# Shields For the King's Men: Official Immunity and Other Obstacles to Effective Prosecution of Federal Officials For Environmental Crimes

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The outcome of a criminal prosecution of a midnight dumper of hazardous waste should depend upon the quality of the government's proof that a crime has been committed by the accused. Yet, if the defendant is a federal employee,[1] the unsuspecting state prosecutor may lose the case before trial because the prosecution is barred by one of four arcane but robust doctrines that protect federal employees from prosecution. These shields for the King's men — sovereign immunity, intergovernmental immunity, official immunity and exclusive federal enclave status — seriously undermine the effectiveness of criminal sanctions as a mechanism to prevent egregious environmental conduct by the federal government and its employees.

This article discusses these four jurisdictional doctrines in the context of criminal prosecutions for hazardous waste violations,[2] assesses the extent to which the doctrines prevent effective use of

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1. The terms "employee," "officer," and "official" are used interchangeably and should not be construed to differentiate between federal officers of various ranks.

2. This Article focuses on prosecution of federal employees for illegal hazardous waste practices. The four jurisdictional doctrines also apply with equal force to criminal prosecutions for other environmental crimes. However, the immunities from prosecution created by these doctrines are waived, to a greater or lesser degree, by the federal facilities provisions contained in each of the environmental laws. Therefore, an assessment of the extent to which these doctrines interfere with state prosecutions must be made separately for each statute.

criminal sanctions to promote federal compliance with hazardous waste laws, and proposes both judicial and legislative means to overcome these barriers. Part I describes the role of the criminal remedy in improving hazardous waste management. It argues that criminal prosecutions are an appropriate mechanism to foster federal facility compliance with environmental requirements and that state, as well as federal, prosecutions may be necessary to achieve full compliance. Part II explains each of the four doctrines and their applicability to state prosecutions of hazardous waste violations. It shows that some of the doctrines pose significant jurisdictional barriers to state criminal prosecutions and constitute a serious impediment to the use of criminal sanctions to remedy federal facility non-compliance problems. Part III then examines whether the four doctrines serve to shield federal employees from federal prosecution and finds that none of the doctrines significantly interferes with federal prosecutions.

Part IV suggests several judicial interpretations of the four doctrines and of the federal facilities provision[3] of the Resource Conservation and Recovery Act ("RCRA")[4] that could minimize the impact of the doctrines in state prosecutions as well. Because amendment of the RCRA federal facilities provision with sensitivity to each of the four jurisdictional obstacles would provide a more satisfactory and better tailored solution to the problem, however, Part IV also examines legislative amendments of the RCRA federal facilities provisions proposed during the 101st Congress. It concludes that the proposed legislation is not wholly adequate to overcome jurisdictional barriers to state prosecutions and offers modest changes in that legislation that would greatly enhance the ability of states to prosecute federal officers for environmental crimes.

## I. THE ROLE OF THE CRIMINAL REMEDY IN IMPROVING FEDERAL HAZARDOUS WASTE MANAGEMENT

### A. *The Problem of Federal Hazardous Waste Management*

The federal government owns over 2,300 installations that contain industrial facilities managing some quantity of hazardous waste—whether it is used oil from government motor pools, spent solvents from paint stripping operations, contaminated jet

3. 42 U.S.C. § 6961 (1988).
4. 42 U.S.C. §§ 6901-87 (1988).

fuel, or degreasing agents.[5] In addition to traditional industrial hazardous wastes, federal installations generate a number of unique wastes such as wastes from munitions, chemical warfare agents, and nuclear weapons production.[6]

Until the 1980s, many federal facilities, like most or perhaps all industrial operations,[7] haphazardly dumped or buried toxic wastes in unlined lagoons or landfills.[8] Many federal facilities, es-

5. U.S. CONGRESS, CONGRESSIONAL BUDGET OFFICE, FEDERAL LIABILITIES UNDER HAZARDOUS WASTE LAWS 1 (May 1990). For articles discussing various legal aspects of federal facility environmental problems, see Gelpe, *Pollution Control Laws Against Public Facilities*, 13 HARV. ENVTL. L. REV. 69 (1989) (focusing on publicly owned sewage treatment facilities); Hanash, *Effects of the Anti-Deficiency Act on Federal Facilities' Compliance with Hazardous Waste Laws*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10541 (1988); Axline, *Stones for David's Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. & LITIG. 1 (1987); Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513 (1987); Stever, *Perspectives on the Problem of Federal Facility Liability for Environmental Contamination*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10114 (1987); Donnelly and Van Ness, *The Warrior and the Druid — The DOD and Environmental Law*, 33 FED. B. NEWS & J. 37 (1986); Note, *How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government*, 18 RUTGERS L.J. 123 (1986); Kenison, et al., *Enforcement of State Environmental Laws Against Federal Facilities*, NAT'L. ENVTL. ENFORC. J. 3 (Nov. 1986); Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10326 (1985).

Two recent articles have specifically addressed criminal liability of federal employees for environmental problems. Hanash, *The Legal Grounds for Prosecuting Federal Employees for Environmental Law Violations*, 1 FED. FACILITY ENVTL. J. 17 (1990) provided a brief overview of environmental criminal law and policy directed at the concerns of federal employees. Brown, et al., *The Liability of the Employee of a Federal Agency Charged with Criminal Environmental Violations: Do the Rules of Fair Play Apply to the Football?*, 35 FED. B. NEWS & J. 441 (1988) presented the views of the defense counsel in a recent federal prosecution, *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *infra* notes 199-213 and accompanying text, concerning the use of criminal sanctions against federal employees.

6. Wastes from munitions production have been the focus of litigation at Twin Cities Army Ammunition Plant. *See* City of St. Anthony v. Dep't of the Army, No. 3-86-269 (D. Minn.). Wastes from, among other things, chemical warfare production have been at issue at Rocky Mountain Arsenal. *See* United States v. Shell, 605 F. Supp. 1064 (D. Colo. 1985); *see also* Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY. L. REV. 513, 516-17 (1987). Radioactive wastes recently received national attention at several Department of Energy (DOE) facilities, including the Feed Material Production Center in Fernald, Ohio, the Hanford Reservation in Washington, the Savannah River Plant in South Carolina, and Rocky Flats in Colorado. *See infra* note 28.

7. *See* S. REP. No. 848, 96th Cong., 2d Sess. 3 (1980). EPA estimated that 90% of the hazardous waste produced annually in the United States was disposed of improperly.

8. *Cleanup at Federal Facilities: Hearings on H.R. 765 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st. Cong., lst Sess. 171 (Feb. 23, 1989) (statement of Troy E. Wade, II, Acting Assistant Secretary for Defense Programs, U.S. DOE) [hereinafter *Cleanup at Federal Facilities*]; *Federal Facility Compliance with Hazardous Waste Laws: Hearing before the Subcommittee on Superfund and Environmental Oversight of the Senate Committee on Environment and Public Works*, 100th Cong., 2d Sess. 5 (Aug. 4,

pecially military installations, may even have been especially lax as a result of the view that federal facilities were immune from effective state regulation by virtue of intergovernmental immunity and sovereign immunity.[9] Federal employees also assumed that they were immune from prosecution for environmental violations occurring while they were on the job.

Although the rules of the game for federal facilities began to change during the 1970s when broad provisions applying environmental requirements to federal facilities were written into various federal environmental statutes,[10] these facilities were relatively slow to react. Even now, after considerable attention has been focused on federal facility compliance for several years, they are still plagued by persistent non-compliance problems.[11] Indeed, facilities owned by the federal government rank substan-

1988) [hereinafter *Federal Facility Compliance with Hazardous Waste Laws*]; *Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 100th Cong., 1st Sess. 102-03 (Apr. 28, 1987) (statement of Anthony J. Celebreeze, Jr., Attorney General, State of Ohio) [hereinafter *Environmental Compliance by Federal Agencies*].

9. In the early 1970s, federal agencies refused to obtain state air and water quality permits in an attempt to establish that the federal facilities provisions of the Clean Air Act (CAA) and Clean Water Act (CWA) did not subject federal facilities to state permit requirements or other means of enforcing state pollution control standards. The resulting litigation culminated in a short-lived victory for the federal government in Hancock v. Train, 426 U.S. 167 (1976), and EPA v. California, 426 U.S. 200 (1976). The Supreme Court's determination that intergovernmental immunity protected federal facilities from permit requirements was immediately overridden by the 1977 amendments to the two federal facility provisions.

Sovereign immunity was also successfully raised in both permit cases and in civil penalties cases. *See, e.g.*, California v. Dep't of the Navy, 431 F. Supp. 1271 (N.D. Cal. 1977) (accepting sovereign immunity defense in CAA enforcement action); California v. Dep't of the Navy, 371 F. Supp. 82 (N.D. Cal. 1973) (also accepting sovereign immunity argument in CAA enforcement action).

10. Clean Water Act § 313, 33 U.S.C. § 1323 (1988): Safe Drinking Water Act (SDWA) § 300j-6, 42 U.S.C. § 300j-6 (1988); Resource Conservation and Recovery Act (RCRA) § 6001, 42 U.S.C. § 6961 (1988); Clean Air Act § 118, 42 U.S.C. § 7418 (1988).

11. For example, inspection of 362 Department of Defense (DOD) facilities in 1988 revealed that 60% of the facilities had one or more RCRA violations. Memo from Joseph A. Martone and Robert Landry to Deputy Secretary of Defense, An Environmental Regulatory Compliance Profile of the Department of Defense at 12 (February 3, 1990) [hereinafter Martone and Landry Memorandum].

In 1989, the violation rate was 50%. *Id.* at 13. The Martone and Landry Memorandum utilized data collected by EPA's Office of Federal Activities. These data include information from both major and minor facilities and include violations of varying severity. However, they do not include information on non-compliance that is unknown to EPA or state regulators, even though the non-compliance may be known to DOD personnel. *Id.* at 2. Thus, the figures in the Martone and Landry Memorandum understate the actual level of non-compliance.

tially higher than privately owned facilities in their level of significant non-compliance with hazardous waste regulations.[12]

### B. *The Role of Criminal Prosecution*

The overall goal of prosecuting federal officers under environmental criminal laws is the same as the primary goal of enforcing any criminal law: prevention of antisocial conduct. Through use of criminal sanctions, society endeavors to modify individual and institutional behavior to achieve high levels of compliance with environmental laws.[13]

However, the role that should be assigned to criminal sanctions in modifying federal hazardous waste management practices in particular depends in large part on the answers to a number of preliminary questions. First, is the federal facility non-compliance problem an institutional failure or a series of unrelated, isolated incidents of environmental crimes by individual federal officers? Second, if the problem is an institutional failure, will criminal sanctions effectively address the underlying causes of unsafe federal hazardous waste management practices? Third, assuming that criminal sanctions are an effective means of institutional change, are they necessary to create institutional change given the availability of other means of social control? Fi-

12. Significant non-compliance ("SNC"), which is defined specifically for each environmental medium (*i.e.*, air, water, hazardous waste), generally reflects a serious environmental threat at a major facility. In 1989, there were 44 federal facilities, including 30 DOD facilities in significant non-compliance. *Id.* No 1989 figures are available concerning the SNC rate at federal facilities or comparing the federal SNC rate with those of industry and municipalities. However, the SNC rate at major federal facilities during fiscal year 1988 was 60% compared to 48% at major industrial facilities. *Id.* In fiscal year 1987, the federal SNC rate was 54% compared to 48% at industrial facilities. *Id.*

13. Enforcement of criminal laws attempts to modify individual and institutional behavior. Criminal law accomplishes this task through a variety of mechanisms: specific deterrence, rehabilitation, general deterrence, retribution, and education. Criminal prosecutions modify the behavior of the individual or institutional offender in three ways. First, it prevents the violator from engaging in proscribed behavior by incarceration (incapacitation). Second, through sufficiently swift, predictable, and severe punishment, it seeks to deter the violator from violating again (specific deterrence). Third, it may attempt to rehabilitate by attacking the underlying causes of the crime. Criminal prosecutions also modify the behavior of those who might be tempted to violate the law. Such modification is accomplished through swift, predictable, and severe punishment of others (general deterrence). Finally, enforcement of criminal laws modifies the behavior of the general populace in two distinct manners. First, it educates them to regard certain behavior as highly improper, shaping both societal norms and individual preferences. Second, it satisfies the society's need to punish, hopefully encouraging the mob to leave retribution to the state. LAFAVE AND SCOTT, SUBSTANTIVE CRIMINAL LAW 22-27 (2d ed. 1986).

nally, if the problem is an institutional failure and criminal sanctions are an effective and necessary solution to that problem, is it fair to use criminal sanctions against individual federal officers to address an institutional failure?

A broad consensus exists concerning the answer to the first question: federal facility non-compliance involves a widespread institutional failure, not merely isolated instances of improper acts by individual federal officers.[14] While there have been incidents involving purely *ultra vires* actions by individual federal officers,[15] the larger federal facility problem is characterized by pervasive and persistent non-compliance with hazardous waste requirements.[16]

The answer to the question of whether criminal sanctions will effectively address the causes of federal facility non-compliance, depends on what causes the institutional non-compliance problem. The underlying causes of federal facility non-compliance with hazardous waste laws have not been studied rigorously.[17] Based on impressionistic evidence,[18] however, four major causes appear evident. First, for many years federal facilities were not

14. The systematic nature of federal facility non-compliance is so widely recognized that it has become an implicit assumption underlying all commentary on federal facility. *See, e.g.*, Stever, *Perspectives on the Problem of Federal Facility Liability for Environmental Contamination*, 17 Envtl. L. Rep. (Envt. L. Inst.) 10114 (1987); Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY. L. REV. 513, 516-17 (1987); Note, *How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government*, 18 RUTGERS L.J. 123 (1986).

15. For example, three federal employees in Texas were indicted for alleged improper disposal of federal hazardous wastes through their unlicensed, private hazardous waste business. United States v. Kruse, No. A-87-CR115 (W.D. Texas) (indicted and acquitted). In another incident at Wright-Patterson Air Force Base, a federal employee allowed an acquaintance to use federal storage facilities to store unmarked radioactive materials. When the materials were discovered, two workers and an adjacent Boy Scout Camp were contaminated during their removal. Interview with Daniel Benton, Central Environmental Law Office, U.S. Air Force (Oct. 1988).

16. *See supra* note 12.

17. Indeed, the tendency to prescribe a cure before making a thoughtful diagnosis is rampant in this politically charged policy arena. For example, when the EPA Office of Federal Activities published the EPA federal facility compliance strategy in November 1988, the strategy contained no estimates of the extent and nature of federal facility non-compliance and no analysis of its causes. U.S. EPA, FEDERAL FACILITY COMPLIANCE STRATEGY (Nov. 1988).

18. These observations derive from the author's service between 1985 and 1989 in the Lands Division, where she personally handled litigation regarding several federal installations, supervised environmental litigation associated with nearly 100 federal facilities, and participated in the formulation of federal policy concerning federal facility environmental compliance.

subject to state environmental regulation. When this began to change, some federal agencies resisted the notion that their facilities were required to comply with both federal and state environmental requirements.[19] Second, agency leadership failed to pay attention to environmental matters. This lack of what is called "command attention" in military jargon derived from the specific mission orientation of each agency. Until recently, for example, at every level of the agency, the Department of Defense ("DOD") perceived its primary and virtually sole role to be assuring national security by maintaining the military might of the United States. Similarly, the Department of Energy ("DOE") saw its role as the creation of domestic nuclear energy capacity and production of nuclear weapons. Matters that did not contribute to the achievement of the mission, such as spending time and resources on environmental compliance, were deemed largely irrelevant distractions. The absence of command attention to environmental compliance meant that the leadership of some federal agencies operated with little information concerning the agency's hazardous waste compliance problems, developed inadequate mechanisms to control the agency's hazardous waste practices in the field, and provided insufficient support to environmental compliance efforts.

Third, the federal budgetary process prompted agency managers to cut "non-essential" environmental compliance costs in order to perform their primary mission while keeping their overall budgets at a politically acceptable level.[20] The budgetary process (together with the federal procurement process) also required as much as five to eight years to complete major environmental construction projects. Thus, compliance was significantly delayed even after environmental problems had been recognized by the agency.

Finally, in a fluid and highly technical regulatory field, there was a dearth of qualified engineering and legal personnel to provide federal agencies with the sophisticated environmental expertise necessary to achieve compliance. The federal government was, and continues to be, handicapped in its ability to attract and retain qualified personnel due to civil service salary constraints and the other obvious frustrations incident to working in an enor-

19. *See infra* note 47.

20. *See* Note, *Assuring Federal Facility Compliance with the RCRA and other Environmental Statutes: An Administrative Proposal*, 28 WM. & MY. L. REV. 513, 542-46 (1987).

mous bureaucracy such as the federal government. These are no doubt among the most significant causes of environmental non-compliance problems at federal facilities.

Criminal sanctions can be effective, if indirect, mechanisms to address several of the underlying causes of federal facility non-compliance. The problems of a continuing perception of immunity, lack of leadership attention, and skewed budgetary priorities are dramatically affected by the threat of a criminal prosecution.[21] To paraphrase Dr. Johnson, nothing concentrates the mind so well as the prospect of being hanged.[22] Criminal sanctions certainly focus the attention of agency officials on environmental compliance. Similarly, even when an individual federal officer does not feel directly threatened by the prospect of criminal prosecution, the mere fact that other federal officers have been convicted of felonies for environmental crimes sends a strong message that notifies all federal officials that violations of hazardous waste laws are unacceptable, that environmental compliance is not just another managerial pressure to be balanced against other demands of the job, and that violations of environmental laws are crimes.[23]

The federal officer who is aware that certain conduct constitutes an environmental crime may be more likely to utilize any lawful alternative to violating an environmental law. The severity of societal disapprobation associated with environmental crimes should induce the officer to achieve environmental compliance

21. The efficacy of criminal sanctions in this context rests primarily upon their specific and general deterrent effects.

22. J. BOSWELL, LIFE OF JOHNSON, quoting letter of Sept. 19, 1777 as quoted in J. BARTLETT, FAMILIAR QUOTATIONS 432a (14th Ed. 1968) ("Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.")

23. Some of the law and economics literature on corporate sanctions suggests that monetary penalties, particularly civil penalties, are more effective than the prospect of imprisonment with respect to white collar criminals. *See, e.g.*, Posner, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980); Landes and Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975). *But see* Note, *In Search of Effective Hazardous Waste Legislation: Corporate Officer Criminal Liability*, 22 VAL. U.L. REV. 393 (1988) (arguing that criminal sanctions against corporate officers are necessary). That theoretical analysis has not been extended to crimes committed on behalf of public or not-for-profit institutions. Whatever its validity in the *corporate* context, many federal officers are sincerely motivated by the public service aspect of their jobs. It is the author's sense, based upon contact with dozens of federal officers responsible for environmental compliance efforts, that those officers may be more convincingly educated to recognize the serious nature of environmental non-compliance, and are deterred far more, by the stigma of a criminal conviction rather than a civil penalty.

even if compliance requires actions that offend the officer's sense of mission, such as halting or reducing services, or that require high expenditures of political capital, such as insisting that a superior officer immediately reprogram available funds or reorder priorities.[24]

On the other hand, use of criminal sanctions against federal officers has a number of drawbacks. First, the indirect nature of criminal sanctions must be recognized. Criminal prosecutions do not directly change hazardous waste practices, planning procedures, budget priorities, or the budgetary process;[25] they merely provide incentives for those who might be prosecuted or embarrassed by a prosecution to make such changes. Second, criminal prosecutions, far more than civil litigation or administrative enforcement actions, are apt to cause crisis management, rather than thoughtful bureaucratic reform. Finally, one underlying cause of federal facility noncompliance may be exacerbated rather than cured by criminal prosecutions of federal officers, namely the lack of qualified personnel. Certainly, many talented people will have an added incentive to leave government service if they face the prospect of being the target of criminal prosecution for institutional conditions that they regard as beyond their control.

In addition to the more general problems regarding the efficacy of criminal sanctions to achieve federal facility compliance, state criminal prosecutions may cause additional problems of an institutional nature. First, state prosecutions may heighten federal/state tensions and destroy the potential for cooperative federalism with respect to federal facility compliance. Second, state prosecutions, as well as other forms of state environmental enforcement, may skew federal priorities towards compliance activity at federal facilities in states with the most vigorous prosecutorial policies, rather than toward federal facilities with the worst compliance problems.

Even after confronting the issue of whether criminal sanctions are an effective, if somewhat risky, means to cure the institutional failure of federal facility non-compliance, the question remains whether criminal prosecution of federal officers is either neces-

24. For a recent economic analysis of the preference-shaping function of criminal law, see Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990).

