were formally ordered for the Convention Center, where more than 10,000 evacuees had assembled, until days after the city had decided to open it as a backup emergency shelter."[185] Federally supplied food provisions did not mobilize until Wednesday,[186] and the Superdome, a designated refuge, ran out of food and water on Friday.[187]

The discretionary function exception may nonetheless provide a powerful defense for the government. If the exception applies to § 5180, food-related litigation will terminate on a motion to dismiss for lack of subject matter jurisdiction.[188] A court will therefore examine § 5180 under the two-part test to determine whether it shields the government from liability.[189]

A court must first determine whether the action is a matter of choice for the relevant government employee.[190] The plain language and legislative history of § 5180 reveal that the duty to provide adequate food is mandatory, and canons of construction support this interpretation.[191] Even if an official duty is mandatory, the discretionary function exception will apply if the statute or regulation in question does not provide a "fixed or readily ascertainable standard" for performing the duty.[192] The exception might therefore be said to apply to § 5180 because neither the statute nor the applicable regulations define precisely what constitutes

183. The Hurricane Pam exercise used realistic weather and damage information to help officials develop response plans for a catastrophic hurricane in Louisiana. FEMA, Hurricane Pam Exercise Concludes, http://www.fema.gov/news/newsrelease.fema?id=13051 (last visited July 16, 2006). According to the Hurricane Pam scenario, only one-third of New Orleans residents would evacuate prior to the storm's arrival. Times-Picayune, In Case of Emergency, http://www.ohsep.louisiana.gov/newsrelated/incaseofemrgencyexercise.htm (last visited Aug. 7, 2006).

184. Evan Thomas, *The Lost City*, NEWSWEEK, Sept. 12, 2005, at 42-52.

185. Lipton, *Levee's Failure*, *supra* note 3, at A1. Although FEMA planned to have 360,000 ready-to-eat meals and fifteen trucks of water delivered to the city in advance of the storm, only 40,000 meals and five trucks arrived. *Id.*

186. The government dispatched 400 trucks, carrying 5.4 million meals. Evan Thomas, *How Bush Blew It*, NEWSWEEK, Sept. 19, 2005, at 33.

187. Lipton et al., *Hurricane to Anarchy*, *supra* note 3, at A1.

188. *See* FED. R. CIV. P. 12(b)(1). Rule 12(b)(1) is not the only mechanism by which a party may challenge subject matter jurisdiction, but it is the earliest opportunity to do so. *See* FED. R. CIV. P. 12(h)(3) (allowing parties to challenge subject matter jurisdiction at any time).

189. The development and operation of the two-part test is described *supra*, Part II.C.2.

190. *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988).

191. *See supra* text accompanying notes 137-39.

192. *See* Powers v. United States, 996 F.2d 1121, 1124 (11th Cir. 1993).

"adequate" food supplies.[193] This argument fails, however, because any interpretation of "adequate" perforce involves an amount proportionate to the number of victims predicted to remain behind.[194]

Under the second part of the test, the court examines whether the judgment is of the kind the discretionary function exception was designed to shield.[195] The exception, as a retention of sovereign immunity, is designed to prevent judicial second-guessing of legislative and administrative decisions.[196] This characterization of the discretionary function exception reflects a concern for separation of powers and an aversion to "government through litigation."[197]

In this case, a court need not engage in judicial second-guessing to find that the federal government failed in its duty to provide adequate food. The Hurricane Pam exercise and other pre-disaster scenarios provide sufficient objective information to evaluate the government's response.[198] Therefore, a court would not need to substitute its judgment for that of the executive branch. Moreover, separation of powers does not insulate the decisions of the coequal branches of government from judicial review,[199] and litigation provides a mechanism for government accountability.[200] Assuming a court proceeds to the second part of the *Berkovitz* test, it should find the discretionary function exception is not designed to shield decisions regarding "adequate" food for Hurricane Katrina victims predicted to remain in New Orleans.

The discretionary function exception will more likely bar claims alleging violation of the "conveniently available" provision of § 5180.

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193. For the full text of § 5180(a) and 44 C.F.R. § 206.151(a), see *supra* notes 124, 135.

