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DEFENDING AGAINST DEFENSE: CIVIL RESISTANCE, NECESSITY AND THE UNITED STATES MILITARY'S TOXIC LEGACY

Kyle Bettigole*

There are some who say that there is absolutely no prospect of the administration or the Congress to bring this matter to a successful conclusion and that the track record proves it and that the only possibility, however remote, the only possibility of survival lies in protest. If people believe that, who can say they are wrong?

I. INTRODUCTION

The United States is in the midst of a toxic crisis. For nearly fifty years, the U.S. military, the nation's largest polluter, has threatened human health and the environment with the ceaseless dumping and improper disposal of noxious chemicals throughout virtually every state. Through widespread mishandling and mismanagement of radioactive waste, spent fuels, oils, solvents, paints, acids, heavy metals, and other hazardous materials, the Departments of Defense (DOD)

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2 For the purposes of this Comment, the term "military" includes the Department of Defense and the Department of Energy's nuclear weapons facilities.


5 NGA/NAAG REPORT, supra note 4, at 2.
and Energy (DOE) have "cast a chemical plague over our country,"6 creating a toxic legacy for the next several generations.

As the owner of approximately 20,000 nuclear weapons, tremendous fleets of planes, tanks, vehicles, and thousands of installations responsible for the development and maintenance of the nation’s defense machinery, the military continually must confront disposing of its wastes.7 Collectively, the DOD and the DOE generate approximately twenty million tons8 of hazardous9 or mixed hazardous and radioactive waste10 annually, or nearly one ton of waste every minute.11 Given the practical difficulties of handling such enormous amounts of waste, the DOD and the DOE historically have resorted to crude and improper waste disposal techniques12 which, consequently, have spawned an astounding number of hazardous waste sites.13

The DOD, which oversees a vast complex of properties in the United States, has identified over 14,401 contaminated sites at 1,579 of its facilities.14 These sites are the result of daily activ-

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6 NTCF REPORT, supra note 3, at i.
7 Shulman, supra note 4.
9 Hazardous waste is defined as:
   A solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:
   (A) cause, or significantly contribute to an increase in mortality or an increase in serious reversible, or incapacitating reversible, illness; or
   (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
10 Mixed hazardous and radioactive waste is hazardous waste that is mixed with radioactive materials. See Barbara A. Finamore, Regulating Hazardous and Mixed Waste at Department of Energy Nuclear Weapons Facilities: Reversing Decades of Environmental Neglect, 9 HARV. ENVTL. L. REV. 83, 84 (1985). Radioactive waste is defined as "solid, liquid, or gaseous material resulting from weapons production that contains radionuclides in excess of threshold quantities." U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, COMPLEX CLEANUP: THE ENVIRONMENTAL LEGACY OF NUCLEAR WEAPONS PRODUCTION 211 (1991) [hereinafter OTA REPORT]. Radionuclides are defined as "certain natural and manmade atomic species with unstable nuclei that can undergo spontaneous breakup or decay, and in the process, emit Alpha (helium nuclei), Beta (fast electron streams) particles, and Gamma rays (short X-rays), collectively known as radiation." Id.
11 Shulman, supra note 4.
12 See NGA/NAAG REPORT, supra note 4, at 2 (waste disposal practices have included "dumping [wastes] in unlined pits, lagoons, and landfills, and using sewer drains for disposal").
13 See infra notes 14–25 and accompanying text.
14 CONG. BUDGET OFFICE, FEDERAL LIABILITIES UNDER HAZARDOUS WASTE LAWS, S. Doc. No. 95, 101st Cong., 2d Sess. 13 (1990) [hereinafter FEDERAL LIABILITIES]. A hazardous waste site is a specific place containing hazardous wastes, thus one facility or installation may include numerous sites. Id. For example, the Hanford Nuclear Weapons Reservation in Washington state is one facility, however it contains over 3,000 hazardous waste sites. Id.
ity throughout the twentieth century where the DOD "allowed the leakage of oil and other fuels, drained toxic chemicals into waterways, dumped lethal sludge at unlined landfills and littered the country with unexploded shells and bombs." Presently, over 120 DOD sites are included on the Superfund National Priorities List, and this number continues to increase. Meanwhile, DOD clean-up efforts to date account for less than two percent of the wastes identified on current and former military installations.

The DOE's fourteen major nuclear weapons production facilities, similarly, have released millions of tons of radioactive and non-radioactive toxic pollutants into the environment, creating approximately nine thousand contaminated nuclear waste sites throughout the United States. Recently, the Senate Committee on Armed Services commissioned the Office of Technology Assessment (OTA), an independent research arm of Congress, to investigate and report on the problems created by the DOE's nuclear weapons complex. The OTA summarized:

Contamination of soil, sediments, surface water, and groundwater throughout the Nuclear Weapons Complex is extensive. At every facility the groundwater is contaminated with radionuclides or hazardous chemicals. Most sites in nonarid locations also have surface water contamination. Millions of cubic meters of radioactive and hazardous wastes have been buried throughout the complex, and there are few adequate records of burial site locations and contents. Contaminated soils and sediments of all categories are estimated to total billions of cubic meters.

The environmental contamination problems at DOE facilities are so extreme that their technical dimensions are considered as complex as

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16 Bruce Van Voorst, A Thousand Points of Blight, Time Mag., Nov. 9, 1992, at 68.
17 Shulman, supra note 4.
18 Supra note 15, at 8.
19 OTA Report, supra note 10, at 15 n.1.
20 Keystone Report, supra note 14, at 1–2.
21 See supra note 10 for the definition of "radionuclides."
those existing anywhere in the world.\textsuperscript{23} Virtually all of these facilities are included on the Superfund National Priorities List\textsuperscript{24} and, as of 1992, none of them had been decontaminated.\textsuperscript{25}

Cost estimates for the cleanup of the DOD's and the DOE's hazardous waste sites are enormous. The DOD estimates that $35 billion to $65 billion is needed to clean up its own sites,\textsuperscript{26} while the United States General Accounting Office indicates that it will cost approximately $95 billion to $130 billion to remediate sites at DOE facilities.\textsuperscript{27} Yet the non-economic costs of the military's contamination crisis exact an even greater toll on the public, for the health problems and environmental degradation which these wastes create are tremendous. Skin burns and rashes, chronic illnesses such as cancer, brain damage, nerve and digestive disorders, and reproductive problems are among the many health dangers created by direct contact with hazardous substances, or indirect exposure to contaminated air or drinking water.\textsuperscript{28} Similarly, improperly discarded wastes threaten vegetation, wildlife, and valuable natural environments such as national parks and wetlands.

Although government facilities must comply with federal and state hazardous waste laws,\textsuperscript{29} individual states and the United States Environmental Protection Agency (EPA) historically have been unable to hold the military accountable for its wastes.\textsuperscript{30} Though many of the DOD's and the DOE's contamination problems began when few laws and regulations addressed the disposal of hazardous wastes,\textsuperscript{31} the military's contamination practices continued even after Congress implemented major environmental legislation,\textsuperscript{32} including the Resource

\textsuperscript{23} KEYSTONE REPORT, supra note 14, at 1.
\textsuperscript{24} SHULMAN, supra note 15, at 187.
\textsuperscript{25} Id. at 8.
\textsuperscript{26} NGAA/NAAG REPORT, supra note 4, at 3.
\textsuperscript{27} Id. Some estimates have indicated the cleanup costs for DOE facilities will be as great as $300 billion over the next thirty years. Government Waste: The Hit List, REUTERS, Jan. 25, 1993.
\textsuperscript{28} FEDERAL LIABILITIES, supra note 14, at 9. Groundwater can become contaminated when wastes improperly disposed in landfills or shallow surface impoundments pass through the soil. Id. Hazardous waste can corrode metal drums or storage tanks as well, resulting in leakage into surrounding soil and nearby surface water or groundwater. Id. Rain and surface waters also can carry uncovered wastes off-site, contaminating surrounding soil and groundwater. Air contamination occurs when vapors rise from uncovered waste sites. Id.
\textsuperscript{29} See infra notes 256–67, 332–38 and accompanying text.
\textsuperscript{31} KEYSTONE REPORT, supra note 14, at 1–3.
\textsuperscript{32} See infra notes 256–67 and accompanying text.
Conservation and Recovery Act of 1976 (RCRA). The EPA, in fact, confirmed that the federal government, including DOD and DOE facilities, regularly fails to comply with hazardous waste management laws, and that its compliance rates are between ten to fifteen percent lower than private industry compliance rates.

Since the late 1970s, in response to the military's ongoing pollution activity and its threat to human health and the environment, concerned citizens have engaged in acts of non-violent civil resistance against the DOD and the DOE. These protests have sought to pressure the military to stop disposing its wastes in violation of hazardous waste laws, and to hold it accountable for these contamination problems. The protesters' acts of civil resistance have included trespassing in restricted areas at a nuclear weapons facility and blocking roadways and entrances outside military bases. Thousands of arrests for these demonstrations have occurred, resulting in penalties ranging from fines for misdemeanor violations, to prison terms for criminal felony convictions.

Once charged with violating the law, these protesters frequently have asserted the necessity defense to explain the basis for their behavior. The necessity defense is an affirmative defense which posits that for reasons of social policy, an individual is justified in violating

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34. H.R. REP. No. 102–111, supra note 8, at 2.
35. Civil resistance is distinguishable from civil disobedience in that an act of civil resistance violates a law which is not itself the object of protest. See United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1992); Schulkind, supra note 1, at 79–80. For example, lunch counter sit-ins in the 1960s were protests against laws which prohibited persons of a specific race from sitting in particular areas of a restaurant. Schoon, 971 F.2d at 196. In these situations, individuals were "protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow." Id. Military demonstrators are not protesting a law against trespass, however. Rather, they are protesting the DOD's and the DOE's operating practices. See Francis Anthony Boyle, Defending Civil Resistance Under International Law 17 (1987); Joel H. Levitan, Putting The Government On Trial: The Necessity Defense and Social Change, 33 WAYNE L. REV. 1221, 1225 (1987).
36. See, e.g., Myron Levin, Nuclear Protesters Plan 'Lesser of 2 Evils' Defense, WASHINGTON POST, Nov. 17, 1978, at A4. Over 250 arrests were made outside the Rocky Flats nuclear weapons plant when a citizens group protested "past and present radioactive emissions" from the plant. Id.
37. Id.
39. See generally Creative Defenses in Civil Disobedience Cases, 42 GUILD PRAC. 1 (1985) (discussing numerous cases involving civil disobedience and civil resistance arrests).
40. See Levin, supra note 36. For example, one Rocky Flats nuclear weapons plant protester was charged with four counts of trespass and three of obstruction, and these violations carried prison terms of over three years. Id.
a law if "the harm which will result from compliance with the law is
greater than that which will result from the violation of it." Ex­
pressed another way, the law should promote the achievement of
higher values at the expense of lesser values, and sometimes the
greater good for society is achieved by violating, rather than comply­
ing with the law.