25. In criminal law nomenclature, criminal prosecutions of federal officers seldom have any direct rehabilitative effect.

sary or fair. The answer depends, of course, on whether the available alternatives could induce satisfactory compliance. There are numerous external mechanisms that can be used to modify hazardous waste practices of federal facilities beside criminal prosecution. They include formal and informal administrative enforcement actions by the Environmental Protection Agency ("EPA"), state administrative and civil enforcement actions, citizen suits, adverse media attention, and congressional oversight.[26] These external control mechanisms can not only force institutional change but can also encourage development of internal mechanisms to control the actions of individual federal officers.[27]

The mere fact that there is widespread noncompliance more than a decade after the implementation of RCRA may suggest the need to bring all weapons, including criminal prosecutions, to bear on the problem. There is considerable evidence, however, that external control mechanisms other than criminal prosecution have become increasingly effective. For example, injunctive actions, or even threatened injunctive actions, by states against federal facilities have engendered relatively rapid agreement between the federal government and the states about improvement of current hazardous waste management practices and remedies for prior contamination.[28] Similarly, extensive congressional

26. Other external control mechanisms that are useful in the corporate context, such as EPA civil enforcement actions, are not utilized against federal facilities because of separation of powers concerns. U.S. EPA, FEDERAL FACILITY COMPLIANCE STRATEGY (Nov. 1988). *See supra* note 17. The only direct method for citizen enforcement is a citizen suit under RCRA section 7002 against the federal facility. Citizen remedies are limited to the citizen suit provision. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 451 U.S. 1 (1981)(no implied cause of action apart from citizen suit). Citizens generally lack the ability to compel either the state or EPA to take enforcement action against federal facilities. The federal APA and parallel state laws do not allow citizens to compel enforcement action because enforcement is "committed to agency discretion." *See, e.g.*, 5 U.S.C. § 701(a)(2) (1988). *See also* Heckler v. Chaney, 470 U.S. 821 (1985); Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987) (no pre-enforcement review under CWA). Similarly, citizens cannot compel enforcement actions through citizen suits because enforcement is not a "non-discretionary" duty. *See, e.g.*, 42 U.S.C. § 6972(a)(2) (1988).

27. Internal mechanisms include making environmental performance a major component of personnel ratings, basing raises and promotions on environmental compliance, and using job assignments, transfers, and discharges to discipline those who tolerate inadequate environmental compliance.

28. At least 25 federal facilities have resolved environmental problems with states through administrative agreements, administrative consent orders, or consent decrees in the past five years. A score of military installations as well as several DOE facilities, including DOE's Hanford Reservation in Washington State, the Savannah River Plant in South Carolina, the Feed Materials Production Center at Fernald, Ohio and the Rocky Flats in-

oversight of the Department of Energy has led to a dramatic change in DOE's environmental management approach.[29] Furthermore, other external control mechanisms are being strengthened and may prove more effective. For example, EPA has strengthened its RCRA administrative enforcement mechanism against federal facilities.[30] Further, EPA and the states may soon be able to collect civil penalties for environmental violations at federal facilities.[31]

Such a sanguine analysis, however, does not necessarily suggest that criminal sanctions should not be utilized against federal officers whose conduct is otherwise criminal. First, in other institutional contexts, the necessity of using criminal sanctions to achieve compliance is ordinarily a small part of the prosecutorial calculus. Prosecutors typically decide whether to pursue criminal prosecutions primarily on the basis of factors indicating the seriousness of the offense, not on the basis of whether prosecution is

stallation in Colorado, have reached such agreements. *See, e.g.* California v. Dep't of the Navy, No. 86-190 (E.D. Cal.) (Mare Island) (consent decree filed 5/29/87); California v. Navy, (N.D. Cal.) (Alameda NAS) (consent decree filed); Conservation Law Found. v. Dep't of the Air Force, No. 86-1044-S (D.Mass.) (Otis Air National Guard Base) (consent decree filed 9/29/89); Natural Resources Defense Council (NRDC) v. Herrington, No.1-85-2583-6 (D.S.C.) (Savannah River Plant) (consent decree filed 7/24/89); New York v. United States, No.CV-83-2228 (E.D.N.Y.) (former Air Force base) (consent decree filed); Ohio v. Dep't of Energy, No. 86-0217 (S.D. Ohio) (Feed Materials Production Center - Fernald) (consent decree filed); Ohio v. Dep't of the Air Force, No. C-2-86-0175 (S.D. Ohio) (Richenbacker Air National Guard Base) (consent decree filed 6/5/89); Fort v. Bureau of Land Management (BLM), No. 87-0049-JB (D.N.M.) (dismissed without prejudice based on administrative agreement 8/24/89).

29. Congressional oversight hearings regarding federal facility compliance have been held on an annual basis in recent years. Department of Defense, Department of Energy and Department of Justice officials have endured sharp criticism of the federal government's environmental compliance efforts in those hearings. *See supra* note 8 (congressional hearings). The intense scrutiny of DOE's performance on the Hill and in national news media led DOE to announce that environmental compliance was the prime agency objective in managing its nuclear weapons facilities. It also led to creation of "tiger teams" empowered by Secretary Watkins to make whatever management changes at each DOE facility were deemed necessary to assure future compliance.

30. *See* U.S. EPA, FEDERAL FACILITIES COMPLIANCE STRATEGY, Appendix K (Nov. 1988).

31. Legislation proposed in the 101st Congress explicitly provides that the federal and state requirements to which federal facilities are subject include civil penalties. *See infra* notes 249-51 and accompanying text. That legislation was incorporated into the EPA Cabinet elevation bill, H.R. 3847, 101st Cong., 2d Sess. (1990), which was passed by the House but died in the Senate. Similar legislation was to be reintroduced in the 102nd Congress. S.596, 102nd Cong., 1st Sess. (1991). Even without legislative reform, EPA Region V is currently attempting to impose civil penalties on several DOE facilities.

necessary to specifically deter this offender.[32] Second, to the extent that the external control mechanisms applied to federal facilities merely replicate enforcement against industrial facilities, they are patently inadequate. The environmental record of industrial facilities, nearly half of which have violations posing a serious environmental threat, is certainly not enviable.[33] Enhanced enforcement efforts against both federal facilities and industrial facilities are clearly necessary. Third, and most importantly, the enhanced general deterrent and educational effects of criminal sanctions allow state and federal environmental enforcement officials to achieve federal facility compliance far more efficiently than they can by bringing administrative and civil enforcement actions.[34]

A final consideration is whether it is fair to prosecute individual federal officers to cure an institutional failure. On the one hand, there is a serious potential for an individual federal officer to be the pawn in a battle between the federal government and the states.[35] On the other hand, an individual federal officer is no more a victim of his circumstances than the corporate officer whose dangerous environmental conduct results in a federal knowing endangerment[36] or state homicide charge,[37] or the

32. *See* M. CLINARD & P. YEAGER, CORPORATE CRIME 93 (1980). Clinard and Yeager listed several factors used by federal enforcement officials to decide whether to prosecute corporations: degree of loss to the public, level of complicity by high corporate managers, duration of the violation, frequency of violation, evidence of intent to violate, notoriety of the violation, ability to create favorable precedent, history of serious violations, deterrence potential, and degree of cooperation.

33. *See supra* note 12.

34. *See supra* notes 21-24 and accompanying text.

35. For discussion of the equity problems by the defense counsel for the federal employees who were defendants in United States v. Dee, 912 F.2d 741 (4th Cir. 1990), which involved hazardous waste violations at Aberdeen Proving Ground, see Brown et al., *supra* note 5. The problem of federal officers becoming targets for prosecution merely because of federal/state tensions may be substantially ameliorated by the "equal treatment" requirement of intergovernmental immunity that remains unaltered in all federal facilities provisions. *See infra* notes 109-10 and accompanying text.

36. Knowing endangerment is the most serious form of environmental, as opposed to common, crime. Violations of RCRA and the CWA that place another person in imminent danger of death or serious bodily injury are punishable by 15 years imprisonment and a $250,000 fine. An organization found guilty of knowing endangerment can be fined $1,000,000. CWA § 209(c)(3)(A), 33 U.S.C. § 1319(c)(3)(A) (1988); RCRA § 3008(e), 42 U.S.C. § 6928(e) (1988).

37. The increasing significance of criminal prosecutions for environmental crimes in the corporate context is recognized by a growing body of literature documenting this development. *See, e.g.*, Celebreeze, *Criminal Enforcement of State Environmental Laws: The Ohio Solution*, 14 HARV. ENVTL. L. REV. 217 (1990); Leon, *Environmental Criminal Enforcement: A Mushroom-*

young person who distributes methamphetamine because of a lack of more lawful, lucrative job opportunities. We freely prosecute both of these types of criminals despite their unfortunate circumstances. We insist that both take personal responsibility for their acts and, where the law imposes a duty, for their omissions. Indeed, in large organizations, individuals tend to lose their sense of personal responsibility for the conduct of the organization. Hence, to restore a sense of personal responsibility for institutional conduct, it is essential that society hold corporate and governmental officials responsible for controlling their organizations.[38]

The answers one gives to the questions of efficacy, necessity, and fairness determine the role one assigns to criminal prosecution of federal officers. Those who believe that criminal sanctions will encourage institutional change, that other mechanisms are insufficient to accomplish institutional change, and that federal officers must be held accountable in the same manner as corporate officers, will advocate a broader role for criminal sanctions. Those who believe that criminal sanctions will not cause positive institutional adjustments, that such sanctions are not necessary because other mechanisms work effectively, or that individuals should not be penalized for institutional failure, will envision a limited role for criminal sanctions against federal officers. The latter will perceive criminal sanctions playing a limited but essential role of discouraging individual federal officers from committing isolated environmental crimes.

As the parts of the article that follow demonstrate, the significance of the jurisdictional barriers encountered in prosecuting federal officers depends substantially on whether one assigns a broad or narrow role to criminal sanctions against federal officers.

*ing Cloud*, 63 ST. JOHN'S L. REV. 679 (1989); McMurray & Ramsey, *Environmental Crimes: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 113 (1986); Starr, *Countering Environmental Crimes*, 13 ENVTL. AFF. 379 (1986); Comment, *Criminal Liability for Corporations that Kill*, 64 TUL. L. REV. 919 (1990); Comment, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U.L. REV. 311 (1990); Note, *In Search of Effective Hazardous Waste Legislation: Corporate Officer Criminal Liability*, 22 VAL. U.L. REV. 385 (1988).

38. For arguments favoring corporate officer liability over corporate liability, see, *e.g.*, Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957); Comment, *Corporate Criminal Liability for Homicide, Has the Fiction Been Extended Too Far?*, 4 J. L. & COM. 95 (1984); Comment, *Limits on Individual Accountability for Corporate Crimes*, 67 MARQ. L. REV. 604 (1984); Note, *In Search of Effective Hazardous Waste Legislation: Corporate Officer Criminal Liability*, 22 VAL. U.L. REV. 385, 393 (1988).

If criminal prosecution is intended only to punish the wholly *ultra vires* actions of persons who happen to be federal employees, then jurisdictional barriers to criminal prosecution of federal officers are significant only if both the federal government and the states are unable effectively to prosecute those persons. As Part III demonstrates, there are no substantial jurisdictional obstacles to federal prosecutions. Thus, if the role of criminal sanctions is limited to *ultra vires* actions, the impact of the four jurisdictional doctrines on effective prosecution of federal officers is relatively insignificant. However, if criminal sanctions are to play a significant deterrent or educational function in improving federal facility compliance, then the states must also be able to prosecute federal officers effectively.

The conclusion that state prosecutions are essential does not rest on the naive and faulty premise that EPA criminal investigators, Federal Bureau of Investigation agents, and U.S. Department of Justice prosecutors are wholly unwilling to prosecute federal employees who commit environmental crimes in the course of their duties. Rather, state prosecutions are necessary because the overall impact of criminal sanctions is maximized by prosecuting high level career officers and political appointees who are aware of, and nevertheless fail to control, illegal hazardous waste management practices.[39] Obviously, such prosecutions are most difficult for federal prosecutors to bring.[40] Criminal prosecutions are likely to encounter tremendous resistance within the remainder of the executive branch, tempering the ardor of even the most courageous political managers of EPA and the Justice Department. Further, any overt attempt by federal prosecutors to use criminal prosecutions to promote institutional change within the federal government would undoubtedly be viewed as an illegitimate and unwarranted arrogation of power by the Jus-

39. High level government officers who have the power and responsibility to assure compliance with hazardous waste laws should be amenable to prosecution under the "responsible corporate officer" doctrine. *See* United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277, *reh'g denied*, 320 U.S. 815 (1943).

40. United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *infra* notes 199-213, represents such a prosecution. However, it should be noted that the *Dee* prosecution stemmed from an investigation by state authorities. Because the exclusive federal enclave status of the facility prevented a state prosecution, the state prosecutor moved from the state Attorney General's Office to the United States Attorney's Office. Thus, the *Dee* case does not necessarily reflect a general willingness by the Justice Department to pursue criminal prosecution of high level federal officers whose failure to control their subordinates leads to continuing hazardous waste violations.

tice Department. Thus, for criminal sanctions to play a significant role in improving federal facility compliance, states must be allowed to prosecute environmental crimes by federal officers.

### C. *The Incidence of Criminal Prosection for Illegal Hazardous Waste Management Practices*

Federal and state prosecutors have only recently begun to prosecute federal officers for environmental crimes. The federal government has indicted at least seven federal employees associated with three separate incidents.[41] States have occasionally issued misdemeanor charges against federal officers.[42]

The relatively low incidence of prosecution probably derives from a number of factors. First, the prosecution of federal officers faces a unique set of jurisdictional barriers, procedural problems, and unusual substantive defenses.[43] Second, as in the

41. *See infra* notes 196-213 and accompanying text. It is difficult to ascertain the exact number of federal prosecutions for environmental crimes by federal officers because of the split of prosecutorial authority between the 93 U.S. Attorneys and the Environmental Crimes Section of the Environment and Natural Resources Division, U.S. Department of Justice in Washington, D.C. The U.S. Attorneys in each judicial district do not keep records of federal employees prosecuted for environmental crimes. The Executive Office of the U.S. Attorneys, U.S. Department of Justice, declined to allow the gathering of that information. July 3, 1990 response to the author's Freedom of Information Act Request. The information on federal prosecutions of federal officers thus is limited to information available from the Environmental Crimes Section.

42. *See* California v. Walters, 751 F.2d 977 (9th Cir. 1984). A number of unreported state criminal charges are probably filed against federal employees or the federal government for environmental violations. For instance, New York has repeatedly issued criminal citations against federal facilities for environmental violations. These citations are voluntarily dismissed by the state after consultation with the U.S. Attorneys and the responsible federal officials. It appears that the practice is more a means of attracting federal attention to a problem than a serious attempt to enforce criminal laws against federal employees.

43. State prosecutions of federal employees face three special procedural problems. First, a federal officer may seek to bar a state prosecution through the device of a declaratory judgment. *See, e.g*, Baucom v. Martin, 677 F.2d 1346 (11th Cir. 1982). Second, a federal officer may seek federal habeas corpus relief before trial or after conviction based on one of the jurisdictional barriers. *Infra* notes 50-77 and accompanying text. Third, a federal officer may seek to remove a state criminal proceeding to federal court under the federal officer removal provision. 28 U.S.C. § 1442(a)(1) (1988). The relationship between these procedural devices and the limits placed upon them by cases such as Mesa v. California, 489 U.S. 121 (1989) and Drury v. Lewis, 200 U.S. 1 (1906), though worthy of further examination, is beyond the scope of this article.

In addition, certain somewhat unusual defenses may arise in such prosecutions. For example, a federal officer may raise the prohibition of the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988), against spending unappropriated funds as a form of impossibility defense. A federal officer who relies on representations of his superiors about the propriety of certain practices may raise a reliance on official interpretation/mistake of law defense. A fed-

case of prosecutions of officers of large corporations for environmental crimes, similarly in prosecutions of federal officers it is difficult to allocate responsibility between the institution and the individual officer. Tracing personal responsibility for a decision to a particular individual is also problematic.[44] Third, state environmental enforcement prosecutions have likely been inhibited in the past by a sense of comity.[45] Fourth, only in the past five years has the federal government begun to develop an effective environmental criminal enforcement program.

However, due to increasing attention given to hazardous waste problems at federal facilities,[46] a sense that federal facilities are especially recalcitrant with respect to mismanagement of hazardous waste,[47] and problems encountered in using traditional administrative and civil enforcement mechanisms against federal

eral officer who follows orders of his superiors may echo the claim of the German officers at Nuremburg. A discussion of the validity of these defenses is also beyond the scope of this article.

44. *See* Comment, *Criminal Liability for Corporations That Kill*, 64 TUL. L. REV. 919, 931 (1990); Comment, *Prosecuting Corporate Polluters: The Sparing Use Of Criminal Sanctions*, 62 U. DET. L. REV. 659, 667 (1985).

45. Federal officials have brought numerous environmental enforcement civil suits against state and local governments, seeking injunctive relief and civil penalties, but the federal government has not sought to indict any state and local officials for environmental crimes.

46. *See, e.g., Cleanup at Federal Facilities*, *supra* note 8; *Federal Facility Compliance with Hazardous Waste Laws*, *supra* note 8; *Environmental Compliance by Federal Agencies*, *supra* note 8.

47. The threat of state criminal prosecutions of federal officers represents the culmination of nearly two decades of frustration endured by those charged with administering and enforcing state environmental laws. Conflicts began in the mid-1970s when federal facilities refused to secure permits from federally-approved state air and waste pollution control programs. The federal position was sustained by the Supreme Court in Hancock v. Train, 426 U.S. 167 (1976) and EPA v. California, 426 U.S. 200 (1976), only to be overridden by Congress in the next year by amendments to the Clean Air Act and Clean Water Act.

A trio of controversies in the mid-1980s sparked an intense conflict between states and federal facilities. First, the states encountered bitter resistance by the federal government to state environmental regulation of Department of Energy nuclear facilities. DOE first contended that DOE facilities were altogether exempt from state regulation due to the exemption of source, special nuclear, and by-product materials under the RCRA and the CWA. That position was dispatched by Leaf v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984), and by a legal opinion from the Office of Legal Counsel, U.S. Department of Justice. DOE then scuffled with EPA and the states for several more years about the regulatory status of mixed hazardous and radioactive wastes. DOE appeared to concede in 1988 that RCRA regulated mixed wastes. 52 Fed. Reg. 15937 (1987). Two years later, it was still battling to avoid regulation of mixed wastes. Sierra Club v. Dep't of Energy, 734 F. Supp. 946 (D.Colo. 1990). For a partial account of this battle, see Finamore, *Regulating*

facilities,[48] federal and state enforcement personnel have predicted that they will bring an increasing number of criminal actions against federal employees who are responsible for hazardous waste management at federal facilities.[49]

## II. Four Jurisdictional Barriers to State Criminal Prosecutions of Federal Employees

In order accurately to assess the extent to which the four jurisdictional doctrines pose obstacles to state prosecution of federal employees for hazardous waste violations, the fundamentals of each doctrine and their interrelationships must be carefully examined.[50] This is particularly true given the lack of analytic clar-

*Hazardous and Mixed Waste at Department of Energy Nuclear Weapons Facilities: Reversing Decades of Environmental Neglect*, 9 Harv. Envtl. L. Rev. 83 (1985).

Second, the federal government and the states engaged in an extended battle over assessment of civil penalties against federal facilities under the various environmental statutes, including RCRA. Here the federal government encountered more success with sovereign immunity arguments. *See* Ohio v. Department of Energy, 904 F.2d 1058 (6th Cir. 1990); Mitzelfelt v. Air Force, 903 F.2d 1293 (10th Cir. 1990), California v. Dep't of Defense, 878 F.2d 386 (9th Cir. 1989); United States v. Washington, 872 F.2d 874 (9th Cir. 1989); Maine v. Navy, 702 F. Supp. 322 (D.Me. 1988); McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986); Florida Dep't of Envtl. Regulation v. Silvex, 606 F. Supp. 159 (M.D. Fla. 1985); Natural Resources Defense Council (NRDC) v. Herrington, No. 1-85-2583-6 (D.S.C.) (briefs filed July 18, 1988, no decision). *See also* Metropolitan Sanitary Dist. v. United States, 737 F. Supp. 51 (N.D. Ill. 1990) (CWA only); Sierra Club v. Lujan, 728 F. Supp. 1513 (D. Colo. 1990) (CWA only); Ohio v. Dep't of the Air Force, No. C-2-86-0175, slip op. (S.D. Ohio Mar. 9, 1987) (CAA only); Alabama v. Veterans Admin., 648 F. Supp. 1208 (M.D. Ala. 1986) (CAA only).

Third, the federal government had a series of disputes with the states over the states' ability to control the cleanup of hazardous wastes at federal facilities. The most publicized skirmish concerned the control of the cleanup of a chemical production facility at the Rocky Mountain Arsenal. Colorado v. Dep't of the Army, 707 F. Supp. 1562 (D. Colo. 1989). These battles have embittered many state officials towards federal facilities.

48. In addition to the difficulties encountered by states, *see supra* note 47, federal environmental enforcement officials have chafed at their inability under the U.S. Department of Justice's interpretation of their statutory and constitutional powers to sue federal facilities, administratively assess civil penalties against federal facilities, or issue administrative compliance orders regarding hazardous waste. *See* U.S. EPA, Federal Facility Compliance Strategy, Appendix H (Nov. 1988) (Justice Department testimony concerning limitations on EPA authority due to separation of powers).

49. *See, e.g.*, presentation by Jack Van Kley, Ohio Assistant Attorney General, at Executive Enterprises Inc. Conference on Federal Facilities (June 2, 1988).