194. The American Heritage Dictionary defines *adequate* as: "1. Sufficient to satisfy a requirement or meet a need. . . . 2. Barely satisfactory or sufficient: *The skater's technique was only adequate*." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 25 (4th ed. 2000).

195. *See Berkovitz*, 486 U.S. at 536-37; *see also* Dureiko v. United States, 209 F.3d 1345, 1351 (Fed. Cir. 2000). A court turns to the second part of the *Berkovitz* test only if it finds the decision involved an element of judgment. Nonetheless, the test is examined here.

196. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949); *see also* Littell v. Morton, 445 F.2d 1207, 1214 (4th Cir. 1971) (characterizing the policy of *Larson* as avoiding "substantial bothersome interference with the operation of government).

197. *See* Niles, *supra* note 34, at 1312.

198. *See Hurricane Pam Exercise Concludes*, *supra* note 183; *see also* Lipton et al., *Hurricane to Anarchy*, *supra* note 3, at A1.

199. *See* Chemerinsky, *supra* note 26, at 1218.

200. *See* Jackson, *supra* note 26, at 573.

"[D]ecisions involving the allocation and deployment of limited governmental resources are the type of administrative judgment that the . . . exception was designed to immunize from suit."[201] Thus, if FEMA officials decided to establish a food distribution center at the Superdome instead of the Convention Center, that decision would be properly protected by the discretionary function exception.

Although food was unavailable at *both* the Superdome and Convention Center, this is more reflective of a failure to provide adequate supply than to make food conveniently available. Moreover, judicial review of the convenient availability of food commodities does raise legitimate concerns of judicial second-guessing and micromanagement of executive agencies. Therefore, Hurricane Katrina victims would do well to focus their § 5180 claims on the adequacy of food commodities, not the location at which they were or were not distributed.

To illustrate this point further, consider the court's decision in *Dureiko*. Recall the court's holding that while FEMA's initial decision to enter into a contract was discretionary, its acts pursuant to the contract were mandatory.[202] A contrary interpretation would allow FEMA to avoid having to pay contractors for cleanup efforts.[203] Section 5180 requires similar, but inverted, reasoning. The initial decision of whether or not to send food to a disaster area is mandatory, but decisions of where and how to distribute the food require discretion. To interpret the adequacy provision of § 5180 otherwise would allow the President to send no food at all and then claim the protection of the discretionary function exception.

Thus, by focusing on the inadequate quantity of food supplied by the federal government, Hurricane Katrina victims maximize their chances of surviving a motion to dismiss based on the discretionary function exception. Assuming that claims based on § 5180 are legally sufficient, we turn to potential vehicles for recovery.

V. VEHICLES FOR RECOVERY

Having discussed the basis for claims Hurricane Katrina victims might bring against the federal government, focus now shifts to the vehicles for recovery that might be available. Two vehicles are discussed in this Part: a victim compensation fund along the lines of the September 11th fund, and a class action lawsuit. After assessing the relative merits of each, it concludes that a class action provides the best vehicle for recovery.

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201. *See* Fang v. United States, 140 F.3d 1238, 1241 (9th Cir. 1998).
202. Dureiko v. United States, 209 F.3d 1345, 1353 (Fed. Cir. 2000).
203. *Id.* at 1353-54.

A. Victim Compensation Fund

One potential vehicle for recovery would be a victim compensation fund modeled after the September 11th Victim Compensation Fund of 2001 (the Fund).[204] The Fund represented a novel approach to post-catastrophe relief by establishing an alternative to recovery through traditional tort remedies. Although the tort option was not foreclosed for the victims of September 11th, Congress provided incentives that would channel claims into the no-fault compensation scheme established by the Air Transportation Safety and System Stabilization Act.[205] "[C]laimants eligible under the Fund are put to a choice—they must elect either to claim benefits under the Fund or to waive their rights [to Fund benefits] and pursue a tort claim."[206] Tort remained available as an option for those who fell outside the eligibility limits.[207]