When civil resistance defendants successfully interpose the neces­
sity defense, juries find them not guilty of violating the literal lan­
guage of the law. Courts do not automatically permit a defendant to
raise the necessity defense, however. The defendant first must intro­
duce enough evidence so that a reasonable juror may conclude that
the evidence satisfies each required element of the defense. If
the defendant satisfies this burden, the judge must permit the defense,
and instruct the jury accordingly. Typically, in civil resistance or civil
disobedience cases, courts refuse to present a necessity defense
instruction to the jury. Nearly every reported state and federal
appellate decision has rejected the application of the necessity defense
under these circumstances because the defendants have been unable
to satisfy the court's assessment of what constitutes "necessity."

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42 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.4, at 627 (1986). LaFave & Scott explain that:

When the pressure of circumstances presents one with a choice of evils, the law prefers
that he avoid the greater evil by bringing about the lesser evil. The evil involved in
violating the terms of the criminal law . . . may be less than that which would result
from literal compliance with the law . . . .

Id. at 629. The necessity defense also is frequently described as the "choice of evils" or "defense of justification." See id. See also MODEL PENAL CODE § 3.02 (1985).

43 LAFAVE & SCOTT, supra note 42, § 5.4, at 629.

44 Id. at 630.

45 This Comment contemplates trials in which a jury presides, because most of the cited case
law concerned jury trials. A jury-waived or bench trial presumably requires the same showing
of evidence in order to raise an affirmative defense, therefore, the arguments presented in this
Comment are equally applicable to non-jury proceedings. See Schulkind, supra note 1, at 86
n.39.

46 Id. at 80. The required elements of the necessity defense are discussed infra notes 79–81
and accompanying text.

47 Schulkind, supra note 1, at 80.

48 See supra note 35 for a distinction between acts of civil resistance and acts of civil disobe­
dience.

49 An alarming trend is the use of the motion in limine to preclude any evidence from reaching
the jury. See generally Douglas L. Colbert, The Motion in Limine in Politically Sensitive Cases:
Silencing the Defendant at Trial, 39 STAN. L. REV. 1271 (1987). The motion in limine is a written
motion typically made prior to, or at the beginning of a trial, which dispenses with prejudicial
statements, evidence, and, as in the case of a civil resistance defendant, an affirmative defense,
before it reaches the jury. Id. at 1271–72. A judge also may defer ruling on the motion until the
defendant raises the affirmative defense at trial. Id. at 1271 n.1.

50 For example, in the nuclear weapons context, many demonstrators have argued unsuccess­
fully that their actions were necessary to prevent the United States from violating various
The motivations and reasons underlying the civil resistance activities at military facilities created a tenable reason for courts to permit the necessity defense, however. Because the DOD and the DOE routinely violated environmental laws and shielded themselves from punishment, nonviolent civil resistance since the late 1970s was both justifiable and necessary to protect human health and the environment, and to hold the military accountable for its behavior.

This Comment thus reevaluates the necessity defense in the context of the environmental contamination and human health dangers that the military posed, and continues to pose, to the public. It adopts the protester's perspective in urging that civil resistance has been defensible as a means to prevent the DOD and the DOE from threatening the public and the environment, and as a vehicle to coerce the military into greater environmental compliance. Section II of this Comment presents a brief history of the necessity defense and articulates the elements of the defense which a defendant must satisfy in order to receive a jury instruction on the defense. Section III applies the elements of the necessity defense to military protests and analyzes how nonviolent civil resistance in this context satisfies each element. Specifically, Section III evaluates the contamination problems endemic to the DOD and the DOE, and examines how these agencies historically circumvented compliance with RCRA.

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United Nations and international law agreements and declarations. See, e.g., United States v. Lowe, 654 F.2d 562, 566–67 (9th Cir. 1981); United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1979). Nuclear weapons demonstrators also have urged to no avail that their protesting was necessary to prevent the imminent threat of a nuclear war. See, e.g., United States v. Brodhead, 714 F. Supp. 593, 596 (D. Mass. 1989); People v. Weber, 208 Cal. Rptr. 719 (Cal. App. Dep't Super. Ct. 1984). Nuclear power demonstrators have argued that power plants present the threat of a major nuclear accident as well as long-term threats to human health due to the effects of low-level radiation. See, e.g., State v. Warshow, 410 A.2d 1000 (Vt. 1979). Neither contention has been persuasive. See infra notes 99–107 and accompanying text. The defense has been raised successfully in a number of unreported state trial court decisions, however. Compilations of these cases may be obtained through The Meiklejohn Civil Liberties Institute in Berkeley, California.

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51 See infra notes 268–314 and accompanying text.
52 See infra notes 58–82 and accompanying text.
53 See infra notes 83–331 and accompanying text.
54 See infra notes 136–95, 268–314 and accompanying text. This Comment focuses primarily on RCRA since RCRA is the most comprehensive environmental legislation concerning the generation, treatment, and disposal of hazardous waste, and since issues concerning RCRA have presented perhaps the greatest impediments to ensuring environmental compliance by the military. See infra notes 268–91 and accompanying text. However, the issues it addresses also have been raised regarding compliance with other environmental laws such as the Clean Air and Clean Water Acts. See, e.g., Michael D. Axline et al., Stones for David's Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities, 2 J. ENVTL. L. & LITIGATION 1, 20–32 (1987).
local, state, and EPA authority created a climate ripe for citizens to engage in justifiable acts of nonviolent civil resistance. Section IV concludes by evaluating whether future acts of civil resistance against the military are defensible under the necessity defense in light of Congress' recent enactment of the Federal Facilities Compliance Act. This legislation, which now expressly subjects the military to all federal, state, interstate, and local solid waste laws, breathes new life into RCRA and efforts to regulate the military's waste disposal practices.

II. THE NECESSITY DEFENSE DEFINED

The necessity defense arises from a social policy which recognizes that at times the law must be violated to achieve a moral imperative. This imperative derives from an individual's belief that a tremendous harm is occurring, and that a particular action is necessary to deter or eliminate this harm. The individual invokes the necessity defense as a means to explain why she justifiably broke the law. The defendant admits that she committed the act for which she is charged, and that such an act technically violates the law. The defendant contends, however, that such conduct was "justified because it was the only feasible way to avoid a greater evil;" therefore, "it would be unjust to apply the law in the particular case."

The history of the necessity defense in the United States traces back to the nineteenth century. Courts invoked the defense in a myriad of situations involving emergencies arising out of the forces of nature. For example, in The William Gray, a court found a shipmaster not guilty of violating an embargo act forbidding his ship entry into a port when adverse weather forced the crew to seek refuge in the port. In the late nineteenth century, prison escapees dissatisfied

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55 See 42 U.S.C.A §§ 6903, 6908, 6924, 6927, 6939e-6939e, 6961, 6965 (West 1993), discussed infra notes 332-39 and accompanying text.
56 Id. § 6961(a).
57 See infra Section IV.
59 Id.
61 Id.
63 The William Gray, 29 F. Cas. 1300 (C.C.D.N.Y. 1810). See also United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (mutiny necessary where ship held unseaworthy); Seavy v.
with prison conditions and their treatment while incarcerated unsuccess­
fully tried to assert the defense.64 The prison protest cases were a precursor to the use of the necessity defense in situations where indi­
viduals “protest, call attention to, or bring about a change in a social condition or political policies.”65

The first widespread use of the defense in civil resistance protests occurred in the late 1960s and early 1970s, when anti-Vietnam war demonstrators were arrested for protest activity.66 For example, in United States v. Moylan, a group of antiwar protesters entered a local selective service board and destroyed files with napalm.67 The United States Court of Appeals for the Fourth Circuit denied the protesters the necessity defense, stating:

To encourage individuals to make their own determinations as to
which laws they will obey and which they will permit themselves
as a matter of conscience to disobey is to invite chaos. No legal
system could long survive if it gave every individual the option of
disregarding with impunity any law which by his personal stand­
ard was judged morally untenable.68

Civil resistance defendants subsequently have used, and continue to
use the necessity defense as a defense for protest activity in a wide
variety of social contexts, including: nuclear power and weapons pro­
duction,69 the anti-abortion movement,70 United States policy and in-

64 See, e.g., People v. Richards, 75 Cal. Rptr. 597, 604 (Cal. Ct. App. 1969) (no necessity for
prison escape arising out of dissatisfaction with prison sentence); People v. Whipple, 279 P. 1008,
1010 (Cal. Dist. Ct. App. 1929) (no necessity for prison escape arising out of unsanitary prison
conditions). 65 Lippman, supra note 62, at 324.
(8th Cir. 1972); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), cert. denied, 397 U.S. 910
67 Moylan, 417 F.2d at 1003.
68 Id. at 1009.
69 See infra notes 99–117 and accompanying text.
70 See, e.g., Allison v. Birmingham, 580 So. 2d 1377 (Ala. Crim. App.), cert. denied, 558 So. 2d
volvement in Central America,\textsuperscript{71} corporate investments in South Africa,\textsuperscript{72} homelessness,\textsuperscript{73} reduced funding for AIDS research,\textsuperscript{74} logging practices in the Pacific Northwest,\textsuperscript{75} animal rights,\textsuperscript{76} and auto emissions pollution.\textsuperscript{77}

Necessity remains a common law defense in some states, while in many others it is codified.\textsuperscript{78} Though the required elements of the defense vary among states, virtually every court's interpretation of it includes some variation of the following definitions: (1) the actor has acted to avoid a significant evil; (2) there are no adequate legal means to escape the evil; and (3) the actor's chosen remedy is not disproportionate to the evil sought to be avoided.\textsuperscript{79} One common formulation

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\textsuperscript{74}See, e.g., People v. Alderson, 540 N.Y.S.2d 948 (N.Y. Crim. Ct. 1989).


\textsuperscript{76}See, e.g., State v. Troen, 786 P.2d 751 (Or. Ct. App.), review denied, 801 P.2d 841 (Or. 1990), and cert. denied, 111 S. Ct. 2857 (1991).