50. More detailed discussion of these doctrines is provided in Part II(C)-(F), *infra* notes 87-195 and accompanying text.

ity concerning the doctrines that is sometimes apparent in legal briefs, court opinions, and the writings of commentators.[51]

## A. *The Four Jurisdictional Doctrines*

### 1. Sovereign Immunity

Sovereign immunity is the common law doctrine that prevents a suit against the United States without its consent.[52] Consent can

51. For example, the origin of sovereign immunity is sometimes erroneously traced to the supremacy clause. *See, e.g.*, Note, *How Well Can States Enforce Their Environmental Law When the Polluter is the Federal Government?*, 18 RUTGERS L.J. 123, 129 (1986). Neither the seminal case discussing the impact of the supremacy clause on the state regulation of federal activities, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), nor modern Supreme Court cases discussing supremacy clause limitations on state environmental regulation of federal facilities, Hancock v. Train, 426 U.S. 167 (1976) and EPA v. California, 426 U.S. 200 (1976), speak in terms of sovereign immunity. Instead, the historical origin of sovereign immunity in the United States is Chief Justice Marshall's opinion in the state sovereign immunity case of Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821).

Similarly, courts discussing the applicability of state substantive regulations to federal facilities have erroneously referred to this as a question of sovereign immunity. *E.g.*, Florida Dep't of Envtl. Regulation v. Silvex, 606 F. Supp. 159 (1985); Kelley v. United States, 618 F. Supp. 1103 (D. Mich. 1985). Commentators also sometimes loosely refer to the applicability of state substantive regulations in terms of sovereign immunity. *See, e.g.*, Stever, *Perspectives on the Problem of Federal Facility Liability for Environmental Contamination*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10114 (1987).

52. For discussion of the historical development of sovereign immunity, see, *e.g.*, Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). Critics of the doctrine have for the last century sharply criticized the doctrine as inconsistent with the modern conception of the relationship between the individual and the democratic state. They have also questioned whether the American or even the English courts have ever consistently followed the doctrine. *See, e.g.*, Anderson, *Tort and Implied Contract Liability of the Federal Government*, 30 MINN. L. REV. 133 (1946); Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387 (1970); Davie, *Suing the State*, 18 AM. U.L. REV. 814 (1984); Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383 (1970); Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919). Some commentators have optimistically suggested that the statutory waivers of sovereign immunity for actions sounding in contract and tort as well as nonstatutory review actions have abolished sovereign immunity. *See, e.g.*, Brill, *The Citizen's Relief Against Inactive Federal Officials: Case Studies in Mandamus, Actions "in the Nature of Mandamus," and Mandatory Injunctions*, 16 AKRON L. REV. 339 (1983). However, as Supreme Court decisions during the last two decades have indicated, the doctrine of sovereign immunity is anything but dead. *See, e.g.*, Library of Congress v. Shaw, 478 U.S. 310 (1986); Franchise Tax Board of California v. Postal Service, 467 U.S. 512 (1984); Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983); Block v.

be granted only by Congress, not by the Executive Branch,[53] and congressional consent must be express and unequivocal.[54] The policy underlying the modern application of the doctrine is the protection of the federal government from undue interference with its functions or with its control over federal instrumentalities, funds, and properties.[55]

### 2. Intergovernmental Immunity

Intergovernmental immunity, *inter alia*,[56] prevents the states from regulating the activities of the United States or imposing fis-

North Dakota, 461 U.S. 273 (1983); Lehman v. Nakshian, 453 U.S. 156 (1981); United States v. Mitchell, 445 U.S. 535 (1980); California v. Arizona, 440 U.S. 59 (1979); United States v. Testan, 424 U.S. 392 (1976). Indeed, the willingness of the Supreme Court to extend sovereign immunity to government contractors in Boyle v. United Technologies, 487 U.S. 500, *reh'g denied*, 489 U.S. 1047 (1988), suggests the vitality of the doctrine.

53. United States v. Testan, 424 U.S. 392, 399 (1976); United States v. King, 395 U.S. 1, 3 (1969); Soriano v. United States, 352 U.S. 270, 277 (1957).

54. United States v. Shaw, 309 U.S. 495, 501 (1940); Munro v. United States, 303 U.S. 36, 41 (1938); Stanley v. Schwalby, 162 U.S. 255, 270 (1876).

55. Prevention of undue interference with government operations has recently been described as the *raison d'être* of the doctrine of sovereign immunity. Goewey, *Assuring Federal Facility Compliance With the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513, 521 (1987). *See also* Axline, *Stones for David's Sling, Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVT'L L. & LITIG. 1, 17 (1987); Berman, *Integrating Government and Officers Tort Liability*, 77 COLUM. L. REV. 1175, 1176 (1977); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389, 397 (1970); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Note, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946).

56. In addition to placing limits on federal regulation of states, the doctrine of intergovernmental immunity proscribes both direct state regulation of the federal government and indirect burdening of the federal government by discriminatory regulation of those who deal with the federal government. North Dakota v. United States, 110 S. Ct. 1986, 1995 (1990). The doctrine has been used to invalidate a variety of state regulations. *See* Hancock v. Train, 426 U.S. 167 (1976) (United States immune from state air pollution permitting requirements); EPA v. California, 426 U.S. 200 (1976) (United States immune from state water quality permitting requirement); United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285 (1963) (moving companies immune from state regulation preventing the federal government from obtaining volume discount rates); Paul v. United States, 371 U.S. 245 (1963) (state minimum wholesale milk prices not enforceable against suppliers of federal government); Public Utilities Comm'n of California v. United States, 355 U.S. 534 (1958) (state regulation prohibiting free or reduced rate transportation without PUC approval invalid as to common carriers serving the United States); Leslie Miller Inc. v. Arkansas, 352 U.S. 187 (1956) (building contractors employed by federal governments immune from state licensing requirements); Mayo v. United States, 319 U.S. 441 (1943) (Department of Agriculture immune from state fertilizer inspection fee); Johnson v. Maryland, 254 U.S. 51 (1920) (postal employee driving truck as part of his official duty exempt from state license and fee requirement). However, most cases concerning federal immunity from

cal burdens upon the United States without its consent.[57] Again, consent can only be granted by Congress[58] and must be explicit.[59] This aspect of intergovernmental immunity derives from the Supremacy Clause of the United States Constitution, and its purpose is to assure the supremacy of the federal government by preventing states from interfering with its operations.[60]

state regulation involve intergovernmental tax immunity. *See, e.g.*, California Bd. of Equalization v. Sierra Summit, Inc., 109 S. Ct. 2228 (1989) (intergovernmental tax immunity did not extend to buyer at bankruptcy liquidation sale); Cotton Petroleum v. New Mexico, 109 S. Ct. 1698 (1989) (state could impose severance tax on the same oil and gas, produced on Indian Reservation by non-Indian lessees, as were subject to the tribes severance tax); Washington v. United States, 460 U.S. 536 (1983) (state could tax labor costs and tangible property of federal contracts); United States v. New Mexico, 455 U.S. 720 (1982) (federal contractors not protected from state use tax); United States v. County of Fresno, 429 U.S. 452 (1977) (tax on federal lessee permissible); United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975) (tax on federal instrumentality impermissible); James v. Dravo Contracting Co., 302 U.S. 134 (1937) (federal contractors not immune from taxation simply because they use federal property); Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218 (1928) (state tax on military contractor); Gillespie v. Oklahoma, 257 U.S. 501 (1922) (tax on lease of federal property); Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842) (tax on federal employee); Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829) (tax on federal bond).

57. Because of the dominance of taxation cases and state immunity from federal regulation cases, scholarly attention has largely focused on these two areas, largely neglecting the subject of intergovernmental immunity from state regulation. *See, e.g.*, Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987); Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989). A noteworthy exception to this rule is an early contribution by Professor Tribe. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976). In this article, Tribe suggested that intergovernmental immunity doctrine could best be understood not simply through the concept of federalism, but by viewing it through the lens of separation of powers. In Tribe's estimate, intergovernmental immunity doctrine reflected the Supreme Court's concern with protecting Congress' power to address federalism questions. In recent years, given rigorous application of the strict construction doctrine, the Court's concern in intergovernmental immunity doctrine seems to have shifted towards protecting the executive branch from congressional attempts to shift the balance of power between the states and the executive branch. This development perhaps can be explained by the continued split in partisanship between Congress and the President, which may lead to the appointment of a judiciary sympathetic to executive power. *See generally* R.F. NAGEL, CONSTITUTIONAL CULTURES (1989).

58. Mayo v. United States, 319 U.S. 441, 448 (1943).

59. Paul v. United States, 371 U.S. 245, 263 (1963); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954); Mayo v. United States, 319 U.S. 441, 447 (1943).

60. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819), in which the court stated that "[i]t is of the very essence of supremacy to remove all obstacles to [federal]

### 3. Official Immunity

Official immunity is the common law doctrine that limits civil damages actions against officers of the United States.[61] In civil actions, certain public officials enjoy an absolute immunity for actions within their scope of authority; others enjoy only a qualified immunity.[62] Although official immunity from tort is a judicial in-

action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

Although the rationale of *McCulloch* was prevention of undue interference with the federal government, the intergovernmental immunity doctrine as applied by the Supreme Court in *North Dakota* no longer requires an inquiry into whether federal operations will be obstructed. Any direct regulation or taxation of the United States without consent is prohibited. Indirect regulation or taxation is prohibited only if discriminatory. The plurality opinion in *North Dakota* declined to follow prior cases suggesting indirect regulation that interferes with federal operations is impermissible even if not discriminatory. Instead, the plurality adopted a rule that parallels the intergovernmental tax immunity rule, where a non-discriminatory state tax is improper only if its legal incidence, as opposed to its practical or economic burden, falls on the United States. *North Dakota*, 110 S. Ct. 1986, 1995 (1990).

61. For scholarly commentary on official immunity from civil damage actions, see sources cited *supra* note 52.

62. The doctrine of official immunity in the tort context developed in differing directions depending upon whether the damage action employed a common law tort theory or a constitutional tort theory. Historically, federal officers faced personal liability for torts committed in the course of their duties. *See* Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 797 (1824) (state officers acting pursuant to unconstitutional law liable for damages); Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (military officer liable for damages in seizure of ship ordered by the President but not authorized by law). The imposition of personal liability counterbalanced the application of sovereign immunity to preclude actions against the government. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972).

Exceptions to personal liability then developed for judges (Bradley v. Fisher, 80 U.S. 335 (1871)), prosecutors (Yaselli v. Goff, 12 F.2d 396, *aff'd per curiam*, 275 U.S. 503 (1927)), and legislators (Tenney v. Brandhove, 341 U.S. 367 (1951)). In 1959, the absolute immunity accorded judges, prosecutors, and legislators was extended to executive employees acting within the outer perimeter of their employment. Barr v. Matteo, 360 U.S. 564 (1959).

After the recognition of constitutional tort actions in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), official immunity in constitutional tort actions against executive officers was qualified to immunize actions within the scope of the official's employment undertaken in good faith. Scheuer v. Rhodes, 416 U.S. 232, 245 (1974). An objective test of qualified immunity in constitutional tort actions was subsequently imposed in Harlow v. Fitzgerald, 457 U.S. 800 (1982). *See also* Anderson v. Creighton, 483 U.S. 635 (1987).

Unlike the qualified immunity applied in the constitutional tort context, official immunity for federal executive officers remained absolute in the common law tort arena until Westfall v. Erwin, 484 U.S. 292 (1988), when the Supreme Court limited absolute immunity to discretionary actions. Congress rapidly overruled *Westfall* by passing the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat.

vention with constitutional implications, the immunity of federal officials can be modified by Congress.[63] The principal rationale for official immunity in the civil context is to ensure the vigorous exercise of executive authority. Other policy rationales include: (1) limiting the distraction and drain of resources caused by defending suits, (2) reducing the flight of valuable employees from federal service due to potential personal liability, and (3) minimizing the inequity of holding federal officials personally liable for actions taken on behalf of their government.[64]

Federal officers also enjoy official immunity from state criminal prosecution for actions within the scope of their authority if those actions are necessary and proper.[65] Official immunity in the criminal context rests on a far different foundation than that of official immunity in the civil context; it derives directly from the supremacy of the federal government.[66] Federal officers are im-

4563 (1988), which transforms common law tort actions against federal employees into actions against the United States.

63. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982). While research did not uncover any cases deciding whether Congress, and perhaps only Congress, can modify official immunity in the criminal context, the close relationship between official immunity and intergovernmental immunity suggests that Congress does possess that power.

64. Robichaud v. Ronan, 351 F.2d 533, 535-36 (9th Cir. 1965); Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285, 1295 n.54 (1953). *See also* Gray v. Bell, 712 F.2d 490, 496 (D.C. Cir. 1983).

65. *In re* Neagle, 135 U.S. 1, 58 (1890).

66. See *infra* notes 119-149 and accompanying text for a more complete discussion of federal officer immunity from state criminal prosecution. Federal officer immunity was fashioned by the courts on the basis of the supremacy clause to give substantive protection to federal officers who invoked the procedural protection of the federal habeas corpus and removal statutes. In the third case of Ex Parte Jenkins, 13 F. Cas. 445, (E.D. Pa. 1853) (No. 7259), the court stated that the habeas *corpus* statute empowered the court to uphold the supremacy of federal law: "My duties are performed when I have released the prisoner from unlawful imprisonment; for that imprisonment is unlawful, however formal it may be, that affects to punish for an act enjoined or justified by the supreme law of the land." *Id.* at 452.

The bulk of federal officer immunity cases has arisen under writs of habeas corpus pursuant to the Act of Mar. 2, 1833, ch. 58, 4 Stat. 635 (1833), which provided for the grant of such writs where the prisoner "shall be confined by any authority of law for any act done in pursuance of a law of the United States or any process of a judge or court thereof." This Act was passed in response to the Nullification Ordinance and Laws of South Carolina in 1832, an opening shot in the war between the states that culminated in the Civil War. *See Ex Parte* Jenkins, 13 F. Cas. 445 (E.D. Pa. 1853) (No. 7259). Ironically, the earliest cases involving federal officer immunity can be traced back to state attempts to interfere with federal enforcement of the fugitive slave laws. *In re* McShane, 235 F. Supp. 262, 271 (N.D. Miss. 1964). Federal marshals invoked the habeas corpus power of federal courts and were discharged from custody on state criminal charges arising from conflicts with state authorities and the local citizenry when the marshals took fugitive slaves into custody for

mune from state criminal prosecution in order to prevent states from indirectly exercising power that cannot be exercised against the United States directly.[67] Unlike the official immunity granted in the tort context, where both state and federal officers are immune, state officers are not given immunity from federal criminal prosecution. Although the origins of official immunity with respect to tort and criminal prosecution differ, it is necessary to understand official immunity from tort in order to understand official immunity from state criminal prosecution because the latter has borrowed concepts and precedents from the former.[68]

### 4. Exclusive Federal Enclave Status

Exclusive federal enclaves are geographical areas within the territorial boundaries of states in which the federal government possesses exclusive legislative and prosecutorial jurisdiction.[69] States cannot prosecute crimes committed within such areas, and

return to their places of enslavement. *Id. See also Ex Parte* Robinson, 20 F. Cas. 965 (S.D. Ohio 1856) (No. 11,934); *Ex Parte* Sifford, 22 F. Cas. 105 (S.D. Ohio 1857) (No. 12,848).

Federal officer immunity has been used to resist recurrent state attempts to affect national policy by criminal prosecution of federal officers. The controversies have ranged from opposition to foreign wars (*see, e.g., In re* Wulzen, 235 F. 362 (S.D. Ohio 1916)), resistance to federal taxation (*see, e.g.*, Virginia v. Paul, 148 U.S. 107 (1893)), the war between the bootleggers and the federal government before and during Prohibition (*see, e.g.*, Maryland v. Soper, 270 U.S. 9 (1926); Lilly v. West Virginia, 29 F.2d 61 (4th Cir. 1928)), violent labor struggles (*see, e.g.*, West Virginia v. Laing, 133 F. 887 (4th Cir. 1904); Brown v. Cain, 56 F. Supp. 56 (E.D. Pa. 1944)), the civil rights conflict in admitting a black student, James Meredith, to the University of Mississippi (*In re* McShane, 235 F. Supp. 262 (N.D. Miss. 1964)), and a most "urgent" controversy of that day: limitations on the use of oleomargarine (Ohio v. Thomas, 173 U.S. 276 (1899)).

Following the historical trend that begins with the fugitive slave cases, the majority of modern federal officer immunity cases involve federal law enforcement. *See, e.g.*, Kentucky v. Long, 837 F.2d 727 (6th Cir. 1988); Morgan v. California, 743 F. 2d 728 (9th Cir. 1984); Baucom v. Martin, 677 F.2d 1346 (11th Cir. 1982); Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977); Connecticut v. Marra, 528 F. Supp. 381 (D. Conn. 1981); Pennsylvania v. Johnson, 297 F. Supp. 879 (W.D. Pa. 1969).

For a partial history of federal officer immunity with emphasis on the procedural aspects of habeas corpus and removal, see Strayhorn, *The Immunity of Federal Officers From State Prosecution*, 6 N.C.L. REV. 123 (1928).

67. *In re* Neagle, 135 U.S. at 61-62.

68. Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977) (adopted the tort approach to scope of employment relying upon tort precedents).

69. The Public Land Law Review Commission (PLLRC), which studied the problems arising in areas of exclusive federal jurisdiction, referred to such areas as "federal enclaves." PUBLIC LAND LAW REVIEW COMMISSION, FEDERAL LEGISLATIVE JURISDICTION 147 (1969). To avoid confusion with areas of concurrent jurisdiction, which are also sometimes referred to as federal enclaves, areas of exclusive federal jurisdiction will be referred to in this article as "exclusive federal enclaves."

state law, with important exceptions,[70] does not apply.[71] Federal power to exercise exclusive jurisdiction over these areas arises from the somewhat obscure constitutional provision known as the Enclave or Jurisdiction Clause,[72] which was intended to protect federal installations from improper state influence.[73]

5. Relationship of the Four Doctrines

In analyzing the jurisdictional barriers to state prosecutions, the four doctrines must be considered separately. It is tempting to suppose that the doctrines must be unified by some underlying principle, since all are concerned with protecting federal power over federal activities. But this temptation must be avoided as the doctrines are analytically distinct, arise from different historical origins, and serve only partially overlapping purposes.

The relationship between sovereign immunity and inter-governmental immunity has been confused both by the courts and the commentators.[74] This confusion may arise from the fact that both doctrines act to protect the ability of the federal government to operate, though protecting it from somewhat distinct threats. The principal threat addressed by the doctrine of sovereign immunity is the ability of the individual, through the courts, to hamstring the executive. In the modern democratic state, it is best understood as a separation of powers concern. Somewhat ancillary to this primary concern, the doctrine also has federalism implications, because it reduces the power of the states to create enforceable rights against the federal government. The threat addressed by intergovernmental immunity, on the other hand, is purely a federalism concern: the ability of the states to obstruct the federal government. The intermingling of the two doctrines by commentators may represent obfuscation, rather than confusion, because the questionable paternity of sovereign immunity

70. *See infra* Part II. F. 2-4, notes 176-95.

71. The definitive works on exclusive federal legislative jurisdiction are the reports published by the INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITH THE STATE (1956-57) and PUBLIC LAND LAW REVIEW COMMISSION (PLLRC), FEDERAL LEGISLATIVE JURISDICTION (1969). Commentary on problems of federal legislative jurisdiction has been relatively limited. *See* Note, *Federal Areas: The Confusion of a Jurisdictional - Geographical Dichotomy*, 101 U. PA. L. REV. 124 (1953); Note, *Land Under Exclusive Federal Jurisdiction: An Island Within A State*, 58 YALE L.J. 1402 (1949).

72. U.S. CONST., art. I, § 8, cl. 2.

73. PLLRC, *supra* note 69, at 5.

74. *See supra* notes 51-52.

allows its critics to cast a shadow over the more legitimate progeny of the Supremacy Clause, intergovernmental immunity.[75] But whatever the source of the confusion, it is erroneous to treat the two doctrines as interchangeable.

Courts and commentators have also been confused about the relationship between sovereign immunity and official immunity, especially in the tort context. While the good faith qualified immunity of federal officers extends to, and defines, the sovereign immunity of the United States in the tort context,[76] the Supreme Court has generally indicated that sovereign immunity and official immunity have distinct origins and contours. While it has not explicitly considered the relationship between sovereign immunity and official immunity in the context of federal officers, the Supreme Court has held that municipalities can not assert the good faith defense of its officers,[77] which suggests that the contours of official immunity and sovereign immunity should not be considered co-extensive in the environmental criminal context.

Intergovernmental immunity and official immunity, although also not coextensive, should overlap. Otherwise, in the criminal and civil penalty contexts, a state may attempt to transfer the burden of federal "non-compliance" with state regulations to federal officers in their personal capacity. Federal officer immunity for acts within the officer's scope of duties must be at least as broad as intergovernmental immunity to serve the purposes of intergovernmental immunity and official immunity — prevention of undue interference with federal operations.