A Hurricane Katrina victim compensation fund (VCF) would provide two main improvements on traditional tort recovery. First, it would avoid the delays and expense of protracted litigation. Resources and energies that would otherwise go to pursuing and defending claims could be put to more socially beneficial uses, such as rebuilding the Gulf Coast region. Second, a VCF would minimize the government's potential liability to Hurricane Katrina victims. A VCF provides incentives for Hurricane Katrina victims to accept the benefits offered and forego tort claims; the government could thus capitalize its outlays to victims, rather than face uncertainty as to the amounts that presumably sympathetic juries may award. In addition to these benefits, a VCF also provides a mechanism for the government to compensate victims more quickly than would tort litigation.[208]

Benefits notwithstanding, a VCF is unlikely to materialize. First, unlike the World Trade Center attacks of September 11th, a hurricane

204. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (2003)).

205. *Id.* § 405(b)(2); *see also* Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 460-64 (2003) (noting such aspects of the VCF as prompt payment, nonadversarial proceedings, and the ability to obtain a preliminary estimate of recovery).

206. Rabin, *supra* note 22, at 785.

207. *Id.*

208. *Cf.* John Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1035-36 (2003) (observing the promptness with which the Air Transportation Safety and Stabilization Act, and the VCF in particular, were created and passed).

striking the Gulf Coast region was not unprecedented.[209] Although Hurricane Katrina's magnitude distinguished it from average storms witnessed during hurricane season, it did not engender the reaction that characterized the days and weeks immediately following September 11th. There was certainly an outpouring of support to Hurricane Katrina victims, but there was not the sense, as existed following September 11th, that all Americans had suffered losses.[210] This might be traced in part to the relative unforeseeability of the September 11th attacks and in part to the distinction between man-made disasters and natural disasters.[211]

Second, political pressures for rapid recovery are not as strong with regard to Hurricane Katrina as existed for the victims of September 11th. "A long and bitter contest over liability [for September 11th victims] . . . almost certainly would have been regarded as intolerable to the national community."[212] While many Americans believe the federal government responded inadequately to Hurricane Katrina, the sense that immediate recovery is essential does not exist. Third, the insolvency concerns that prompted creation of the Fund are absent with respect to Hurricane Katrina. It is likely that mass tort claims in the wake of September 11th would have thrown major players in the airline industry into bankruptcy.[213] No analogous private industry exists in the Hurricane Katrina scenario to provide similar pressures for a no-fault alternative to tort liability.

Moreover, general criticisms of VCFs apply here as well.[214] First, the premise on which a VCF rests is uncertain: Should payments from the Fund be based primarily on the unmet needs of the victim, taking into account collateral sources of recovery such as insurance, or should they seek individualized justice without regard for collateral sources?[215]

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209. *See Hurricane Pam Exercise Concludes*, *supra* note 183.

210. *See* Rabin, *supra* note 22, at 772 (stating that case-by-case contests over tort claims do not carry the emotional resonance and national empathy generated toward the victims of September 11th).

211. For a discussion of how notions of fault, blame, and compensation have changed with respect to natural and man-made disasters, see generally Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL L. REV. 251 (2003) (surveying over one hundred years of disasters).

212. Rabin, *supra* note 22, at 771.

213. *See id.* (asserting that insolvency concerns, more than any other single factor, explain Congress's speed in setting up the Fund).

214. Some criticisms include: treating married and unmarried people differently, providing no compensation to people whose injuries will manifest themselves later, and homogenizing noneconomic loss claims. *See* Culhane, *supra* note 208, at 1052. Professor Culhane argues that deeper philosophical objections surround the very existence of the Fund, as well as its operation. *Id*.

215. *See* David Y. Stevens, Note, *Tort Liability After the Dust Settles: An Economic Analysis of the Airline Defendants' Duty to Ground Victims in the September 11 Litigation*, 80 IND. L.J. 545, 561-62 (2005) (discussing "secondary cost reductions" in compensating victims).

Additionally, payments from a VCF raise difficult issues of line drawing: How can the system make principled distinctions between victims' situations without creating arbitrary categories?[216] Finally, there is the question of the precedent a Hurricane Katrina victim compensation fund would set for future natural disasters. Continuing a VCF model in the future would increase costs of disaster relief and disregard the traditional principle that liability does not attend to "acts of God."[217] On the other hand, if the Hurricane Katrina VCF was a one-time-only response, we risk violating the principle of similar treatment should the government respond inadequately to some future disaster.