\textsuperscript{79}Arnolds & Garland, supra note 60, at 294; Schulkind, supra note 1, at 82. Some versions of the necessity defense are derived from the American Law Institute's Model Penal Code § 3.02, which states in relevant part that:

\begin{enumerate}
  \item Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
  \begin{enumerate}
    \item the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
    \item neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situations involved; and
    \item a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
  \end{enumerate}
\end{enumerate}

MODEL PENAL CODE § 3.02 (1985).
requires that defendants establish four conjunctive elements before a court will permit the defense:

1. the defendants were faced with a choice of evils and chose the lesser evil;
2. they acted to prevent imminent harm;
3. they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and
4. they had no legal alternatives to violating the law.80

Additionally, many states have adopted a requirement found in the Model Penal Code that disallows the necessity defense where the legislature has already spoken and sanctions the particular activity that the defendants protested.81 For example, because Congress has authorized the production and use of nuclear power, a defendant who is arrested for protesting the hazards associated with nuclear power cannot appeal to the necessity defense to justify his actions.82

III. APPLICATION OF THE NECESSITY DEFENSE TO MILITARY PROTESTS

Courts frequently refuse to grant a jury instruction on the necessity defense in civil resistance cases.83 Although the Constitution accords criminal defendants the right to due process and to present a full defense,84 the defendant first possesses the burden of presenting enough evidence to warrant an instruction on the defense.85 In apply-

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80 United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1992).
81 Model Penal Code § 3.02(1)(c) (1985).
82 See infra notes 118-24 and accompanying text.
83 Courts permitted the necessity defense in two reported civil resistance cases. See People v. Gray, 571 N.Y.S.2d 851 (N.Y. Crim. Ct. 1991); People v. Archer, 537 N.Y.S.2d 726 (N.Y. City Ct. 1988). In People v. Archer, an abortion clinic protest case, the New York City Court permitted an instruction on the necessity defense provided that the defendants first were able to establish that abortions were being performed at a clinic beyond the first trimester. 537 N.Y.S.2d at 735. In People v. Gray, the court permitted the necessity defense and acquitted individuals who blocked a vehicle lane on a bridge to protest increasing vehicular pollution. 571 N.Y.S.2d at 863. The lane previously was open for pedestrians and cyclists, but subsequently was converted into a vehicle lane. Id. at 853.
84 Chambers v. Mississippi, 410 U.S. 284, 294 (1972) (“[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations”).
85 United States v. Bailey, 444 U.S. 394, 411 (1980). The Court stated, “it is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so
ing the elements of the necessity defense to a particular act of civil resistance, courts frequently conclude that the defendant has not produced evidence sufficient to satisfy each element of the defense. For example, a defendant may proffer enough evidence to demonstrate an imminent harm and a causal nexus between the action taken and averting the harm, but fail to demonstrate that no legal alternatives to protesting existed. Consequently, the court will not permit a jury instruction and the necessity defense will be prohibited.

Despite courts' reluctance to permit the necessity defense in civil resistance cases, the military's contamination crisis involves unique circumstances that should historically have enabled civil resistance protesters to meet each required element of the defense. An analysis of the key elements of the necessity defense and of the DOD's and the DOE's handling of its wastes reveals that: (1) DOD and DOE facilities across the country created an imminent harm to human health and the environment that was not legislatively sanctioned so as to preempt civil resistance defendants' justification for protesting; (2) the alarmed citizens who committed acts of civil resistance at these facilities could demonstrate a causal nexus between their protest activity and the harm to be averted; and (3) the DOD's and the DOE's past ability to circumvent environmental laws and eschew accountability for their contamination problems prompted non-violent civil resistance protests as the only practical source of public recourse.

A. Imminent Harm

The necessity defense frequently requires that defendants establish that the harm they averted was imminent. Courts assert that an imminent harm must be actually present or immediate. The harm also must be tangible and measurable, for harms that are forthcoming

that, if a jury finds it to be true, it could support an affirmative defense—here, that of duress or necessity.” Id.

86 See infra notes 234–51 and accompanying text.
87 See infra notes 196–216 and accompanying text.
88 See infra notes 228–33 and accompanying text.
89 See infra notes 315–31 and accompanying text.
90 See, e.g., N.Y. PENAL LAW § 35.05 (McKinney 1987) (necessity defense available when “[s]uch conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur”); United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989) (necessity defense requires that defendants show “they acted to prevent imminent harm”), cert. denied, 498 U.S. 1046 (1991); United States v. Brodhead, 714 F. Supp. 593, 596 (D. Mass. 1989) (defendants must be able to show that they reasonably believed their action was necessary to avoid imminent threatened harm).
91 See LAFAVE & SCOTT, supra note 42, § 5.4, at 639.
and opaque will not satisfy the imminence requirement.\textsuperscript{92} In \textit{People v. Gray}, one of the few reported cases which has permitted the necessity defense, the defendant protesters successfully established an imminent harm.\textsuperscript{93} There, the state charged the defendants with disorderly conduct when they blocked a traffic lane of a bridge in New York City.\textsuperscript{94} The defendants were protesting a Department of Transportation regulation which opened a lane normally reserved for bicycles and pedestrians to automobiles during rush hour traffic.\textsuperscript{95} The defendants introduced testimony and studies demonstrating that motor vehicle pollution causes lung, respiratory tract and heart disease, as well as cancer risks from exposure to air toxics.\textsuperscript{96} Accordingly, a New York state criminal court asserted that, unlike many necessity defense cases where the harm sought to be avoided was too remote to be deemed imminent, "the grave harm in this case is occurring every day."\textsuperscript{97} The court noted further that New York City's failure to attain the EPA's minimum standards for air pollution meant that it would have to reduce vehicular traffic in order to attain these standards.\textsuperscript{98}

In most cases, however, the defendant protesters fail to establish an imminent harm. For example, in \textit{State v. Warshow},\textsuperscript{99} a group of nuclear power demonstrators were arrested for peacefully blocking the main gate of a temporarily closed nuclear power plant in order to deny access to workers who were repairing and refueling the facility.\textsuperscript{100} At trial, the protesters attempted to assert the necessity defense.\textsuperscript{101} They urged that the power plant posed an immediate hazard because it emitted low-level radiation and created dangerous nuclear waste.\textsuperscript{102} The trial court denied the defense, and the defendants were convicted.\textsuperscript{103} The Vermont Supreme Court affirmed the trial court's
decision, holding that "low-level radiation and nuclear waste are not the types of imminent danger classified as an emergency sufficient to justify criminal activity."104 The court defined "imminence" as a danger that "must be, or must reasonably appear to be, threatening to occur immediately, near at hand, and impending."105 Consequently, the defendants' reference to long-range risks and dangers did not adequately demonstrate an imminent or present threat to health and safety.106 The court added, "[w]here the hazards are long term, the danger is not imminent, because the defendants have time to exercise options other than breaking the law."107 The Texas Court of Appeals also applied this reasoning in affirming the conviction of a defendant who chained himself to the front door of a utility because he feared the emission of low-level radiation from a nuclear power plant about to commence operations later that year.108 The court held that the defendant's fear of something which was to take place at a later date would not constitute a reasonable belief that his action was immediately necessary to avoid imminent harm.109

Similarly, in many of the nuclear weapons protest cases, courts rejected the defendants' request for a jury instruction on the necessity defense where the defendants asserted that their actions were necessary to avoid an accidental or intentional nuclear war.110 In People v. Weber, the defendants blocked sidewalks and streets in front of General Dynamics and a U.S. Navy submarine base, decreeing that their behavior was necessary to prevent a nuclear war.111 The appeals division of a California superior court maintained that the apprehen-

104 Id.
105 Id. See also Commonwealth v. Capitolo, 498 A.2d 806, 809 (Pa. 1985) ("[t]o be imminent, the danger must be, or must reasonably appear to be, threatening to occur immediately, near at hand, and impending"). See also United States v. Seward, where the Tenth Circuit emphasized that: 

The defense of necessity does not arise from a "choice" of several courses of action, it is instead based on a real emergency. It can be asserted only by a defendant who was confronted with such a crisis as a personal danger, a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts. 687 F.2d 1270, 1276 (10th Cir. 1982), cert. denied, 459 U.S. 1147 (1983).
107 Id. The defendants argued further that their action was necessary to prevent a nuclear accident. Id. Again, the court rejected the defendants' contention, asserting that "the spectre of nuclear accident [does not] fulfill the imminent and compelling harm element of the defense . . . . [The defendants] claimed that they acted to foreclose the 'chance' or 'possibility' of [an] accident. This defense cannot lightly be allowed to justify acts taken to foreclose speculative and uncertain dangers." Id.
109 Id. at 317.
The court stated that the necessity defense must be “articulable to an immediate, imminent fear and compulsion.” Protesters also failed to establish an imminent danger in Andrews v. People, following their arrest for obstructing a roadway leading to the Rocky Flats nuclear weapons plant in Colorado. In response to the protesters’ contention that the plant emitted radiotoxic pollutants which threatened human health and the environment, and that its manufacture of plutonium triggers increased the risk of nuclear war, the Supreme Court of Colorado held that the dangers were “long-term and speculative, and thus insufficient to demonstrate that a specific, definite, and imminent injury is about to occur.” Similarly, in State v. Dansinger, the Supreme Judicial Court of Maine held that protesters at a National Guard base failed to prove imminence where they feared the imminent physical harm of a nuclear war. The court determined that the defendants’ subjective fears alone were not sufficient to establish imminence; rather, it must be shown as a fact that such a threat existed.

In addition to the above requirements, if a legislature has determined that engaging in a particular activity does not constitute a harm, or it has made a deliberate legislative choice to accept the harm resulting from that activity, the civil resistance defendant cannot invoke the necessity defense. If the legislature has made such a choice, “its decision governs.” In State v. Dorsey, the New Hampshire Supreme Court denied the necessity defense to nuclear power

112 Id. at 721.
113 Id. See also United States v. Brodhead, 714 F. Supp. 593, 596 (D. Mass. 1989) (threat of nuclear war sought to be avoided by defendant protesters insufficient to establish imminency).
114 800 P.2d 607, 611 (Colo. 1990).
115 Id.
116 521 A.2d 685, 688 (Me. 1987).
117 Id.

... the availability of the defense of necessity is precluded . . . when there has been a deliberate legislative choice as to the values at issue. The common law defense of necessity deals with imminent dangers from obvious and generally recognized harms. It does not deal with non-imminent or debatable harms, nor does it deal with activities that the legislative branch has expressly sanctioned and found not to be harms.

410 A.2d 1000, 1003 (Vt. 1979) (citations omitted).
119 LaFave & Scott, supra note 42, § 5.4, at 629.
protesters because the State of New Hampshire and the United States Congress have made deliberate choices in favor of the use of nuclear power. 120 The court held "it is inconceivable that the legislature would intend that nuclear power be considered such a harm as to justify individuals in breaking the law. We are confident that it was not intended that such matters be included within the scope [of the necessity defense statute]." 121

Moreover, even if a legislative policy is deemed "unwise," courts find that civil disobedience is not the proper course for expressing dissension. 122 In State v. Diener, the Missouri Court of Appeals barred the necessity defense in a criminal prosecution for nuclear weapons protesters charged with trespass. 123 The court held that the necessity defense is not available to individuals who deliberately violate the law to express disagreement with national defense policies already ratified by elected representatives. 124

Legislative policies and decisions do not preempt all acts of civil disobedience or civil resistance, however. In People v. Gray, the court acknowledged that the defendants' protests against vehicular pollution were consonant with the legislature's goal to eliminate air pollution and its accompanying dangers. 125 Thus, unlike the many cases concerning protests against nuclear power and nuclear weapons where courts have implied a legislative choice in favor of these activities, and thus preempted the necessity defense, the protesters in Gray were not preempted. 126 Because their protest activity did not contravene legislative policy, but rather promoted the legislature's goals, legislative preemption did not foreclose the defendants' opportunity to raise the necessity defense. 127