Sovereign immunity, as a concept that interferes with both federal and state judicial power over the sovereign, bears no relationship to exclusive federal enclave status. Official immunity, which bars the exercise of state criminal jurisdiction over federal officers under certain circumstances, operates both on and off ex-

75. *See supra* notes 56-60 and accompanying text.

76. The immunity of the sovereign from suit does not necessarily extend to his officers. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 398-99 (1971). Although the Fourth Circuit in Norton v. United States, 581 F.2d 390, 396 (4th Cir. 1978), held that the federal government's liability for the torts of its officers is "inextricably tied" to the individual officer's liability, and this allowed the United States to assert the good faith defense of its officers, the Fourth Circuit holding was based on its reading of the congressional intent in waiving sovereign immunity in the 1974 Amendments to the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1990), not on the basis of an inherent relationship between the two. Other courts have suggested their agreement with the Fourth Circuit in *dicta*. *See, e.g.*, Caban v. United States, 728 F.2d 68, 75 (2d Cir. 1984).

77. Owen v. City of Independence, 445 U.S. 398 (1980).

clusive federal enclaves and, therefore, constitutes much broader protection than the enclave doctrine. Intergovernmental immunity also operates both on and off exclusive federal enclaves and is in that sense broader protection against the exercise of state criminal jurisdiction. However, it is also narrower than the protection of the enclave doctrine in the sense that its protection extends only to the federal government, federal employees, and any private parties who are discriminated against because they deal with the government. The enclave doctrine protects all entities, including the federal government, federal employees, and private parties, from the exercise of state criminal jurisdiction.

### B. *The Multifaceted Role of Section 6001 in Addressing the Four Jurisdictional Doctrines*

RCRA section 6001, as the only provision in RCRA that addresses federal facilities, necessarily plays a multi-faceted role in removing these jurisdictional barriers to state criminal and civil hazardous waste enforcement actions against federal facilities and federal employees who operate such facilities.[78]

RCRA section 6001 provides in part that:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements. . . . Neither the

78. None of the cases interpreting § 6001 or any other federal facility provision in environmental laws has addressed the distinction between these doctrines or has described the versatile role of § 6001. Several commentators have alluded to the existence of both the supremacy clause and sovereign immunity limits on state regulation, but they have not examined the doctrines and their relationship in any detail. *See* Murchison, *Waivers of Intergovernmental Immunity In Federal Environmental Statutes*, 62 VA. L. REV. 1177 (1976); Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10326 (1985); Kenison, *Enforcement of State Environmental Laws Against Federal Facilities*, NAT'L ENVTL. ENFORC. J. (Nov. 1986); Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513 (1987).

> United States, nor any agent, employee, or officer thereof, shall be immune from any process or sanction of any state or federal court with respect to the enforcement of any such injunctive relief. . . .[79]

This section of RCRA and the comparable federal facilities provisions of other federal environmental statutes are commonly referred to as waivers of sovereign immunity.[80] In fact, however, the federal facilities provisions may serve more generally to resolve each of the distinct jurisdictional problems faced by both civil and criminal state enforcement actions against federal agencies and federal officers.

First, as previously mentioned, they serve as at least partial waivers of the United States' sovereign immunity from suit in state or federal court.[81] Second, federal facilities provisions serve as partial waivers of the intergovernmental immunity of the United States, embodied in the Supremacy Clause, which would otherwise proscribe application of state law to federal activities.[82] These two functions are generally recognized, although there continue to be fierce debates between the United States and the states concerning the extent of the waivers.[83] Third, they may serve to limit or extend the official immunity of federal employees involved in activities subject to federal, state, and local environmental regulation.[84] Fourth, they may serve as partial retrocessions to the states of legislative jurisdiction over federal

79. 42 U.S.C. § 6961 (1988).

80. In addition, federal facilities provisions make federal environmental laws applicable to federal facilities, which otherwise might not apply because those laws only apply to "persons," and the definition of "person" frequently does not include the United States. *See, e.g.*, 42 U.S.C. § 6903(15) (1988) (RCRA definition of "person") and 42 U.S.C. § 6928 (1988) (RCRA federal enforcement provision). Finally, federal facilities provisions may play some role in preemption analysis. Justice Powell in his dissenting opinion in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), recently added a sixth item to the catalog of functions of RCRA § 6001. Suggesting that § 6001 and other federal facilities provisions preserve the applicability of state environmental requirements to private activities on federal lands, he construed them as "non-preemption" clauses.

81. Sierra Club v. Lujan, 728 F. Supp. 1513 (D. Colo. 1990); Metropolitan Sanitary Dist. v. Dep't of the Navy, 722 F.Supp. 1565 (N.D. Ill. 1989); Ohio v. Dep't of Energy, 689 F. Supp. 760 (S.D. Ohio 1988).

82. *See, e.g.*, Hancock v. Train, 426 U.S. 167 (1976); EPA v. California, 426 U.S. 200 (1976).

83. *See supra* note 47.

84. No court has considered whether § 6001 or any other federal facilities provision addresses official immunity from criminal prosecution. The Fourth Circuit in United States v. Dee, 92 F.2d 741 (4th Cir. 1990), concluded that there is no official immunity from prosecution under federal law. *See infra* notes 216-27 and accompanying text.

enclaves.[85] These latter two functions of the federal facilities provisions are not widely recognized, and as a result there has been little examination by scholars or courts of the extent to which section 6001 serves them.

### C. *Sovereign Immunity as a Jurisdictional Barrier to State Prosecutions of Federal Employees for Environmental Crimes*

#### 1. Prosecution of Federal Employees in Their Official Capacity

As discussed above,[86] there have been very few attempts by states thus far to use their criminal prosecutorial power against federal employees for violating state environmental statutes. In *California v. Walters*,[87] the only reported case involving state criminal charges with respect to environmental violations by a federal employee,[88] California attempted to bring misdemeanor charges against the administrator of a Veterans Administration hospital for violating the state's laws regarding disposal of medical wastes. The parties framed the issue not in terms of the official immunity analysis that has generally governed state criminal prosecution of federal employees,[89] but in terms of whether Congress had waived sovereign immunity from state criminal penalties in RCRA section 6001.

The Ninth Circuit concluded that section 6001 had not waived sovereign immunity from state criminal penalties. The court reasoned that section 6001 had waived immunity only from substantive and procedural requirements of relevant state laws, but not immunity from enforcement of those requirements, except for injunctive relief.[90] Because state criminal penalties were obviously

85. Only one lower state court decision has addressed this aspect of RCRA § 6001. *See* New Jersey v. Ingram, 226 N.J. Super. 680, 545 A.2d 268 (1988).

86. *See supra* note 42 and accompanying text.

87. 751 F.2d 977 (9th Cir. 1984).

88. *See supra* note 42.

89. *See infra* Part II. E., notes 118-147 and accompanying text.

90. The Ninth Circuit's distinction is drawn from the district court decision in Meyer v. Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986). The distinction originates in the historical development of federal facility provisions in the environmental statutes. Initially, the federal facility provisions in the Clean Water Act and the Clean Air Act were construed by the Supreme Court to waive federal immunity only as to substantive requirements, not procedural requirements such as permits. Congress then amended the provisions in both acts to waive immunity as to substantive *and* procedural requirements, including permits. The RCRA federal facility provision largely followed the model of the amended CWA and CAA federal facility provisions in waiving immunity as to substantive and procedural re-

solely a means of enforcement, the Ninth Circuit concluded that sovereign immunity barred the criminal prosecution.

The court's use of a sovereign immunity analysis was based on the fact that "[b]oth parties agree that this case is in essence against the United States."[91] The criminal prosecution was against Walters in his official capacity, not his personal capacity. Thus, while *Walters* may be good precedent on the availability of criminal prosecutions of federal employees in their official capacity, it casts little light on the circumstances under which the individual federal employee can be prosecuted in his personal capacity by the state for hazardous waste management activities undertaken in the course of his employment.[92]

The state's concession that it was proceeding against Walters in his official capacity was a critical strategic choice. If the state had been successful in arguing that section 6001 was a waiver of sovereign immunity, its concession would have allowed the state to reach the deep pocket of the United States, skirt the barrier of official immunity and thus obviate both the need for proof that Walter's actions were not necessary and proper and the burden of proving that Walters should be held personally liable for the actions of his subordinates. The choice may also have reflected the state's beliefs about the relative culpability of the institution as opposed to the officer who administered it, and about the relative deterrent impact of exacting money from the federal treasury as opposed to fining or imprisoning individual employees. Alternatively, it may simply have arisen from the state's erroneous belief that federal officials acting within the scope of their duties necessarily enjoy sovereign immunity, a confusion of the concepts of official capacity and scope of duties.

Ironically, the broad sovereign immunity barrier against state environmental enforcement mechanisms articulated by the Ninth

quirements. It carefully included one means of enforcing those requirements — injunctive relief and sanctions to enforce such relief — within the waiver, but it did not include any general language waiving sovereign immunity or intergovernmental immunity as to means of enforcement other than injunctive relief and sanctions to enforce injunctive relief. This omission from the waiver, particularly in light of broad language in the CAA and CWA federal facility provisions, subjecting federal facilities to "process and sanctions," was read by the Ninth Circuit and other courts to mean that § 6001 does not waive immunity to means of enforcement other than injunctive relief and sanctions to enforce injunctive relief.

91. *Walters*, 751 F.2d at 978.

92. *See* United States v. Dee, 912 F.2d 741 (4th Cir. 1990).

Circuit in the *Walters* decision produced a fiery battle between the federal government and the states on the availability of civil penalties for environmental violations.[93] This battle in turn led states to threaten use of criminal sanctions against federal employees in their personal capacity if they continued to be unable to utilize the more mild sanction of civil penalties against the federal government.[94]

### 2. Prosecution of Federal Employees in Their Individual Capacity

There have not been any decisions on the application of sovereign immunity to prosecution of federal employees in their individual capacity in the environmental or any other criminal context. However, it is safe to opine that sovereign immunity does not bar such prosecutions. Federal employees in their individual capacity do not enjoy sovereign immunity — that is the sovereign's privilege alone.[95]

As a result, states are likely to adopt the alternative route of proceeding against federal employees in their individual capacity. The federal government may in turn resist this attempt to circumvent sovereign immunity, at least in those cases in which it views the prosecution as inappropriate. If so, the courts may be called upon to do more critical analysis of the distinction between personal capacity and official capacity prosecutions than was required of the court in *Walters*. It is difficult to predict the course that the courts will pursue, because the distinction between official capacity actions and personal capacity actions for purposes of sovereign immunity is entirely uncharted in the criminal context. However, the issue has arisen in the tort context, and courts will likely analogize to that body of law.

To determine whether a tort action is brought against an officer in her official or her personal capacity, the courts look beyond the caption of the case to the "course of proceedings" to identify the real party in interest.[96] If the plaintiff is seeking relief from the

93. Mitzelfelt v. Dep't of the Air Force, 903 F.2d 1293 (10th Cir. 1990) (citing cases and articles). *See also* Axline, *supra* note 5; *Kennison*, *supra* note 5.

94. *See supra* note 49 and accompanying text.

95. United States v. Yakima Tribal Court, 794 F.2d 1402 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); Schowengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987).

96. Brandon v. Holt, 469 U.S. 464, 469-70 (1985) (the court relied upon summary judgment papers, opening statements, evidentiary rulings, findings on liability and proceed-

government, then the action must be against the officer in her official capacity.[97] The court must then determine whether sovereign immunity bars the action. If, on the other hand, the plaintiff is seeking relief from the officer, the court must determine whether official immunity[98] bars the prosecution.

In the criminal context, sovereign immunity bars actions against the United States and thus actions against federal officers in their official capacity. However, even where a federal officer is acting within the scope of his duties, he can be held personally liable for violations of state criminal law, unless the prosecution is barred by official immunity. The state, of course, is limited in such prosecutions to relief that operates solely against the officer.[99]

### D. *Intergovernmental Immunity as a Barrier to State Prosecutions*

Once the sovereign immunity barrier is overcome, the next obstacle to state criminal prosecutions of federal employees for violating state hazardous waste laws is intergovernmental immunity.[100] Unless there is a clear and unambiguous waiver, intergovernmental immunity prevents the application of state hazardous waste regulations to federal facilities. A federal employee cannot be prosecuted for violating a law that does not apply to the facility at which he works or governmental activity in which he is engaged.

Thus, the crucial question is whether section 6001 waives intergovernmental immunity. Certainly the Supreme Court considered similar federal facility waivers in the Clean Air Act ("CAA")

ings as to damages in the trial court to establish whether the suit was intended to be against the officer in his personal or official capacity).

97. *Id.*; Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Burgos v. Milton, 709 F.2d 1, 2 (1st Cir. 1983).

98. See *infra* notes 118-48 and accompanying text for a discussion of official immunity.

99. Kentucky v. Graham, 473 U.S. 159 (1985). The state may seek to impose a fine payable from the officer's personal assets or to imprison him.

100. While the Supreme Court's analysis in Hancock v. Train, 426 U.S. 167 (1976), and EPA v. California, 426 U.S. 200 (1976), discussed the Clean Water Act (CWA) and Clean Air Act (CAA) federal facility provisions in a manner consistent with the distinction drawn here between sovereign immunity and intergovernmental immunity, it did not explicitly adopt that analysis. Similarly, in *Walters*, the Ninth Circuit distinguished between substantive and procedural requirements and means of enforcement, drawing an inadvertent distinction between the subject matter of intergovernmental immunity, substantive and procedural state "requirements," and the subject matter of sovereign immunity, "means of enforcement." 751 F.2d at 978.

and the Clean Water Act ("CWA") to be broad waivers of the federal government's immunity from state regulation.[101] Initially, the sweeping language of section 6001 suggests that the federal government's immunity from state regulation regarding solid and hazardous waste management should be viewed as similarly broad. However, careful and thorough reading of the waiver indicates that Congress did not intend to completely waive intergovernmental immunity. Instead, Congress placed conditions on that waiver, which must be strictly construed in favor of federal immunity.[102]

1. The "Disposal" Limitation on the Waiver in Section 6001

Despite the seeming breadth of the waiver, a federal employee may assert that it is limited in several respects. First, the language of the waiver explicitly subjects federal facilities only to requirements "respecting control and abatement of solid waste or hazardous waste *disposal*."[103] A federal employee may argue that disposal does not include storage, treatment, and transportation requirements of state hazardous waste laws.

A state prosecutor confronted with this argument can make a number of responses to it. First, the earlier reference in section 6001 subjecting "any activity resulting, or which may result, in the disposal or *management* of solid or hazardous waste" to state requirements arguably reflects a broader congressional intent that federal facilities comply with all state hazardous waste *management* laws. The difficulty with this argument, however, is that the text quite clearly distinguishes between who is to be regulated and the kind of regulation to which the regulated entity is subject. Second, a state prosecutor can respond that state laws intended to *prevent* unintentional disposal, such as laws to assure safe storage,

101. Hancock v. Train, 426 U.S. 167, 198 (1976); EPA v. California, 426 U.S. 200, 226 (1976). Although the Supreme Court held that the CAA and CWA federal facility provisions did not subject federal facilities to state permit requirements, the CAA and CWA provisions were amended in 1977 to specifically include permit requirements. Pub. L. No. 95-217, 91 Stat. 1596, 1597 (codified as amended at 33 U.S.C. § 1323 (1988)); Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. § 7418 (1988)). The RCRA federal facilities provision, which was written while the controversy over permit requirements was pending, specifically included compliance with state permit requirements.

102. McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 1186 (E.D. Cal. 1988); Smalls v. EPA, 683 F. Supp. 120, 121 (E.D. Pa. 1988); Meyer v. Coast Guard, 644 F. Supp. 221, 222-23 (E.D.N.C.1986); Florida Dep't. of Envtl. Reg. v. Silvex Corp., 606 F. Supp. 159, 163 (M.D. Fla. 1985).

103. 42 U.S.C. § 6961 (1988) (emphasis supplied).

treatment, and transportation, are arguably disposal laws within the scope of section 6001. Third, she can argue that the United States does not read the waiver as excluding state laws relating to storage, treatment and transportation,[104] and has avowed its intent to comply with such laws by Executive Order 12,088.[105] This last response, however, violates a cardinal rule of intergovernmental immunity law — that such immunity can only be waived by Congress.[106] Though it is unclear how the courts would receive the argument that section 6001 waives immunity only as to disposal requirements,[107] state prosecutors would hold the sounder position in arguing that if a management activity could result in disposal, it is subject to state solid and hazardous waste laws designed to prevent such disposal.[108]

### 2. The Equal Treatment Limitation

A second defense that may be argued by a federal employee is that federal facilities need only comply with such requirements

104. Federal agencies routinely comply with those laws and the Attorney General has never raised that argument in litigation, on behalf of any federal agency. The federal interpretation of § 6001 may be relevant to whether an employee is entitled under *Neagle* to official immunity. Its significance for intergovernmental immunity, however, is less clear. Unlike sovereign immunity and official immunity, which are regarded as personal privileges that may be waived if not raised, intergovernmental immunity implicates the jurisdiction of the state, and consequently of the court, over the subject matter.

105. Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (1978), *reprinted in* 42 U.S.C. 4321 (1988), requires that federal agencies ensure that "all necessary actions are taken for the prevention, control, and abatement of environmental pollution" and comply with "applicable pollution control standards," which are defined to include "the same substantive, procedural, and other requirements that would apply to a private person."

106. *See, e.g.*, Mitzelfelt v. Air Force, 903 F.2d 1293 (10th Cir. 1990) (EPA could not waive sovereign immunity as to civil penalties by regulation); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 704 (1976).

107. H.R. REP. No. 3847, 101st Cong., 2d Sess. (1990) proposes to amend § 6001 and add "and management" to avoid this argument. *See infra* notes 249-64 and accompanying text.

108. Disposal includes "the discharge, deposit, injection, dumping, spilling, leaking, or *placing of any solid waste or hazardous waste* into or *on any land or water so that such solid waste or hazardous waste* or any constituent thereof *may enter the environment* or be emitted into the air or discharged into any waters, including ground waters." RCRA § 1003(3), 42 U.S.C. § 6903(3) (1988) (emphasis supplied). While it may be fair to classify state laws to prevent disposal as disposal laws, the term "disposal" itself should not be construed to include storage, transportation, and similar management activities. The act in numerous places treats these as separate activities. *E.g.*, RCRA § 1003(28), 42 U.S.C. § 6903(28) (1988) (definition of solid waste management); RCRA § 3004, 42 U.S.C. § 6924 (1988) (standards for owners and operators of hazardous waste treatment, storage, and disposal facilities).

"in the same manner, and to the same extent, as any person is subject to such requirements." Unlike the disposal restriction, the equal treatment defense has actually been raised by the United States.[109] The equal treatment argument may even altogether prevent prosecutions by states that have exempted themselves or their local governments from particular hazardous waste provisions of state environmental laws. It also may allow a federal employee to raise a unique type of selective prosecution argument, which can only be raised by a member of a suspect class.[110] A federal employee may seek dismissal of an indictment where the state has been more stringent in applying a regulatory requirement to the federal facility than to other similarly situated facilities. Likewise, a federal officer may argue that a state is prosecuting him or her when it would not prosecute a private, state or local employee for the same violation.

### 3. The Uniform, Specific and Objective Limitation

The third defense that may be raised by a federal employee is that the "requirement" that the employee allegedly violated is not a "specific and objective" requirement capable of uniform application.[111] Federal employees charged with violating state closure plans, enforcement orders, corrective action orders, imminent hazard orders that specify cleanup levels on an *ad hoc* basis or completely fail to specify the precise level of cleanup, and similarly vague prohibitions in state laws,[112] may argue that such plans, orders and laws do not comprise requirements for which intergovernmental immunity has been waived.[113] Such plans, or-

109. Ohio v. Dep't of Air Force, No. C-2-86-0175 (S.D. Ohio 1987) (consent decree).

110. Wayte v. United States, 470 U.S. 598, 608 (1985); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962).

111. One of the earliest cases interpreting § 6001 held that Florida nuisance law did not constitute a specific, objective, ascertainable requirement for which federal immunity had been waived. Florida Dep't of Envtl. Reg. v. Silvex Corp., 606 F. Supp. 159, 163 (M.D. Fla. 1985). *See also* Romero-Barcelo v. Brown, 643 F.2d 835, 852-56 (lst Cir. 1981), *rev'd on other grounds*, 456 U.S. 305 (1982) (no waiver of sovereign immunity in Noise Control Act as to general state nuisance law because such a law was not a relatively precise standard capable of uniform application).

112. Even if immunity were deemed waived by RCRA § 6001 for such vague requirements, they may not pass constitutional muster where they form the basis of a criminal prosecution, rather than a civil enforcement action. Kolender v. Lawson, 461 U.S. 352, 357 (1983); Smith v. Goguen, 415 U.S. 566, 573 (1974); Winters v. New York, 333 U.S. 507, 515 (1948).

113. The United States has raised this argument sparingly in the context of nuisance statutes. *See, e.g.*, Kelley v. United States, 618 F. Supp. 1103 (W.D. Mich. 1985). It has not

ders and laws do not allow the federal government to ascertain in advance what it and its employees must do to comply. Furthermore, vague plans, orders and laws tend to allow discriminatory treatment of the federal government.