Despite a VCF's benefits and appeal, inadequate institutional pressures exist to encourage the federal government to establish one. Additionally, the uncertain principles upon which a VCF rests raise valid objections to its existence in the first place.

B. Class Action

A second potential vehicle for recovery is a certified class action. Class actions carry their own unique benefits and burdens. Although a mass tort class action would be difficult to maintain, it nonetheless appears to be the preferred vehicle for Hurricane Katrina victims to recover for their losses.[218]

1. Benefits and Problems of Class Actions

Class actions rose to prominence in the 1970s as a particular form of joinder device.[219] They were initially trumpeted as a means for the common person to seek remedies from powerful defendants against whom less powerful plaintiffs would have little chance of success in

216. *See* Culhane, *supra* note 208, at 1052.

217. *See, e.g.*, Warrior & Gulf Navigation Co. v. United States, 864 F.2d 1550, 1553 (11th Cir. 1989) ("A party may be deemed negligent yet still be exonerated from liability if the act of God would have produced the same damage irrespective of the party's negligence."); *see also* RESTATEMENT (SECOND) OF TORTS § 451 (1965) (defining an intervening "extraordinary force of nature").

218. Mass tort class actions seeking monetary recovery proceed under Federal Rule of Civil Procedure 23(b)(3).

219. Interestingly, the Advisory Committee to the 1966 Amendments to Federal Rule of Civil Procedure 23(b) believed the requirements of subdivision (b)(3) rendered class actions inappropriate for "mass accident" litigation. Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 171-72 (1998).

conventional litigation.[220] While this Comment is not intended as a treatise on class actions, a cursory review of the benefits of class actions is in order. First, class actions allow recovery for persons who might otherwise have remained ignorant of their injury or the possibility of recovery.[221] Second, class actions are more economically feasible for aggrieved parties insofar as class action plaintiffs can share the cost of retaining counsel and other litigation expenses.[222] Third, class actions provide an incentive to litigate collectively where no such incentive might exist individually.[223] A common example is a scenario in which a large number of plaintiffs suffered minor losses; their collective loss provides an incentive to sue, whereas their individual losses would not.[224] Finally, class actions provide a method of fair allocation of resources. All class members share the amount awarded, and any settlement or compromise requires court approval.[225]

Class action lawsuits contain their own unique problems. First, class members exercise little control over the litigation.[226] This is the trade-off resulting from collective representation and the incentives to litigate collectively.[227] Second, the res judicata effects of class actions bar future claims from members of the class.[228] Finally, aggregated claims

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220. In the words of Justice Douglas, "Some of these [class action plaintiffs] are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. . . . The class action is one of the few legal remedies the small claimant has against those who command the status quo." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185-86 (1974) (Douglas, J., dissenting).

221. *See* FED. R. CIV. P. 23(c)(2)(B) (requiring that Rule 23(b)(3) class members receive notice of, *inter alia*, the nature of the action and the issues involved); *see also* ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 377-78 (2000) (describing such requirements as "essential due process elements for binding absent class members.").

222. 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 5:18 (4th ed. 2002).

223. *Id.* § 5:7.

224. *See* Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 22 (1996). Professor Fiss offers a price-fixing agreement in small transactions as an illustration of this concept; the damage to an individual investor may be only seventy dollars, but the damage inflicted on all investors reaches the millions. *Id.*

225. *See* FED. R. CIV. P. 23(e); *see also* Manuel L. Real, *What Evil Have We Wrought: Class Action, Mass Torts, and Settlement*, 31 LOY. L.A. L. REV. 437, 442 (1998) ("This rule is the foundation for much of the judge's power to persuade and facilitate fairness in settlement.").

226. *See* KLONOFF & BILICH, *supra* note 221, at 2 ("How can a court ensure that class action dismissals and settlements do not end up benefiting counsel and defendants at the expense of the class members?").

227. *Cf.* Kenneth R. Feinberg, *Reporting From the Front Line—One Mediator's Experience With Mass Torts*, 31 LOY. L.A. L. REV. 359, 370 (1998) (noting the impracticability for a mass tort class action lawyer to communicate with each and every client).