121 Id.
122 See State v. Greene, where the Kansas Court of Appeals stated:
The legislature has established a statutory scheme for the development and use of nuclear power. If the [necessity] defense were available to those who disagree with that policy . . . [t]hat result would transfer from the legislature to random groups of citizens the task of weighing nuclear power's benefits against its potential for harm . . . . We are not concerned with the wisdom of the present legislative policy on the subject; we do conclude that such a policy decision is for the people's elected representatives and not for jurors in individual cases.
124 706 S.W.2d 582, 586 (Mo. App. 1986).
125 Id.
126 571 N.Y.S.2d 851, 856 (N.Y. Crim. Ct. 1991). The court noted that the Clean Air Act Amendments of 1970 required the EPA to promulgate "clean air" standards. Id. at 856 n.2. It added further that New York did not, and has never satisfied the EPA's minimum standards. Id.
127 Id. at 856.
Finally, some courts have noted that harms generated from human sources must be illegal to justify acts of protest. In *Allison v. Birmingham*, for example, the Alabama Court of Criminal Appeals rejected abortion protesters' assertions that necessity demanded they block the entrance to an abortion clinic. The court stated that when a human, rather than a natural source generates the harm to be avoided, the harm must be unlawful to invoke properly the necessity defense. The court noted, therefore, “because abortion is legal, the harm sought to be avoided is not unlawful and, thus, the greater harm is the trespass.” Similarly, in *St. Louis v. Klocker*, the Missouri Court of Appeals denied the necessity defense to a group of abortion protesters who blocked access to a clinic's abortion procedure rooms. The court explained that the necessity defense requires that the defendants acted to avoid an “imminent public or private injury,” and it determined that no such injury was occurring at the clinic. It stated, “[s]ince abortions, like those in issue here, are constitutionally protected activity, and, therefore, legal, their occurrence cannot be a public or private injury.” Accordingly, the court held that the defendants' necessity defense claim must fail because it was “inconsistent with other provisions of law.”

1. Imminent Harms and the United States Military

a. Department of Defense Installations

In 1982, a neighborhood boy brought a live, unexploded grenade into his school for “show and tell,” jolting into action residents of four towns adjacent to the Massachusetts Military Reservation in western Cape Cod. The child found the grenade on the beach, in one of the many areas at the defense installation that were not fenced-in. The

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129 Allison, 580 So. 2d at 1379, 1389.
130 Id. at 1380–81.
131 Id. at 1381.
132 637 S.W.2d at 175.
133 Id. at 176.
134 Id. at 177.
135 Id. See also State v. Clarke, 590 A.2d 468, 468 (Conn. App. Ct.) (because the harm of abortion is not a recognized injury under the law, the defense of necessity is insufficient as a matter of law), appeal denied, 593 A.2d 135 (Conn. 1991); People v. Crowley, 538 N.Y.S.2d 146, 149 (N.Y. Just. Ct. 1989) (because abortion is legal and constitutionally protected, defendants had no standing to argue that they were preventing an imminent “public or private injury”).
136 SHULMAN, supra note 15, at 147.
137 Id.
live grenade was merely a sign of much larger problems at the 22,000-acre military reservation, where pollution has occurred since the late 1970s.\textsuperscript{138} Truck, airplane, and jet fuels, cleaning solvents, and waste oil represent only a few of the many toxins which the installation released into the environment.\textsuperscript{139} A military funded environmental study identified forty-two hazardous waste sites present at the installation.\textsuperscript{140} Other estimates have revealed that base personnel released approximately six million gallons of aviation fuel into the sand while testing airplanes’ automatic fuel release mechanisms.\textsuperscript{141} Collectively, these releases created at least eight toxic plumes,\textsuperscript{142} some two miles long and a half-mile wide, which seeped from the base into an aquifer which supplies Cape residents with their drinking water.\textsuperscript{143} Ultimately, in the five communities which surround the base, the combined cancer rate rose steadily to thirty percent above the state average from 1982 to 1989.\textsuperscript{144} Moreover, two cities, Falmouth and Bourne, revealed lung cancer and leukemia cases at seventy-nine percent and seventy-two percent higher than the state average, as well as increases in colo-rectal, breast and bladder cancers.\textsuperscript{145} 

Cape Cod is representative of thousands of DOD sites scattered throughout virtually every state\textsuperscript{146} which demonstrate a history of environmental violations and compliance problems. The DOD’s transgressions have been documented extensively, revealing the enormous imminent harm that its contamination has presented to the public and to the environment.\textsuperscript{147} For example, In Lakehurst, New Jersey, the DOD’s Naval Engineering Center rests just north of the New Jersey Pinelands Preservation Area, a sprawling one million acre Pine Bar-

\textsuperscript{139} Jeff McLaughlin, Upper Cape Cancer Rate Continuing to Soar, BOSTON GLOBE, June 24, 1990, at 36.  
\textsuperscript{140} Michael Satchell, Uncle Sam’s Toxic Folly, U.S. NEWS & WORLD REP., Mar. 27, 1989, at 20.  
\textsuperscript{141} Satchell, supra note 140.  
\textsuperscript{142} Id.  
\textsuperscript{143} Id.  
\textsuperscript{144} Id.  
\textsuperscript{145} Satchell, supra note 140.  
\textsuperscript{146} NGA/NAAG REPORT, supra note 4, at inside cover. The Armed Forces’ installations subsume 25.6 million acres of land across the United States, resting in such disparate areas as the rural plains of Nebraska, and urban centers such as Watertown, Massachusetts, a city adjacent to Boston. See Van Voorst, supra note 16. See also Shulman, supra note 15, at 74, 157.  
\textsuperscript{147} See Seth Shulman’s book, supra note 15, for a thorough discussion of the DOD’s pollution problems.
rens forest reserve.\textsuperscript{148} Beneath this forest flows the Cohansey aquifer, the largest source of fresh water in the Northeast.\textsuperscript{149} The Lakehurst installation exists as a key location for the research and development of Navy aircraft, however the EPA also ranks it among the nation’s most polluted waste sites.\textsuperscript{150} Investigations have revealed that past releases of three million gallons of aviation and jet fuels and other hazardous wastes contributed to the pollution problems at Lakehurst.\textsuperscript{151} At a nearby parachute jump site, Navy officials determined that between 1950 and 1970, the Navy dumped approximately two million gallons of aviation fuel into the soil.\textsuperscript{152} Now officials fear that such practices have contaminated the aquifer.\textsuperscript{153} The EPA already concluded in 1983 that water at the base itself was contaminated and presents an immediate threat to human health.\textsuperscript{154}

In Jacksonville, Arkansas, similarly, the Little Rock Air Force Base poisoned the environment and threatened public health through its manufacturing of herbicides such as Agent Orange, which was sprayed by United States forces in Vietnam.\textsuperscript{155} Operations at an on-site chemical plant, which sits “smack dab in the middle of a middle-class neighborhood,”\textsuperscript{156} generated toxic byproducts such as dioxin which polluted Jacksonville’s backyards, creeks, school grounds, and drinking water.\textsuperscript{157} EPA studies conducted since 1979 revealed that dioxin concentrations in soil samples taken from residential neighborhoods adjacent to the site were 200 times more concentrated than those of a city in Missouri which the EPA ordered evacuated.\textsuperscript{158} One resident described her yard: “[f]lowers smell funny, blades of grass

\textsuperscript{148} Id. at 63.
\textsuperscript{149} Id. The aquifer stores more than seventeen trillion gallons of fresh water, and is believed to be one of the largest groundwater suppliers in the country. Id. The entire southern New Jersey population relies on the Cohansey aquifer for its drinking water. Id. at 64.
\textsuperscript{150} Id.
\textsuperscript{151} Leo H. Carney, Florio Assails Military’s Dumping, NEW YORK TIMES, Aug. 11, 1985, at 1.
\textsuperscript{152} SHULMAN, supra note 15, at 67. The fuel was dumped into the soil to “rid the parachute jump site of grass and other vegetation so it could be easily spotted from the air.” Id. at 68.
\textsuperscript{153} Carney, supra note 151. Time Magazine also reported in 1992 that a plume of contaminated TCE solvent water “is leaking into the aquifer that supplies water to the southern part of the state.” Van Voorst, supra note 16.
\textsuperscript{154} SHULMAN, supra note 15, at 70–71.
\textsuperscript{155} NTCF REPORT, supra note 3, at 43. The manufacturing of these herbicides ceased in 1986. Id.
\textsuperscript{156} Primetime Live (ABC television broadcast, Oct. 11, 1990).
\textsuperscript{157} NTCF REPORT, supra note 3, at 43.
\textsuperscript{158} Liane Clorfene Casten, While the E.P.A. Fiddles: A Town is Being Poisoned, 246 NATION 11, Mar. 19, 1988, at 370.
turn red, and the funniest-looking mushrooms you ever saw." To­
day, the lethal results of such contamination is reflected by the health of Jacksonville's residents. Many suffer from a variety of illnesses apparently caused by the contamination.159

Finally, in Grand Island, Nebraska, the city's 33,000 residents have been threatened by the release of toxics at the U.S. Army's Cornhusker Ammunition Plant.161 The plant opened in 1942 and was a site where explosives were packed into one thousand pound bombs as well as smaller munitions.162 Every week, workers underwent cleansing procedures that washed away large quantities of toxic, explosive dust into a network of over fifty cesspools and leaching pits.163 At the installation's laundry, contaminated wastewater from the workers' clothing flowed into an underground sump, where burlap-like sacks collected silty explosive residue, then were removed and ignited.164 Although the Army contended publicly that all the contaminated cleaning water would not migrate from the base,165 internal reports revealed that "significant levels of [explosive chemicals] exist in the groundwater," and that the Army "had strong reason to suspect that the chemicals had migrated beyond the installation's boundaries."166

In fact, estimates indicated that "the contaminated groundwater could be migrating toward the city by as much as three meters per day."167 Four years after the Army first suspected that off-base migration was occurring, the Army finally divulged publicly that extremely high levels of a toxic chemical called RDX appeared in over half of the 467

160 See Scott Charton, Arkansass Waiting for EPA to Clean Up 'Priority' Waste Sites, LOS ANGELES TIMES, Oct. 22, 1989, at 6. For example, one resident who swam in a lake contaminated with "orange foam that lathered its banks," and ate fish and rabbits presumably contaminated by the chemical plant, suffers from a paralytic left arm, trembling hands, asthma, allergies and chronic headaches. Id. In another case, a three-month-old baby died from what an initial autopsy revealed as sudden infant death syndrome. Primetime Live (ABC television broadcast, Oct. 11, 1990). Tests conducted later indicated the presence of toxic chemicals in the child's liver and kidneys which the child's parents conclude he ingested when his baby formula was mixed with contaminated tap water. Id. Furthermore, a biochemist's 1986 study revealed that between 1980 and 1982, Jacksonville exhibited a higher rate of miscarriages and stillbirths than the national average. Casten, supra note 158.
161 SHULMAN, supra note 15, at 75.
162 Id.
163 Id. at 76.
164 Id.
165 See id. at 77.
166 Id.
167 Id.
private, residential wells it tested in the vicinity of Grand Island. One Grand Island citizen who lived near the plant and feared for his own and his family's health attempted to sell his house. Ultimately, when no one would buy it and the Army wouldn't compensate him for it, he had to declare bankruptcy and abandon the home.