State prosecutors may argue that it is inherent in the nature of hazardous waste regulation that standards be implemented on an *ad hoc* basis, rather than specified in advance, and thus "requirements" in the context of hazardous waste must include closure plans, administrative enforcement orders, corrective action orders, and imminent hazard orders that contain standards determined on an *ad hoc* basis. However, this argument is not precisely accurate. Both the federal and state governments have simply chosen to regulate in an *ad hoc* manner; an *ad hoc* manner of regulation is not necessarily inherent in the subject matter. Thus, the better view of section 6001 is that it does not waive intergovernmental immunity as to closure plans and administrative orders, except to the extent that these plans and orders seek to implement or enforce uniformly applicable, specific and objective state standards.[114]

### 4. The Limitation on the Scope of Solid and Hazardous Waste

The final restriction on the waiver in section 6001 that may be raised by federal employees seeking to avoid state prosecution in-

raised the "uniform, specific and objective" objection in other contexts where states seek to enforce state hazardous waste laws. Certainly, administrative cleanup orders may fail to meet the "uniform, specific and objective" standard. However, in the cleanup context, the possibly broader waiver of intergovernmental immunity in CERCLA §§ 120(a)(1) and (4) must also be considered.

114. This reading of § 6001 is contrary to the reading of the U.S. Department of Justice, which considers corrective action orders to interim status facilities to be the equivalent of corrective action permit requirements. U.S. EPA, FEDERAL FACILITY COMPLIANCE STRATEGY, app. H at 23 (Statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Div., U.S. Justice Dep't). There is a significant difference between permits and orders. Because permit requirements are ascertained in advance, a federal agency can anticipate what actions will be required in advance. Unless corrective action orders at interim status facilities are based on uniform, specific and objective state standards, a federal agency cannot ascertain in advance what corrective actions will be required of it. The uniform, specific and objective condition on the waiver of intergovernmental immunity is especially important in the cleanup context, where a state, by means of an *ad hoc* order, can seek to secure a more extensive clean up than that provided under CERCLA § 120. Through such a device, a state may defeat attempts by the federal government to set priorities on the response actions to cleanup hazardous waste contamination at federal facilities.

volves the limited definition of solid and hazardous waste. In construing federal facilities provisions in other statutes, courts have limited the waiver of immunity to those state laws covering the same subject matter as the federal law. For example, groundwater is not subject to regulation under the Clean Water Act and thus courts have construed the waiver in the CWA federal facilities provision to be limited to state laws regulating surface water,[115] or state laws regulating groundwater with a hydrological connection to surface water.[116]

Similarly, since only solid and hazardous waste is regulated by RCRA, a federal employee could argue that section 6001 does not waive immunity from state regulation of such substances as domestic sewage, irrigation return flows, radioactive wastes, point source discharges regulated under the CWA, and other hazardous materials that are not discarded (i.e., recycled materials).[117] Since Congress has chosen to regulate by environmental media and to provide separate federal facilities provisions for each medium, it is sensible to limit the waiver in such provisions to the medium as defined by Congress.

In combination, these potential restrictions on the waiver in section 6001 mean that intergovernmental immunity remains a potential barrier to some state prosecutions of federal employees for hazardous waste violations. Although sovereign immunity does not bar state prosecutions of federal employees for environmental crimes they personally commit, and intergovernmental immunity has been largely, but not entirely, waived, there are two other jurisdictional barriers — official immunity and federal enclave status — that may impose significant limitations on prosecutions of federal employees for violating state law in their management of hazardous waste at federal facilities.

115. New York v. United States, 620 F. Supp. 374, 383 (E.D.N.Y. 1985); Kelley v. United States, 618 F. Supp. 1103 (W.D. Mich. 1985).

116. McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1988).

117. 42 U.S.C. § 6903(27) (1988). Hazardous wastes are a subset of solid wastes and are only regulated under RCRA if they meet the definition of solid waste. 42 U.S.C. § 6903(5) (1988). Note that the meaning of discarded materials in the definition of solid waste does not include some recycled materials. American Mining Congress v. EPA, 824 F.2d 1177, 1186 (D.C. Cir. 1989). *See also* Note, *Solid Waste and Recycled Materials Under RCRA: Separating Chaff from Wheat*, 16 ECOLOGY L.Q. 623 (1989).

### E. *The Official Immunity of Federal Employees from State Criminal Prosecution*

The seminal case of *In re Neagle*[118] established the authoritative standard for determining the immunity of a federal officer to state criminal prosecution.[119] In *Neagle*, the Supreme Court held that the Supremacy Clause[120] authorizes federal courts to prevent state authorities from prosecuting federal officers for committing acts authorized or required by federal law. The court held that a U.S. deputy marshal, deputized to defend a Supreme Court Justice from violent attacks, could not be prosecuted by California for killing an unhappy litigant who threatened, and then attacked, the Justice. The Court determined that the Attorney General had properly executed his duties in directing the U.S. Marshal to deputize Neagle for that purpose, that Neagle was therefore authorized to act as a marshal, and that as a marshal Neagle had authority to use force, if necessary, to protect the justice. The Court stated that:

> if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act, he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the state, or of any other authority whatever.[121]

118. 135 U.S. 1 (1890).

119. Scholarly commentary on *Neagle* and its progeny is extremely limited and virtually no analysis has been attempted of the problem of state prosecution of federal officers. The Public Lands Law Review Commission (PLLRC), in reviewing alternative means to maintain adequate federal control of federal activities other than exclusive federal enclave status, briefly discussed both intergovernmental immunity and official immunity from criminal prosecution. *See* PUBLIC LAND LAW REVIEW COMMISSION, FEDERAL LEGISLATIVE JURISDICTION 43-47 (1969).

120. U.S. CONST. art. VI, cl. 2. The Supreme Court in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), enunciated the principle of supremacy: "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them." 17 U.S. at 426. Applying it to Maryland's attempt to tax the Bank of the United States, Chief Justice Marshall stated, "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436.

121. 135 U.S. at 75.

The Supreme Court therefore affirmed the release of the marshal under a writ of habeas corpus prior to his trial by the state.

The sole purpose of immunizing federal employees from state prosecution is to protect the supremacy of the federal government over the states. Thus, the Court in *Neagle* quoted *Tennessee v. Davis*,[122] regarding the significance of official immunity:

> [T]he general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers; it can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. . . . No state government can exclude it from the exercise of any authority conferred upon it by the Constitution; obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.[123]

Modern cases applying the *Neagle* principles approach the question of official immunity from state prosecution as a two part test.[124] First, was the federal employee performing an act that he was authorized to do by federal law? Second, was the federal employee doing no more than was necessary and proper for him to do in the performance of the authorized act? An examination of subsequent judicial interpretation of the two prongs of the *Neagle* test is critical to determining the extent to which the qualified immunity of federal officers will impede state prosecution of hazardous waste violations by federal employees.

1. Authority to Act

Due to the somewhat ambiguous language of the Court in *Neagle*, the first prong of the *Neagle* standard is susceptible of three differing interpretations: 1) the "mandatory duty" interpretation, 2) the "actual authority" interpretation, and 3) the "scope of duties" interpretation. The mandatory duty interpretation limits a

122. 100 U.S. 257, 262-3 (1879) (quoting Martin v. Hunter's Lessee, 14 U.S. 304, 363 (1816)).

123. 135 U.S. at 61-62.

124. Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988).

federal employee's immunity to circumstances in which the federal employee is under a federal duty to act.[125] The actual authority interpretation immunizes the federal employee's conduct only as long as she has actual authority under federal law to commit the acts for which she is being prosecuted.[126] The scope of duties interpretation extends the federal employee's immunity to any act within the scope of her duties, provided the second "necessary and proper" prong is also satisfied.[127]

Few cases have explicitly considered the choice among these competing interpretations of the first prong of the *Neagle* test. Numerous courts have utilized language suggesting their accept-

125. The first interpretation is suggested by the literal language of *Neagle* which framed the issue in terms of whether Neagle had a duty under the laws of the United States to protect a federal judge from attack. 135 U.S. at 54. The court stated that habeas corpus relief would be available "if it was the *duty* of Neagle, under the circumstances, a duty which could arise only under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him." 135 U.S. at 58 (emphasis added). The court found the requisite duty in a combination of federal and state laws regarding the general duties of marshals: "there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a *duty*." 135 U.S. at 68 (emphasis added).

126. The second interpretation is underscored by the nature of the court's analysis in *Neagle*. Although the court spoke in terms of duty, what it in fact sought to discern was whether Neagle possessed actual authority under federal law to protect a federal judge and to use force to do so. The opinion traced the President's inherent authority to protect federal judges, concluded that the Attorney General exercises such authority, noted the correspondence from the Attorney General authorizing Neagle's deputization, and held that this chain of authority authorized Neagle's actions. 135 U.S. at 63-68. The alternate holding that Neagle's actions were pursuant to a duty imposed by positive law was based on a federal statute *empowering* marshals to act, not establishing a duty to act.

127. The third interpretation is arguably justified by the *Neagle* court's reliance on Tennessee v. Davis, 100 U.S. (10 Otto) 257 (1879), which stated that the federal government:

> only can act through its officers and agents, and they must act within the States. If, when thus acting, *and within the scope of their authority*, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the State, yet *warranted by the federal authority they possess*, and if the general government is powerless to interfere at once for their protection — if their protection must be left to the action of the state court — the operations of the general government may at any time be arrested at the will of one of its members.

135 U.S. 62 (quoting Tennessee v. Davis, 100 U.S. at 262) (emphasis added). Note that the language of *Davis* supports not only the scope of duties interpretation, but, perhaps more strongly, the actual authority interpretation.

It can also be justified by the *Neagle* court's willingness to consider any duty derived from the general scope of an officer's duties to be "law" providing jurisdiction under the habeas corpus statute. 135 U.S. at 59. However, the scope of the habeas corpus statute is not necessarily the proper measure of federal officer immunity — which may logically be narrower.

ance of the mandatory duty interpretation,[128] usually in the context of immunizing a soldier who followed the direct order of a military superior. Thus interpreted, official immunity expresses little more than the doctrine of preemption: where federal law requires an act and state law forbids an act, an actual conflict exists and federal law must prevail. Courts have often refused to give so limited a scope to official immunity. They have properly rejected the mandatory duty interpretation because it fails to recognize that most federal officers do not act in a purely ministerial capacity, but rather within broad grants of discretion. Thus, if federal officers were protected only when they were performing a mandatory duty, the goal of applying the Supremacy Clause to acts of federal officers — to preserve the ability of the federal government to act within its Constitutionally specified realm — would not be achieved. Other courts have summarized the first prong of the *Neagle* standard in a manner that suggests an acceptance of the actual authority interpretation.[129] Either interpretation can be supported by the literal language and analytic approach of *Neagle*.[130]

However, when confronted with an allegation that a federal officer has exceeded his actual authority, the courts in recent years

128. *See, e.g.*, Bosker v. Comingone, 177 U.S. 459, 470 (1900) (affirming discharge of Internal Revenue Agent who, in accordance with federal regulations, refused to release tax information to state authorities). *See also* Pennsylvania v. Thomas, 612 F. Supp. 14, 14-15 (W.D. Pa. 1984) (army reserve officer was immune from prosecution for violating Pennsylvania vehicle weight restriction law where he was acting under direct orders of superior officer and his actions were in direct compliance therewith); Montana v. Christopher, 345 F. Supp. 60, 61 (D. Mont. 1972) (noncommissioned officer who reported failure of lights to his superior who directed him to operate without the lights was immune from prosecution for violating state law); Pennsylvania v. Johnson, 297 F. Supp. 877 (W.D. Pa. 1969) (military policemen acting on orders as federal officers immune from prosecution for assault and battery as they believed their conduct was necessary in performance of their duty); Puerto Rico v. Fitzpatrick, 140 F. Supp. 398, 400 (D.P.R. 1956) (no immunity for violation of local laws where defendant's negligent handling of his vehicle prior to accident was not necessary to the proper performance of his official duties); *In re* Turner, 119 F. 231, 235 (C.C.D. Iowa 1902) (military officer erecting military post under directions of war department not subject to arrest on warrant of state court); State v. Burton, 41 R.I. 303, 306, 103 A. 962, 963 (1918) (in time of war, military officer following instructions of superior officer is not amenable to prosecution for violating state law regulating speed of motor vehicles); Hall v. Commonwealth, 129 Va. 738, 754, 105 S.E. 551, 554 (1921) (U.S. postal service employee engaged in transporting mail subject to prosecution for speed violation, as orders regarding schedules did not require exceeding speed limit).

129. Ohio v. Thomas, 173 U.S. 276, 283 (1889); Massachusetts v. Hills, 437 F. Supp. 351, 353 (D. Mass 1977).

130. *See supra* notes 125-127.

have applied the far more expansive approach to federal officer immunity represented by the scope of duties interpretation.[131] In *Clifton v. Cox*,[132] for instance, the Ninth Circuit held that a federal Bureau of Narcotics agent who shot a fleeing suspect during a drug raid was immunized from state prosecution for second degree murder. The court found that the agent was acting within the general scope of his duties in executing a search warrant, notwithstanding the fact that the warrant was later found to be illegal, the raid used Army equipment in direct violation of federal law, and the victim was shot while fleeing, which constitutes a clear violation of federal regulations governing the use of firearms by Bureau of Narcotics agents.

The scope of duties interpretation, however, is not supported by the cases that preceded *Neagle*[133] nor by the bulk of cases that

131. *See* Kentucky v. Long, 837 F.2d 727, 749-52 (6th Cir. 1988) (affirmed dismissal of state burglary charges against FBI agent who violated FBI rules regarding undercover operations); Clifton v. Cox, 549 F.2d 722, 728-29 (9th Cir. 1977) (fatal shooting by federal narcotics agent during execution of search warrant immunized from state murder prosecution). *See also* Connecticut v. Marra, 528 F. Supp. 381 (D. Conn. 1981), in which an FBI operative who entrapped a city police official in a bribery scheme was immunized from state attempted bribery charge because, although the FBI operative "may have technically exceeded his express authority, he continued to act under the authority of the United States government." *Id.* at 386. The scope of duties interpretation is not a modern invention. An Assistant U.S. Attorney who negligently failed to return subpoenaed county court records was discharged from state contempt charges by the Court in *In re* Leaken, 137 F. 680, 682-83 (S.D. Ga. 1905), because the charges arose from omissions within the scope of his employment. *See also* Isaac v. Googe, 284 F. 269, 270 (5th Cir. 1922) (denying immunity to attorney of court- appointed receiver, who solicited business from creditors of the bankrupt, on the grounds he was acting beyond the scope of his employment); *Ex Parte* Gillette, 156 F. 65, 72 (W.D. Mich. 1907) (military guard who shot bystander in attempting to shoot escaping deserter discharged even if he transcended his authority from misinformation or lack of good judgment).

The lower courts may have drawn comfort in casting a broad cloak of immunity based upon the Supreme Court's willingness to find actual authority in tenuous circumstances. *See* Ohio v. Thomas, 173 U.S. 276, 283-84 (1899) (authority to purchase oleomargarine found in appropriation of monies for rations at disabled veterans' home); *In re* Neagle, 148 U.S. 1, 67-68 (1890) (relying on inherent authority of President to protect federal judges).

There is, however, a hint in recent removal cases such as Mesa v. California, 489 U.S. 121, 134-36 (1989), and North Carolina v. Ivory, 906 F.2d 999, 1001-03 (4th Cir. 1990), that the courts are unwilling to continue to adhere to the scope of duties interpretation.

132. 549 F.2d 722 (9th Cir. 1977).

133. The lower court cases that preceded the Supreme Court's decision in *Neagle* may cast some light on the standard for federal officer immunity intended by the *Neagle* court. The district court in *Ex Parte* Jenkins articulated the extent of official immunity in the following terms:

> If the evidence shall present the case of an imperfect justification; if it shall show that these relators, or any of them, have transcended the rightful limits of their authority, and have wilfully or ignorantly violated the law, no considerations of policy or sympa-

applied federal officer immunity after *Neagle*.[134] Furthermore, application of the scope of duties approach to official immunity in cases such as *Clifton* seems to produce extreme results. Thus, it is difficult to discern why the courts have accepted such an interpretation.[135]

Several factors may have influenced the courts. First, federal officer immunity arose in the procedural context of habeas corpus and removal. It was reasonable for the federal courts to cast the broader net associated with color of office or scope of duties to bring a federal officer within the procedural protection of the federal courts. The error was in extending those concepts to define the extent of federal immunity. Second, to some extent the courts merely borrowed the more familiar concept of official immunity from tort to define federal officer immunity, despite the differing rationales of the two doctrines. Third, the fact that most immunity decisions arise in the law enforcement context led to an intermingling of the law regarding defenses available to law enforcement officers with federal officer immunity.

However, while these factors may explain historically why the courts have chosen the scope of duties interpretation, they fail to provide a doctrinal justification for its adoption. The choice of

> thy will press upon this court to rescue them from punishment, by withholding them from the tribunal which demands their presence. But, on the contrary, if it shall appear before me that they honestly and rightfully sought to execute their writ; that they employed force only because it was needed, and no more than was needed;—they must not be withdrawn from their daily recurring official duties and sent away with the sanction of the court, under whose mandate they have acted, and by whom their action has been approved, to take their trial in a distant part of the country.

13 F. Cas. 445, 452 (E.D. Pa. 1853) (No. 7259). The *Sifford* court stressed the fact that the marshals were under an affirmative duty to make arrests and hold prisoners. *Sifford*, 22 F. Cas. at 108. Other lower court cases predating *Neagle* also involved the duties of federal law enforcement officers. In Roberts v. Jailer, 26 F. Cas. 571 (6th Cir. 1867) (No. 15,463), the Sixth Circuit affirmed the discharge of a special federal bailiff who killed the person he was attempting to arrest. The court held the bailiff was authorized to make the arrest and justified in his use of force in self-defense. *Id.* at 577. The court in *In re* Weeden, 24 F. Cas. 738 (D. Ken. 1877) (No. 14,412), refused to discharge a deputy marshal from state custody who had shot two persons who assaulted him in the course of his service of an arrest warrant. The court denied release because the deputy provoked the assault by insulting a family member of the person being arrested. The court limited federal officer immunity to those actions "done *under* and by *virtue* of the warrant in his hands." *Id.* at 739. Certainly the history of official immunity in the criminal context prior to *Neagle* suggests that the courts did not understand federal officer immunity to excuse otherwise illegal acts within the scope of a federal officer's duties simply because the officer reasonably believed them to be necessary.

134. *See supra* notes 131-32 and accompanying text.

135. See *supra* note 127 for textual justification.

the scope of duties interpretation may reflect an unarticulated policy of the courts to protect well-intentioned federal officers who reasonably, but erroneously, believe their actions are authorized under federal law. The courts appear content to rely upon the "necessary and proper" prong of *Neagle* to mitigate the potential for overreaching conduct by federal officers resulting from the scope of duties interpretation.

2. Necessary and Proper

On first impression, the "necessary and proper" test as articulated by the Supreme Court in *Neagle* appears to mandate an inquiry by the federal court into whether the officer's action was in fact necessary and proper.[136] However, the Court's language after articulating the test gives rise to an ambiguity concerning the meaning of the standard. In one breath, the Court suggests that Neagle is entitled to immunity from state criminal prosecution only if he is correct in his belief that his action is necessary and, in the very next breath, the Court suggests that his belief need only be well-founded.[137] This ambiguity in *Neagle* has manifested itself in a majority and minority position on interpretation of the test to be applied. While a few courts formulate the second prong as an inquiry into whether the federal officer's action was in fact necessary and proper,[138] most courts hold that a federal officer is im-

136. The Supreme Court's test of federal officer immunity was:

> [I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshall of the United States, and *if in doing that act he did no more than what was necessary and proper for him to do*, he *cannot* be guilty of a crime under the law of the state of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever.

In re Neagle, 135 U.S. 1, 75 (1889) (emphasis added).

137. The Supreme Court stated:

> The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; *that Neagle was correct in the belief* that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; *that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim*; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

135 U.S. at 75-76 (emphasis added).

138. *E.g.*, Puerto Rico v. Fitzpatrick, 140 F. Supp. 398, 400 (D.P.R. 1956); City of Norfolk v. McFarland, 145 F. Supp. 258, 260 (E.D. Va. 1956).

mune from state criminal prosecution if he reasonably and honestly believed that his action was necessary and proper to carry out his federal duties.[139] Furthermore, the honesty of the federal officer's belief is more heavily stressed by a majority of courts than the reasonableness. Seemingly unaware of the implications of the choice between the different possible formulations of the test, courts have failed to state reasons for choosing one over the other.

The tendency of courts to stress the subjective element of the second prong of the *Neagle* test,[140] and to focus on honesty rather than reasonableness, has serious consequences for the overall balance of federalism struck by the official immunity doctrine. When the objective element is not given weight, the necessary and proper standard does not seriously limit any federal officer acting within the broad scope of his duties from claiming official immunity. Thus interpreted by the courts, the immunity of federal employees begins to resemble the absolute immunity previously accorded only to limited categories of government officials such as legislators, judges, and prosecutors.[141]

Emphasis on whether an officer honestly believes that his actions are necessary and proper generally would be expected to have two consequences. First, under the principles outlined in *United States ex rel. Drury v. Lewis*,[142] it should lead federal courts to

139. Clifton v. Cox, 549 F.2d 722, 728 (9th Cir. 1977); Kentucky v. Long, 837 F.2d 727, 745 (6th Cir. 1988); *In re* McShane, 235 F. Supp. 262, 274 (N.D. Miss. 1964) ("If . . . petitioner shows . . . that he had an honest and reasonable belief that what he did was necessary in the performance of his duty . . . then he is entitled to the relief [habeas corpus] he seeks.")