228. *See* CONTE & NEWBERG, *supra* note 222, §§ 5:36, 5:38.

create a strong incentive to sue, thus increasing the risk of frivolous lawsuits.[229]

2. Weighing Benefits and Problems for Hurricane Katrina Victims

The benefits of a class action are present to different degrees for Hurricane Katrina victims. Hurricane Katrina victims are likely aware of their injury—lack of food during the disaster—but may be unaware of the possibility of recovery from the federal government. The economic efficiency of pursuing a class action and the incentive it creates to litigate are also significant benefits due to the socioeconomic status of the average victim who remained behind.[230] The degree to which class action provides a fair allocation of resources is less clear for Hurricane Katrina victims. For one thing, it raises a question similar to those regarding a victim compensation fund: Short of dividing the recovery amount equally among all members, how would the class determine which members should receive what amount?[231]

The problems attending class actions are also unique with respect to Hurricane Katrina victims. As mentioned, a lesser degree of control over the litigation necessarily follows the benefits of collective representation and litigation.[232] The res judicata effect of the class action is less problematic for a mass tort case because class members would be provided an opportunity to "opt out" of the litigation and pursue their claims individually.[233] Given the particular fact scenario involved with Hurricane Katrina, it may also be safely assumed that the class action would be meritorious rather than frivolous litigation.[234] Additionally, the government's protection under the doctrine of sovereign immunity facilitates dismissal of frivolous claims against it.[235]

229. *See* Davis, *supra* note 219, at 187 ("Much of the recent criticism of class actions . . . stems from the 'blackmail settlement' aspect of class actions, especially those certified for settlement only and not for litigation.").

230. Recall that over one-quarter of New Orleans's population live below the poverty line. *See* U.S. Census Bureau, *supra* note 5.

231. *See* Culhane, *supra* note 208, at 1052 (discussing limitations of the VCF); *see also* Feinberg, *supra* note 227 (noting, with respect to mass tort settlements, the difficulty of determining each class member's individual award).

232. *See supra* text accompanying note 227.

233. *See* FED. R. CIV. P. 23(c)(2)(B).

234. *See supra* text accompanying notes 182-87.

235. For a full discussion of sovereign immunity, see *supra* Part II.

On balance, a Rule 23(b)(3) certified class action appears to be the best vehicle for recovery available to Hurricane Katrina victims. A class action retains most features of traditional tort litigation, such as the plaintiff's burden of proving all elements of their claim, but the high cost of litigation can be shared among members of the class. A class action also represents the best option for balancing the competing interests underlying the doctrine of sovereign immunity.[236] By allocating to Hurricane Katrina victims the burden of proving their claims, class action litigation protects against raids on the treasury to a greater extent than a VCF.[237] Should their claims prove meritorious, the class action vehicle provides a channel by which the federal government may be held accountable for its failure to provide adequate food supplies.[238]

VI. CONCLUSION

Hurricane Katrina devastated the Gulf coast region. This Comment contends that citizens of New Orleans for whom the federal government failed to provide adequate food supplies have a cause of action against the federal government. The doctrine of sovereign immunity, as reflected in the discretionary function exception, should not bar Hurricane Katrina victims' claims because the duty to provide adequate food supplies is a non-discretionary duty. A class action lawsuit provides the best vehicle for recovery and best balances the competing policies underlying the doctrine of sovereign immunity.

Federal disaster relief has improved dramatically over the past fifty years. Under the Stafford Act, the federal government provides a range of disaster relief from temporary housing to unemployment assistance. While these federal programs are commendable, the government must still be held accountable for its failings. When a statute provides a clear directive to the federal government, like the directive of § 5180 of the Stafford Act, the discretionary function exception should not apply. Victims of the government's failure to carry out that directive should have their day in court.

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236. *See supra* text accompanying notes 42-56.

237. *Cf.* Alden v. Maine, 527 U.S. 706, 749 (1999) (raising fiscal concerns regarding abrogation of state sovereign immunity under the Eleventh Amendment).

238. *See* Chemerinsky, *supra* note 26, at 1217 (arguing that the need for governmental accountability outweighs fiscal concerns).