b. Department of Energy Facilities

The Hanford Nuclear Reservation, located in southeastern Washington, commenced operations in 1943 as a top-secret installation charged with manufacturing material for the Manhattan Project's atom bomb. Throughout its history, the facility released more than 200 billion gallons of hazardous wastes into unlined pits and lagoons. Additionally, workers pumped at least 127 million gallons of radioactive liquids directly into the ground. The long-term effects of this discharge on soil and groundwater still are unclear; however, at least 230 square miles of the site are contaminated. Moreover, an estimated 200 square miles of groundwater are poisoned, and "chemical concentrations exceed drinking water standards by several orders of magnitude." The facility also released radiation over the years into the nearby Columbia River, which reached the Pacific Ocean 200 hundred miles away. Fish and drinking water along the river were contaminated, and as many as 2,000 people were exposed to potentially dangerous doses of radiation. Currently, 177 waste tanks filled with millions of gallons of radioactive waste and toxic chemicals left over from the production of plutonium pose the danger of a catastrophic explosion; the DOE, however, still does not know what is in the tanks, or just how dangerous they are. As of 1990, sixty-five of these tanks had leaked, and one of them released approximately 7,500 gallons of deadly radioactive waste, "raising serious questions..."
about the success of efforts to improve safety of the storage of waste from the production of nuclear weapons.180 In total, the DOE estimates that 500,000 gallons of liquid radioactive waste have seeped from the tanks into the ground.181

Hanford is just one facility of the DOE's nuclear weapons "industrial empire"182 that over the past forty-five years has saturated the environment with toxic chemicals and radioactive wastes.183 Specific data concerning each weapons facility reveals the enormous harms facing the public and the environment. In southwestern Ohio, for example, people live next to a hazardous waste and radioactive waste dump comprised of solvents, radioactively contaminated PCBs and radionuclides such as uranium, thorium and plutonium.184 Additionally, hundreds of thousands of pounds of deadly wastes are buried in leaky pits above an aquifer which provides the second largest source of drinking water for the State of Ohio.185 This legacy of radioactive and hazardous waste contamination originated at the DOE's Feed and Materials Production Center186 near Fernald, Ohio, where the DOE has admitted in hearings that it knowingly consented to the release of hundreds of thousands of pounds of hazardous and radioactive substances into the air and water.187 In addition, discovery documents obtained in a lawsuit brought by the Attorney General of Ohio against the DOE revealed that the liners in a waste pit which contained radioactive wastewater developed tears on at least three occasions,

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182 OTA REPORT, supra note 10, at 3. The 14 major facilities which comprise the DOE nuclear weapons complex are located throughout thirteen states, sprawling across 3,350 square miles and employing over 100,000 people. Id. at 15. To put the size of the weapons facilities into perspective, OTA reports that the Nevada Test Site covers an area larger than the state of Rhode Island, while the Oak Ridge Reservation (Tennessee), Sandia National Laboratory (New Mexico), and Los Alamos National Laboratory (New Mexico) each occupy an area approximately the size of Washington, DC. Id. at 15 n.2.

183 Id. at 3.

184 Hearings 1989, supra note 181, at 48. PCBs, or polychlorinated biphenyls, are a family of chemicals that are probable cancer inducing carcinogens. See SHULMAN, supra note 15, at 203, 206. See supra note 10 for the definition of "radionuclides."

185 Hearings 1989, supra note 181, at 48.


187 Hearings 1989, supra note 181, at 48.
creating the likely possibility that the wastewater seeped into neighboring groundwater. Further documentation has revealed that the DOE installed a radioactive wastewater pit in an abandoned well which had never been sealed, creating an even greater likelihood that the water escaped. Meanwhile, groundwater in private wells became contaminated with radioactive pollution when rains washed uranium off buildings and seeped into the soil. The situation in Fernald is so dire that the EPA concluded that public health and welfare and the environment face “imminent and substantial endangerment” due to the past release and potential release of more hazardous substances.

Similarly, at the Savannah River Site in South Carolina, workers dumped several hundred thousand gallons of toxic, radioactive waste daily in the Savannah River, contaminating water and wildlife. Cancer rates subsequently rose and a rare blood disease afflicted plant employees and nearby residents. In addition, over time employees dumped approximately thirty million gallons of radioactive liquids into the ground, threatening the drinking water of surrounding communities, including Atlanta, Georgia. Directly on site, levels of a radioactive carcinogen called strontium-90 were detected in surface water matching levels 43,000 times above federal government drinking water standards.

2. Imminent Harm Analysis

The foregoing examples each share characteristics that satisfy the necessity defense’s imminent harm requirement, for they speak to impending and unavoidable crises in communities across the United States. Whether its eight toxic plumes seeping into residents’ drinking water on Cape Cod, aquifers and wells in New Jersey, Ohio, 

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188 Hearing 1987, supra note 186, at 89.
189 Id. at 90–97.
191 Hearings 1989, supra note 181, at 48.
193 Id.
194 SHULMAN, supra note 15, at 101.
195 Id.
196 Supra notes 141–42 and accompanying text.
197 Supra notes 151–54 and accompanying text.
198 Supra notes 188–90 and accompanying text.
and Nebraska\textsuperscript{199} threatened by the past releases of hazardous and radioactive waste, dioxin contamination throughout an entire Arkansas community\textsuperscript{200} or radioactive waste contaminating rivers in the Pacific northwest\textsuperscript{201} and Atlantic coast,\textsuperscript{202} nearly every military facility has presented an enormous harm to the public and to the environment.

Unlike the cases where the threatened harm was long-term or speculative,\textsuperscript{206} or based upon defendants' subjective fears,\textsuperscript{204} the military's harm has been visibly evident, immediate, and profound.\textsuperscript{205} Families have been forced to move,\textsuperscript{206} cancer rates have soared,\textsuperscript{207} people feel ill and have developed rare diseases.\textsuperscript{208} Indeed, for many residents "the grave harm is ... occurring every day."\textsuperscript{208} The military, moreover, has conceded that its past practices contaminated the environment,\textsuperscript{210} while the EPA has acknowledged the threat these sites present to human health.\textsuperscript{211} Additionally, just as the court in \textit{People v. Gray} suggested that New York's failure to comply with EPA air pollution standards created an imminent harm, the military's failure to comply with hazardous waste laws also suggests that an imminent harm has occurred.\textsuperscript{212}

These harms, furthermore, are not the type that legislative pre-emption shields from protest activities.\textsuperscript{213} Though Congress sanctions military activities and has made a legislative choice in favor of developing our nation's defense, it also created environmental laws intended to protect human health and the environment.\textsuperscript{214} Therefore,

\textsuperscript{199} \textit{Supra} note 168 and accompanying text.
\textsuperscript{200} \textit{Supra} notes 155-58 and accompanying text.
\textsuperscript{201} \textit{Supra} notes 176-77 and accompanying text.
\textsuperscript{202} \textit{Supra} note 192 and accompanying text.
\textsuperscript{204} \textit{See} \textit{State v. Dansinger}, 521 A.2d 655, 688 (Me. 1987).
\textsuperscript{205} \textit{Compare} \textit{People v. Weber}, 208 Cal. Rptr. 719, 721 (Cal. App. Dep't Super. Ct. 1984) (necessity defense must be "articulable to an immediate, imminent fear and compulsion").
\textsuperscript{206} \textit{See supra} notes 169–70 and accompanying text.
\textsuperscript{207} \textit{See supra} notes 144–45, 180 and accompanying text.
\textsuperscript{208} \textit{See supra} notes 160, 193 and accompanying text.
\textsuperscript{210} \textit{See supra} notes 140–41, 182, 166–68, 187 and accompanying text.
\textsuperscript{211} \textit{See supra} notes 158, 191 and accompanying text.
\textsuperscript{212} \textit{Gray}, 571 N.Y.S.2d at 866 n.2.
\textsuperscript{213} \textit{See supra} notes 118–27 and accompanying text.
the legislature has not preempted protesters from demonstrating against these harms. Rather, as in People v. Gray, the goals of these protests are consistent with the legislature's goal of military compliance with environmental laws. Additionally, the military's unlawful pollution activities satisfy those jurisdictions which require that the harm from human sources be illegal, for the DOD's and the DOE's improper storage and disposal of these wastes has patently violated environmental laws such as RCRA.

B. Causal Relationship

Courts reject the application of the necessity defense where defendants fail to establish a causal nexus between their actions and the termination or abatement of the harm sought to be avoided. For example, in United States v. Simpson, a group of Vietnam war protesters were arrested for attempting to destroy selective service records. The United States Court of Appeals for the Ninth Circuit stated that the necessity defense requires that "a direct causal relationship be reasonably anticipated to exist between the defender's action and the avoidance of harm." In denying the defendants the necessity defense, the court noted that "[t]he Vietnamese conflict could obviously have continued whether or not the San Jose, California draft board was able to restore its files and continue its lawful operation."

Typically, the causal relationship requirement is rigid and unattainable. For example, in United States v. Seward, a group of nuclear weapons protesters blocked a roadway leading to the Rocky Flats

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215 571 N.Y.S.2d at 856; supra notes 125–27 and accompanying text. See infra notes 256–67 and accompanying text.

216 See Allison v. Birmingham, 580 So. 2d 1377, 1380–81 (Ala. Crim. App.), cert. denied, 580 So. 2d 1390 (1991). See supra notes 136–95 and accompanying text. One individual remarked concerning the Navy's Lakehurst installation, "If Lakehurst had been an individual rather than a military installation, it would be called a criminal, a midnight dumper, and there would be action to put the person in prison." Carney, supra note 151.

217 United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972).

218 Id. at 518.

219 Id.

220 See also State v. Marley, where the Supreme Court of Hawaii denied the necessity defense to a group of protesters who trespassed upon the Honolulu office of the Honeywell Corporation, a major U.S. defense contractor, and disrupted the office through various non-violent protest activities. 509 P.2d 1095 (Haw. 1973). The Supreme Court held that "[u]nder any possible set of hypotheses, the defendants could foresee that their actions would fail to halt Honeywell's production of the war material [produced by Honeywell] . . . ." Id. at 1109.
nuclear weapons plant. The United States Court of Appeals for the Tenth Circuit, in rejecting the necessity defense, explained that the defendant must show that "a reasonable man would think that blocking entry to Rocky Flats for one day would terminate the official policy of the United States government as to nuclear weapons or nuclear power." Similarly, in Commonwealth v. Averill, the Massachusetts Appeals Court denied the necessity defense to a group of nuclear power protesters who were arrested when they refused to leave a private park adjacent to a nuclear power plant. The court held that the necessity defense requires that the individual reasonably anticipated a direct causal relationship between his act and the avoidance of the harm. It added that the protesters' actions only served to generate publicity, and that actions designed to galvanize public opinion could not eliminate an immediate harm. Additionally, in United States v. Dorrell, the United States Court of Appeals for the Ninth Circuit affirmed the conviction of a protester who entered a missile assembly plant intending to destroy MX missiles. The court held that the defendant failed as a matter of law to establish that his entry into the plant and his vandalism of military property "could be reasonably anticipated to lead to the termination of the MX missile program and the aversion of nuclear war and world starvation."