140. *Clifton*, 549 F.2d at 728 ("Proper application of this standard does not require a petitioner to show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be."); Brown v. Cain, 56 F. Supp. 56, 58 (E.D. Pa. 1944) ("The inquiry must, therefore, be as to the *honesty* of the relator's belief that the arrest was justified and that the shooting was reasonably necessary to accomplish it.") (emphasis added). This tendency to consider official immunity in subjective terms is surprising in light of the Supreme Court's adoption of a wholly objective test of official immunity in the tort context. Harlow v. Fitzgerald, 457 U.S. 800 (1982). *See also* Anderson v. Creighton, 483 U.S. 635, 638-41 (1987); Malley v. Briggs, 475 U.S. 335, 340-45 (1986); Davis v. Sherer, 468 U.S. 183, 193-96, *reh'g denied*, 468 U.S. 1226 (1984).

141. *See supra* note 62.

142. 200 U.S. 1 (1906). The Court concluded that the issue of whether a soldier was acting within the scope of his federal duties was a question first to be determined by the state. *Drury* involved an army officer who allegedly ordered a soldier to shoot a civilian suspected of stealing from the Army base. The soldier and the officer were both indicted by the state on charges of murder and manslaughter. The court held the district court properly exercised its discretion in deciding not to remove the case from state courts be-

defer questions of immunity to the state courts where a trier of fact would resolve disputes about the state of mind of the federal officer in the case. Second, this greater deference to state sovereignty should be balanced with a broader defense for federal officers. However, until recently, since federal courts have been loathe to apply the principles of *Drury*, there has been a substantial expansion of federal officer immunity. For example, although the Ninth Circuit in *Clifton* actually outlined testimony raising serious factual disputes about the propriety of the federal officer's actions (and thus inferentially about the genuineness of the officer's belief that his actions were necessary and proper), the court upheld the issuance of habeas corpus relief.[143] The Ninth Circuit stated that "[there was] no evidence to support a finding that petitioner was acting outside the scope of his authority or that he employed means which he could not honestly consider reasonable in discharging his duties."[144] Thus, although *Clifton* presented facts quite similar to those in *Drury*, the court's decision was a far cry from the judicial restraint the Supreme Court advocated in *Drury*.

More recently, the Ninth Circuit and other courts have resisted the notion that the Supremacy Clause is "intended to be a shield for 'anything goes conduct' "[145] by federal officers and have denied writs of habeas corpus.[146] These cases do not suggest that a federal officer who reasonably believes that he is acting properly and who is within the scope of his duties may be convicted of state criminal charges, but merely that where the facts establishing that proposition are open to dispute, the proper course is to allow the federal officer to raise his authority as a defense in the state courts.[147]

cause there was a conflict in the evidence as to whether the suspect had in fact been stealing and whether the suspect had surrendered prior to being shot. The court stated, "it is conceded if he had [surrendered], it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by Federal law, and the state court had jurisdiction." 200 U.S. at 8.

143. *Clifton*, 549 F.2d at 730.

144. *Id.*

145. Kentucky v. Long, 837 F.2d 727, 746 (6th Cir. 1988).

146. *See, e.g.*, Morgan v. California, 743 F.2d 728 (9th Cir. 1984).

147. *Long*, 837 F.2d at 752. After a prima facie showing by the federal officer of a basis for immunity, state must make an evidentiary showing sufficient to raise "a *genuine* factual issue whether the federal officer was acting pursuant to the laws of the United States and was doing no more than what was necessary and proper for him to do in the performance of his duties." *Id.*

### 3. Problems with Current Judicial Interpretation of the *Neagle* Test

The "scope of duties" interpretation of the "authority to act" prong of the *Neagle* test essentially provides absolute immunity to any federal employee performing an act related to his job, except to the extent that his action does not meet the second "necessary and proper" prong of the *Neagle* test. Thus, courts have attempted to rely on the second prong of the test to prevent unbridled abuse of the environment by federal employees. This reliance is problematic for the reasons advanced above. First, the utility of the second prong in preventing environmentally damaging conduct by federal officers is limited since the inquiry has been transformed from asking whether the action of the officer was actually necessary and proper to asking whether the officer reasonably believed it was necessary and proper. Second, some courts simply drop the reasonableness inquiry altogether when they evaluate official immunity claims, making the standard equivalent to absolute immunity for federal officers.[148] The problems of reliance on the second prong to prevent untoward results are pointed out by extreme cases like *Clifton*, in which the Ninth Circuit's decision that the officer reasonably believed his actions were necessary and proper is very difficult to rationalize.[149]

### 4. The Limits Imposed on Federal Officer Immunity by RCRA Section 6001

The only reported environmental case involving federal officer immunity from state criminal prosecution presented a classic conflict between a state's protection of its environment and the federal government's ability to conduct military operations.[150] A

148. *E.g.*, *In re* Leaken, 137 F. 680 (S.D. Ga. 1905); *In re* Waite, 81 F. 359 (N.D. Iowa 1897); Massachusetts v. Hills, 437 F. Supp. 351 (D. Mass. 1977).

149. *Clifton*, 549 F.2d at 728-29. In addition, it is unclear that erecting a jurisdictional barrier is the proper means to protect well-intentioned federal officers who either unwittingly or from perceived necessity exceed their authority. Discerning the good intentions that allow assertion of a mistake or necessity defense, which excuses an unauthorized violation of the law, should be a matter for the trier of fact. This is not an appropriate role for either the federal court acting in its removal or habeas corpus jurisdiction, or a state court acting on a demurrer, unless the facts supporting the assertion of those defenses are essentially undisputed. Thus, the strict scrutiny of the invocation of removal and habeas corpus jurisdiction is appropriate. *See supra* note 43.

150. *In re Turner*, 119 F. 231, 232 (S.D. Iowa 1902).

private landowner obtained an injunction from a state court against an Army officer charged with building a sewer from a military base to a small river on the grounds that the discharge would pollute the river.[151] The officer refused to obey the injunction and was arrested for contempt.[152] The federal court discharged the officer pursuant to a writ of habeas corpus on the grounds that a federal officer was not subject to injunction or arrest for following lawful orders. This classic 1902 case obviously predates the federal environmental laws and the waivers of federal immunity that they contain.

The waiver in RCRA section 6001 provides in part that "[n]either the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any state or federal court with respect to the enforcement of any such injunctive relief."[153] This provision authorizes criminal prosecution of federal officers who violate state injunctions regarding solid and hazardous waste disposal. However, by limiting the waiver of immunity to sanctions enforcing injunctive relief, it maintains the existing immunity of federal officers from prosecution under state environmental criminal laws under the *Neagle* principles. The argument dismissed by the court in *Walters*[154] - that such laws are "requirements" to which the United States is subject - is even weaker with respect to criminal prosecution of federal officers, because RCRA section 6001 subjects only federal departments, agencies, and instrumentalities, not federal officers or employees, to substantive and procedural "requirements." Thus, fairly read, RCRA section 6001 currently diminishes federal officer immunity only to the extent that a federal officer may not disobey a state court injunction to comply with state solid and hazardous waste disposal requirements.

At a number of facilities, the United States has agreed to consent decrees that contain specific compliance requirements, such as construction of facilities or improvements in training, to be carried out according to a particular schedule. The United States has also sometimes entered into more broadly worded agreements to comply with state environmental laws. While clearly the United States is liable for contempt sanctions in the event that

151. *Id.*
152. *Id.* at 235.
153. 42 U.S.C. § 6961 (1988).
154. 751 F.2d 977 (9th Cir. 1984). *See supra* notes 88-94 and accompanying text.

those consent decrees are violated, it is less certain that federal officers would be liable for criminal contempt sanctions. The decrees typically recite their applicability to federal officers, employees, and agents, but those officers are not generally parties to the underlying action in their individual capacity.[155] Therefore, while the United States may be held in contempt for the actions of these officers, it is not certain that the individual officers are themselves subject to criminal contempt sanctions.[156]

### F. *Exclusive Federal Enclave Status as a Bar to State Criminal Prosecutions*

Another substantial jurisdictional barrier to state prosecution of federal employees for environmental crimes is the law of federal enclaves. Many federal facilities with serious hazardous waste problems, including the Rocky Mountain Arsenal[157] and numerous active military bases such as McClellan Air Force Base,[158] and Norfolk Naval Shipyard,[159] enjoy exclusive federal enclave status.[160] Several facilities have already been the subject of civil environmental enforcement action.[161] While the United States has only once raised exclusive federal enclave status as a defense to a civil enforcement action under state environmental law and did

155. *See supra* note 28.

156. Courts generally impose contempt penalties upon those in privity to a party only where there is a showing that the person had actual notice of the consent decree. *See* Waffenschmidt v. MacKay, 763 F.2d 711 (5th Cir.), *cert. denied*, 474 U.S. 1056 (1985); SEC v. Ormont Drug & Chemical Co., 739 F.2d 654 (D.C. Cir. 1984); U.S. *ex rel.* Vuitton Et Fils S.A. v. Karen Bags, Inc., 592 F. Supp. 734 (S.D.N.Y. 1984).

157. McQueary v. Laird, 449 F.2d 608, 612 (10th Cir. 1971). The most recent data on the jurisdictional status of all federal installations comes from the General Services Administration. GENERAL SERVICES ADMINISTRATION, INVENTORY REPORT ON JURISDICTIONAL STATUS OF FEDERAL AREAS WITHIN THE STATES (June 30, 1962). While the inventory report was compiled in 1962, there do not appear to have been substantial changes in exclusive federal jurisdiction since that time. The GSA report indicates that Rocky Mountain Arsenal is largely an exclusive federal enclave. *Id.* at 117.

158. *Id.* at 92.

159. *Id* at 804.

160. The jurisdictional status of 70% of the 30 DOD facilities with significant noncompliance status for hazardous waste could be readily identified as reported in the Martone and Landry Memorandum, *supra* note 12. Of those 21 facilities, 12 or approximately 57% are wholly or in large part exclusive federal enclaves. Thus, the jurisdictional status of federal facilities may present a serious problem for state environmental enforcement actions, both civil and criminal.

161. *See supra* note 28.

not pursue that defense to resolution,[162] individual federal employees faced with criminal charges arising out of a facility's environmental violations may not exercise such restraint in the future.

Since millions of acres of federal land, primarily military installations, are areas of exclusive federal jurisdiction,[163] a substantial barrier to state prosecutions may result from federal enclave immunity. States may encounter difficulty enforcing state criminal laws against individuals committing environmental crimes within a federal enclave, whether those individuals are federal employees or not. For example, in *New Jersey v. Ingram*,[164] the court held that a state could not prosecute a defendant who was not a federal employee for dumping hazardous wastes on lands owned by the U.S. Army Corps of Engineers because the lands constituted an exclusive federal enclave.[165]

### 1. The General Law of Exclusive Federal Enclaves

Ordinarily, states have complete jurisdiction over the land within their exterior boundaries. Areas of exclusive federal legislative jurisdiction ("exclusive federal enclaves")[166] are the exception to this rule. In such areas, state criminal law may not apply.[167] Exclusive federal enclaves arise under three circumstances: (1) a state affirms retention of exclusive federal jurisdiction at the time it is admitted to the Union; (2) land is acquired (by purchase or condemnation) by the United States for purposes within the meaning of the Enclave Clause (Art. I, § 8, cl. 17) and the state consents to the acquisition; or (3) there is a cession of jurisdiction to the United States by the state after statehood.[168]

162. United States v. Air Pollution Control Bd. of State of Tennessee Dep't of Health and Env't, No. 3:88-1030 (complaint filed Dec. 8, 1988).

163. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 172 (1987).

164. 226 N.J. Super. 680, 545 A.2d 268 (Law Div. 1988).

165. The land had been acquired by the United States for federal purposes and the state had consented to the acquisition. 226 N.J. Super. at 688-690, 545 A.2d at 273-74.

166. ANTIEAU, MODERN CONSTITUTIONAL LAW, § 12:66 (1969). *See also* North Dakota v. United States, 110 S. Ct. 1986 (1990) (Scalia, J., concurring); Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, (1988); Black Hills Power & Light Co. v. Weinberger, 808 F.2d 665, 668 (8th Cir. 1987), *cert. denied*, 484 U.S. 818 (1987).

167. For a brief discussion of the criminal law applicable to exclusive federal enclaves, see PLLRC, *supra* note 69, at 63-66.

168. *See* Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (post-statehood cession); United States v. McBratney, 104 U.S. 621 (1881) (purchased property); Arizona v. Manypenny, 445 F. Supp. 1123 (D. Ariz. 1977), *rev'd on other grounds*, 672 F.2d 761 (9th

As a general rule, the state law in effect at the time of the cession of jurisdiction remains in effect and becomes the federal law applying to the federal enclave, but does not change as state law subsequently changes.[169] Congress may, of course, opt to assimilate changes in state law into federal law as was done in the Assimilative Torts Acts[170] and the Assimilative Crimes Act,[171] thus adopting what Professor Tribe has called a policy of "dynamic conformity."[172] However, assimilation of state law as federal law within federal enclaves does not confer jurisdiction upon state prosecutors or state courts.[173] Although the United States would be able to prosecute federal employees in federal court for violation of assimilated state environmental laws, the state would not.

Because most federal enclaves were acquired prior to the enactment of state environmental criminal laws,[174] those laws ordinarily will not apply in exclusive federal enclaves and the enclave status will preclude state prosecutions. However, even in exclusive federal enclaves, the general inapplicability of state environmental criminal law may be overcome by (1) prior state reservation of criminal jurisdiction or (2) partial retrocession of federal jurisdiction.[175] In addition, the Assimilative Crimes Act may form the basis for federal prosecution of state environmental crimes.

Cir. 1982) (discussing various exceptions to state territorial jurisdiction), *cert. denied*, 459 U.S. 850 (1982).

169. Arlington Hotel v. Fant, 278 U.S. 439 (1929); Paul v. United States, 371 U.S. 245 (1963).

170. 16 U.S.C. § 457 (1988).

171. 18 U.S.C. § 13 (1988).

172. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 329 (2d Ed. 1988).

173. 18 U.S.C. § 3231 (1988) (federal district courts have exclusive jurisdiction over federal crimes). *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 213 (1987) (states have no authority to prosecute offenses under the federal Organized Crime Control Act); Graham v. Brewer, 295 F. Supp. 1140 (N.D. Ala. 1968) (no prosecution in state court under 18 U.S.C. § 13).

174. Many federal enclaves were acquired during the 19th century. Examples include Fort Lincoln Military Reservation, North Dakota (acquired 1898); Puget Sound Navy Yard, Washington (acquired 1891); and Fort Leavenworth, Kansas (exclusive jurisdiction granted 1875).

175. "Retrocession" is a term of art in federal enclave law referring to the return of territorial jurisdiction to a state after jurisdiction has been ceded by a state to the United States. A "partial retrocession" refers to a return of jurisdiction over certain subject matter to the state, although the United States retains jurisdiction as to other subjects and the land remains an exclusive federal enclave.

### 2. State Reservations of Criminal Jurisdiction

States may reserve jurisdiction over certain subject matters at the time of state consent to federal acquisition of state territory[176] or at the time of state cession of jurisdiction.[177] In such cases consents and cessions are strictly construed in favor of retention of state sovereignty.[178] Nevertheless, reservations of jurisdiction may be quite narrow. In particular, one common form of reservation, which reserves to the state "the administration of the criminal laws," must be carefully distinguished from a reservation of general criminal jurisdiction.[179] These reservations have been construed to reserve to the state only a right to serve criminal process on persons within the enclave for crimes committed elsewhere in the state, not the right to exercise general criminal jurisdiction.[180]

### 3. Partial Retrocession of Federal Jurisdiction Over Environmental Crimes

Although Congress has exclusive legislative jurisdiction within federal enclaves, it can return a portion of that legislative power to the state by means of a partial retrocession, as it has with respect to taxation[181] and to workers compensation laws.[182] Retrocessions return both legislative and prosecutorial power to the states. To be effective, however, such grants of territorial sovereignty must be explicit.[183]

176. Paul v. United States, 371 U.S. 245, 268 (1963).

177. States may qualify a cession of jurisdiction "in accordance with agreements reached by the respective governments." James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99 (1940). For state cessions occurring after enactment of 40 U.S.C. § 255 in 1940, the federal government must "indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such state or in such other manner as may be prescribed by the laws of the state where such lands are situated." State v. Ingram, 226 N.J. Super. 680, 690, 545 A.2d 268, 274 (Law Div. 1988) (quoting 40 U.S.C.A. § 255 (1988)).

178. United States v. Brown, 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977).

179. Humble Pipe Line Co. v. Waggonner, 376 U.S. 369, 371 n.3 (1964); *see also* State *ex rel* Jones v. Mack, 23 Nev. 359, 363, 47 P. 763, 764 (1897).

180. *Humble Pipe Line Co.*, 376 U.S. at 371-72.

181. 4 U.S.C. §§ 104-10 (1988).

182. 40 U.S.C. § 290 (1988).

183. *See* INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES (1954); United States v. Lewis Area Sch. Dist., 539 F.2d 301, 307 (3rd Cir. 1976).

Interestingly, in *State v. Ingram*,[184] the only reported case that has considered whether section 6001 (or any other federal facility provision) constitutes a partial retrocession, the New Jersey court concluded in the affirmative, though it found that the retrocession was limited to state programs authorized by EPA.[185] Since the particular state program at issue in *Ingram* was not authorized at the time the criminal acts were committed, the court held that the state had failed to prove that it possessed the territorial jurisdiction necessary to enforce its criminal laws.[186] Yet, if section 6001 is in fact a partial retrocession, whether EPA has authorized the state program should be irrelevant. Nothing in section 6001 appears to limit the applicability of state law to authorized state programs.[187]

As *Ingram* is the only case to have confronted the issue to date, it remains an open question whether section 6001 is a partial retrocession of criminal jurisdiction. On its face, the language of section 6001 appears to subject federal departments and agencies having jurisdiction over any federal facility to state law, thus effecting a partial retrocession as to those facilities that enjoy exclusive federal enclave status. Section 6001 states that "[e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having *jurisdiction* over any solid waste management *facility or disposal site*. . ." is subject to certain federal, state, and local requirements. (emphasis added). The term "jurisdiction" could be read to refer merely to whether the federal agency possesses management re-

184. 226 N.J. Super. 680, 545 A.2d 268 (Law Div. 1988).

185. *Id.* at 687, 545 A.2d at 272.

186. *Id.* at 691, 545 A.2d at 275.

187. Note that the United States has never argued that § 6001 or any other environmental federal facility provision waives sovereign immunity or federal supremacy only for state laws under authorized state programs. The United States has enjoyed mixed success with the far more modest proposition that federal facility provisions do not waive sovereign immunity as to state environmental laws only tangentially related to the subject matter of the provision. The Sixth Circuit has embraced such a distinction between approved and unapproved state programs in the context of the waiver of sovereign immunity in § 313 of the Clean Water Act. Ohio v. Dep't of Energy, 904 F.2d 1058 (6th Cir. 1990). However, in finding a waiver of sovereign immunity for civil penalties under federally approved state programs, the Sixth Circuit relied on the express language of § 313 limiting civil penalties to those 'arising under Federal law.' RCRA § 6001 contains no such express reference to civil penalties. Indeed, the Sixth Circuit declined to read § 6001 as a waiver of sovereign immunity as to civil penalties in part because of the absence of protection of the United States from unapproved state laws. The Sixth Circuit, however, held that the RCRA citizen suit provision at § 7002, 42 U.S.C. § 6972, did provide such a waiver.

sponsibility within the federal government, and not to affect in any manner the state's legislative and prosecutorial jurisdiction over federal facilities that constitute exclusive federal enclaves. In light, however, of the evident Congressional intent to subject federal facilities to state law, the better reading is that section 6001 constitutes a partial retrocession of legislative jurisdiction.

Even assuming that section 6001 is read as a partial retrocession, another question arises. Is the partial retrocession a retrocession of legislative and prosecutorial jurisdiction, or merely of legislative jurisdiction? If the distinction drawn between "requirements" and "means of enforcement" by the Ninth Circuit in *California v. Walters*[188] is followed, then section 6001 will not be interpreted as having retroceded prosecutorial jurisdiction, except as to suits for injunctive relief and sanctions to enforce injunctive relief. On the other hand, if the analysis adopted by district courts in *Ohio v. U.S. Department of Energy*[189] and in *Maine v. Navy*[190] is followed, then section 6001 will be interpreted as making state means of enforcement, including state criminal prosecution, applicable to federal facilities.[191]

### 4. Prosecution Under the Assimilative Crimes Act

The Assimilative Crimes Act[192] provides that, where there are gaps in the substantive federal criminal law applicable to an exclusive federal enclave, offenses defined by state criminal law will be assimilated into federal law and become federal crimes. Persons who commit such crimes within a federal enclave are thus

188. 751 F.2d 977, 978 (9th Cir. 1984). *See also* Mitzelfelt v. Dep't of Air Force, 903 F.2d 1293 (10th Cir. 1990) (distinguishing between "requirements" for which sovereign immunity waived and "process or sanctions" such as civil penalties for which sovereign immunity not specifically waived by § 6001).