1. Causal Relationship Analysis

Individuals who have protested the pollution emanating from military facilities could satisfy the necessity defense's causal relationship requirement because the object and the goals of their protest activity were narrower in scope than in other protest cases where defendants failed to establish a causal nexus. The case law reveals that defendants could not establish a causal relationship between their protests and the avoidance of the harm presented because the objects of their protests were longstanding, firmly established government policies or

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221 687 F.2d 1270, 1272 (10th Cir. 1982), cert. denied, 459 U.S. 1147 (1983).
222 Id. at 1273.
224 Id. at 7.
225 Id. at 7-8.
226 758 F.2d 427, 435 (9th Cir. 1985).
227 Id. at 433. See also Andrews v. People, 800 P.2d 607, 610 (Colo. 1990) (defendants failed to prove that protest would bring about termination of DOE facility's production of nuclear weapons).
activities. In opposing an entire war, a power source, or the development of nuclear weapons, the prospect of an individual or group of individuals terminating that activity through an act of protest is virtually nonexistent. Thus, these defendants could not successfully propound that they reasonably anticipated their protest activity would reduce or eliminate the harm they sought to avoid.

By contrast, the object of protest for military contamination demonstrators has not been nuclear power or weapons development or the nation's defense policies and activities. Protesters instead have challenged the harmful contamination which results from these activities in their communities. In seeking to modify an individual facility's waste disposal practices rather than its policies or its production of weapons, citizens have reproached an activity that the legislature does not sanction or support.

Under these circumstances, therefore, where the object of their demonstrations has been narrowly drawn, protesters have maintained a realistic chance of realizing their goals through civil resistance. By calling attention to a specific facility's disposal practices and placing pressure upon that facility to alter its conduct, citizens could reasonably anticipate that their collective voices and tenacity would make the military reconsider its behavior. The OTA acknowledged, in fact, that one of the reasons for the current waste and contamination problems at DOE facilities is that the nuclear weapons complex has operated throughout this century without any external surveillance or meaningful public scrutiny. Additionally, one author concluded, "I am convinced that with increased public attention and, where necessary, public outcry, with vigilant community oversight and a concerted, determined effort to enforce the military's compliance with state and federal environmental laws ... my community may someday be able to reclaim its currently poisoned military land."

C. No Legal Alternatives

Courts frequently deny the necessity defense to civil resistance defendants because they find that legal alternatives to the defendants'
actions existed. Though the necessity defense does not make law-breaking legal, it does justify behavior where no legal recourse exists. However, if legal alternatives to a particular course of behavior are present, defendants have no standing to raise the necessity defense. Consequently, defendants' actions, irrespective of their reasons for undertaking them, are indefensible.

*People v. Gray* represents one of the few cases where defendants satisfied the "no legal alternatives" requirement. In exonerating protesters who blocked an automobile lane of a bridge which had previously been a cycling and pedestrian lane, a state criminal court acknowledged that New York City closed the cycling lane without advance warning or discussion with any of the public interest groups that regularly consulted with New York's Department of Transportation. The court also emphasized that the defendants pursued an exhaustive variety of avenues to reopen the lane, including formal written protests, letter writing and phone calling to Department of Transportation officials, petitions, requests to obtain a public hearing, and weekly demonstrations that involved walking or cycling across the outer roadway. The court thus held that the defendants lack of success in pursuing these alternatives satisfied the "no legal alternatives" requirement, and justified their resort to nonlegal activity.

Few courts are persuaded by defendants' claims that they exhausted every legal alternative, however. In *United States v. Quilty*, the United States Court of Appeals for the Seventh Circuit articulated a narrow interpretation of the "no legal alternatives" requirement in denying the necessity defense to a group of nuclear weapons protesters. The court held that "[t]here are thousands of opportunities for the propagation of the anti-nuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and by the release of information to the media, to name only a few." Similarly, in *Commonwealth v. Brugmann*, the Massachusetts Appeals Court acknowledged the existence

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234 See infra notes 241–51 and accompanying text.
238 Id. at 861–62.
239 Id. at 861.
240 Id. at 862.
241 741 F.2d 1031, 1033 (7th Cir. 1984).
242 Id. See also Commonwealth v. Hood, 452 N.E.2d 188, 196 (Mass. 1983) (defendants had legal alternatives to abate danger, such as use of publicity, media, distribution of literature at an appropriate site, and participation in the political process).
of legal alternatives for a group of defendants who trespassed outside a nuclear power plant. The court held that defendants must make themselves aware of existing alternatives, or demonstrate that they are futile, in order to satisfy the requirement.

Courts have been unresponsive, furthermore, to arguments that defendants were unsuccessful when they appealed to the legislative process. For example, in United States v. Kabat, the defendants were convicted for trespassing and vandalizing missiles at a nuclear weapons facility. Though the defendants asserted that other protest activities and political efforts had been ineffectual in halting the nuclear arms buildup, the United States Court of Appeals for the Eighth Circuit held that these failures did not justify violating the law. The court noted that "necessity" does not arise from defendants' own impatience with less visible and time consuming alternatives. It explained further that the necessity defense does not exist to excuse the conduct of individuals who oppose the legislature's decisions and policies, and that "a lack of results might mean only that the will of the majority, legitimately expressed, had prevailed."

Finally, courts also assert that citizens can appeal to the justice system to combat illegal harms, rather than resorting to civil resistance. For example, in State v. Hund, the Oregon Court of Appeals affirmed the conviction of protesters who attempted to disrupt a corporation's allegedly illegal logging activities. The court noted that if the corporation's actions were illegal, a federal court maintained the authority to determine whether the corporation and the forest service violated any laws, and to stop the violations.
1. No Legal Alternatives and Military Environmental Compliance

Although courts have routinely determined that legal alternatives to protesters' actions existed, for years civil resistance at military facilities frequently was the public's only practical source of recourse for addressing and ameliorating the military's hazardous waste disposal practices. Despite early congressional attempts to regulate federal facilities, the DOD and the DOE handily circumvented environmental laws such as RCRA, while continuing to carpet the United States with toxic waste. Additionally, the United States Department of Justice (DOJ) shielded federal facilities from EPA regulation by asserting that certain constitutional principles prohibit the EPA from regulating the military. Collectively, these impediments to ensuring meaningful environmental compliance by the DOD and the DOE perpetuated a crisis which often rendered citizen intervention the only reasonable means by which to address the military's pollution problems.

a. Federal Facility Compliance and the Doctrine of Sovereign Immunity

In 1976 Congress enacted section 6001 of the Resource Conservation and Recovery Act (RCRA), a provision which sought to regulate the hazardous waste management activities of federal facilities from "cradle to grave." Section 6001 mandated 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 ... respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same

252 See infra notes 268--91 and accompanying text.
253 See supra notes 2--25, 136--95 and accompanying text.
254 See infra notes 293--314 and accompanying text.
255 See infra notes 315--31 and accompanying text.
extent, as any person... 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.\textsuperscript{258}

One of the catalysts for the enactment of this provision was the United States Supreme Court's decision in \textit{Hancock v. Train}.\textsuperscript{259} In \textit{Hancock}, the Court held that federal agencies were not required to obtain state air discharge permits pursuant to section 118 of the Clean Air Act.\textsuperscript{260} Reasoning that the Supremacy Clause of the Constitution forbids state regulation of government activities, the Court explained that states can regulate federal facilities only to the extent that Congress explicitly and unambiguously authorizes such regulation.\textsuperscript{261}

In responding to the \textit{Hancock} decision with the enactment of section 6001 of RCRA, "Congress placed federal facilities on an equal footing with private companies, municipalities, state agencies and individuals who violated the provisions of RCRA."\textsuperscript{262} Federal facilities' wastes, in theory, now were regulated under RCRA in the same manner as other private individuals.\textsuperscript{263} Section 6001 subjected federal facilities to the various civil and criminal sanctions for RCRA violations—the EPA could issue administrative compliance orders and civil penalties for noncompliance with such orders,\textsuperscript{264} courts could assess civil and criminal penalties,\textsuperscript{265} and individuals could bring suit under RCRA's citizen suit provision.\textsuperscript{266} Section 6001 thus directed the DOD and the DOE to comply with RCRA, and it provided a source of...

\textsuperscript{259} 426 U.S. 167 (1976).
\textsuperscript{260} Id. at 180.
\textsuperscript{261} Id. at 178–79, cited in \textit{Hearing 1987}, supra note 186, at 555. The Court stated: Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

\textit{Id.} See also \textit{EPA v. California ex rel. State Water Resources Control Bd.}, 426 U.S. 200, 227 (1976), where the United States Supreme Court held that states are barred from regulating federal facilities under the Clean Water Act. Moreover, the Court specifically noted that while the Clean Water Act required federal facilities to obtain EPA permits, the Act's definition of "person" did not include federal agencies, thus the EPA could not successfully issue compliance orders, bring civil actions, and levy civil penalties against agencies that failed to obtain EPA permits. See \textit{id.} at 222 n.37.
\textsuperscript{262} H.R. REP. No. 102–111, supra note 8, at 5.
\textsuperscript{264} 42 U.S.C. § 6928(a), (c) (1988).
\textsuperscript{265} Id. § 6928(d)–(g).
\textsuperscript{266} Id. § 6972.
recourse for the government and the public against those facilities that refused to comply.267

In reality, however, section 6001 did not provide the panacea for the military's compliance problems as initially contemplated by its language. Though Congress and the EPA maintained that facilities owned or operated by the federal government fell within the ambit of section 6001,268 the government asserted that the doctrine of sovereign immunity shields it from section 6001 regulation.269

The doctrine of sovereign immunity prohibits states and private parties from bringing actions against the federal government unless Congress explicitly and unambiguously waives its privilege against suit.270 Premised upon the belief that the federal government needs

267 DOE radioactive waste was not regulated under section 6001, however, and this gap in the regulations has allowed the DOE to dispose of its radioactive waste with impunity. The regulatory history of radioactive waste began in 1959, when Congress amended the Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011–2296 (1988 & Supp. III 1991), to include the regulation of three types of materials associated with radiation hazards: source, special nuclear, and byproduct material. Id. § 2021. See Finamore, supra note 10, at 89–90. Though Congress' enactment of RCRA in 1976 created a comprehensive scheme of regulation concerning the management of hazardous waste, Congress specifically excluded “source,” “special nuclear,” and “byproduct material” from RCRA regulation in order to avoid overlap with the AEA. See 42 U.S.C. § 6903(27) (1988); Finamore, supra note 10, at 93. The AEA thus retained exclusive authority over radioactive waste, while RCRA regulated nonradioactive waste. As of 1987, however, the DOE clarified that the hazardous portion of radioactive waste mixed with hazardous waste at its sites also is subject to RCRA. See 10 C.F.R. § 962.3 (1993).

The implications of such specific exemptions concerning radioactive waste have been enormous, for no party other than the DOE can regulate the release of these radioactive materials. Because the AEA maintains exclusive jurisdiction over radioactive source, special nuclear, and byproduct material, states and the EPA cannot bring enforcement actions to remedy problems concerning the DOE's radioactive contamination. Although the AEA grants an affected citizen an administrative remedy to address problems concerning nuclear power and Nuclear Regulatory Commission licensed facilities, it grants no rights to citizens regarding the DOE and nuclear weapons production. See Dan W. Reicher, Nuclear Energy and Weapons, in SUSTAINABLE ENVIRONMENTAL LAW 873, 969 (Celia Campbell-Mohn et al. eds., 1993). The AEA states that:

No action shall be brought against any individual or person for any violation under this Act unless and until the Attorney General of the United States has advised the Commission with respect to such action and no such action shall be commenced except by the Attorney General of the United States . . . .

42 U.S.C. § 2271(c) (1988 & Supp. III 1991). Thus, even if a defense facility's radioactive waste spills out onto private individuals' lands, no one can bring an enforcement action requiring the DOE to abate its activity. See Reicher, supra, at 969–70. As Reicher suggests, “[t]he inescapable conclusion is that EPA—and concomitantly states, citizens, municipalities, and corporations—simply do not have adequate authority to implement and enforce radiation standards with respect to civilian and defense nuclear facilities.” Id. at 977.


270 Wolverton, supra note 30, at 577.
some immunity from prospective lawsuits or other regulatory actions against it, the doctrine traces back to the goals of the Constitution's framers.\textsuperscript{271} The framers referred to the common law of medieval England, where judges appointed by the Crown were expected to refrain from ruling against the monarchy\textsuperscript{272} because, in theory, the "King can do no wrong."\textsuperscript{273}

Given that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed,"\textsuperscript{274} federal agencies, with the support of the DOJ, declared that federal facilities were not subject to section 6001 of RCRA because the provision was not explicit in its waiver of sovereign immunity.\textsuperscript{275} By asserting that section 6001 did not unambiguously waive the government's sovereign immunity, the DOD and the DOE shielded themselves from administrative orders that might have spurred compliance with RCRA, and enforcement actions that might have deterred future violations through the threat of civil penalties.\textsuperscript{276} As one state attorney general explained in 1989, "[t]he appears that at every opportunity, no matter how clear and deliberate the attempt by Congress to waive immunity in environmental matters, the U.S. asserts that the waiver is ambiguous, and therefore, state enforcement efforts must fail."\textsuperscript{277}

In several federal court cases, the DOJ, representing the government, successfully staved off state hazardous waste enforcement actions seeking civil penalties against federal facilities.\textsuperscript{278} It argued that section 6001 did not clearly and unambiguously waive the United States' sovereign immunity with respect to civil and criminal penalties.\textsuperscript{279} For example, in United States v. Washington, the United States essentially argued that RCRA section 6001 did not clearly waive its sovereign immunity.\textsuperscript{279}

\textsuperscript{271}Shulman, supra note 15, at 46.

\textsuperscript{272}Id.


\textsuperscript{275}See Hearings 1989, supra note 181, at 166 (statement of V. Ann Strickland, Deputy Counsel, National Audubon Society).

\textsuperscript{276}See id. at 147 (testimony of Shira A. Flax, Washington Representative, Sierra Club); Id. at 165 (statement of V. Ann Strickland, Deputy Counsel, National Audubon Society).

\textsuperscript{277}Hearings 1989, supra note 181, at 18 (statement of Kenneth O. Eikenberry, Attorney General, State of Washington).

\textsuperscript{278}See infra notes 280–91 and accompanying text.

\textsuperscript{279}H.R. Rep. No. 102–111, supra note 8, at 5. See, e.g., California v. Walters, 751 F.2d 977 (9th Cir. 1985); McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986); Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986). The DOJ also has relied on the doctrine of sovereign immunity to prevent the EPA from issuing administrative orders to federal facilities to correct RCRA violations. Hearings 1989, supra note 181, at 166 (statement of V. Ann Strickland, Deputy Counsel, National Audubon Society). The DOJ maintains that such orders serve only as the method for enforcing requirements, yet are not themselves "requirements" as stated in RCRA section 6001. Id. See 42 U.S.C. § 6961 (1988).
States Court of Appeals for the Ninth Circuit rejected the imposition of civil penalties in a state RCRA action against the DOE because "the only unequivocal and express reference to sovereign immunity in [section 6001] is directed at court-ordered sanctions for a violation of an injunction." In other words, the court found that RCRA only authorized the imposition of civil penalties as sanctions to enforce injunctive relief against a federal facility. Similarly, in an action by the State of California against the Veterans Administration for state hazardous waste disposal violations, the United States Court of Appeals for the Ninth Circuit held that criminal sanctions are an enforcement mechanism and do not constitute a "requirement" for the purposes of section 6001 of RCRA. Section 6001, therefore, did not waive the government's immunity with respect to criminal sanctions.

Sovereign immunity at times also affected citizens' opportunities to enforce RCRA and to hold the government accountable for its actions. In McClellan Ecological Seepage Situation (M.E.S.S.) v. Weinberger, the United States District Court for the Eastern District of California precluded a RCRA citizen suit action against the DOD. A citizens group sought injunctive and declaratory relief and civil penalties against the DOD for alleged RCRA violations, however the court held that the citizen suit provision of RCRA is inapplicable. The court asserted that a literal reading of RCRA reveals that Congress did not waive sovereign immunity concerning the imposition of civil penalties against federal facilities under RCRA. Additionally, it narrowly

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280 872 F.2d 874, 877 (9th Cir. 1989).
281 See supra note 258 and accompanying text.
282 Walters, 751 F.2d at 978, 979.
283 Id. at 978. The court stated:

Section [6001] has enough clear and unambiguous language to overcome the government's sovereign immunity to permit requirements, which the Court held had not been waived in Hancock [v. Train]. But the differences between former § 118 [of the Clean Air Act] and [§ 6001] do not show at all, much less clearly and unambiguously, an intent to subject the United States to criminal sanctions in addition to permit requirements.

Id. at 979. See also Mitselfelt v. Department of Air Force, 903 F.2d 1238, 1295-96 (10th Cir. 1990) (section 6001 of RCRA did not unambiguously waive federal sovereign immunity from civil penalties); Meyer, 644 F. Supp. at 223 (civil penalties for violations of state requirements not applicable to defendant because such penalties "appear to be a means by which requirements are enforced and not requirements themselves"); Florida Dep't of Envtl. Regulation v. Silvex Corp., 606 F. Supp. 159, 163 (M.D. Fla. 1985) (government immunity not waived under section 6001 of RCRA concerning state statute imposing strict liability for negligent release of hazardous waste material).
284 McClellan, 655 F. Supp. at 605.
285 Id. at 603-04.
286 Id.
construed the definition of "person" found in RCRA's citizen suit provision and concluded that the United States is not a "person" subject to suit for the purposes of the provision. Therefore, even citizens could be barred from holding the military accountable for its wastes.

The United States Supreme Court further supported the DOJ's interpretation of section 6001 of RCRA in a recent decision which ultimately prompted the enactment of the Federal Facilities Compliance Act. In United States Department of Energy v. Ohio, the Court held that federal facilities were subject to coercive fines intended to force compliance with injunctions or other court orders, however sovereign immunity had not been waived with regard to punitive fines, or punishments for past statutory and regulatory violations. Additionally, the Court held that states could not obtain civil penalties against the government through RCRA's citizen suit provision, for the United States is not a "person" within the meaning of the word in the provision.

b. Cases and Controversies

Although section 3008 of RCRA authorizes the EPA to issue administrative orders to fellow agencies, including the DOD and the DOE, the DOJ undermines EPA authority to enforce those orders through a policy which prohibits one agency or department of the government from bringing suit against another agency or department. The DOJ contends that intrabranch disputes do not present a justiciable controversy which satisfies the article III case or contro-

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287 See id.
288 Id. Not all courts precluded the implementation of citizen suits, however. For example, in California v. United States Department of the Navy, the Ninth Circuit held that civil penalties were unavailable under the civil provision of the Clean Water Act because the section did not imply a cause of action for civil penalties. 845 F.2d 222, 224–25 (9th Cir. 1988). However, the court did suggest that civil penalties were available in a citizen suit against a federal facility. Id.
290 Id. United States Dep't of Energy, 112 S. Ct. at 1631, 1635.
291 Id. at 1634–35. A subsequent case, Maine v. Department of Navy, further solidified this position, as the United States Court of Appeals for the First Circuit held that sovereign immunity barred the state of Maine from imposing civil penalties against the Navy for past violations of RCRA at a Navy shipyard. 973 F.2d 1007, 1011 (1st Cir. 1992).
versy requirement of the United States Constitution. The DOJ's position derives from the requirement that parties in a suit be adverse in fact. Technically, if one agency or department sues another, "the United States actually is suing itself," calling into question "whether the intrabranch dispute is genuinely adverse." If no adversity of interest exists between the opposing parties, a matter cannot and will not be considered by a court.

The DOJ relies on decisions such as United States v. Interstate Commerce Commission (ICC) in reaching the conclusion that suits brought by the EPA against sister agencies are not justiciable. In ICC, the United States disputed an unfavorable ICC rate order. The court distinguished the dispute from those that are nonjusticiable intragovernmental disputes. It held that the dispute was actionable because it was between the United States and carriers permitted by the ICC to charge allegedly unlawful rates. Given that the dispute was between the government and private persons, "the established principle that a person cannot create a justiciable controversy against himself" had no application. The DOJ infers from this holding that an action by the United States against an executive officer or agency requires a "nongovernmental 'real party and interest.'" Therefore, because the EPA is a government entity, the DOJ bars it from bringing an action against another branch of the government. This policy effectively eliminates the EPA's ability to enforce its compliance orders and bring suits against the DOD and the DOE for their failure to comply with environmental laws. Accordingly, the EPA has stated in its Federal Facilities Compliance Strategy that it "will not bring civil judicial suit against Executive Branch Agencies . . . EPA generally will not assess civil penalties against Federal facilities . . . EPA will negotiate Compliance Agreements or Consent Orders with Federal agencies."
c. Unitary Executive Theory

The DOJ also contends under the unitary executive theory that enforcement actions and even administrative orders brought by one agency against a sister agency interfere with the President’s authority under article II of the Constitution to manage the executive branch. The unitary executive theory originated with the Constitution’s framers, whose goal was to create a unified executive branch that did not direct intrabranch squabbles to the justice system. Article II vested the executive power in the President to manage and coordinate the officers within his branch, and to ensure “the branch speaks with one voice.” In mandating that the President alone shall execute the laws, it directed the President to resolve disputes between executive departments and establish “general administrative control of those executing the laws.”

The unitary executive theory also finds support in two Executive Orders. Executive Order 12,088 requires the Administrator of EPA to “make every effort to resolve conflicts regarding [violations of environmental statutes] between Executive Agencies . . . . If the Administrator cannot resolve a conflict the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.” Executive Order 12,146, similarly, decrees that “[w]henever two or more Executive agencies are unable to resolve a legal dispute between them . . . each agency is encouraged to submit the dispute to the Attorney General.”