189. 689 F. Supp. 760, 764 (S.D. Ohio 1988), *aff'd on other grounds*, 904 F.2d 1058 (6th Cir. 1990). The Sixth Circuit did not agree with the district court's reading of § 6001 and held that § 6001 does not waive sovereign immunity as to all state means of enforcement. However, it did hold that § 7002, 42 U.S.C. § 6972, does waive sovereign immunity as to civil penalties.

190. 702 F. Supp. 322, 330 (D.Me. 1988).

191. *See supra* notes 94-96 and accompanying text.

192. 18 U.S.C. § 13. The Assimilative Crimes Act applies to the "special maritime and territorial jurisdiction of the United States" as defined in 18 U.S.C. § 7, which includes:

> (3) Any land reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

subject to prosecution by the United States in federal district court.

In any attempt to prosecute state environmental crimes under the Assimilative Crimes Act, a preliminary question is, of course, whether there is any gap in federal environmental criminal law to be filled.[193] State environmental criminal statutes parallel federal environmental criminal statutes, and thus gaps may be rare.[194] Furthermore, to the extent that a state environmental criminal statute is simply broader than the parallel federal statute, the courts may be reluctant to apply the broader state law because the Assimilative Crimes Act does not permit the redefinition and expansion of federal offenses.[195] Additionally, even if a state's environmental criminal laws were deemed assimilated into federal law, it is questionable whether the Assimilative Crimes Act is intended to accomplish wholesale assimilation of the complex regulatory schemes that make up many state environmental laws. But if these parts of state laws are not assimilated, state criminal laws that seek to enforce state regulatory schemes would be difficult to assimilate. Thus, it is unlikely that the Assimilative Crimes Act expands the environmental criminal laws applicable to exclusive federal enclaves.

In sum, there are significant jurisdictional obstacles to state prosecution of federal officers for environmental crimes. While sovereign immunity does not bar state prosecution of federal officers in their personal or individual capacity, it does prevent prosecution in their official capacity where the relief sought is relief against the United States. Intergovernmental immunity also prohibits state prosecutions except to the extent that intergovernmental immunity is waived by RCRA section 6001. While the waiver in section 6001 is seemingly broad, it, like all waivers of intergovernmental immunity, must be narrowly construed. The

193. United States v. Davis, 845 F.2d 94, 96 (5th Cir. 1988).

194. Federal environmental statutes generally place primary responsibility for implementation and enforcement of pollution control programs in the hands of the states while charging EPA with responsibility for prescribing minimum standards for such state program and for implementing a federal program unless the state program meets those standards. Thus, the federal and state programs tend to be quite similar. *See, e.g.*, 42 U.S.C. § 6926(b) (1988) (state hazardous waste program authorization). However, even in states with approved programs, EPA retains residual enforcement authority. United States v. Conservation Chemical Co., 681 F. Supp. 1394 (W.D. Mo. 1988). *See also* 42 U.S.C. § 6928 (1988) (RCRA federal civil and criminal enforcement provision).

195. Williams v. United States, 327 U.S. 711, 717 (1946).

residual intergovernmental immunity left after the waiver in section 6001 bars state prosecutions if (1) the subject is not regulated under RCRA, (2) the requirements violated were not uniform, specific, and objective, or (3) the state seeks to prosecute a federal employee under circumstances or in a manner in which it would not prosecute other persons.

Official immunity, which is not addressed by the waiver in section 6001, is an even greater barrier. It blocks state prosecution of federal officers whenever they are acting within the scope of their duties and reasonably believed that their action was necessary and proper. Finally, federal enclave status poses a further barrier to state prosecutions. While section 6001 should be read as a partial retrocession of jurisdiction, it may only retrocede legislative and not prosecutorial jurisdiction if the distinction drawn in *Walters* between "requirements" and "means of enforcement" is followed. Thus, in order for states to prosecute federal officers effectively, the jurisdictional barriers against such prosecutions must be overcome by either judicial reinterpretation of the various jurisdictional doctrines and of section 6001, or by legislative action to broaden section 6001.

## III. Jurisdictional Barriers to Federal Criminal Enforcement of Federal Employees

### A. *Federal Prosecution of Federal Employees for Environmental Crimes*

Although the federal government began prosecuting environmental crimes in 1970,[196] it took nearly two decades before the first federal prosecution of a federal employee for environmental violations occurred.[197] Of the criminal investigations that have been initiated, only three have resulted in indictments.[198]

196. Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,065-66 (March 1985).

197. Some environmental criminal prosecutions by USAO may have occurred without the knowledge of the Environmental Crimes Section due to the decentralized nature of prosecutorial functions within the U.S. Department of Justice. *See supra* note 41 and accompanying text.

198. The first federal criminal case tried against a federal employee involved three federal employees charged with the improper disposal of hazardous wastes from a prison industrial program in Texas. The government indicted the manager of the program, the business manager of the program, and a foreman responsible for the disposal of hazardous waste for the program. The government alleged that the three employees disposed of hazardous waste at a site without a permit because that was the quickest and easiest way to dispose of the waste and the program was facing an upcoming state inspection. The gov-

One case tried against federal employees, *United States v. Dee*,[199] drew substantial attention because it involved the first widely reported indictment brought against federal employees under federal environmental laws and because it implicated three relatively high level government employees.[200] It is also the only reported case in which federal officials have attempted to invoke federal officer immunity and federal enclave status as defenses to a federal environmental prosecution. *Dee* involved the improper storage and disposal of hazardous waste and negligent discharge of pollutants into navigable waters at the Chemical Research and Development Command (CRDC) located at Aberdeen Proving Grounds. A five-count indictment charged the Director of the CRDC Munitions Directorate, his immediate subordinate (the Chief of the Productability Engineering and Technology Division of the CRDC), and the latter's immediate subordinate (the Director of a research facility called the Pilot Plant), with four felony RCRA violations and one misdemeanor CWA violation.[201] The

ernment alleged that the foreman formed an unlicensed hazardous waste disposal business, secured a government contract from the program without competitive bidding, and disposed of the waste in his backyard without a permit. The defendants were acquitted by a jury. United States v. Kruse, No. A-873-CR115 (W.D. Tex.).

The second indictment was against a federal civilian employee at Ft. Drum, New York, for disposing of 37 five-gallon cans of waste into a pond. The Ft. Drum employee was charged with four counts of improper disposal of hazardous wastes under RCRA, 37 counts of discharge of pollutants into navigable waters without a permit under CWA, and two counts of failure to report a release of hazardous substances under CERCLA. The employee was convicted by a jury of the two CERCLA counts and acquitted on the remaining 41 counts. United States v. Carr, Crim. No. 88-0036 (N.D.N.Y. Dec. 18, 1988), *appealed on other grounds*, 880 F.2d 1550 (2d Cir. 1889). Imposition of prison sentence was suspended for one year and he was fined $300.

199. Crim. No. HAR-88-0211 (D. Md. Feb. 23, 1989). It should be noted that Maryland had an authorized hazardous waste program authorized by EPA at the time the actions in United States v. Dee occurred. This suggests that under the rationale of *Ingram*, the federal enclave status of Aberdeen Proving Ground would not have been an impediment to state prosecution of the individual federal employees in the *Dee* case. However, the state Attorney General's office, which originally developed the Aberdeen case, did not bring the charges because of perceived jurisdictional problems. Instead, the state's prosecutor left the state attorney general's office and became a federal prosecutor in order to bring the indictment without encountering jurisdictional obstacles.

200. Dee was a senior federal executive; Lentz and Gebb were both high level civil service managers. Each of the defendants had a degree in chemical engineering.

201. The RCRA charges arose from violations at two CRDC buildings, the Pilot Plant and the "Old Pilot Plant." Count One charged defendants with knowingly causing the unpermitted storage and disposal of an ignitable nerve gas at the Pilot Plant. Count Two charged defendants with knowingly causing the unpermitted storage and disposal of discarded laboratory chemicals in storage buildings near the Pilot Plant. Count Three charged defendants with knowingly causing the unpermitted treatment and disposal of

government had a strong case factually,[202] and the defendants were ultimately convicted,[203] but on the way to the conviction the government was confronted with thorny legal questions concerning the ability of the United States to prosecute its employees for violation of environmental laws.

Prior to trial, the *Dee* defendants filed a motion to dismiss[204] on the ground that the indictment failed to allege that the defendants acted in other than their official capacities with respect to the violations charged.[205] The district court denied the motion to

numerous waste chemicals by directing employees to dump them into sumps at the Pilot Plant. Count Four charged defendants with causing the unpermitted storage and disposal of numerous abandoned laboratory chemicals at the Old Pilot Plant.

The Clean Water Act count (Count Five) charged each of the three defendants with negligently causing the discharge of a pollutant into navigable waters without a permit. The charge arose from a spill that occurred when a tank of hydrosulfuric acid at the Pilot Plant sprung a leak, releasing several hundred gallons of acid through a deteriorated dike into nearby Canal Creek, which drains into the Chesapeake Bay. The spill resulted in a fish kill. The negligence charge rested on evidence that defendants knew that the dike required repairs, and that they failed to respond quickly enough to the spill. The jury was hung with respect to Count Five as to all three defendants, and they were therefore acquitted of that charge.

202. The RCRA charges rested on evidence that defendants were warned repeatedly by Army safety inspectors and consultants that improper storage and handling of chemicals at the Pilot Plant and the Old Pilot Plant posed a significant hazard. The prosecution presented evidence that hazardous conditions were created by incompatible storage of hundreds of leaking containers of abandoned chemicals. Evidence presented by the United States indicated that conditions in some storage areas were so hazardous that clean-up personnel could enter them only with self-contained breathing equipment. The government's evidence also indicated that defendants were advised repeatedly of the Army regulations that required compliance with RCRA. According to the government, defendants either failed to correct the problems, or actively directed subordinates to dispose of the chemicals in violation of RCRA. Defendants did not present any credible evidence that they sought, or were denied, funds to correct the problems. Rather, the government's evidence indicated that defendants assigned a relatively low priority to environmental compliance. DeMonaco, Criminal Liability, Presentation at Dynamics of Environmental Law (April 26, 1989).

203. The jury found Dee guilty of Count Four and hung on the other three RCRA counts. They found Lentz guilty of Counts One, Three and Four; and hung on Count Two. They found Gepp guilty of Counts One, Two and Three, and hung on Count Four.

204. Memorandum in Support of Defendants' Joint Motion to Dismiss Counts of Indictment Alleging Violations of the Resource Conservation and Recovery Act ("Joint Motion to Dismiss") at 2, United States v. Dee, Crim. No. HAR-88-0211 (D. Md. Feb. 23, 1989).

205. *Id.* at 2. Defendants made three arguments at the district court level. First, they argued that federal employees acting in their official capacity are not "persons" as defined by RCRA. *Id.* at 10-13. Second, they contended that, because Maryland is authorized to operate its hazardous waste program in lieu of the federal program, any hazardous waste violation is a violation of state law, not federal law. *Id.* at 13-19. Continuing in that logic, defendants argued that because the applicable environmental criminal laws are state laws and since Aberdeen Proving Ground is an exclusive federal enclave and state criminal laws

dismiss without issuing a written opinion and the Fourth Circuit rejected the defendants' interlocutory appeal, also without opinion. The defendants' federal officer immunity defense was raised in the post-conviction appeal that followed. The defendants argued that federal employees "carrying out official duties" and "acting within the scope of their employment" are not "persons" as defined by RCRA section 1003[206] and thus are not subject to RCRA except to the extent that the RCRA federal facility provision so provides.[207] They also contended that because section 6001 only provides for civil injunctive relief, they could not be criminally prosecuted.[208]

The government responded to the "person" argument by noting that federal officers, like corporate officers, are "individuals" and thus "persons" subject to RCRA.[209] It met the defendants'

do not apply, defendants could not be prosecuted for state hazardous waste violations on such a federal enclave. Third, they argued that federal employees acting within the scope of their employment are immune from criminal prosecution because RCRA only allows for injunctive relief against the United States and federal employees acting in their official capacity. *Id.* at 19-33.

With respect to the "scope of duties" defense, the government argued first that there is no authority for that defense in federal criminal cases and second that it is impossible for a federal employee to act within the scope of his duties when committing environmental violations because federal employees are never authorized to violate federal law. Government's Consolidated Responses to Defendant's Motions at 4-5, 8-14; Government's Response to Defendants' Reply Memorandum in Support of Motion to Dismiss Counts I Through IV; Government's Motion to Dismiss Appeal and Opposition to Appellants' Motion to Stay at 8-15.

The government responded to the federal enclave argument by noting that defendants were charged with violations of federal law, storage and disposal of hazardous waste without a permit under subchapter C of RCRA, not violations of state law. Government's Motion to Dismiss Appeal and Opposition to Appellant's Motion to Stay at 5-8; 42 U.S.C. § 6928(d)(2)(A) (1988). Defendants replied that RCRA § 6001 prevents criminal prosecutions under state or federal law on federal enclaves, citing the *Walters* case. Defendants' Reply Memorandum in Support of Their Joint Motion to Dismiss Counts I Through IV of the Indictment at 6-16. The government's surreply argued that the *Walters* court erred in deciding that § 6001 excluded criminal sanctions, relying on Ohio v. United States Dep't of Energy, 689 F. Supp. 760 (S.D. Ohio 1988).

206. RCRA § 1003, 42 U.S.C. § 6903 (1988), defines "person" to mean "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body."

207. Brief for Appellants William Dee, Robert Lentz, and Carl Gepp at 24-26, United States v. Dee, 912 F.2d 741 (4th Cir. 1990).

208. *Id.* at 26-30. Although they suggest that only civil sanctions are available under § 6001, presumably defendants recognize that § 6001 might permit criminal contempt sanctions also.

209. Brief for United States at 27, United States v. Dee, 912 F.2d 741 (4th Cir. 1990).

section 6001 argument by pointing out that sovereign immunity and official immunity are inapplicable to federal prosecutions.[210] Alternatively, the government contended that the federal employees were not acting within the scope of their authority because they have no authority to disregard federal criminal laws.[211]

The Fourth Circuit dealt summarily with the issues raised by the parties, declining to address at any length either the doctrinal arguments made or the confusion manifest in the briefs.[212] Instead, the court simply held that the defendants were not charged in their official capacity, but rather as individuals, and that there was no official immunity to prosecution under federal law.[213] Nevertheless, as the discussion below indicates, the decision reached by the court does stand on firm doctrinal ground.

### C. *Extension of Barriers Against State Prosecution of Federal Employees to Federal Prosecutions*

In considering jurisdictional barriers to federal enforcement efforts, the question arises whether the extension of barriers against state prosecution of federal employees to federal prosecutions of such employees would be justified. Close examination reveals that current doctrine does not logically require such an extension, that the policy considerations underlying the jurisdictional barriers do not justify any attempt to extend those barriers to federal prosecutions, and that section 6001 does not enlarge those doctrines to prevent federal prosecutions of federal officers.

As in the state context, sovereign immunity does not bar federal prosecution of a federal employee in his personal capacity. It is only because an action against an employee in his official capacity is, in essence, an action against the sovereign that sovereign

210. *Id.* at 29-32.

211. *Id.* at 32.

212. United States v. Dee, 912 F.2d 741 (4th Cir. 1990). Although the government's argument that official immunity does not apply because of the federal nature of the prosecution was well-founded, the government's contention that federal employees violating federal environmental laws cannot be acting within the scope of their duties is erroneous given the dominant interpretation of official immunity under *Neagle*. The "scope of duties" interpretation parallels the official immunity concept in the tort context and thus the scope of duties question cannot be answered by a mere assertion that an officer violated federal law. If it were, then there would be no qualified immunity of a federal officer in constitutional tort actions, for such officers are always alleged to have violated the supreme federal law. Furthermore, official immunity has been granted repeatedly in cases where the federal officer violated federal law. *See supra* note 139 and accompanying text.

213. United States v. Dee, 912 F.2d at 745.

immunity bars prosecution of a federal employee in his official capacity by state or federal prosecutors.[214]

The doctrinal basis for refusing to extend intergovernmental immunity to federal prosecutions initially appears equally obvious. Intergovernmental immunity prevents state regulations from applying to federal facilities, but does not prevent federal control of federal facilities. However, although there is no intergovernmental immunity barrier to federal regulation of federal facilities, the issue of the application of intergovernmental immunity is not quite that simple. Federal hazardous waste laws and regulations do not apply to federal facilities except through RCRA section 6001, since the United States is not a "person" under RCRA section 1003(15) and RCRA requirements apply only to "persons."[215] Thus, the arguable limits on the substantive applicability, created by the gaps in the waiver of intergovernmental immunity in section 6001, that have been previously discussed — the limitations to disposal, the equal treatment restriction, the specific and objective requirement, and the exclusions from the definition of solid waste — would be equally applicable to federal prosecutions. Federal prosecutions that implicate these limits may be barred, not by intergovernmental immunity or by the immunity of the federal officer, but by the fact the federal facility at which the alleged violation occurred is not subject to the substantive federal hazardous waste law or regulation.

The question of whether official immunity bars federal prosecutions is more easily answered. Although the Supreme Court has not expressly decided the issue, it has several times indicated that there is no official immunity from criminal prosecution under federal law.[216] It stated in *O'Shea v. Littleton* that:

214. *See* United States v. Dee, 912 F.2d 741 (4th Cir. 1990). Although the idea that the sovereign would not prosecute himself might appear doctrinally self evident, it is not politically obvious. There have been recurrent suggestions that EPA or an independent federal entity should be responsible for taking civil and criminal enforcement actions against federal facilities. *See, e.g.*, H.R. 3847, 101st Cong., 2d Sess., § 602 (1990). It is beyond the scope of this article to set forth the separation of powers arguments that arguably prevent such a result and the policy arguments that can be mustered on either side. For a recent article discussing this recurrent theme in the federal facilities controversy, see Steinberg, *Can EPA Sue Federal Agencies*, 17 ECOLOGY L.Q. 317 (1990).

215. 42 U.S.C. § 6903(15) (1988); 42 U.S.C. § 6938 (1988).

216. O'Shea v. Littleton, 414 U.S. 488, 503 (1974); Gravel v. United States, 408 U.S. 606, 627 (1972).

> [W]e have never held that the performance of duties of judicial, legislative or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. On the contrary, the judicially fashioned doctrine of official immunity does not reach "[s]o far as to immunize criminal conduct proscribed by an Act of Congress."[217]

In *Gravel v. United States*,[218] the Court stated even more broadly that "the so-called executive privilege has never been applied to shield executive officers from prosecution for crime."[219] Indeed, a claim by federal officers of immunity from federal prosecution is somewhat frivolous in light of almost 100 years of federal prosecution of federal officials for various financial improprieties[220] and other abuses of their office.[221] Federal officers are also subject to federal prosecution for violating federal laws not uniquely associated with their status as federal officers. For instance, the Watergate era led to prosecution of federal officers for such crimes as conspiracy,[222] obstruction of justice,[223] false statements,[224] deprivations of civil rights[225] and conspiracy to deprive civil rights.[226] There simply is no authority for the proposition that federal officers enjoy any official immunity from federal prosecution.[227]

217. 414 U.S. at 503 (1973) (quoting Gravel v. United States, 408 U.S. 606, 627 (1972)).

218. 408 U.S. at 606.

219. *Id.* at 627.

220. *See, e.g.*, United States v. Conlon, 661 F.2d 235 (D.D.C. 1981), *cert. denied*, 454 U.S. 1149 (1982); United States v. Irons, 640 F.2d 872 (7th Cir. 1981); United States v. Scott, 74 F. 213 (D. Ky. 1895).

221. For example, federal law makes improper searches by federal officers punishable as a crime. 18 U.S.C. §§ 2234-36 (1988). Less than a dozen prosecutions have been reported under these sections. There is a common law tradition of holding public officers responsible for abuses of their office, which was reflected in federal laws criminalizing extorsive and oppressive behavior by federal officers. *See* United States v. Deaver, 14 F. 595, 597 (W.D.N.C. 1882).

222. 18 U.S.C. § 371 (1988).

223. 18 U.S.C. § 1503 (1988).

224. 18 U.S.C. §§ 1001, 1621, 1623 (1988). *See* United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976).

225. 18 U.S.C. § 242 (1988).

226. 18 U.S.C. § 241 (1988); *see* United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976).

227. United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976) (mistake of law), and United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976) (implicitly delegated power to use questionable national security exception to warrant requirement), raise related but separate issues.