The DOJ thus contends that EPA administrative orders and enforcement suits obstruct the President’s unitary management of the executive branch. Accordingly, these actions technically are prohibited under the unitary executive theory, and thus restrict the EPA’s

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305 Steinberg, supra note 293, at 325; see Hearing 1987, supra note 186, at 208 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division).


307 Id. at 209; Steinberg, supra note 293, at 325.

308 U.S. Const. art. II, § 3 (“[the President] shall take Care that the Laws be faithfully executed”).

309 Steinberg, supra note 293, at 325.


311 Steinberg, supra note 293, at 329 (citing Executive Order No. 12,088, 3 C.F.R. 243 (1979), reprinted in 42 U.S.C. § 4321 (1988)).


313 Hearing 1987, supra note 186, at 63.
authority to induce the DOD and the DOE to comply with environmental laws.\footnote{Id. at 672 (memorandum of John M. Harmon, Assistant Attorney General, Office of Legal Counsel).}

2. No Legal Alternatives Analysis

Given the enormous threat that the military's waste management techniques have presented to the public, and the past failure of, and restrictions on, efforts to regulate the DOD and the DOE, citizens frequently were left to fend for themselves to ensure their protection from military wastes. Unfortunately, lawful attempts to confront these problems often fared unsuccessfully. For example, in 1982, citizens on Cape Cod formed a group which pursued many strategies aimed at uncovering and eliminating the Massachusetts Military Reservation's disposal practices.\footnote{SHULMAN, supra note 15, at 148.} The group faced measured resistance with every initiative.\footnote{Id.} It was forbidden from speaking at military base public meetings, denied its initial request for a health study, told that elevated cancer rates on Cape Cod were due to ""lifestyle factors' such as smoking and diet,"\footnote{Id. at 148-49.} and ignored when it appealed to then-Governor Michael Dukakis.\footnote{Id. at 149.} These citizens also requested answers from the military detailing the extent of the hazardous waste problems at the base.\footnote{Satchell, supra note 140.} The military told the citizens to be quiet and added that such matters were ""none of [the citizens'] business and [the citizens] had no right to know"" about the base's contamination problems.\footnote{SHULMAN, supra note 15, at 149.} Demonstrations ensued, resulting in the arrest of one protester who laid in the road at the base's entrance to protest the pollution.\footnote{SHULMAN, supra note 15, at 149.} At trial, the judge sentenced the protester to two months in jail for disorderly conduct and noted that the defendant's punishment would serve as an example to discourage further types of actions.\footnote{Id.}

The experience of the citizens on Cape Cod typifies the roadblocks the public faced in pursuing various strategies addressing the military's contamination problems. For although many cases instruct that legal alternatives to civil resistance always exist for individuals to confront a grave and imminent harm,\footnote{See supra notes 241–51 and accompanying text.} in reality few options could
effectively deter the military's unbridled contamination activity. As indicated, intractable legal issues concerning federal facilities' compliance with environmental laws allowed the military to elude RCRA.324 Congressional efforts to regulate federal facilities were hamstrung by courts' strict interpretation of section 6001 of RCRA, and the DOJ undermined the EPA by constitutionally challenging its enforcement authority.325 Thus, the military's contamination activity was not the intended result of the "will of the majority, legitimately expressed." Rather, it occurred because the legislature was unsuccessful in its attempt to subject federal facilities to RCRA supervision, and because the DOJ has objected to the EPA regulating these facilities in the same manner as private polluters. Consequently, citizens' appeals to RCRA or the EPA for help concerning this pollution often were fruitless. Similarly, citizens were stonewalled when courts prohibited citizen suits against the military;327 for they could not absolutely depend on the legal system to redress the illegal harms they were committed to combating.328

The military's recalcitrance concerning environmental regulation and its indifference to public welfare thus confirmed that citizens' pursuit of legal alternatives in many instances would be futile and offered no hope for change.329 Rather than cooperating with citizens and striving to improve its waste disposal practices, the military callously dumped its wastes and often maintained secrecy concerning these practices to avoid regulation.330 Hence, even if "thousands of opportunities" existed theoretically for citizens to air their concerns, none of these lawful alternatives realistically could ensure the

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324 See supra notes 268--314 and accompanying text.
325 See supra notes 280--314 and accompanying text.
326 See United States v. Kabat, 797 F.2d 580, 591 (8th Cir. 1986), cert. denied, 481 U.S. 1030 (1987) ("[protesters'] lack of results might mean only that the will of the majority, legitimately expressed, had prevailed"); see supra notes 245--48 and accompanying text.
327 See supra notes 284--91 and accompanying text.
330 Compare People v. Gray, 571 N.Y.S.2d 851, 861 (N.Y. Crim. Ct. 1991) (New York City closed cycling lane without advance warning or discussion with public). For example, the DOE's Rocky Flats and Fernald facilities demonstrated a long history of environmental violations and concealment of these violations. H.R. REP. NO. 102-111, supra note 8, at 4. Similarly, the OTA noted that the public historically had great difficulty in obtaining information from the DOE about environmental and health issues at its nuclear weapons complex. OTA REPORT, supra note 10, at 66. The DOD also has refused to divulge information at the EPA's urging concerning its releases of toxic materials into the air, water, and land. SHULMAN, supra note 15, at 56.
331 United States v. Quilty, 741 F.2d 1031, 1033 (7th Cir. 1984).
military's compliance with hazardous waste laws. Civil resistance, therefore, offered a badly needed and justifiable alternative by which citizens could simultaneously uphold laws proscribing hazardous waste disposal, and provide for their own protection.

IV. CONCLUSION

In October, 1992, Congress clarified the longstanding ambiguity concerning the language of section 6001 of RCRA and its waiver of sovereign immunity by passing the Federal Facilities Compliance Act. In overruling the Supreme Court's decision in Department of Energy v. Ohio, this legislation expressly waives the federal government's sovereign immunity, and expands RCRA to require federal facilities to comply with federal, state, interstate, and local solid waste laws. The Act amends the definition of "person" to include explicitly each department, agency, and instrumentality of the United States. Federal facilities now are subject to the "requirements" enunciated in RCRA's original language from 1976—administrative orders and civil or administrative fines or penalties pursuant to hazardous waste laws.

Additionally, the Act authorizes the Administrator of the EPA to commence administrative enforcement actions "against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government," and states must use all funds collected from penalties and fines imposed for violations of RCRA for environmental improvement or protection projects. The Act further requires the Administrator of the EPA to undertake an annual inspection of each facility owned or operated by the United States that is subject to RCRA, and to make the records of such inspections available to the public.

The Federal Facilities Compliance Act on its face promises to ensure public and environmental protection for years to come, for it explicitly directs federal facilities to comply with environmental laws, or suffer the penalties for non-compliance. By according enforce-

333 Id. § 6961(a)(3).
334 Id. § 6903(15).
335 Id. § 6961(a). See also H.R. REP. NO. 102-111, supra note 8, at 21.
337 Id. § 6961(c).
338 Id. § 6927(c).
339 See id. § 6961(a). The Act does not, however, address the regulation of purely radioactive waste. Therefore, unless the Atomic Energy Act is amended to allow for the regulation of
ment authority to states, citizens, and the EPA, a powerful recourse now exists to address the military’s waste disposal practices. Citizens presumably will no longer face the insurmountable struggles against the military that they encountered in the years prior to the enactment of this legislation. Consequently, the acts of civil resistance that could be justified by the necessity defense five, ten, or fifteen years ago, today may be unnecessary and unwarranted.

Yet the Federal Facilities Compliance Act does not provide every answer for the problems concerning the military’s wastes. First, questions linger concerning the Act’s constitutionality.340 If the DOJ’s position is correct concerning the cases and controversies clause of the Constitution and the unitary executive theory, the portions of the Act concerning the EPA’s authority may be constitutionally suspect.341 In the event that the EPA remains helpless to bring enforcement actions against the DOD and the DOE, the public will bear a greater burden of attempting to regulate the military itself. Second, the Act does not ensure that every military facility in every community will comply with hazardous waste laws, nor does it provide immediate protection for citizens who face an imminent hazard from military contamination. If state governments or the EPA fail to respond to such exigencies, citizens may be left to their own devices to ameliorate the military’s hazardous waste contamination problems.342 Thus, while the Federal Facilities Compliance Act creates new avenues to address the military’s waste disposal activities, these avenues must successfully deter, if not eliminate the military’s longstanding practices. For if citizens are left with no means to protect themselves or the environment, once again they may be justified under the necessity defense for civil resistance protests.

radioactive waste, this waste will continue to remain immune from external oversight. See supra note 267.


341 Id. at 820, 832–33.

342 Although citizens can rely on citizen suits to combat future problems with the military, the expense of these actions may make them an unrealistic alternative for many individuals. For example, a citizens group wanted to pursue a lawsuit against the Army for its contamination activities at the Cornhusker Ammunition Plant in Grand Island, Nebraska. SHULMAN, supra note 15, at 79, 81. However, the group could not afford the exorbitant legal costs for the action, nor could it risk losing the suit and being required to pay the Army’s attorneys fees. Id. Thus, if citizen suits are not a realistic alternative for individuals lacking the means to bring them, some courts may be receptive to civil resistance protesters’ arguments that no legal alternatives existed to combat the harm they faced. Consequently, the mere availability of citizen suits does not unilaterally eliminate the application of the necessity defense to future military protests.
Fortunately, however, the future concerning the military's contamination problems appears promising, for the public has become increasingly involved in the struggle against the improper disposal of DOD and DOE wastes.\footnote{See \textit{Shulman}, supra note \textit{15}, at 150-51.} Citizen coalitions from California to Cape Cod have formed to act as watchdogs, and to pressure the military to comply with environmental laws.\footnote{See \textit{id.}} National organizations such as the National Toxics Campaign Fund and the Military Toxics Network are among the many forces which lobby at the national level, and lawfully protest at the local level to ensure that the military discloses the full extent of its toxic chemical releases and permits citizen involvement in local environmental clean-up initiatives.\footnote{Id.; \textit{NTCF Report}, supra note \textit{3}, at 79.} In addition, the EPA has chartered a federal advisory committee comprised of representatives of federal agencies, tribal and state governments and associations, and local and national environmental, community, and labor organizations that is providing recommendations to the military and to other federal agencies concerning their environmental restoration efforts.\footnote{See \textit{Keystone Report}, supra note \textit{14}, at v.} Given this groundswell of effort to remedy the military's, as well as all federal facilities' waste problems, civil resistance hopefully will become an outmoded and unnecessary means of redress.

\footnotesize\texttt{\textsuperscript{343} See Shulman, supra note 15, at 150-51.}\footnotesize\texttt{\textsuperscript{344} See id.}\footnotesize\texttt{\textsuperscript{345} Id.; NTCF Report, supra note 3, at 79.}\footnotesize\texttt{\textsuperscript{346} See Keystone Report, supra note 14, at v.}