It is equally clear that this result is appropriate given the policy rationale underlying official immunity. The most significant reason for granting official immunity is the potential interference of criminal prosecutions with federal officers' willingness to vigorously carry out their duties, and thus the potential for interference with the operation of the federal government. Judged solely by this criterion, official immunity from federal prosecution is unwarranted. The adverse impact of the Executive Branch's decision to prosecute one of its own can be viewed, at most, as a self-inflicted wound.[228]

Finally, the impact of federal enclave status on federal prosecutions can be dismissed in just a few words. While federal enclave status conceivably adds some assimilated state crimes to the federal crimes available to federal prosecutors, it does not bar federal prosecutions.

Though a ban on federal prosecutions is not justified under the four jurisdictional doctrines, the question raised by the *Dee*[229] defendants remains:[230] Does section 6001, by stating that federal officers shall not be immune from sanctions to enforce civil injunctive relief, imply that they shall be immune from other sanctions? The second sentence of section 6001, which states that "[n]either the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any state or federal court with respect to the enforcement of any such injunctive relief," does not expressly create such immunity. Furthermore, a strong argument can be made that such immunity should not be implied. First, it is not necessary to imply that section 6001 creates immunity from sanctions other than

228. One rationale for official immunity at least in the tort context has been to diminish the inequity of holding federal officers personally liable for actions taken on behalf of their governments. There is a possibility that the Executive Branch will use subordinate officials as scapegoats or diversions to cover the sins of their superiors, and that without the incentive of a defense, those officials will not benefit from revealing the involvement of their superiors. Brown, *The Liability of the Employee of a Federal Agency Charged with Criminal, Environmental Violations: Do the Rules of Fair Play Apply to the Football?*, 35 FED. B. NEWS AND J. 441 (1988). Thus, if proper attribution of blame is a significant public policy goal, a qualified immunity defense might arguably be an appropriate means to encourage full disclosure by subordinate employees. On balance, though, such a defense appears more likely to encourage lawlessness than to promote full disclosure of illegal conduct by superiors.

229. United States v. Dee, 912 F.2d 741 (4th Cir. 1990).

230. In *Dee*, defendants contended that § 6001 limited the waiver of official immunity to civil sanctions, the Fourth Circuit held that there was no official immunity from federal prosecution so § 6001 could not be construed as a limitation on sanctions available against federal officers.

those to enforce civil injunctions in order make sense of the second sentence of the section. That sentence is more naturally read to limit preexisting official immunity than to create greater immunity. Second, creation of immunity from federal criminal prosecution is contrary to the evident purposes and legislative history of section 6001.[231]

Thus, neither the four jurisdictional doctrines nor section 6001 pose a significant barrier to federal prosecution of federal officers for hazardous waste violations. Whether the government will vigorously pursue such prosecutions remains to be seen.

## IV. Overcoming the Obstacles to Effective State Prosecution of Federal Officials for Environmental Crimes

The barriers to state prosecutions posed by intergovernmental immunity, official immunity, and exclusive federal enclave status may be overcome by judicial or legislative action. The courts may sympathetically interpret RCRA section 6001 or they may redefine the doctrine of official immunity in such a manner as to allow state criminal prosecutions to proceed under appropriate circumstances. Alternatively, Congress may choose to tailor section 6001 so as to deal specifically with the jurisdictional doctrines that impede the use of criminal and other sanctions against federal employees who violate state hazardous waste laws. While each of these different approaches to reducing the jurisdictional barriers to state prosecutions have advantages and disadvantages, carefully crafted legislation is the superior, and the most probable, means for overcoming these barriers.

### A. *Interpreting RCRA Section 6001 as a Waiver of Official Immunity and a Partial Retrocession of Territorial Jurisdiction Over Federal Enclaves*

The courts conceivably may construe section 6001 broadly as implicitly waiving all aspects of official immunity and as serving as a partial retrocession of legislative and prosecutorial jurisdiction to the states with respect to hazardous waste laws. However, while section 6001 can be read as silent on the question of official immunity from criminal prosecution, the language of that section strongly suggests that official immunity from state criminal prose-

231. *See* S. Rep. No. 94-869, 94th Cong., 2d Sess. (1976).

cutions is waived by section 6001 only for criminal contempt and other sanctions to enforce injunctive relief. Section 6001 states that: "Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief." This provision appears to preserve the official immunity of federal officers from state criminal prosecutions for violating hazardous waste laws, but does not preserve such immunity from prosecutions for violating injunctions enforcing those laws. Thus, reinterpreting section 6001 does not seem to be a realistic means of overcoming the barrier of official immunity from state prosecutions.

Similarly, it may be difficult to obtain a sympathetic reading of section 6001 as a partial retrocession of legislative and prosecutorial jurisdiction over federal enclaves. While section 6001 arguably cedes legislative jurisdiction to the states by requiring federal facilities to comply with state substantive and procedural requirements, there seems to be no retrocession of prosecutorial power except as to injunctive relief. Without prosecutorial power, the federal facilities provision arguably facilitates federal enforcement of state hazardous waste laws under state criminal laws assimilated through the Assimilative Crimes Act.[232] However, RCRA section 6001 fails to establish the subject matter jurisdiction of the federal courts to enforce state criminal laws, as was done in the Assimilative Crimes Act. Furthermore, even if the federal facilities provision did allow for federal prosecution of state environmental crimes, it would not serve the purpose of establishing a credible threat of criminal prosecution as a means to ensure federal facility compliance.

### B. *Reinterpretation of the Doctrine of Official Immunity as a Means to Facilitate State Criminal Prosecutions*

Two doctrinal reinterpretations might penetrate the shield of official immunity that surrounds federal officials. First, the states could seek a reading of *Neagle* immunizing only actions of federal officers that the officers possess actual authority to perform and that are necessary and proper to the exercise of their federal authority. In the context of hazardous waste, official immunity would then become an extremely narrow defense. Given the dic-

232. *See supra* notes 191-95 and accompanying text.

tates of RCRA section 6001 and Executive Order 12088, a federal officer cannot possess actual authority to violate state hazardous waste laws absent a Presidential exemption.[233] This judicial reinterpretation of the common law doctrine of official immunity would force the federal decision to violate state hazardous waste laws to the highest levels since a federal officer knowingly violating those laws without a Presidential exemption would face criminal prosecution.[234] Presumably criminal liability would extend up the line of authority from the federal employee immediately responsible for the violation to the Cabinet level, if the state is able to prove that higher officials knew or should have known about the violation and had the power to prevent it.[235] Such a reinterpretation, however, may be unlikely given the pattern of the courts interpreting *Neagle* to immunize any conduct within the scope of duties that a federal officer reasonably believes to be necessary and proper.

Another means of reformulating official immunity law without legislation would involve judicial incorporation of the results of the Supreme Court's recent decisions in *Westfall v. Erwin*[236] and *Berkovitz v. United States*[237] into the *Neagle* test. This approach might prove more palatable to the courts because it would not necessitate a wholesale reexamination of a century of precedents interpreting *Neagle*.

As discussed in Part II(E), the overly expansive scope of duties interpretation of the first prong of *Neagle* is based upon the application of tort precedents to federal officer immunity from criminal prosecution. For example, in *Clifton v. Cox*,[238] the Ninth Circuit adopted the broad scope of authority approach to federal

233. RCRA § 6001 provides for a one year, renewable Presidential exemption. In order to base the exemption on lack of funding, the President must request adequate appropriations to solve the environmental problem that necessitates the exemption.

234. "Knowingly" is the common state of mind requirement for hazardous waste crimes. *See* United States v. Hayes International, 786 F.2d 1499 (11th Cir. 1986). *See also* Allan, *Criminal Sanctions Under Federal and State Environmental Statutes*, 14 ECOL. L. Q. 117 (1987); Celebreeze, *Criminal Enforcement of State Environmental Laws: The Ohio Solution*, 14 HARV. ENVTL. L. REV. 217 (1990); Note, *Criminal Sanctions for Environmental Crimes and the Knowledge Requirement: United States v. Hayes Int'l, 786 F.2d 1499 (11th Cir. 1986)*, 25 AM. CRIM. L. REV. 535 (1988).

235. *See supra* note 39.

236. 484 U.S. 292 (1988).

237. 486 U.S. 531 (1988).

238. 549 F.2d 722 (9th Cir. 1977).

officer immunity in reliance upon *Barr v. Matteo*,[239] the leading case at that time on federal employee immunity from common law tort suits. The *Clifton* court concluded that a federal officer cannot be held liable for criminal acts committed within the outer perimeter of his authority, even if his actions are not required by law or by direction of his superiors.[240]

The absolute immunity articulated in *Barr* was eliminated by the Supreme Court's decision in *Westfall v. Erwin*.[241] The Court in *Westfall* decided that absolute immunity from state common law tort suits was available only for discretionary acts. The Supreme Court's decision in *Berkovitz v. United States*[242] further determined that, for purposes of the Federal Tort Claims Act, an act was not discretionary if it was contrary to federal law or policy. If the results of *Westfall* and *Berkovitz* are applied to the criminal immunity of federal officers, the results will approximate the actual authority approach. Official immunity will be available only where actual, if not express, authority or discretion is found and the act committed is not prohibited by federal law.

Courts may hesitate to apply this approach, however, for two reasons. First, the *Westfall* case was immediately followed by legislation recreating absolute official immunity from common law torts.[243] Second, despite the *Neagle* history, courts may be reluctant to utilize in the criminal context precedents involving official immunity from tort.

The Congressional reaction to *Westfall* should not deter courts from incorporating the principles of the *Westfall* and *Berkovitz* decisions into their interpretation of official immunity in the criminal context. The *Westfall* legislation was aimed at state common law tort actions against federal officers and does not extend to federal constitutional or statutory violations by federal officers. Thus, the *Westfall* legislation underscores the significance of federalism concerns in determining official immunity — if federal law is the source of law, Congress does not care to extend official immunity; only if state law is the source of law does Congress give its officers the full measure of immunity. Thus, it is consistent with the *Westfall* legislation for the official immunity of federal of-

239. 360 U.S. 564 (1959).
240. 549 F.2d at 726-27.
241. 484 U.S. 292 (1988).
242. 486 U.S. 531(1988).
243. *See supra* note 62.

ficers to be limited to the extent of their actual authority under federal law. As for the second argument that could be made against incorporating *Westfall* and *Berkovitz* into the *Neagle* analysis, its soundness is undermined by the fact that the official immunity problem was initially created by distorting the first prong of *Neagle* through the tort concept of "scope of duties." If it is appropriate to use tort precedents to broaden official immunity in the criminal context, it is equally appropriate to use such precedents to narrow official immunity from criminal prosecution.

The choice between judicial and legislative reform of official immunity echoes the discussion between commentators some time ago concerning the proper mode of reform of sovereign immunity.[244] Interestingly enough, although sovereign immunity is a common law doctrine, courts have concluded that only Congress may waive it.[245] In contrast, courts have been much less reluctant to modify the common law doctrine of official immunity in the tort law context.[246] Judicial modification of official immunity in the criminal context, however, may be less appropriate. In the criminal context, official immunity of federal officials derives from federalism concerns. As Professor Tribe has powerfully argued, Congress, rather than the judiciary, is the appropriate branch to balance the interests of states and the federal government.[247] Thus, it may be that Congress, rather than the judiciary, should modify the official immunity doctrine according to the balance it chooses to strike between the federal interest in protecting federal operations from undue state interference and the state's interest in prosecuting environmental crimes.

Further, judicial modification of the jurisdictional barriers to state prosecutions is limited in that no doctrinal reinterpretation appears available to breach the wall of exclusive federal enclave status. Judicial reformulation simply cannot solve the problem posed for state prosecutions by exclusive federal enclave status. While sympathetic doctrinal reinterpretations might lower the barrier of official immunity, which is the broadest and most substantial barrier to prosecution of federal officials for environmen-

244. *Compare* Byse, *supra* note 52, *with* 3 K. DAVIS, ADMINISTRATIVE LAW §§ 23.10-.12, ch. 27 (1958).

245. *See supra* notes 53-54.

246. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Westfall v. Erwin, 484 U.S. 292 (1987).

247. Tribe, *supra* note 57.

tal crimes, the courts are likely to be cautious in treading upon what has been so clearly marked as congressional turf.[248] Thus, there is an apparent need for carefully fashioned congressional action to amend section 6001 to lower the jurisdictional barriers to permit appropriate use of criminal sanctions to promote institutional change at federal facilities.

### C. *Legislative Revision of Section 6001*

Legislation that would have dramatically changed the ability of states to prosecute federal officers for environmental crimes was introduced in the 101st Congress but died in the Senate due to fierce opposition to the federal facilities provision and to other aspects of the the EPA cabinet elevation bill.[249] The federal facilities provision is likely to be one of the central issues during RCRA reauthorization in the 102nd Congress. The bill, H.R. 3847, stated with breathtaking simplicity that: "An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law . . . ."[250] In one sentence, the bill, if enacted, quite clearly would have washed away the common law doctrine of official immunity in the area of crimes involving solid or hazardous wastes.[251] Further, H.R. 3847 sought to resolve many of the remaining disputes that may arise regarding intergovernmental immunity and sovereign immunity.[252] For example, H.R. 3847 would have expanded the breadth of the waiver of intergovernmental immunity to include hazardous waste activities other than

248. Nixon v. Fitzgerald, 457 U.S. 731, 748 (1982).

249. H.R. 1056, introduced by Rep. Dennis Eckart (D-Ohio), 101st Cong., lst sess., was incorporated into H.R. 3847, the bill elevating EPA to cabinet status, by the House. H.R. 3847 passed in the House. 136 Cong. Rec. H1170 (daily ed. Mar. 18, 1990). 136 Cong. Rec. H1196 (daily ed. Mar. 28, 1990). The Senate killed H.R. 3847 because of the federal facility provisions. The part of the bill elevating EPA to cabinet status was reintroduced on Jan. 3, 1991 as H.R. 67, without any federal facilities provisions.

250. H.R. 3847, 101st Cong., 2d Sess., § 602(a)(4) (1990).

251. If H.R. 3847's waiver of official immunity from criminal prosecution were enacted, a significant question would arise whether federal officers may be prosecuted for conduct that preceded enactment. Presumably, the general rule against retroactive application of criminal laws would be invoked and state prosecutions for conduct prior to enactment of H.R. 3847 would be precluded.

252. H.R. 3847, 101st Cong., 2d Sess., § 602(a)(4) (1990).

disposal[253] and to extend it to administrative orders.[254] It would have eliminated the sovereign immunity dispute between the federal government and the states regarding the applicability of civil penalties to federal agencies.[255] Finally, H.R. 3847 would have clarified EPA's administrative enforcement powers over federal facilities by including federal agencies in the definition of persons subject to RCRA[256] and by requiring EPA to initiate administrative enforcement actions against federal agencies in the same manner and circumstances as they would be initiated against other persons.[257]

The proposed bill was less successful in addressing the problem of exclusive federal enclave status. Although it stated that federal employees are subject to criminal sanctions under federal and state law,[258] it did not indicate that such sanctions could be enforced by state prosecutors in state courts. A single sentence could be added explicitly stating that: "The United States hereby cedes concurrent jurisdiction over areas within the special exclusive territorial jurisdiction of the United States to the states for the sole purpose of enacting and enforcing such substantive and procedural requirements."

If it were also modified to provide that state prosecutors would have enforcement power, legislation such as H.R. 3847 would probably suffice to eliminate the obstacles to state prosecutions posed by various federal immunities. Nevertheless, since only the waiver of official immunity is explicitly stated in H.R. 3847, those

253. H.R. 3847, § 602(a)(2), adds "and management" after the term "disposal" in RCRA § 6001, 42 U.S.C. 6961 (1988).

254. Section 602(a)(3) inserts a specific reference to "administrative orders" in the list of substantive and procedural requirements to which federal facilities are subject. § 602(a)(4) waives "any immunity" of the United States as to administrative orders.

255. Section 602(a)(3) lists "civil and administrative penalties and fines" as substantive and procedural requirements to which federal facilities are subject. § 602(a)(4) waives any immunity of the United States as to any "civil or administrative penalty or fine."

256. Section 603(a) adds a definition of person as RCRA § 6005: "For purposes of this Act, the term 'person' whenever used in this Act, shall be treated as including each department, agency, and instrumentality of the United States."

257. Section 602(b)(1) specifies that: "The Administrator may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pursuant to the enforcement authorities contained in this Act. The Administrator shall initiate an administrative enforcement action against such a department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person."

258. H.R. 3847, 101st Cong., 2d Sess., § 602(a)(4) (1990).

who advocate a total waiver of federal immunity should be wary of relying on such legislation. The courts have been especially restrictive in interpreting federal facility provisions. For example, general language such as "all requirements" has been interpreted to exclude procedural requirements.[259] "All procedural requirements, substantive and procedural" has been read to exclude means of enforcement.[260] Language listing specific means of enforcement has been construed to exclude means of enforcement not specifically listed such as civil penalties.[261] This strict construction of federal facilities provisions, together with the question of whether courts should rely on legislative history to discern a "clear and unambiguous" waiver,[262] suggests a need for legislative language clearly abrogating all types of immunity, whatever the doctrinal source, and conferring partial legislative jurisdiction upon the states with respect to otherwise exclusive federal enclaves.[263]

Significantly, H.R. 3847 would not have altered the ability of federal employees facing state prosecutions to assert an "unequal treatment" or "selective prosecution" defense. This defense is an important bulwark against improper state prosecutions of federal employees. Additionally, H.R. 3847 would not have affected the

259. Hancock v. Train, 426 U.S. 167 (1976); EPA v. California, 426 U.S. 200 (1976).

260. United States v. Washington, 872 F.2d 874 (9th Cir. 1989).

261. *Washington*, 872 F.2d at 877.

262. Mitzelfelt v. Dep't of Air Force, 903 F.2d 1293, 95-96 (10th Cir. 1990); *Washington*, 872 F.2d 874; Florida Dep't of Envtl. Regulation. v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985). The Plain Meaning Rule allows resort to legislative history and other means of statutory construction only if the proper construction cannot be discerned from the plain meaning of the statute. Caminetti v. United States, 242 U.S. 470 (1917). Combining a strict application of this rule with the rule of strict construction of waivers of federal immunity, resort to legislative history to interpret a federal facility provision may be prohibited. While courts generally have relied on legislative history in construing such waivers, the long term viability of that method of statutory construction is in doubt given the Supreme Court's recent aggressive attack on use of legislative history. *See* Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990).

263. Although this Article suggests the need to broaden the waivers of immunity contained in § 6001, it is appropriate to retain certain limitations on those waivers. For example, as discussed previously, an equal treatment restriction is desirable. Similarly, limiting the waiver to formally adopted, specific state requirements of general applicability prevents application of *ad hoc* discriminatory standards to the federal government. *See* 42 U.S.C. § 9621(d)(2)(C)(iii) (1988) (limitations on applicable state standards to be met in CERCLA cleanups). Finally, a restriction of the waiver to state laws falling within the general scope of the federal law is necessary to maintain congressional control over the state laws to which federal facilities are subject.

ability of federal officers to avail themselves of the special procedural protections designed to assure fair treatment, and to raise defenses that reflect the unique duties and limitations placed upon federal officers.[264] Finally, in appropriate cases, even the burden of defense costs could be lifted from the shoulders of individual federal officers by a decision of the federal government to provide counsel in state prosecutions. Thus, while a slightly revised H.R. 3847 would drastically reduce the jurisdictional barriers to state prosecution of federal employees for environmental crimes, federal officers would not be rendered defenseless against overly zealous or vindictive state prosecutions. Instead, this legislative effort would allow criminal sanctions to assume their proper role in federal facility compliance.

## V. Conclusion

There are substantial barriers to state criminal prosecution of federal employees for improper hazardous waste management practices at federal facilities. Intergovernmental immunity, official immunity, and the federal enclave status of many federal facilities may effectively preclude state prosecutions. Federal prosecutions face none of the jurisdictional problems that threaten state prosecutions. The significance of jurisdictional barriers to criminal prosecution of federal officers is intimately related to the role that criminal sanctions are expected to play in solving federal facility non-compliance problems. If the role of sanctions is merely to prevent a series of isolated instances of environmental crimes where greedy or irresponsible federal officers abuse their position for personal profit, then the jurisdictional barriers are insignificant because the federal government can be depended upon to prosecute egregious conduct motivated by personal concerns of individual officers. Furthermore, the most difficult and universal obstacle to state prosecution, official immunity, is easily overcome under such circumstances. However, if the role that criminal sanctions need to play is encouraging drastic institutional change by the federal government, the federal government cannot be relied upon to foster that change through criminal prosecutions and the obstacles to state prosecution are a serious concern. To assure effective use of criminal prosecutions to guarantee environmental compliance at federal facilities, juris-

264. *See supra* note 43.

dictional barriers to state criminal prosecutions of federal officers for environmental crimes must be lowered.

Judicial reinterpretation of the official immunity doctrine, and sympathetic judicial reading of section 6001, could largely eliminate the barriers to effective state prosecutions. However, the courts tend to read section 6001 strictly in favor of the federal government and may be reluctant to reinterpret official immunity doctrine in favor of state prosecutions. The courts in this sensitive area of federalism are likely to leave delicate questions of immunity to Congress. Therefore, carefully fashioned Congressional action designed to allow use of criminal sanctions to promote institutional change is essential. Unless such action is forthcoming, states will continue to be deprived of what is perhaps their most powerful tool to assure environmental compliance.